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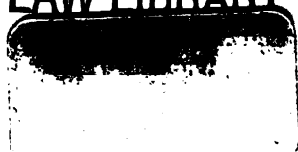
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THE  
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## REHEARINGS DENIED.

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[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

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**BROWN v. PATTERSON.**

(Supreme Court of Missouri. Division No. 1.  
Dec. 23, 1909.)

**1. WITNESSES (§ 144\*)—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS.**

Under Rev. St. 1899, § 4632 (Ann. St. 1906, p. 2520), relating to the competency of witnesses, a party in ejectment claiming title through a deceased grantor may not testify as to declarations made by the grantor while in possession of the adjacent land subsequently sold to the adverse party as to the boundary line between the tracts.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 633; Dec. Dig. § 144.\*]

**2. EVIDENCE (§ 230\*)—ADMISSIONS BY GRANTOR—ADMISSIBILITY AS AGAINST GRANTEE.**

Admissions made by one in possession of real estate as to his claims may be proved by third persons as against his subsequent purchaser.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 840-851; Dec. Dig. § 230.\*]

**3. ESTOPPEL (§ 98\*) — PERSONS AFFECTED — SUBSEQUENT PURCHASERS.**

Where an owner conveying a part of his land knew the true boundary between the land conveyed and the land retained by the deed, and stated that a certain strip was included therein, and the grantee, with the knowledge of the grantor, took possession of such strip and made improvements thereon, a subsequent purchaser from the grantor of the part retained was estopped from denying that the strip was conveyed to the grantee.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290; Dec. Dig. § 98.\*]

**4. TRIAL (§ 261\*)—INSTRUCTIONS—REQUESTS—SUFFICIENCY.**

Where the court in its instructions ignored an issue, a requested charge on such issue, though erroneous, was sufficient to show that he was relying thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 660, 671, 675; Dec. Dig. § 261.\*]

**5. WITNESSES (§ 160\*)—COMPETENCY—HUSBAND AND WIFE.**

At common law and under Rev. St. 1899, § 4636 (Ann. St. 1906, p. 2536), authorizing a married woman to testify in enumerated cases, the widow in a suit between strangers may testify as to conversations between the deceased husband and a third person under whom a party to the suit claims, had in her presence, and as to things which she knew of her own knowledge and without conversation with her deceased husband.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 160.\*]

**6. WITNESSES (§ 53\*)—COMPETENCY—HUSBAND AND WIFE—STATUTE.**

The proviso in Rev. St. 1899, § 4636 (Ann. St. 1906, p. 2536), that nothing in the section shall be construed to authorize any married woman while the relation exists or subsequently to testify to any conversations of her husband, applies only to the cases enumerated in the section in which the wife may testify, and does not disqualify the wife to testify in cases not so enumerated.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 137; Dec. Dig. § 53.\*]

**7. STATUTES (§ 228\*)—CONSTRUCTION—"PROVISOS."**

The office of a proviso is to restrict or explain the general terms of the act of which it forms a part, and not to add to the body of the substantive law nor to take anything therefrom. Quoting 6 Words and Phrases, title "Proviso."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 310; Dec. Dig. § 228.\*]

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Action by William R. Brown against H. S. Patterson. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Sangree & Bohling, for appellant. Barnett & Barnett, for respondent.

**GRAVES, J.** Action in ejectment for 2½ acres of land in Pettis county. Petition in usual form placing ouster as of April 1, 1903, and alleging damages in the sum of \$100. The answer pleaded (1) general denial, (2) estoppel, and (3) the ten-year statute of limitations. Reply was general denial. A trial before a jury resulted in a verdict for plaintiff for possession together with damages in the sum of one dollar.

"Whereupon it is ordered, adjudged and decreed by the court that the plaintiff have and recover of the defendant the possession of the real estate described in the petition as follows, to wit: two and one-half (2½) acres off of the north side of the northwest quarter of the southwest quarter of section 19, township 48, range 20, being a strip of land of uniform width, and its length east and west being the distance across said quarter of said quarter section in Pettis county, Missouri. And that plaintiff have and recover of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes



not a stranger to the alleged contract with Brummett. He was Brummett's subsequent grantee and assignee of Brummett's claim against Harryman, which claim of Brummett was the question at issue and on trial, although then held by Patterson.

The statute mentioned disqualified Patterson, and as the trial court admitted other admissions of Harryman, whilst he was in possession, from witnesses who were third persons, in this regard the court could not have been expected to go further. In other words whilst the third parties were competent to testify to the admissions of Harryman, whilst in possession of the land south of that now owned by defendant, it does not follow that a privy to such contract, or the beneficiary of such contract or admission can testify when it is shown that the opposing party is dead. The cases cited by defendant are easily distinguished upon principle. The statute itself is too familiar to the bar of the state to require reproduction here. This contention of the defendant will be ruled against him.

2. Defendant claims that there is flagrant error in the first instruction given in behalf of the plaintiff. The instruction reads: "The court instructs the jury that, under the undisputed evidence in this case, the plaintiff is the owner of the strip of land in controversy, unless the defendant has acquired the right to the same by virtue of the statute of limitations as defined in the other instructions, therefore your verdict must be for the plaintiff unless you believe from the evidence that the defendant has established his defense, that he is entitled to hold said land by virtue of the statute of limitations as hereinafter defined."

It will be noticed that this instruction limits the defendant to the one defense of the statute of limitations. It undertakes to and does fix the issue to be tried before the jury. One paragraph of the answer pleads estoppel. It pleads valuable improvements had been made upon the land with the knowledge and consent of plaintiff's grantor, and for that reason the plaintiff was estopped now to claim the land. The evidence upon this point tends to show that, immediately after Brummett got the land from Harryman, he began clearing the land and fencing it. That this was done with the knowledge of Harryman. The evidence as to the acts of the parties strongly tends to show some agreement or understanding about this line. That Patterson completed the fence and as we take it from the evidence reduced the land to cultivation. All this was done with the knowledge of Harryman, or his immediate grantees of the Brown tract. The evidence shows that Harryman started to build a fence on the south of Brummett's fence some 30 feet, and that Brummett cut out the fence row and a part of the intended road. It would seem that the land was rough land. The answer as said contained a plea of es-

toppel. Under this evidence the question of estoppel was in this case, and the court erred in giving this instruction, one for plaintiff, which limited the defense of defendant to that of the statute of limitations alone.

Going a step further upon the question of estoppel, the plaintiff's counsel claimed that there was no disputed boundary line, because both Brummett and Harryman knew the true line, and therefore there was no occasion for an agreed boundary line, and no proof in the record of such an agreement. Grant this to be true, and the evidence tends to show that Harryman did know the true line, but there is evidence in the record showing that Harryman said that this strip had been sold to Brummett. There is proof that Harryman lived there for several years after Patterson purchased, and that he must have known and did know of these improvements. Harryman therefore stood by and misled Brummett and Patterson to do acts to their detriment, i. e., to fence and reduce to cultivation this land. Had both Brummett and Harryman been ignorant of the true line, but were acting upon what they supposed to be the true line, these acts of Brummett and Patterson would not constitute estoppel, but where Harryman is shown to have said that he sold the land to Brummett, and evidently knew the true line, and then stood by and permitted valuable improvements to be made, and he himself participated therein by building his own fence 30 feet south of the one being built by Brummett, the question of estoppel comes in the case. In such case there would be the willful misleading of one party by the other to the detriment of such party doing the acts of improvement.

In discussing a very similar case, wherein we held that there was no estoppel by reason of the land being reduced to cultivation and fenced under the facts of that case, *Foard v. McAnally*, 215 Mo. 390, 114 S. W., loc. cit. 995, we took occasion to further say: "It must be borne in mind that we are dealing now with the question of estoppel, and that, too, in the absence of an agreed line. If the evidence had disclosed a division line agreed upon by the parties, and in addition the doing of some act by one of the parties in pursuance of such agreement and understanding, which act was induced by the conduct as expressed in the agreement, and which act was detrimental to the party, then we can see elements of estoppel in pais; but, on the other hand, if the building of the fence, the plowing and cultivation of the ground, and the continuous use and possession thereof, which are the acts involved here, were superinduced by the mistaken view entertained by both parties that the supposed line was the true line—and we repeat without it being an agreed line—then, under our holdings, we see no elements of estoppel in pais. In such case there is no willful misleading of one party by the other to his detriment. If the plaintiff had, as a

matter of fact, known the true line, and by either acts or words so conducted himself as to have misled Meador, to his detriment, then a different question would be here."

The case at bar comes within the latter clause of the quotation above made. The trial court refused an instruction upon estoppel asked by the defendant, and whilst the form of the instruction may not fully measure up to the law, yet he had already cut out the entire question by this instruction No. 1 for plaintiff, and defendant's instruction is at least sufficient to show that he was pressing that defense. For the error in giving instruction No. 1 for plaintiff the case must be reversed and remanded, and in view of these facts, another question as to the admissibility of evidence should be passed upon which we will do in the next paragraph.

3. A deposition of the wife of Brummett was offered in evidence by the defendant. Brummett had been dead for some years and his wife had remarried to a Mr. Hocker, and lived at the date of the trial in California. In this deposition she testifies to many things, some important and some unimportant, which were of her own individual knowledge. In the deposition she testifies to an agreement between Harryman and her husband as to where the south line of the present Patterson tract should be as well as to an agreement as to a road that was to be made between Harryman and her husband, who was then purchasing the Patterson land. She testifies to the character of the land at that time. She testifies as to what her husband did in the way of improving the land by fencing and clearing out a fence row. This question necessarily divides itself into two parts: (1) As to things which the wife knew of her own knowledge and without talk with her husband; and (2) the conversation heard by her and had by her husband and Harryman.

(a) At the common law, the wife was not disqualified from testifying in a suit between strangers. 1 Greenleaf Ev. (16th Ed.) §§ 341-2. As to facts which she knew of her own knowledge, and there are some such facts in this deposition, there can be no question as to her right to testify. In case of Shanklin v. McCracken, 140 Mo., loc. cit., 358, 41 S. W. 901, this court in banc said: "The evidence offered in this case clearly does not come within the rule of exclusion laid down in any of these cases. The evidence offered was simply an act of the husband unconnected with any 'admission or conversation' with him, a knowledge of which the witness derived not from her husband, but from the exercise of her own sense of sight, and we think the court committed error in rejecting it."

The evidence referred to was the proffered testimony of the widow as to the act of the delivery of a deed to her deceased husband. Other cases are to the effect that the widow can testify to matter of her own knowledge. 1 Greenleaf on Ev. (16th Ed.) § 254; Cornell

v. Vanartsdalen, 4 Pa., loc. cit. 374; Ryan v. Follansbee, 47 N. H., loc. cit. 101; Elswick v. Commonwealth, 76 Ky., loc. cit. 157; Smith v. Potter, 27 Vt., loc. cit. 308, 65 Am. Dec. 198; White v. Perry, 14 W. Va., loc. cit. 80. Many cases could be cited but these suffice. In Smith v. Potter, cited above, Chief Justice Redfield of the Vermont court said: "But where the husband has deceased, it has long been settled that the widow may testify to matters of her own knowledge and indeed to all matters in regard to any transaction affecting her husband's interest, unless it involve the disclosure of matters of confidence between the husband and wife, or to transactions affecting the character of her husband, unless she is herself interested in favor of the testimony given. This was expressly decided in Edgell v. Bennett, 7 Vt. 534. And this was before the rule of the English courts, and has long been practiced upon, in this state, at the jury trials. The statute having removed all objections, on account of interest, it becomes an inquiry merely, whether the testimony is objectionable as containing matters of confidence, or tending to discredit the husband. The deposition in question does not seem to be of this character, and, if relevant to the issue, was, we think, admissible." There was evident error in excluding the deposition of Mrs. Hocker as a whole, and for this error the cause should be remanded for a new trial.

(b) But going to the more vital question and the one which should be passed upon in order to enlighten the court in the new trial, i. e., should Mrs. Hocker be permitted to testify as to any contract or agreement made between Harryman and her deceased husband, Brummett, in her presence? Death has sealed the lips of both actors. Brummett's interest in this agreement long since passed to Patterson, at least in a way. Harryman's views of the contract or agreement and his interest therein, have in a way passed to Brown. Now can Brummett's widow declare to the world this contract? The present action, so far as the widow is concerned, is between strangers. In such case, she was at common law entitled to testify. The common-law rule has well been stated by Greenleaf. 1 Greenleaf Ev. (16th Ed.) §§ 333c, 334, and 335. In section 333c, supra, it is said: "Testimony by a husband or wife may involve any one or more of three distinct and independent principles, not always kept separate by authors and judges: (1) One spouse may not testify for the other; (2) one spouse may not testify against the other; (3) one spouse may not testify to confidential communications by the other. The first rests on the notion of interest i. e., the untrustworthiness of one spouse as likely to favor the other by testifying falsely on the other's behalf. The second rests on a notion of policy or sentiment, that it is a hardship to the one to be condemned by the testimony of the other, and that the allow-

ance of such a practice would tend to disturb marital harmony. The third rests on a public policy similar to that which protects confidential communications between attorney and client, government and informer, and certain other classes of persons; the thought being that the full activity and benefit of the relation cannot be attained unless the persons in it have full security in advance that their confidences cannot be disclosed." The evidence offered in this deposition as to the contract falls under the ban of neither of the three principles announced by the author, nor under the reasons for the three principles. For in the case at bar the surviving spouse is neither testifying for or against her husband, nor is she testifying to confidential communications between husband and wife. Confidential communications between husband and wife usually fall under the ban of secrecy, notwithstanding the relationship has ceased either by divorce or death. But the evidence here is not in the nature of confidential communications between husband and wife. There can be no such character of conversation in the presence of a third party. But, further, this is not a conversation between husband and wife, but a conversation between the husband and a third party in the presence of the wife. Leaving out for the present the consideration of our statute, which we will consider in another paragraph, we are of opinion that the testimony of this woman was competent on the matter of the agreement.

In addition to the authorities cited and discussed, *supra*, the following additional cases lend support to these views. *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224; *Spivey et al. v. Platon*, 29 Ark., loc. cit. 608; *Litchfield v. Merritt*, 102 Mass., loc. cit. 524; *Pratt v. Delavan*, 17 Iowa, loc. cit. 309; *Stuhlmuller v. Ewing*, 39 Miss. 447; *French v. Ware*, 65 Vt. 338, 26 Atl. 1096.

4. But in arguing that this testimony of the widow is incompetent the plaintiff plants himself behind a proviso, at the end of section 4656, Rev. St. 1899 (Ann. St. 1906, p. 2536). The section in full reads: "No married woman shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of or against her husband, whether joined or not with her husband as a party, in the following cases, to wit: First, in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed; second, in actions against carriers, so far as relates to the loss of property and the amount and value thereof; third, in all matters of business transactions when the transaction was had and conducted by such married woman as the agent of her husband; and no married man shall be disqualified as a witness in any such civil suit or proceeding prosecuted in the name of or against his wife, whether he be joined with her or not as a party, when such suit or pro-

ceeding is based upon, grows out of, or is connected with, any matter of business or business transaction where the transaction of business was had with or was conducted by such married man as the agent of his wife: Provided, that nothing in this section shall be construed to authorize or permit any married woman, while the relation exists, or subsequently, to testify to any admission or conversations of her husband, whether made to herself or to third parties."

As said by Henry, J., in *Holman v. Bachus*, 73 Mo., loc. cit. 50: "The proviso is clumsily constructed." Plaintiff relies upon this *Holman* Case, and the cases of *Moore v. Wingate*, 53 Mo. 398, and *Johnson v. Quarles*, 46 Mo. 423, as supporting his contention that this proviso excludes the testimony of Mrs. Hocker as to the conversation had in her presence. He also relies upon several cases from the Courts of Appeals, which cases cite the cases from this court, *supra*. The broad language of the *Holman* and *Moore* Cases was thus commented upon by this court in the more recent case of *Lynn v. Hockaday*, 162 Mo., loc. cit. 123, 61 S. W. 888 (85 Am. St. Rep. 480): "In *Moore v. Wingate*, 53 Mo. 398, loc. cit. 400, concerning the proviso now under discussion, it was said: 'This provision of the statute was intended to apply to all cases, whether the husband was a party to the action or not.' The language is broader there than necessary; it would have been sufficient if it said that the provision applied to the facts of that case. And perhaps all that there was intended was that it applied as well to a case in which her husband or his estate was interested as it did to a case in which he was a party. That it was not intended to construe the statute as imposing a new disqualification on a wife is shown by the words immediately following: 'It was intended to leave the disabilities of a married woman, in reference to these matters, just as they were at common law.' In *Holman v. Bachus*, 73 Mo. 49, a similar broad expression is found, but the same idea prevails through the opinion, that the statute only dealt with existing common-law disabilities. In that case the estate of deceased husband, though not sued, was interested. There is nothing in *Willis v. Gammill*, 67 Mo. 730; *McFadin v. Catron*, 120 Mo. 253 [25 S. W. 506], or *Shanklin v. McCracken*, 140 Mo. 356 [41 S. W. 898] to which we are referred, contrary to this view."

In the same case in discussing the force and effect of this proviso, this court further said: "But there was no objection made to her competency as a witness on the ground that she was a party in interest to the contract alleged to have been made by the deceased, but it was only on the ground that she was the wife of deceased, and the argument in the brief of counsel is that she was disqualified by the terms of the proviso in section 8922, Revised Statutes 1899, now sec-

tion 4656, Revised Statutes 1899. The statute declares that no married woman shall be disqualified as a witness in a civil suit prosecuted in the name of or against her husband in certain cases, and specifies the cases, but this is not one of them. Then it adds: 'Provided, that nothing in this section shall be construed to authorize or prevent any married woman, while the relation exists, or subsequently, to testify to any admission or conversations of her husband, whether made to herself or to third parties.' That proviso by its very terms is only a restriction of the right in that section conferred. The section enables a married woman to testify in certain kinds of cases in which by the common law she was disqualified, but having qualified her as a witness in those cases, it adds in effect, that in exercising the right there conferred she is not to speak of what her husband may have said to her or to any one else. It is, on the whole, an enabling and not a disabling statute. *Bates v. Forcht*, 89 Mo. 121 [1 S. W. 120]. The restriction in the proviso is not on a capacity she had before, but only on the privilege there conferred. At common law, in a suit between strangers, in which neither the interest of herself nor that of her husband was affected she was a competent witness to testify to a conversation between her husband and a third person. 1 Greenleaf Ev. (16th Ed.) §§ 341, 342. Such a case would not come within the purview of that statute."

It thus appears that we have held that the purpose of this proviso was to restrict, in the way mentioned in the proviso, the grants contained in the previous provisions of the statute; that its purpose was not to take from the body of the common law rights there given, but simply restrict the terms of the preceding portions of the statute. We are firmly of the opinion that the views in the *Lynn Case* are correct. The purpose of a proviso is not to create new rights or make new law or to take away old rights existing under the law or to repeal a part of existing substantive law, but to restrict or restrain the preceding portion of the statute of which it forms a part. As has been often said this statute is an enabling statute and not a disabling statute. If plaintiff's contention is true, it is both, for the first part gives rights not possessed under the common law, and proviso takes away rights previously possessed under the common law.

In addition to what Valliant, J., said in the *Lynn Case* it might not be amiss to look elsewhere. In case of *People ex rel. Murphy v. Kelly*, 5 Abb. N. C., loc. cit. 405, the New York Court of Appeals adopts this definition of proviso, as taken from *Matter of Second Ave. M. E. Church*, 66 N. Y. 395: "A proviso in a grant or enactment is something taken back from the power first declared. The grant or enactment is to read, not as if the larger power was ever given, but as if no more was ever given than is contained with-

in the terms or bonds of the proviso." As applied to an enactment or law, Words and Phrases, vol. 6, p. 5755, thus speaks of the office of a proviso: "The office of a 'proviso' is to limit or restrict the general language preceding it, and not to enlarge the enacting clause. *Commonwealth v. Charity Hospital*, 48 Atl. 906, 907, 199 Pa. 119; *Patterson v. Winn*, 24 U. S. (11 Wheat.) 380, 387, 6 L. Ed. 500; *Van Relpen v. Jersey City*, 33 Atl. 740, 742, 58 N. J. Law, 262; *State v. Browne*, 57 N. W. 659, 660, 56 Minn. 269." So, too, says Black on Interpretation of Laws, page 271: "The office of a proviso is not to enlarge or extend the act or the section of which it is a part, but rather to put a limitation or a restraint upon the language which the Legislature has employed." In 32 Cyc. p. 743, the following outline of the purposes of a proviso to a law is given: "A clause which generally contains a condition that a certain thing shall or shall not be done in order that something in another clause shall take effect; something ingrafted upon a preceding enactment, generally introduced by the word 'provided'; something grafted upon a preceding enactment, and is legitimately used for the purpose of taking special cases out of the general enactments, and providing specially for them; something taken back from the power first declared." To a like effect is 2 Lewis' Sutherland Statutory Construction, p. 674, whereat it is said: "The proper function of a proviso being to limit the language of the Legislature, it will not be deemed intended from doubtful words to enlarge or extend the act or the provision on which it is ingrafted." And on the preceding page, the same author says: "The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter. It is to be construed in connection with the section of which it forms a part, and it is substantially an exception. If it be a proviso to a particular section, it does not apply to others unless plainly intended. It should be construed with reference to the immediately preceding parts of the clause to which it is attached. In other words, the proviso will be so restricted in the absence of anything in its terms, or the subject it deals with, evincing an intention to give it a broader effect. It is not an arbitrary rule to be enforced at all events, but is based on the presumption that the meaning of the lawmaker is thereby reached."

As stated by Judge Henry, this proviso is not as clear as it might be, but there is nothing in it to indicate a purpose upon the part of the Legislature to branch out into the field of changing the prior existing substantive law. A fair and reasonable construction was given to it by Valliant, J., in the *Lynn Case*, supra. The act itself, which in present form appeared first in 1874, grants to the wife the privilege of testifying for

her husband in three classes of cases; and to the husband the right to testify for his wife in one class of cases. Prior to 1874, the husband was not included. The act itself then grants rights which were not enjoyed under the common law. It enables the husband and wife to testify where they could not testify before under the law. It is more reasonable to say that the Legislature meant by this proviso to say to the wives: We have given you the right to testify in certain cases, but in so doing you must not do the things mentioned in the proviso, than it would be to say to them, that whilst by the body of the act we have given you rights not possessed under the common law, yet by the proviso we have made some new substantive law, by taking from you other rights which you did possess at common law. The Lynn Case properly defines the scope and meaning of the proviso involved in this suit. It is not the purpose of a mere proviso to add to the body of the substantive law, nor to take anything therefrom. Its purpose is to restrict, limit, or explain the general terms of the act of which it forms a part. (Vol. 6, Words and Phrases, title "Proviso.") So construing this proviso, and it appearing that at common law Mrs. Hocker was a competent witness in an action between strangers, it follows that her whole deposition was competent.

5. Appellant insists in the assignment of errors that the trial court erred in giving instruction No. 2 for the plaintiff. This instruction declares that an oral agreement to sell the disputed property by Harryman to Brummett is void. And, further, that no contract for the sale of real estate is valid unless in writing. The instruction is a little emphatic in its wording, but was perhaps well enough under the pleadings. A verbal contract to convey lands is not always void, but specific performance thereof may be enforced under conditions well known to the profession.

Upon the whole, this cause should be and is reversed and remanded.

VALLIANT, J., concurs. WOODSON, J., concurs in result and in the opinion, except he expresses no opinion on the Holman and Wingate Cases discussed in this opinion. LAMM, P. J., does not sit.

#### McKEE et al. v. DOWNING.

(Supreme Court of Missouri, Division No. 2.  
Dec. 14, 1909.)

#### 1. TRUSTS (§ 366\*)—ESTABLISHMENT—NECESSARY PARTIES—ADMINISTRATOR.

In a suit by heirs to establish a resulting trust in land on the ground that defendant, decedent's husband, used her separate property to buy the land and took title to himself, where it

was not charged in the petition that the land was needed to pay decedent's debts, and it did not appear that she had any debts at her death or that any administrator had been appointed, or, if there had, whether or not he had made final settlement, such administrator was not a necessary party, since the land on decedent's death descended to her heirs, subject to the paramount right of creditors of the estate to have it sold by the administrator, upon an order of court, to pay decedent's debts.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 574-577; Dec. Dig. § 366.\*]

#### 2. TRUSTS (§ 359\*)—RESULTING TRUSTS—REMEDIES OF BENEFICIARIES.

Those who are the equitable beneficial owners of a fund which has been invested by another in land, who has taken the legal title to himself, may sue for the land itself or for the amount of money so converted, with interest thereon from the time of the conversion.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 359.\*]

#### 3. PARTIES (§ 75\*)—DEFECTS—MODE OF RAISING OBJECTION.

A defect of parties plaintiff cannot be raised by a motion for judgment on the pleadings, but if the defect is apparent on the face of the petition, it must be raised by demurrer, and, if the petition is sufficient on its face, the objection must be taken by the answer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 115, 116; Dec. Dig. § 75.\*]

#### 4. PLEADING (§ 345\*)—MOTIONS—JUDGMENT ON PLEADINGS.

Defendant is not entitled to judgment upon the mere filing of the petition, unless the petition states such facts as clearly show that plaintiff is not entitled to judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1055; Dec. Dig. § 345.\*]

#### 5. LIMITATION OF ACTIONS (§ 73\*)—ACTION TO RECOVER LAND HELD IN TRUST—APPLICATION OF STATUTES.

Rev. St. 1899, § 4271 (Ann. St. 1906, p. 2345), provides that civil actions other than those for the recovery of real property can only be commenced within the periods prescribed in the article (article 2, of the chapter "Limitation of Actions," relating to personal actions). Section 4279 provides that, if any person entitled to bring an action specified in the article be under any of certain disabilities, he may sue after its removal. Section 4281 of the same article provides that if any person so entitled to sue die before the expiration of the time therein limited for the commencement of suit, if such cause of action shall survive to his representatives, his executor or administrator may, after the expiration of such time and within one year after such death, commence such action, but not thereafter. *Held*, that section 4281 applies only to personal actions and not to a suit by heirs to recover land alleged to be held by defendant as trustee for decedent, his wife, and the limitation applies only to decedent's executor or administrator.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 73.\*]

#### 6. LIMITATION OF ACTIONS (§ 73\*)—ACTION TO RECOVER LAND HELD IN TRUST—MARRIED WOMAN DYING IN COVERTURE.

Such an action to recover land would be governed by Rev. St. 1899, § 4265 (Ann. St. 1906, p. 2338), providing that, if a person entitled to bring any action specified in the article (Limitation of Real Actions), be at the time of the accrual of the right of action a married woman, the time of such disability shall not be any portion of the time limited for beginning

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the action, but her action will not be barred for 24 years from the time it accrues; and section 4267 providing that, if such married woman die intestate while under the same coverture and within 24 years after the cause of action accrued, her heirs may commence such action within 3 years after her death.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 73.\*]

**7. LIMITATION OF ACTIONS (§ 73\*)—ACTION TO RECOVER LAND HELD IN TRUST FOR MARRIED WOMAN.**

Under such statutes, where a woman was married January 14, 1881, and her husband, alleged to have purchased land in his own name with her money, purchased it November 8, 1883, and the wife died September 14, 1903, an action by her heirs to recover the land brought before July 9, 1906, is not barred by limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 73.\*]

**8. LIMITATION OF ACTIONS (§ 193\*)—PLEADING—SUFFICIENCY.**

An allegation in an answer that the action was barred by limitation because not brought within one year after the death of plaintiffs' decedent does not prove itself, and is not sufficient to show that the suit was not brought within that time.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 193.\*]

**9. APPEAL AND ERROR (§ 673\*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.**

Even if the suit be considered a personal action seeking for a monetary judgment as for conversion, the judgment cannot be reversed because the suit was not brought within a year after the death of plaintiffs' intestate, where there is nothing in the record by which it could be determined when the action was brought.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2873; Dec. Dig. § 673.\*]

**10. APPEAL AND ERROR (§ 250\*)—REVIEW—EQUITY CASES—ERRONEOUS RULINGS ON EVIDENCE.**

While in a law case the Supreme Court would not consider an assignment of error to the admission of evidence, where no exception was saved to the court's action in declining to rule thereon, in an equity case, the exclusion of competent testimony or the admission of incompetent testimony by the chancellor is of no great concern on appeal, if the evidence is so preserved that the reviewing court can have it all before it; so that it can be considered for what it is worth and can be admitted or excluded, and the competency of plaintiffs as witnesses may be considered on such an appeal, though no exception was saved to the failure of the chancellor to rule upon their competency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1469-1475; Dec. Dig. § 250.\*]

**11. HUSBAND AND WIFE (§ 115\*)—WIFE'S SEPARATE ESTATE—CONSENT TO HUSBAND'S USE.**

All personal property belonging to a woman at the time of her marriage belongs to her as her separate estate unless reduced to the husband's possession with the wife's express, written assent, under the express provisions of Rev. St. 1899, § 4340 (Ann. St. 1906, p. 2382).

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 115.\*]

**12. HUSBAND AND WIFE (§ 135\*)—WIFE'S SEPARATE ESTATE—USE BY HUSBAND WITHOUT WIFE'S WRITTEN ASSENT.**

Act of a husband in using his wife's individual, personal property to buy land without

her written assent, and taking title in his own name, is a fraud.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 135.\*]

**13. WITNESSES (§ 145\*)—SUCCESSORS IN INTEREST OF DECEDENT—CONSTRUCTION OF STATUTE.**

Rev. St. 1899, § 4652 (Ann. St. 1906, p. 2520), provides that, in actions where one of the original parties to the contract or cause of action in issue and on trial, is dead, the other party to such contract or cause of action shall not be permitted to testify either in his own favor or in favor of any party to the action claiming under him; and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or, if living, would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor. Plaintiffs, heirs of decedent, sued decedent's husband to recover land purchased by him with decedent's separate property without her written assent, title to which was taken in his own name. *Held*, that plaintiffs were not incompetent as witnesses because of the incompetency of decedent to testify as "one of the original parties to the contract \* \* \* in issue and on trial," since no contract was in issue in the suit, and she was not a party to the contract for the purchase of the land by her husband.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 145.\*]

**14. WITNESSES (§ 145\*)—SUCCESSORS IN INTEREST OF DECEDENT—CONSTRUCTION OF STATUTE.**

The statute providing that "the other party to such \* \* \* cause of action shall not be admitted to testify, either in his own favor or in favor of any party to the action claiming under him," meaning under the living party, and not the deceased party, plaintiffs claiming under decedent would not be disqualified thereby.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 145.\*]

**15. WITNESSES (§ 145\*)—SUCCESSORS IN INTEREST OF DECEDENT—CONSTRUCTION OF STATUTE.**

Plaintiffs were not disqualified by the clause, "and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living, would be subject to the foregoing disqualification, shall be admitted to testify in his own favor," since their disqualification is made "subject to the foregoing disqualification" of decedent, and the foregoing part of the section would not disqualify her but only the living party.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 145.\*]

**16. EQUITY (§ 73\*)—ACTION—LACHES.**

Courts do not look favorably upon claims of many years' standing where all the facts might have been established by a timely suit and are slow to disturb land titles which have existed for many years, and where neither of the parties who are the most concerned can testify, one being dead and the other's mouth being closed by that fact; and under such circumstances, in order to justify a decree divesting title upon oral testimony detailing, in many cases, loose conversations which occurred years ago, the chancellor's mind must be satisfied by clear and positive proof.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 222-224; Dec. Dig. § 73.\*]

**17. TRUSTS (§ 89\*)—RESULTING TRUSTS—ACTION TO DECLARE—SUFFICIENCY OF EVIDENCE.**

Evidence *held* not sufficient to establish a resulting trust in land alleged to have been purchased by a husband with his wife's separate

property without her express, written assent, who took title in his own name.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 80.\*]

Appeal from Circuit Court, Nodaway County; Wm. O. Ellison, Judge.

Action by Minerva McKee and others against J. W. Downing. Decree for plaintiffs, and defendant appeals. Reversed and remanded.

J. H. Sayler and Funk & Crawford, for appellant.

BURGESS, J. This is a controversy over the ownership of a 40-acre tract of land in Nodaway county, Mo.

The petition states, in substance: That on the ——— day of June, 1876, Thomas Byrn died intestate, leaving a large amount of real and personal property, and leaving as his only heirs and legal representatives his widow, Susanna, and his children, the plaintiffs, as follows: Minerva Byrn, since intermarried with Joseph McKee; Fannie Byrn, since intermarried with J. T. Wells; Cornelia Byrn, since intermarried with Robert McKee, and Perry and Thomas Byrn. That afterwards, on the 14th day of January, 1881, the said Susanna intermarried with J. W. Downing, the defendant, and that at the time of her said marriage she was seised and possessed in her own right as her separate property of certain real estate and personal property, the latter consisting of horses, cattle, hogs, money, notes, etc., of the value of \$3,000. That from the date of her said marriage the defendant, without authority and without her express assent in writing, assumed the management and control of her said personal property, and wrongfully withheld possession of the same from her. That on November 8, 1883, the defendant purchased from one A. L. Rogers, for a consideration of \$400, a tract of land situated in Nodaway county, described as the S. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 31, township 87, range 33. That the said land so purchased by the defendant was paid for with the separate property, money, and means of his wife, the said Susanna, without her assent in writing, and that the defendant took title to said land in his own name without her knowledge or consent. That said Susanna Downing died intestate in the county of Nodaway on September 14, 1903, leaving as her sole heirs and legal representatives these plaintiffs. That the defendant wrongfully withholds the possession of said real estate from the plaintiffs as the heirs of their mother, the said Susanna. The prayer of the petition is that the court declare the said real estate to have been the separate property of the said Susanna Downing, and that it be decreed that the defendant held the same in trust for her, and since her death to hold the same for and to the use of the plaintiffs as her heirs, and that

the defendant be divested of the title to said real estate, and the same be vested in the plaintiffs, and that the defendant be declared a trustee for and to the use of the plaintiffs as to the real estate so purchased and held by him. Defendant filed a motion for judgment on the pleadings, for the reason that plaintiffs failed to make the administrator of Susanna Downing, deceased, a party plaintiff to the action, which motion was overruled by the court. Thereafter defendant filed his answer, denying the allegations of the petition, and alleging that "the cause of action, if any, stated in plaintiffs' petition, is barred by the statute of limitations, in that suit was not brought within one year after the death of the said Susanna Downing." Defendant then objected to the introduction of any testimony in the cause, for the reasons stated in his answer and motion for judgment on the pleadings, which objection was overruled.

Jasper Dowis, a brother of Susanna Downing, testified for plaintiffs that at the time of said Susanna's marriage to Downing she possessed about 30 or 35 head of cattle, a span of mares and a span of colts. He did not know what Downing paid for the land purchased from Rogers, nor did he ever talk to Downing about it.

John King testified that Mrs. Downing possessed considerable live stock at the time she married Downing, the same consisting of horses, cattle, and hogs; that she had a team of colts worth probably \$250; that he did not remember the circumstances of the purchase of the Rogers land; that he had once heard Mrs. Downing say to her husband that "he traded her property for land. She didn't say what land—her stock."

Cornelia McKee, a daughter of Mrs. Downing, testified that she was about eight years of age at the time of her mother's marriage to Downing. As to the purchase of the land in controversy, she testified that she had heard her mother say to Downing "that he bought that place with her stock—her property," and that Downing, in answer to such statement of her mother, "would never say nothing much about it."

Minerva McKee testified that she was a daughter of Mrs. Downing, and was about 16 years of age at the time of the latter's marriage to the defendant. She also testified as follows: "At the time of her marriage to Mr. Downing, she had quite a bunch of hogs, and she had 36 head of cattle and 4 head of horses, and I see her have \$400 in the house. I remember the circumstance of his buying what is called the 'Rogers 40.' I don't know the purchase price exactly. He paid for it in stock—my mother's. There was a team of colts went in on that and three cows. Never heard my mother say in the presence of Mr. Downing anything about how the land was paid for. Mr. Downing had, when he

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was married to my mother, 40 acres of land, with a small house on it, and 20 acres of timber. Mr. Downing and my mother and their families lived on the farm of 360 acres which had been left by my father."

Fannie Wells, another married daughter and heir of Mrs. Downing, testified that she knew that two colts and some other stock owned by her mother went in on the trade between Downing and Rogers. She had heard her mother time and again say that the stock that was traded for the land was hers. In answer to a question as to whether Downing was present when she heard her mother say that, she answered: "I am not positive, but I have an idea he was present when it was talked."

David Rogers, son of A. L. Rogers, testified that he remembered something of the trade between his father and Downing. "My father got two head of horses, and my recollection is that he got four or five head of cattle. As I remember now, the best horse would have been worth \$100 anyway, I should have thought. The other was a young horse, a colt. I don't know really what it would have been worth." As to the value of the land, witness stated that his father always asked \$10 an acre for it. He knew about the trade, saw the stock on the place, and heard his father say that he got it from Downing, but he did not know of his own knowledge whom the stock belonged to before it came into his father's possession. He never heard Mr. Downing say anything about it.

Eldridge Rowe testified for plaintiffs as follows: "I was present at the home of Mr. Downing and his wife a couple of years after their marriage, and at the time when Mr. Rogers came there to trade this 40 acres of land in controversy for some stock that Mr. Downing had there. I went out with them and looked at the horses; but they was talking about some cattle, and asked me to go along, and I told them, 'No; it was getting late, and I must go.' So I went home and didn't see the cattle at all. Q. What horses was it that they were trading? A. It was a couple of young horses that was on the place there that belonged to the woman—I mean his woman, Mrs. Downing. I knew the colts the time they were foaled. They were out of mares that belonged to Mrs. Downing which she had during her widowhood, and I think the colts were on the place at the time of their marriage. At that time and place, I think, in my best opinion, the mare would have been worth \$100, or maybe a little upwards—that is, the filly. The horse, he was kind of crooked legged, you know. I think \$75 or \$80 would have been a good price for him. Now, I wouldn't say that was really what they were worth, but that would be my opinion. The land trade was not finally made in my presence. I knew Mr. Downing got possession of the land right straight, and he told me himself that he traded. I don't know

anything about the cattle being traded in on the land."

Perry Byrn, a son of Mrs. Downing, testified: That he remembered the trade in question, and that Mr. Downing traded two of his mother's horses in on the land. That he was small at the time, and did not know anything further about the trade. He did not know how old the horses were, but that one of them was crooked in the legs. He claimed the mare since it was a foal, but he did not know whether it was his or not. "Q. Mr. Downing afterwards gave you a horse, did he not, in place of it? A. No, sir; I don't know whether he gave it to me in place of that one or not. He gave me a horse. I don't know anything about and wasn't present when the trade was made. I don't know just exactly what price was put on the horses when they were traded away. I don't know what other stock went in, or whether Mr. Downing paid the balance in money. I remember about the horses, and that is about all I recollect of. There were five of the Byrn children, three girls and two boys. We children, with our mother, lived there and grew up as a part of the family of Mr. Downing after the marriage. That was our home until we were grown. Q. You tell the court how you happened to get that horse Mr. Crawford has been asking about from Mr. Downing. A. Well, sir, we had quite a racket over that horse, and he gave me that horse. I went away and worked. Q. He told you, if you would come back and work there, he would give you this horse, didn't he? A. Yes, sir; he did. Q. Now, Perry, that racket you had was because you claimed that the horse he traded away belonged to you, wasn't it? A. I claimed it, and I don't know whether it belonged to me or not. By the Court: You say you claimed the horse that he traded for this land was yours? A. I claimed the horse. Q. There were two? A. I claimed one of them. Q. How did you claim it? A. Just like any other kid, I suppose."

Oren Stingley testified that prior to the trial he had a talk with the defendant with reference to this case and the trade in question. "We talked about this case coming up, and we talked about the trade with Mr. Rogers. I don't know just how it come. Anyhow, in the rounds, I says: 'You let two colts and two or three cows go?' He says: 'No; I let the colts and one cow go.' He didn't say whose property it was that he let go. I was talking about the woman's property going in on the land. He said, 'One cow and two colts.' He didn't say whether it was hers or his." On cross-examination this witness testified: "One of the colts was a dandy good mare—a good filly—with one eye knocked out; and the other one was just about as hard the other way. He was a crooked-legged and ill-shaped and ill-formed horse. At that time I

would hate to give \$25 for him. At that time I expect the mare would be worth about \$75 or \$100. Perry Byrn claimed the filly. I know Mr. Downing afterwards gave Perry a horse. My understanding was that he gave the horse in place of this filly. In the conversation that I have spoken about with Mr. Downing he told me that he had given Perry a colt worth both of them." On being asked whether there was anything said in that conversation with relation to the investment or trading of any particular property for any particular piece of land, the witness answered, "No; I don't think there was."

Robert McKee, husband of Cornelia Byrn, testified: That he was acquainted with Mrs. Byrn and Mr. Downing prior to and after their marriage. That he used to be about their place a great deal, and that he was somewhat acquainted with the stock of Mr. and Mrs. Downing. "Q. Now, calling your attention to the time, did you know of this trade with Mr. Rogers? A. Yes, sir. I met the little gentleman driving this stock away from the place at the time they drove it away that day—that is, Mr. Downing and Mr. Rogers. I met them just west of Mrs. Downing's old home place, and, as near as I can remember, there was five cattle—three cows, it seems to me, and two yearlings, and two head of horses. They were Mrs. Byrn's horses and cattle. I don't know who the yearlings belonged to. I didn't know whether they were his or hers. Q. They didn't stop and talk to you in the road about the matter, did they? A. Not particular. Oh, I knowed this stuff. Q. You don't know as a matter of fact of your own personal knowledge that this stock was traded for this Rogers land, do you? A. Yes, sir; I heard them talking about making this trade. Q. Who did you hear talk about it? A. I couldn't say. Q. Did you hear Mr. Downing talk about it to Mr. Rogers? A. It was talked in the neighborhood. Q. You didn't hear Mr. Downing or Mr. Rogers say anything about it. You never talked to them about it, did you? A. No, sir." This witness further testified that he did not see the stock delivered at the Rogers' place, and he was not told where the stock was going, that he heard about the trade, and met the stock in the road, and that was as far as he knew about the transaction. At the close of the plaintiffs' case, the defendant asked the court to declare the law to be that under the law and the evidence the judgment and findings must be for the defendant, which declaration of law the court refused to give; the defendant duly excepting.

The findings of the court were, in substance, that the two colts in question were the property of Susanna Byrn at the time of her marriage to defendant, and that they were used by the defendant in paying for the Rogers land; that said colts were of the

value of \$125 at the time of the purchase, and that the land at the time of the purchase was of the value of \$400; that the defendant held the title to the land so purchased and paid for in trust for the said Susanna during her lifetime, and at her death held the same in trust for her heirs, the plaintiffs, and in proportion to the amount of the purchase price which was paid with the property of the said Susanna, to wit, \$125. It was ordered, adjudged, and decreed by the court "that the plaintiffs have and recover from the defendant the title, right, and interest of defendant in and to the southwest quarter of the southeast quarter of section 31, township 67, of range 33, Nodaway county, Missouri, to the extent of  $\frac{125}{400}$ ths, and that the defendant be divested of the title thereto, and that the same be vested in the plaintiffs, and that plaintiffs recover their costs," etc.

Defendant duly filed his motion for a new trial, which was overruled, whereupon defendant appealed to this court.

Respondents have filed no brief in this case, and in consequence extra work has been imposed upon us, work which, under the circumstances of this case, ought to have been performed by counsel for respondents.

1. Defendant assigns as error the overruling of his motion for judgment on the pleadings. The basis of that motion is that the administrator of plaintiff's deceased mother, through whom they claim as heirs, was not made a party to the suit. There are two answers to that assignment:

(1) Her administrator is not a necessary party. The suit is one by her heirs to establish a resulting trust in land, on the ground that the defendant, her husband, used her separate property to buy the land and took the title to himself. If the evidence clearly shows that fact, then he held the title as trustee for her. It was an interest in real estate he so held, and not personal property, and at her death intestate that interest descended to her heirs, and in its recovery, in the absence of estate debts, the administrator is not concerned, and is not a necessary party. The intestate's title to land always descends to his heirs, subject to the paramount right of creditors of the estate to have it sold by the administrator upon an order of court to pay decedent's debts. *McQuitty v. Wilhite*, 218 Mo. 583, 117 S. W. 730; *Thorp v. Miller*, 137 Mo., loc. cit. 238, 38 S. W. 929. It is not charged in the petition that this land is needed to pay Mrs. Downing's debts. Indeed, it nowhere appears in the record that she had any debts at the time of her death, or that any administrator had ever been appointed for her estate, or, if there had, whether or not he had made final settlement. What possible interest then could he have in the results of this suit? If as a result of it defendant is held to hold the legal title as trustee for plain-

tiffs, her heirs, and the title is decreed out of him and vested in them, as the judgment attempts to do, then the land would still be subject to Mrs. Downing's debts up to the time of final settlement by her administrator, and so her administrator would derive every possible benefit from said decree that he could were he a party. On the other hand, if the final judgment declares defendant to be the owner, then the land can never be subject to the payment of her debts, and the administrator would have no right to its use for any purpose. What possible interest of his as her legal representative is therefore to be conserved by making him a party? We can conceive of none. *Johnston v. Johnston*, 173 Mo. 91, 73 S. W. 202, 61 L. R. A. 166, 96 Am. St. Rep. 486, was a bill in equity to establish a resulting trust in certain lots brought by the children of a deceased wife against their foster father, who had used his own and their mother's money to acquire certain lots, and took the title in his own name alone. The court said (page 121): "The heirs, and not the administrator, are the proper parties to prosecute this suit. This is a bill in equity to declare a resulting trust in land, and not an action to recover Mrs. Johnston's interest in personal chattels or for damages for a conversion of a chose in action, and therefore the heirs, and not the administrator, must sue." See, also, *Broughton v. Brand*, 94 Mo. 169, loc. cit. 175, 7 S. W. 119; *Richardson v. Cole*, 160 Mo. 372, 61 S. W. 182, 83 Am. St. Rep. 479. Appellant cites the case of *Butler v. Lawson*, 72 Mo. 227, wherein it was held that the administrators were necessary parties plaintiff. In that case one Gregory, as the administrator of the estate of his wife's former husband and as the administrator of his deceased stepchildren, had converted the estates, which were in North Carolina, into money, and appropriated them to his own use, and moved to Missouri. After his death here the administrators of the heirs of the deceased stepchildren sued him in the circuit court for the amount of money so converted. They did not describe any land in their petition. They did not ask that the title to Gregory's land be divested out of his heirs and vested in them. They simply asked for a monetary judgment, and that the lands and personal estate of the deceased Gregory be subjected to the payment of the judgment. The court in disposing of the point of necessary parties said that the administrators "are proper and necessary parties plaintiff only so far as concerns the personal estate of their respective descendants. The heirs of those descendants, being interested beneficially in the final distribution of the personal estate, as well as of the realty, are necessary parties also, and this for two reasons: The one that they may exercise their equitable option to take the personal and real property in specie if they so desire (2 Story, Eq. Jur., supra); the other that all persons materially interested,

whether legally or beneficially, in the subject-matter of the suit, should be made parties to it, in order that the decree, when made, should not be grounded upon a partial view of the real merits, but a comprehensive survey of the whole case, and of the various and conflicting interests of all concerned, or to be affected thereby."

We agree that those who are the equitable beneficial owners of the fund which has been by another invested in land and who has taken the legal title in himself have an option to sue for the land itself, or to sue for the amount of money so converted, with interest thereon from the time of the conversion (*Prewitt v. Prewitt*, 188 Mo. 675, 87 S. W. 1000); and, if the owner of the fund so converted has died leaving heirs, we can conceive of a case where in a suit for the conversion of the fund and a monetary judgment the heirs should be joined with the administrator of the estate as plaintiffs. But we are not called upon to decide that point, for it is not here. This is not a suit for a monetary judgment. The plaintiffs have described a tract of land, and say it was purchased with their mother's money, and that, therefore, she was the real owner, but that defendant wrongfully caused the legal title to be vested in him, and they ask, as their mother died intestate and they are her only heirs, that the legal title be vested in them. They ask for nothing more. They have exercised their option to have the court declare a resulting trust in their favor. The trial court by its decree did that, and has not undertaken to render a monetary judgment in their favor, and in our own opinion such a judgment could not be rendered without an amendment to the petition praying for it, either alone or in the alternative.

(2) A defect of parties plaintiff cannot be raised by a motion for judgment on the pleadings. If the defect is apparent from the face of the petition, it must be raised by demurrer; and, if the petition is sufficient on its face, as the petition in this case is, the defect must be pleaded in the answer. It is said in *Butler v. Lawson*, 72 Mo., loc. cit. 247, a case cited by appellant on this point, that: "According to express statutory provision, the objection of a defect of parties can only be taken by a demurrer or answer." Section 602, Rev. St. 1899 (Ann. St. 1906, p. 628); *Turner v. Lords*, 92 Mo. 113, 4 S. W. 420; *Crenshaw v. Ullman*, 113 Mo. 633, 20 S. W. 1077; *Baxter v. St. Louis Transit Co.*, 198 Mo. 1, 8, 95 S. W. 856; *Am. Smelter Co. v. Fire Assur. Co.*, 71 Mo. App. 658; *Meriwether v. Joy*, 85 Mo. App. 634. And by section 658, Rev. St. 1899 (Ann. St. 1906, p. 677), it is provided that "when a complete determination of the controversy cannot be had without the presence of other parties," as made manifest by a demurrer or answer, "the court may order them to be brought in by an amendment to the petition, or by a supplemented petition and a new

summons"; and it was held in *Butler v. Lawson*, supra, 72 Mo., loc. cit. 247, that "may" in a case like this means "must." A motion for judgment on the pleadings for defendant cannot be made to fill such an office. Defendant is not entitled to judgment upon the mere filing of a petition unless the petition states such facts as clearly show he is not entitled to judgment; for instance that it is clearly barred by limitations. Even if it fails to state a cause of action, its defects may be raised by demurrer, or, if totally defective, by an objection to the introduction of any testimony. Defendant would have us say that plaintiff's petition fails to state a cause of action because Mrs. Downing's administrator is not joined as a plaintiff, and also to render judgment against plaintiffs without giving them leave to amend or take nonsuit. To sustain defendant's motion would be to hold that final judgment may be rendered by the court as a matter of law without trial or testimony in the face of a petition that on its face states a good cause of action. Such a holding would be anomalous under our practice. In numerous decisions of late, this court has condemned the apparently growing tendency to use motions to fill the office of a demurrer or answer. *Ewing v. Vernon Co.*, 216 Mo. 681, 116 S. W. 518; *Hubbard v. Slavens*, 218 Mo. 598, 117 S. W. 1104. The point is ruled against appellant.

2. Defendant's next contention is that, as the "suit was not brought within one year after the death of the said Susanna Downing" "the cause of action, if any existed, was barred by the statute of limitations"; and in support of that contention they cite section 4281, Rev. St. 1899 (Ann. St. 1906, p. 2355), which reads: "If any person so entitled to sue die before the expiration of the time herein limited for the commencement of such suit, if such cause of action shall survive to his representatives, his executor or administrator may, after the expiration of such time and within one year after such death, commence such action, but not after that period."

There are three answers to this contention:

(1) Section 4281, Rev. St. 1899, is to be read in connection with section 4279. *Rosenberger v. Mallerson*, 92 Mo. App. 27, cited by appellant. Section 4279 says: "If any person entitled to bring an action in this article specified," etc. That "article" applies only to personal actions. It relates to "civil actions other than those for the recovery of real property." Section 4271, Rev. St. 1899 (Ann. St. 1906, p. 2345). Since its first enactment, section 4281 has been a part of the article relating to personal actions and that alone. Rev. St. 1889, §§ 6779, 6780; Rev. St. 1879, §§ 3234, 3235; Rev. St. 1855, p. 1049, c. 103, art. 2, §§ 10, 11; Rev. St. 1845, p. 717, c. 109, art. 2, §§ 5, 6; Rev. St. 1835, p. 394, art. 2, §§ 5, 6. If this had been a suit to recover from defendant the value of the horses and cattle belonging to Mrs. Downing

and used by him in purchasing the land, then said section 4281 might have had some application to the case; but this is not a suit for a monetary judgment. It is a suit for the land, and therefore article one of the chapter on limitations applies. Besides all this, the party who can maintain the suit under section 4281 is the administrator or executor, and the limitation of one year applies to him.

(2) The question of limitation in this case is determined by sections 4265, 4267, Rev. St. 1899 (Ann. St. 1906, pp. 2338, 2342), which were the same in the Revised Statutes of 1889 and 1879. By section 4265 an action to establish her right to land is not barred to a married woman for 24 years from the time the cause of action accrued, if she were under coverture at the time it did accrue and continued the wife of the same husband; and under section 4267, if such married woman die intestate while under the same coverture and within 24 years after said cause of action accrued to her, her heirs may commence such action within 8 years after her death. It is stated in the petition, and admitted in the answer, that Susanna Downing and defendant were married on January 14, 1881. It is shown by the record that on November 8, 1883, the defendant purchased the land sued for and took the title in his own name; and it is stated in the petition and admitted in the answer that the said Susanna, the mother of plaintiffs, died on September 14, 1903. The said cause of action did not and could not have accrued prior to November 8, 1883, and plaintiffs' mother was then under legal disability, and, while she might have brought her suit at any time after she had knowledge of defendant's wrong, she was not compelled to do so at any time for 24 years, if her then coverture lasted that long. She died on September 14, 1903, less than 20 years after the cause of action accrued. Her heirs, the plaintiffs, had three years from that time, or until September 15, 1906, to bring their action. The record does not show when it was brought, but the judgment as set out in the abstract shows that it was rendered on July 9, 1906. The petition must therefore have been filed and the suit brought before that date, or within three years after Mrs. Downing's death. The action was not therefore barred by limitations.

In *Reed v. Painter*, 145 Mo., loc. cit. 354, 46 S. W. 1092, the defendant used his wife's money to buy a farm, and the deed to him was dated March 17, 1874, and Mrs. Painter died April 2, 1884. The court said: "When John Painter took the deed to the Dorman farm for which his wife had paid the purchase money, without her consent, he was guilty of a constructive if not an actual fraud, and a resulting trust was created in her favor. While a married woman under the fourteenth section of the married woman's act found in the General Statutes of

1865 was not entitled to sue by herself for possession of her lands, that right still remaining in the husband, she had during coverture a right of action for an injury done to her inheritance or the integrity of her fee simple title to her lands just as any other person, and when, as in this case, the very title itself had been wrongfully taken from her by the fraudulent act of her husband, an action in equity accrued to her to have the legal title which was in her husband divested and to have the same restored to herself. Mrs. Painter having died during her coverture, and no determination for judgment having been had of the right of action which accrued to her, her heirs were authorized to commence this action, which had descended to them from their mother within three years after her death." That decision is based upon an interpretation of sections 4265, 4267, supra. See, also, *Prewitt v. Prewitt*, 188 Mo. 675, 686, 87 S. W. 1000, where it is held that, as to a resulting trust in land, a married woman has 24 years in which to sue for the recovery of the property.

(3) But there is another reason why the one-year limitation provided by section 4281 could not be held to apply to this case, even though it were a personal action seeking for a monetary judgment as for conversion. It is nowhere shown in the record that the suit was not brought within one year after the death of Mrs. Downing by these plaintiffs, who are her heirs. There is nothing in the abstract whatever from which it can be determined when the suit was brought. It is pleaded in the answer that the cause of action "is barred by the statute of limitations, in that suit was not brought within one year after the death of the said Susanna Downing"; but the answer does not prove itself. The body of the petition is set out in the abstract, but its caption is not, and from it we cannot discover when this suit was brought, nor is there anywhere anything in the entire record that gives us any information upon the point. We could not therefore hold that the suit was not brought within one year of Mrs. Downing's death, and even if section 4281 were applicable to the case, and we have held it was not, we would not be justified in reversing the judgment on the ground that the action is barred by limitations.

3. The serious question in this case is the sufficiency of the evidence to sustain a decree for plaintiffs. The chancellor found that defendant used two of his wife's horses to pay for the land without her written consent; that they were at the time worth \$125; that the land was at that time worth \$400; and the decree invested five-sixteenths of the land in these plaintiffs.

Appellant assigns as error the admission of incompetent evidence. In the course of the trial, while one of the plaintiffs, a daughter of Mrs. Downing, was testifying,

the learned chancellor asked of counsel, "On what theory is this a competent witness?" The counsel for defendant then objected to the competency of the witness, and, as the trial proceeded, objected to any of the plaintiffs testifying, on the ground that, "where one of the parties to the transaction is dead, the other party to the transaction cannot testify, nor can those who succeed to the deceased be allowed to testify," and the chancellor remarked that "the law has been amended by making this important addition, 'nor shall the representative of the party deceased, or those who hold from, through or under her, be competent to testify,'" but did not rule on the point at the time, but at the suggestion of the court and by argument of counsel on both sides the testimony of this and the other plaintiffs was admitted "with the understanding" that the chancellor "will consider the question when he comes to review the testimony and make his findings." No exception was saved at that or any other time. If the chancellor at any time ruled on the competency of these witnesses, the record fails to show it; and hence we cannot tell whether or not he considered their testimony when he came to make his findings of fact. If this were a law case, we would unhesitatingly hold that this court cannot consider the assignment that error was committed in the admission of this evidence, if indeed it was admitted, for the reason that no exception was saved to the action of the court in declining to rule thereon. But this is a suit in equity, and the exclusion of competent testimony or the admission of incompetent testimony by the chancellor is of no great concern on appeal in an equity case, if the evidence is so preserved that we can have it all before us, for we can then consider it for what it is worth and can admit or exclude it ourselves. On this point it was said by Lamm, J., in *Hanson v. Neal*, 215 Mo., loc. cit. 271, 114 S. W. 1078: "Defendants assign error on the exclusion and admission of testimony. In this behalf it must be steadily kept in mind that this is an equity case, and that the admission or exclusion of testimony is rarely reversible error in chancery on appeal. The testimony being here, we can see equity and do it by considering competent proof offered and excluded, or by rejecting incompetent proof objected to and received." In *McCormick v. Parsons*, 195 Mo., loc. cit. 101, 92 S. W. 1164, we said: "Defendants also complain of the failure of the court, upon objection made by them to the admission in evidence of the various records and proceedings in former suits, to pass upon such objections at the time, but neither the action of the court in admitting this evidence over the objection of defendants nor its failure to pass upon the objections would justify a reversal of the judgment, this being an equity case; for in such cases evidence improperly admitted will be disregarded by

this court." To the same effect are *Jones v. Thomas*, 218 Mo., loc. cit. 544, 117 S. W. 1177; *Gibbs v. Haughawout*, 207 Mo., loc. cit. 391, 105 S. W. 1067; *State ex rel. v. Jarrott*, 183 Mo., loc. cit. 218, 81 S. W. 876; *Blount v. Spratt*, 113 Mo. 54, 20 S. W. 967, and numerous other cases. "But," said *Lamm, J.*, in *Morrison v. Turnbaugh*, 192 Mo., loc. cit. 442, 91 S. W. at page 156, "this does not mean that the chancellor should not rule on evidence when its admission is challenged, nor does it mean that, if the case required it, we would not reverse and remand because of reversible error in allowing proof." *Russell v. Sharp*, 192 Mo., loc. cit. 290, 91 S. W. 134, 111 Am. St. Rep. 496. We are therefore of the opinion that the competency of plaintiffs to testify should be considered by us in this case, though no exception was saved to the failure of the chancellor to rule upon their competency at the time appellant objected to their testifying, or at any other time so far as the record shows.

The learned chancellor announced, when the competency of these witnesses to testify was being considered, that the statute which prevents one of the parties to a contract from testifying where the other party is dead had been amended by the addition of these words: "nor shall the representative of the party deceased, or those who hold from, through, or under her, be competent to testify." The statute has not been amended in many years, certainly not since the death of Mrs. Downing in 1903. That statute (section 4652, Rev. St. 1899 [Ann. St. 1906, p. 2520]), so far as applicable, reads: "In actions where one of the original parties to the contract or cause of action in issue and on trial is dead, \* \* \* the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor."

A careful reading of this statute will demonstrate that these plaintiffs were not disqualified to testify unless their deceased mother was. If she had brought suit against defendant during her lifetime, as she had a right to do at any time during her coverture, would she have been disqualified to testify? Certainly not on the theory that she was "one of the original parties to the contract in issue and on trial." The contract for the purchase of the land in suit was between Rogers as grantor and defendant as grantees. She was in no sense a party to that contract, nor is it in issue in this case. As between the parties to it, it is admitted to have been legal—that is, it was a conveyance of land for a valid consideration from Rogers to defendant, who took (it is undisputed) the legal title. Even though she had made an express

agreement with defendant that he might use her separate personal property to buy said land and take the title in his name, her agreement, if not in writing, was void (section 4340, Rev. St. 1899 [Ann. St. 1906, p. 2382]), and there is no pretense that she gave her "express assent" in writing. So, even if such agreement was made by her, that agreement or contract is not "in issue" in this case. The act of defendant in using her individual property to buy land and in taking the title in his own name was a fraud (*Prewitt v. Prewitt*, 188 Mo., loc. cit. 684, 87 S. W. 1000; *Reed v. Painter*, 145 Mo., loc. cit. 354, 46 S. W. 1089); and the purpose of this suit is to make him restore what he had fraudulently deprived her of. No contract is in issue in the case. The words "cause of action in issue and on trial" are more troublesome; but it will be observed that the statute says that "the other party to such \* \* \* cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him"; that is, under the living party (defendant), not under the deceased party. These plaintiffs do not claim under defendant, but under their mother, and therefore they are not disqualified by this clause.

But the section proceeds: "And no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor." This clause is more troublesome in this case than the preceding ones. Under it, plaintiffs were disqualified if their mother, had she brought this suit in her lifetime, would have been disqualified to testify in her own behalf; otherwise, they were not. We do not think she would have been disqualified in such case, and hence they were not disqualified. The statute says that their disqualification is dependent upon and "subject to the foregoing disqualification" of their mother; and the foregoing part of the section does not disqualify her. It disqualifies only the living party. *Freeland v. Williamson*, 220 Mo. 217, 119 S. W. 560, was a suit by Mrs. Freeland against her children to have a resulting trust declared in her favor in land which had been bought with money furnished by her father, and which had been deeded, by error or mistake, to her deceased husband. In 1869 Andrew Miller, her father, who lived in Ohio, sent \$600 to John Spencer in Nodaway county, and directed him to buy the land for his daughter, Mrs. Freeland. Spencer did so, and directed the deed to be made to her, but it was made to her husband, and on his death in 1903 she brought suit against her children to have the title vested in her, and at the trial she testified in regard to the source from which the purchase money came, and also that she had never heard that the deed was made to her husband instead of to herself. Judge Gantt, who wrote the opinion, said

at page 230 of 220 Mo., at page 564 of 119 S. W.: "It is insisted that the court erred in permitting the plaintiff, Mrs. Freeland, to testify in the cause because her husband was dead. In *Scrutchfield v. Sauter*, 119 Mo., loc. cit. 624 [24 S. W. at page 139], it was said by this court: 'It has long been the settled law in this state that the statute (section 8922 [Rev. St. 1889]) defining the competency of the husband and wife to testify in their own behalf, and for each other, did not intend to exclude the wife from testifying in a case in which she was a real party in interest.' Moreover, she did not testify as to any contract with her husband. Her right to the land was not derived through any contract between her and her husband, but depended upon the payment of the money for the land in question by her father for her benefit, under an agreement between her father, Andrew Miller, and John Spencer, to which arrangement her husband was not a party. We think she was clearly a competent witness in her own behalf."

*Reed v. Painter*, 145 Mo. 341, 46 S. W. 1069, was a suit by the heirs of Mrs. Painter, brought after her death, to have a resulting trust in certain lands declared in their favor, on the ground that their mother's money or property was used by defendant Painter, their stepfather, in purchasing the land, and that he wrongfully took the title in his own name. Painter was dead at the time of the trial, and so the suit was really against his heirs. Among the plaintiffs was Mrs. Holcomb, one of Mrs. Painter's daughters, and she was permitted to testify. The court said at page 353 of 145 Mo., at page 1092 of 46 S. W.: "The objection to the competency of Mrs. Holcomb was properly overruled. She was not a party to the original cause of action, and the statute in no way affects her right to testify. She was competent at common law and since the statute. *Looker v. Davis*, 47 Mo. 145." The case of *Looker v. Davis*, above cited by Gantt, J., is an illuminating case.

The case of *Miller v. Slupsky*, 153 Mo. 643, 59 S. W. 990, was a suit by the heirs of Sophia Slupsky to have a resulting trust in a lot and house in St. Louis declared in their favor, on the ground that the defendant, Abraham Slupsky, used the money of his deceased wife, the said Sophia, to buy the property, and wrongfully took the title in his own name. It was specifically held in that case that the defendant, his wife being dead and being the other party to "the cause of action" and "plaintiffs' cause of action being derivative" through her, was incompetent to "testify that the lot in question was bought and paid for by his own money"; but there was no holding that the plaintiffs were or were not competent. But they did testify and their testimony is set out in the opinion, and upon it this court, through Brace, P. J., reversed the decree of the trial chancellor and remanded the cause, with directions to

enter up judgment for plaintiffs. If plaintiffs in that case were competent to testify, then so are plaintiffs in this case.

In *Banking House v. Rood*, 132 Mo., loc. cit. 261, 33 S. W. 817, it is said by MacFarlane, J.: "It will be observed that the proviso (of section 4652, the part we have above quoted) does not exclude the testimony of one party in interest where the other party in interest is dead, but confines the exclusion to a party to the contract or cause of action, while the body of the statute removed the disability of a person caused by his interest in the suit. The exclusion of the proviso is not as broad as the inclusion of the body of the act. Hence an examination of the cases will show that "a party to the contract" has been construed to mean the person who negotiated the contract, rather than the person in whose name and interest it was made." *Stam v. Smith*, 183 Mo. 464, 81 S. W. 1217, was a suit to set aside a deed alleged to have been made in fraud of creditors by a grantor who was dead at the trial. The court held that "the contract in issue and on trial" was whether the deed was made to hinder, delay, and defraud the grantor's creditors, and that was an issue between the grantor and his creditors, and therefore the grantee in the deed was not incompetent to testify.

The three cases first cited, *supra*, are direct authority for holding that plaintiffs were competent to testify in this case. They run back through many years, and should not now be disturbed unless plainly erroneous. If the point were one of first impression in this court, we might hesitate to hold that the statute was not meant to make plaintiffs in a case like this incompetent to testify; but the letter of the statute does not make them incompetent, and that being so, and this court having for many years held them to be competent, we are constrained to hold in this case that they were competent.

We have settled the competency of plaintiffs to testify, because without their testimony the evidence scarcely measures up to that clear, cogent, positive, and convincing character which the law requires for the establishing of a resulting trust where the transaction out of which it grew occurred many years (in this case over 22) before the trial. Even with their testimony, it is not wholly satisfactory in some respects, and is far from satisfactory as to the value of the land at the time it was deeded to defendant.

The evidence unquestionably shows that some cattle were used by defendant to pay for the land, but it does not show what their value was, nor clearly that they belonged to Mrs. Downing, and the chancellor therefore very properly excluded them from consideration in determining what plaintiffs' share in the land should be.

But there is no such infirmity in the evidence as to the four-year old mare and the two-year old colt. In addition to the testimony of all the plaintiffs that they belonged

to their mother, Eldridge Rowe testified that he knew the colts from the time they were foaled, that they were colts of mares that belonged to Mrs. Byrn before her marriage to defendant, and that the colts were on her place at the time of her marriage to defendant, which would make the younger one at least two years old when Downing traded them for the land, for the trade was made in November, 1883, and the marriage was in June, 1881. All the witnesses say the other horse was a four-year old filly. John King, who had worked for Mrs. Downing before her marriage and for Downing afterwards, says of the colts that "their ages were two and four," and "I expect they were worth—the two of them—\$250." Oren Stingley testified that after this suit was brought he and defendant had a talk "about this case, and we talked about the trade with Mr. Rogers," and that in the course of the conversation he said to defendant, "You let two colts and three cows go?" to which defendant replied, "No; I let the colts and one cow go." Robert McKee, the husband of one of the plaintiffs and himself joined as a plaintiff for that reason, testified: "They were Mrs. Byrn's horses and cattle. I don't know who the yearlings belonged to. I didn't know whether they were his or hers." Six witnesses testified that these colts belonged to Mrs. Downing, and an equal number, if we include the implied admission of defendant to Stingley, testified that they were used by defendant in purchasing the land. The chancellor found the colts were worth \$125, and the evidence clearly supports that valuation; in fact, it would support a higher valuation.

The evidence thus far to establish a resulting trust is satisfactory. But there is another feature of this case that should not be overlooked. The land was deeded to defendant almost 20 years prior to Mrs. Downing's death. She had the right from the time she discovered that defendant had used her stock to pay for the land and taken the title in his name to bring suit against him to have the title vested in her, yet she died without ever having brought such a suit. The evidence reveals that she and defendant and their families lived together on the 360-acre farm left by her first husband, and defendant had 60 acres of land of his own. Perry Byrn, 13 or 14 years old when the trade was made, testified that he claimed the four-year old mare, and that he and defendant had some trouble over his claim, and that he "went away and worked," and that, in settlement of his claim and if he would come back and work, defendant gave him another horse. We are not satisfied that defendant did not reimburse Mrs. Downing for her stock he used in paying for this land. The burden of establishing that fact is on him, and he cannot testify. We think the evidence clearly shows that the colts once belonged to Mrs. Downing, but it also tends to show that she had given this mare to her son, and permit-

ted her son to receive the payment for her. If so, her heirs have no right to claim the land bought with the mare. The evidence also fails to show any dispute or acrimony between her and defendant over the use he made of her stock. There is evidence that more than once she said to him or in his presence that he had used her stock to pay for the land, and that he made no reply to her assertions; but does it follow that he did not in some way compensate her? Would it not be more reasonable to suppose that a husband who lived, so far as this record shows, 20 years in peace with a wife, when he discovered she persisted in claiming he had wrongfully appropriated her property, took proper steps to repair the wrong, and that, when she let nearly 20 years go by without suing him, he did in some way reimburse her? And is there not some intimation in the testimony of Perry Byrn that he did reimburse her? The statute makes the appropriation by a husband of his wife's property without her consent in writing a fraud, but it has not altogether dissolved the marital relation. It does not make them strangers, and destroy the many trustful confidences that should always exist between husband and wife. We all know that many little transactions between them in reference to the use by him of her property do arise which when only one side is told look like a conversion by him to his own use of her property, but which, if he could be permitted to explain them, would appear to have been legally and amicably settled by them. The courts do not look favorably upon claims of many years' standing where all the facts might have been established by a timely suit. They are slow to disturb land titles which have existed for many years and where neither of the parties who were most concerned can testify, one being dead and the other's mouth being closed by that fact; and when those are the facts and the decree divesting the title is dependent upon oral testimony, detailing in many cases loose conversations which occurred years ago, they require the mind of the chancellor to be satisfied by clear and positive proof. This feature of the case may be clarified on a retrial, and hence we now do no more than point out its weakness in this respect.

The weakest point in the evidence is as to the value of the 40 acres of land. The only witness who testified on the point was David Rogers, who was a son of A. L. Rogers, the grantor of the land, and who testified that he was 30 years of age at the time the trade was made, living in the neighborhood, and that his father "always asked \$10 an acre for the land, or \$400." In addition to this, it may be said that the petition alleges that defendant purchased the land "for the price and consideration of \$400," and then proceeds to state the volume and page of the record where the deed was recorded, and at the close of the evidence it was "admitted

that defendant holds the legal title to the land referred to." If the deed was offered in evidence, the abstract does not show it. The value of the land placed upon it by Rogers and Downing when they came to trade, or, if that could not be shown, its value in the open market at the time the trade was made, was an essential element of plaintiff's case; and there was no substantial evidence whatever upon the point. That offered does not rise higher than mere conjecture. The fact that Rogers always asked \$10 an acre, or \$400, for the land, is not proof that its value was \$400. The owner of property may ask far more or far less than what it is worth in the market. We do not mean to say that the proof as to the value of the land should be of that clear, cogent, positive, convincing character necessary to establish the resulting trust itself; but we do mean to say that there must be some substantial evidence to support a finding on the point. It ought to have been an easy matter to have shown what was the value of this land in 1883, when Downing bought it, and that, not having been done by any substantial evidence, the judgment should be reversed and the cause remanded.

It is so ordered. All concur.

ST. LOUIS & S. F. R. CO. v. YANKEE et al.  
(Springfield Court of Appeals. Missouri. Jan. 8, 1910.)

1. MINES AND MINERALS (§ 122\*)—OPERATION OF MINES—INJURIES TO SURFACE RIGHTS.

The right to take ore from underneath the surface of a railroad right of way must yield, if, in order to take it, the surface right of the road will be impaired.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 243; Dec. Dig. § 122.\*]

2. APPEAL AND ERROR (§ 1009\*)—REVIEW—QUESTIONS OF FACT—FINDINGS IN EQUITABLE ACTIONS.

The finding of a chancellor on conflicting testimony of witnesses appearing before him will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3972, 3973; Dec. Dig. § 1009.\*]

Appeal from Circuit Court, Jasper County; David E. Blair, Judge.

Action by the St. Louis & San Francisco Railroad Company against W. H. Yankee and others. From a judgment for defendants, plaintiff appeals. Affirmed.

W. F. Evans, Edgar P. Mann, and Joseph B. Todd, for appellant. C. V. Buckley, J. H. Spurgeon, Hugh Dabbs, and R. M. Sheppard, for respondents.

GRAY, J. The appellant, at the time this suit was commenced, was, and now is, a corporation, operating a railroad through the state of Missouri, and through the southwest quarter of the southeast quarter of section

9, township 27, range 32, Jasper county, Mo. The respondents, on November 6, 1908, and for some time prior thereto, were mining for lead and zinc underneath the surface under and near the right of way of the appellant. The fact that the appellant had acquired by deed a strip of land 50 feet wide across said tract of land, and that it was engaged as a common carrier in operating its passenger and freight trains over said road, stood admitted. It also was conceded that the respondent Armil was the owner of the land, subject to appellant's right of way for railroad purposes, and that the other respondents were mining on said land under leases or contracts with said Armil. The petition was filed on the 6th day of November, 1908, and its purpose was to enjoin the respondents from further conducting their mining operations under the right of way of plaintiff, and under the adjoining land, alleging that the defendants had been and were removing the natural support from under and near said right of way, and thereby weakening the surface of the ground, and rendering the same liable to cave in and to sink, and thereby cause said right of way and track to become unsafe and insecure, and render it hazardous to operate the trains of appellant upon its track and right of way at said place; that the defendants would proceed, unless prevented, with such mining, under and near said right of way, so as to render the operation of trains over said track unsafe and insecure, and cause the said right of way and railroad track to cave in and sink, and thereby imperil the lives and limbs of the passengers and employes carried upon said trains of plaintiff, and also endanger and cause the injury and destruction of the property of plaintiff composed of its trains, tracks, and right of way, and asking for an injunction restraining the respondents from further mining under and near said right of way at said point. Upon the filing of the petition, a temporary injunction was granted by the circuit court, and the cause came on for trial on the 23d day of November, 1908, resulting in a dismissal of the appellant's bill, and dissolving the temporary injunction. After an unsuccessful effort to secure a new trial, the appellant appealed to the Kansas City Court of Appeals, and that court transferred the cause to this court.

The evidence in behalf of appellant tended to prove that the drifts in the mine underneath the track and right of way had been cut so wide and in such a manner that there was danger of the ground caving from the surface. Plaintiff's witnesses also testified that a large pillar had been left by persons who had formerly operated said mine, and that the defendants were engaged in removing said pillar, and, on account thereof, the ground would become weakened

and the operation of heavy trains over the road of appellant at that place was likely to cause the ground to sink and cave. Appellants had further testimony to the effect that at some previous time the defendants had agreed that they would not cut any more dirt at the places where they were engaged in cutting at the time this suit was commenced. It was further shown by appellant's witnesses that other mines in the vicinity had caved, causing substantial damages, and that the formation of the ground and the character of mining in such mines were similar to the mining that was being done by the respondents. The appellant's evidence further showed that many trains passed over the track at this place daily, and it stood uncontradicted that, if a cave did occur while a freight or passenger train was passing over the track at said point, great loss of life and property might be sustained. The witnesses for appellant, whose testimony tended to prove the above facts, included the state mine inspector, and no effort was made to impeach any of the witnesses who testified for plaintiff in the case.

The testimony in behalf of respondents was given by about 12 witnesses, including the respondents themselves. Their testimony tended to prove that the pillar heretofore mentioned was no support to the roof, for the reason that between the top of the pillar and the roof proper was a seam of mud of considerable thickness, and in removing the pillar the ground would be in no wise weakened. Respondents' testimony further tended to show that the other mines which appellant claimed had caved did not cave on account of negligent mining, but that the same was purposely caved by persons mining therein. All the witnesses for the respondents testified that the mining being done would in no wise endanger the property of the appellant, and therefore there was no danger of the ground caving on account thereof. Some of these witnesses had been mining in the district for more than 40 years, and their reputations as mining experts were not questioned.

The law of this case is simple. The appellant owned the surface right, and thereby was possessed of the absolute right to have its right of way unmolested. The respondents had the right to take the ore from underneath the surface, provided they carried on their mining operations in such a manner as not to interfere with the surface right of the appellant. The right to take the ore from underneath the surface must yield, if, in order to take it, the surface right of the appellant will in any wise be impaired.

By an act of the Legislature, approved June 1, 1909 (Laws 1909, p. 436), it is a criminal offense, punishable by fine and imprisonment, for any person to mine or excavate beneath the surface of any public highway or railroad right of way, in such manner as to

cause the surface of the ground to cave. This act was passed with an emergency clause, thereby showing that the Legislature deemed it important that the legislation should become effective at once. Any person living in the mining district of Jasper county well knows the wisdom of this act of the Legislature. It was a common occurrence that irresponsible and reckless persons were engaged in mining underneath the public road and railroads in the county, without any regard to the safety of persons who might be traveling on such highways and railroads. Owing to the insolvency of the persons causing the injury, suits for damages afforded no remedy. With all these things known and fully understood, the Legislature passed the act making it a crime to so mine in such places.

This is a suit in equity, and it is the duty of this court to review all the evidence and weigh the same anew; but the usual practice is for the court to defer largely to the findings of the chancellor on all the issues of fact, and to refuse to disturb the judgment on the ground that the findings are against the weight of the evidence. *Jones v. Thomas*, 218 Mo. 508, 117 S. W. 1177.

Where the evidence introduced by the respective parties is conflicting, the Supreme Court has repeatedly held that since the chancellor has the witnesses before him, and the opportunity of observing their demeanor upon the witness stand, and their manner of testifying, he is in a much better position to judge of the credibility of the witnesses and the weight to be given to their testimony than is the appellate court.

In *Huffman v. Huffman*, 217 Mo. 182, 117 S. W. 1, the Supreme Court in banc, declared the rule to be as follows: "The evidence was conflicting, but the chancellor who tried the case had a better opportunity than we have to judge of the reliance that ought to be placed in the testimony of each witness. He had the witnesses before him, he heard them and saw them, under examination and cross-examination, and it is the experience of all the triers of the fact that the personal appearance and manner of the witnesses have much influence, and rightly so, in weighing and reaching a verdict. It is our duty, under such circumstances, to defer to the findings of the trial judge, and so we do in this case."

In this case, if the testimony of appellant's witnesses is true, then the mining of the respondents underneath the right of way was liable to greatly injure and disturb the surface right of appellant over the land heretofore described. If, upon the other hand, the witnesses for respondents told the truth, then the appellant's fears were not well grounded, and nothing was being done by them that would in any probability cause damage to the track or right of way of the appellant. It would be difficult to conceive how the testimony could be more conflicting and contradictory. In addition to the above,

the testimony was largely the opinions of witnesses, and therefore a case of expert testimony. In such cases, it seems to us that greater deference should be given to the finding of the chancellor than where witnesses are testifying to ordinary facts. Two witnesses may be called to give expert testimony in a case. It is not so much what they say, but their appearance and manner of testifying is one of the principal elements in determining the weight to be given their testimony.

We believe, to reverse this judgment, we would have to violate the rule laid down by the Supreme Court for us to follow in such cases, and this we have no desire to do, as we believe it a wise one, and supported by the great weight of authority in all the states of the Union.

The only assignment of error in this case is that the court erred in finding for the defendants and not for the plaintiff on the facts as disclosed by the evidence.

For the reasons above given, we do not feel justified in reversing the judgment of the trial court, and therefore the same is affirmed. All concur.

#### STATE v. DRAUGHN.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

##### 1. CRIMINAL LAW (§ 549\*) — EVIDENCE — WEIGHT AND SUFFICIENCY.

Courts and juries are not limited, in searching for the truth, to the mere words of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252; Dec. Dig. § 549.\*]

##### 2. CRIMINAL LAW (§ 560\*) — EVIDENCE — WEIGHT AND SUFFICIENCY.

It is not necessary to sustain a conviction that the evidence should show the guilt of defendant beyond the possibility of a doubt, but only beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1266; Dec. Dig. § 560.\*]

##### 3. WITNESSES (§ 246\*)—EXAMINATION OF WITNESS BY COURT.

A trial judge has the right to examine a witness the same as attorneys.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 852-857; Dec. Dig. § 246; \* Criminal Law, Cent. Dig. § 1525.]

##### 4. WITNESSES (§ 244\*)—EXAMINATION—LEADING QUESTIONS.

Where a witness is shown to be unfriendly to the prosecution, it is proper to allow the prosecuting attorney to ask him leading questions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 843; Dec. Dig. § 244.\*]

##### 5. WITNESSES (§ 255\*) — EXAMINATION — REFRESHING MEMORY.

The rule that the state cannot impeach its own witness by proving previous statements contradictory to his testimony does not prevent the state from calling the attention of an unwilling or forgetful witness to his testimony before the grand jury for the purpose of refresh-

ing his memory, though such former testimony is different from his testimony in court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 885; Dec. Dig. § 255.\*]

##### 6. INTOXICATING LIQUORS (§ 236\*)—UNLAWFUL SALES—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction for selling liquors in violation of the local option law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

Appeal from Circuit Court, Dade County; B. G. Thurman, Judge.

Jesse Draughn was convicted of selling intoxicating liquors unlawfully, and appeals. Affirmed.

Neale & Newman, for appellant. Edwin Frieze and Howard Ragsdale, for the State.

GRAY, J. This is an appeal by the defendant from the judgment of the Dade county circuit court, assessing a fine of \$300 against him, after trial by jury, on an indictment charging him with selling intoxicating liquors, in violation of the local option law.

There is only one question in the case, and that is: Was the evidence sufficient to support the verdict?

The state relied for a conviction, as to what was sold, on one J. L. Berry. This witness testified on direct examination: "Q. Do you know Mr. Draughn, the defendant in this case? A. Yes, sir. Q. What business was he engaged in last fall? A. Well, he was in the drug business, I suppose, last fall. Q. Where was he in business? A. South Greenfield. Q. Were you at his place of business there? A. Yes, sir. Q. Did you buy anything from Mr. Draughn? A. Yes, sir. Q. What did you get from him? A. Well I suppose it was—I got a half pint of stuff. I don't know what it was—no, a pint. I suppose it was whisky. Q. You called for whisky when you bought that, did you not? A. Well, sir, I disremember whether I called for whisky, or whether I just went in and asked for a pint. Q. What makes you suppose it was whisky? A. Well, that was what the fellow asked me to get for him, was whisky. Q. Did you taste it? A. No, sir. Q. What color was it? A. I disremember whether it was wrapped up. Q. Don't you know what you called for when you went in the store? A. No, sir; I don't recollect just exactly how I called for it. I might have called for a pint, or I might have called for a pint of whisky. I just disremember what I did do. Q. You thought you was getting whisky when you went in there and got that? A. Yes, sir. Q. Who was in the front room when you came out. Mr. Berry? A. Well, sir, I believe Mr. Sexton was in there. Mr. Sexton bought a comb there that day." After these questions and answers, followed a long list of questions by the prosecuting attorney and the court. These questions were asked

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and answered over the objection of the defendant's counsel. The witness further testified that he paid 50 cents for it, but whether he bought it of Mr. Draughn or some one else he did not remember, as it was about the time Draughn was selling out. On cross-examination the witness testified, in speaking of the sale: "I had been to Lockwood, and I came on back there waiting for a train, and I went down there to see Mr. Jones, and he asked me to go up there and get this stuff for him, but I don't recollect whether he said, 'Go up there and get me a pint,' or a 'pint of whisky.' I disremember what he said. I don't remember whether I called for a pint, or a pint of whisky, and I disremember whether it was wrapped or not."

The witness Sexton was placed on the stand, and he testified that he bought a comb of defendant that day, and that Mr. Berry, he believed, was on the premises at that time, and standing there when he bought the comb.

This is substantially the testimony for the state, except it was admitted that local option was in force in the county at the time of the sale. The defendant was the only witness offered in his behalf, and the following is his examination in chief: "Q. Mr. Draughn, are you guilty of this charge? A. No, sir. Q. That is all." The state attempted to cross-examine him, but his counsel objected, so that the cross-examination consisted of the following: "Q. You have told the jury all you are going to tell them about this case? A. Yes, sir; I ain't got nothing more to say; not guilty is all."

The testimony, narrowed down, proves the following facts: That a man by the name of Jones said to Mr. Berry: "Go up to the drug store and get me a pint." The train was about to move, and the witness ran to the drug store and called for a pint or a pint of whisky, and it was furnished to him, and he paid 50 cents for it. Courts and juries are not limited, in searching for the truth, to the mere words of a witness. When a man says to another, "Go up to the drug store and get me a pint," and the man does so and goes into the store and says to the druggist, "I want a pint," and pays him 50 cents for it, there is not a shadow of a doubt but what it was whisky he wanted, and whisky he got. It is not necessary to sustain a conviction that the evidence should show the guilt of defendant beyond the possibility of a doubt, but only beyond a reasonable doubt, and there can be no reasonable doubt of the guilt of the defendant.

Complaint is made of the action of the trial court in asking the witness Berry questions, and permitting the state to cross-examine him in regard to previous statements made by him. It is a well-known fact that, in this class of cases, the memory of state's witnesses is often very poor. If this witness had purchased a pint of benzine or castor oil, we have no doubt but he and the

defendant would have remembered every detail of the transaction. "The trial court has the undoubted right to question or cross-question any witness, provided this is done within such bounds as control attorneys in similar interrogations." *State v. Lockett*, 168 Mo. 480, 68 S. W. 563; *State v. Pagels*, 92 Mo. 300, 4 S. W. 931. The court was of the opinion that the witness was unfriendly to the state, and therefore no error was committed by the court in permitting the prosecuting attorney to ask him leading questions. *State v. Duestrow*, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; *State v. Keith*, 53 Mo. App. 383. The prosecuting attorney was permitted to ask the witness if he had not testified before the grand jury that he was told to get whisky, and that whisky was what he called for when he went into the drug store, and he was also shown a statement of what he testified to, signed by him. The court permitted this, for the purpose of refreshing the memory of the witness. To intelligently pass upon this assignment of error, the following is material: The witness testified that he did not remember whether he was told to get a pint, or a pint of whisky, and he did not remember whether he called for a pint, or a pint of whisky. He was examined several months after the transaction, and, for the purpose of refreshing his memory, the prosecuting attorney asked him these questions. The rule in this state is that the state cannot impeach its own witness by proving previous statements of the witness contradictory to his testimony. But this rule does not mean that an unwilling or a forgetful witness cannot have his memory refreshed by calling his attention to previous testimony or statements. *State v. Duestrow*, 137 Mo., loc. cit. 85, 38 S. W. 554, 39 S. W. 266; *Ashby v. Gravel Road Co.*, 111 Mo. App., loc. cit. 83, 85 S. W. 957. Of course, the party calling the witness cannot impeach him by offering contradictory evidence for that purpose.

In *State v. Duestrow* the court said: "The above-cited authorities fully justify the asking of the questions propounded to this unwilling witness, and it was unnecessary for the state to plead surprise or of having been misled, since both those elements were patent to the most casual observation, since nothing could more conduce to surprise than to have a witness who had previously testified to the whole of a short conversation, but a few months before, and then, afterwards forget, or pretend to forget, the latter and more striking portion of that conversation. Nor does it at all affect the propriety of such questions that they may incidentally have the effect of impeaching such witness. Courts should not be averse to letting in the light of day on such reprehensible transactions."

In *Ashby v. Gravel Road Co.*, the witness was examined as to his evidence on the former trial, and complaint was made. The

court said, if the witness was reluctant, or his memory was clouded, we can see no impropriety in the course of his examination. It was a matter resting very largely with the discretion of the trial judge.

In *George v. McGovern*, 83 Wis. 555, 53 N. W. 899, 35 Am. St. Rep. 77, and *Bullard v. Pearsall*, 53 N. Y. 231, the courts expressly hold that such questions may be asked for the purpose of refreshing the recollection of the witness.

The verdict of guilty comes with the approval of the learned trial court, and he must have been thoroughly satisfied of the defendant's guilt, or he would have unhesitatingly set the verdict aside. He was in a much better position than we are to know the truth of the matter, and, with due deference to his duty and judgment, we will not disturb this judgment.

It is, accordingly, affirmed. All concur.

### ASBILL v. CITY OF JOPLIN.

(Springfield Court of Appeals. Missouri. Jan. 8, 1910.)

#### 1. MUNICIPAL CORPORATIONS (§ 821\*)—OBSTRUCTION IN STREET—PERSONAL INJURIES—EVIDENCE.

In an action against a city for personal injuries from falling over a wire stretched across the sidewalk, plaintiff's testimony that the night was dark, that there was nothing to notify her of the obstruction, and while walking in the ordinary manner she tripped and fell, with the fact that the city had granted the permit to have the sidewalk constructed, entitled plaintiff to go to the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

#### 2. APPEAL AND ERROR (§ 997\*)—DIRECTION OF VERDICT—QUESTION FOR TRIAL COURT.

In an action against a city for personal injuries from falling over a wire stretched across the sidewalk, where plaintiff testified that there were no lights or barriers to notify her that the wire was across the walk, and two witnesses for defendant testified that a barrier and light were properly placed early in the evening, whether a verdict should be directed for defendant was for the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4024; Dec. Dig. § 997.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 821\*)—OBSTRUCTION OF STREET—PERSONAL INJURIES—WEIGHT TO BE GIVEN EVIDENCE—QUESTION FOR JURY.

In an action against a city for personal injuries from falling over a wire stretched across the sidewalk, where plaintiff testified that there were no lights or barriers to notify her that the wire was across the walk, and two witnesses for defendant testified that a barrier and light were properly placed early in the evening, the question was for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1749; Dec. Dig. § 821.\*]

#### 4. TRIAL (§ 206\*)—INSTRUCTION—CURE OF ERROR.

Where the court, in an instruction given in behalf of plaintiff, failed to mention one of defendant's principal defenses, but later upon

defendant's request gave an instruction which clearly submitted the issue, the failure to submit the defense in the first instruction was not reversible error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-708; Dec. Dig. § 296.\*]

Appeal from Circuit Court, Jasper County; David E. Blair, Judge.

Action by Ola E. Asbill against the City of Joplin. Judgment for plaintiff, and defendant appeals. Affirmed.

Mercer Arnold, for appellant. Clay & Davis, for respondent.

GRAY, J. This cause was commenced in the Jasper county circuit court to recover damages for personal injuries which plaintiff claims she received in June, 1907, in falling, caused by tripping on a wire across one of the sidewalks on a public street in the city of Joplin. Her evidence tended to establish the fact that Eighteenth street, at the time complained of, was a public street in the city of Joplin; that the city had given a permit to one Powell to lay and construct a concrete sidewalk on said street; and that while said walk was being laid, and before the sidewalk was opened to the traveling public, there was strung across the end of said walk a wire, intending to prevent persons from passing onto and over said walk. She alleged in her petition that the contractor and defendant failed to set out a danger signal to notify persons of the obstruction caused by stretching said wire across the walk; that on said evening, and while she was passing on said walk, exercising due care, and without notice of said obstruction, she fell and suffered damages in the sum of \$5,000, for which judgment was asked. A trial was had by jury, and a verdict rendered in favor of respondent for the sum of \$500, and the city has appealed to this court.

The assignment of errors are: That the court erred in refusing to give peremptory instruction asked by the appellant; that the verdict is against the evidence; and that the court erred in giving the first instruction requested by the plaintiff.

The plaintiff was the only witness in her behalf as to the condition of the walk at the time of the accident. She testified that the night was dark, and that there were no lights or barriers to notify her that the wire was across the walk, and, while walking along in the ordinary manner, she tripped and fell. When we consider the further fact that the city had granted a permit to have the walk constructed, the plaintiff's evidence entitled her to go to the jury.

In behalf of the defendant, two witnesses testified that the wire was placed across the sidewalk because the concrete walk was not in a condition to be used by the public, and that the wire was stretched and a board was placed at the top of the wire across the

walk, and on which was hanging a lantern, in the early part of the evening. These facts were testified to by two witnesses, who assisted in the construction of the walk. The appellant claims, because no one testified that the light was not placed on the walk in the early part of the evening, that the court should have given the instruction to find for the defendant, inasmuch as the testimony of these witnesses showed that the proper warning had been given early in the evening, and, if it was not there at the time the plaintiff was injured, the city was not liable. It seems to us this was a question for the trial court. *Steamboat City of Memphis v. Matthews et. al*, 28 Mo. 248; *Myers v. City of Kansas*, 108 Mo. 480, 18 S. W. 914; *Morris v. Kansas City*, 117 Mo. App. 898, 92 S. W. 908. In the case of *Steamboat City of Memphis v. Matthews*, above cited, the court says: "All the testimony was on one side, but the jury disregarded it, and the circuit court, who heard the witnesses, sanctioned the verdict of the jury. We must infer from this that the circuit court was satisfied with the course of the jury. The credit due to the witnesses is a matter peculiarly for the jury, and any control over the finding of a jury in this respect could hardly be judiciously exercised by this court, which must be guided altogether by what appears on the face of the record. The circuit judge would not, of course, permit a verdict to stand against his own instruction, and, as that court has virtually certified to us that the verdict was right, we cannot interfere."

What we have just said determines the second point also, as it was for the jury to weigh and properly determine the testimony of the witnesses in behalf of the appellant.

It is finally claimed that instruction No. 1 given in behalf of plaintiff is wrong because it is a general instruction and attempts to inform the jury, if they find certain facts to be true from the evidence, they should render a verdict for the plaintiff, but fails to mention one of the principal defenses relied upon by the defendant, to wit: That if a light or signal was placed at the scene of this accident the evening plaintiff was hurt and prior to her accident, but was afterwards removed by third parties, the plaintiff cannot recover. The court gave an instruction, at the request of the appellant, which clearly submitted this issue, and, as the instructions taken together present the law fully, the action of the court in not submitting in the first instruction this defense is not reversible error. *Austin v. St. Louis Transit Co.*, 115 Mo. App. 146, 91 S. W. 450, and cases therein cited.

We find no error was committed against the appellant materially affecting the merits of the action, and therefore affirm the judgment. All concur.

## IVES v. CRAWFORD COUNTY FARMERS' BANK.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

### 1. APPEAL AND ERROR (§ 874\*)—REVIEW—NATURE OF DECISION APPEALED FROM.

On appeal from a judgment on issues raised by interpleas filed at the instance of the defendant in a suit for a deposit claimed by both parties to a contract, the sufficiency of the petition against the defendant will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3530, 3535; Dec. Dig. § 874.\*]

### 2. WILLS (§ 602\*)—CONSTRUCTION—ESTATE CREATED.

A testator devised land to his grandchildren "absolutely to them, their heirs, but if they should die without issue, then it shall revert and vest in my heirs, equally." Held, that their estate, if a fee, was liable to be defeated on their death without children, and in that event the title vested in the testator's heirs.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1354; Dec. Dig. § 602.\*]

### 3. JUDGMENT (§ 707\*)—CONCLUSIVENESS—PERSONS NOT PARTIES.

A judgment in a suit to quiet title binds only the parties named in the suit.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1230; Dec. Dig. § 707.\*]

### 4. VENDOR AND PURCHASER (§ 130\*)—PERFORMANCE OF CONTRACT—TITLE OF VENDOR.

One who has contracted for a perfect title has the right to demand a title which will enable him to hold the land in peace, and to be reasonably sure that no flaw will disturb its marketable value.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 245, 246; Dec. Dig. § 130.\* Specific Performance, Cent. Dig. § 258.]

### 5. VENDOR AND PURCHASER (§ 137\*)—PERFORMANCE OF CONTRACT—TITLE OF VENDOR.

Where the parties have agreed to submit to and rely on the judgment of an attorney selected to approve the vendor's title, they cannot, in the absence of fraud or collusion, afterwards ask to substitute the judgment of the court.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 260; Dec. Dig. § 137.\*]

### 6. VENDOR AND PURCHASER (§ 137\*)—PERFORMANCE OF CONTRACT—TITLE OF VENDOR.

Where a contract provides that the title of the vendor shall be such as shall be approved by an attorney, his opinion, though wrong, is binding on the parties in the absence of fraud or collusion.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 260; Dec. Dig. § 137.\*]

### 7. FRAUDS, STATUTE OF (§ 131\*)—EFFECT OF STATUTE—PAROL MODIFICATION OF WRITING.

A parol agreement is inadmissible to vary the terms of a previously executed written contract for the sale of land which the law requires to be in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 283, 284; Dec. Dig. § 131.\*]

### 8. FRAUDS, STATUTE OF (§ 131\*)—EFFECT OF STATUTE—PAROL MODIFICATION OF WRITING.

A parol agreement, binding a purchaser of land to accept a title pronounced good by an attorney, modifies a prior written contract, binding him to complete the purchase on the presen-

tation of an abstract showing perfect title, and is inadmissible as varying a contract which the law requires to be in writing.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 283, 284; Dec. Dig. § 131.\*]

**9. VENDOR AND PURCHASER (§ 214\*)—RIGHTS OF PARTIES—ASSIGNEES OF CONTRACT.**

An assignee of all the right and interest that a vendee of land has in the contract of sale, together with all relief concerning the same, has a right to the money paid on the contract by the assignor.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 446; Dec. Dig. § 214.\*]

**10. APPEAL AND ERROR (§ 511\*)—RECORD—MATTERS TO BE SHOWN BY RECORD—FILING OF BILL OF EXCEPTIONS.**

An abstract of the record, reciting that the time for filing the bill of exceptions expired on a given date, and on a prior date the appellant presented to the judge his bill of exceptions, and the same was then allowed, signed, sealed, and ordered to be filed, and the same was thereupon filed, is sufficient to show that it was filed in time.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2319-2321; Dec. Dig. § 511.\*]

*Appeal from Circuit Court, Crawford County; L. B. Woodside, Judge.*

Action by George W. Ives against the Crawford County Farmers' Bank, in which the plaintiff and D. F. Kimlin filed interpleas. From a judgment for plaintiff, Kimlin appeals. Reversed and remanded, with directions to enter judgment in favor of appellant.

Hall & Dame and Reeves & Lay, for appellant. Harry Clymer and A. H. Harrison, for respondent.

GRAY, J. On the 15th day of April, 1908, plaintiff contracted in writing to sell his farm, of about 700 acres, in Crawford county, to Samuel Espenchied, of Illinois. The price of the land was \$9,000 and a lot situated in Salina, Kan. The clause of the contract material to the issue, is as follows: "The said party of the second part has this day deposited with the Crawford County Farmers' Bank, the sum of one thousand dollars, which said sum is to be held by the said bank until the said party of the first part furnishes a full and complete abstract of the title showing a perfect title to said lands in the said party of the first part, and executes and deposits with said bank a general warranty deed conveying said farm to the said party of the second part, his heirs and assigns. The said party of the second part is to pay the balance of said purchase price of \$8,000.00 on or before the 15th day of October, 1908." It was claimed by the plaintiff that after the execution of this contract, and on the same day, there was a parol agreement between the parties that one A. H. Harrison was to examine the abstract of title furnished by Ives, and when he had approved the same, the \$1,000 deposited with the bank

was to be paid to the plaintiff. In due time an abstract was made and delivered to Harrison, who failed to approve the title, as shown by the abstract, and so notified Espenchied in writing. A short time after this notice a letter was received from the attorney of Espenchied in Illinois, approving Harrison's objections to the title. After this letter had been received Harrison instituted suits, as attorney for Ives, to quiet the title to the lands, and also procured deeds from certain parties for the same purpose. About the 10th day of October, 1908, judgments were rendered in the circuit court of Crawford county, in the said suits so instituted by Harrison, and certified copies of these judgments were filed and shown in the abstracts with the deeds so procured and filed after Harrison's first examination. After these things had been done, Harrison approved the title and pronounced it good in Ives, and so notified the attorney for Espenchied. June 1, 1908, Espenchied, in writing, assigned all of his right in the contract with Ives to Kimlin, the appellant herein, and on October 16th, the attorney for Kimlin wrote to Mr. Ives that he had examined the abstract, and the title was not good, and charged that Harrison knew that the abstract was defective, and further stating that Mr. Kimlin had that day closed a deal for other lands, and would not buy Ives' property, for that reason, as well as the fact that he was to have a good title and the same had not been furnished, and also demanding the payment of the \$1,000 deposit in the bank. This letter was received, and Mr. Harrison was requested by Ives to write a letter to Mr. Kimlin, asking him to return the abstracts if he did not intend to complete the deal, and in reply thereto a letter was written by Kimlin's attorneys, stating that the abstracts were held subject to the order of Mr. Ives. At the February term, 1909, Ives sued the Crawford County Farmers' Bank for the \$1,000, stating his cause of action as follows: "And for his cause of action the plaintiff avers that the defendant is indebted to him in the sum of \$1,000 for and on account of money deposited with said defendant to be paid to this plaintiff on or before the 15th day of October, 1908." On the 15th day of February the bank filed a petition, asking that Ives and Kimlin be required to interplead for the money. Interpleas were filed by both of the parties, and the cause was tried on issues therein raised, resulting in a judgment in favor of Ives, from which Kimlin has appealed to this court.

The appellant questioned the sufficiency of the petition filed by Ives against the bank. We do not consider this material at this time. Both parties to the contract were claiming the \$1,000 deposit with the bank, and filed their interpleas therefor, and the cause was tried upon the issues thereby

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

made. The abstract, as perfected by Harrison, did not show a marketable title in Ives in the property, and therefore did not comply with the terms of the contract entered into on the 15th day of April, 1908. The judgments of the circuit court attempting to perfect the title show the suits were commenced against the unknown heirs of Putnam Trask, Josiah B. Trask, Franklin Askins, William J. Farrar, Marvin A. Dunlap, R. P. Dunlap, Andrew H. Trask, Henrietta Paul, and Napoleon B. Trask, and of course notice was given by publication. When Harrison approved the abstract, the evidence does not show that the term of court had adjourned; and, even if it had, the parties defendants in that suit, under the provisions of sections 777, 778, Rev. St. 1899 (Ann. St. 1906, pp. 752, 753), had three years' time in which to appear in court and have the judgment set aside by showing a meritorious defense. And even though it be admitted, that the judgment perfected the title as to all the parties named therein, yet the abstract shows that there were serious defects in Ives' title other than the ones attempted to be cured by the suits. The title to 80 acres of the land was in the following condition: One James Sanders, who owned the same, made a will on the 28th day of June, 1882, disposing of this tract of land as follows: "I do hereby give and bequeath unto my grandchildren, James S. Paul and Henrietta Paul, minor heirs of Martha H. Paul, deceased, the following described real estate, to wit: The S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  and the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 28, township 37, range 3. Absolutely to them, their heirs, but if they should die without issue, then said real estate shall revert and vest in my heirs, equally, or share and share alike." A warranty deed, dated June 1, 1883, from Martha H. Paul and James S. Paul, to Mr. Ives to this tract of land, was shown in the abstract. But the abstract did not show any conveyance from Henrietta Paul, or that Martha H. Paul and Henrietta Paul were one and the same person.

In making the unknown heirs of Henrietta Paul parties to the suit to quiet title, the attorney for Mr. Ives must have construed the will as giving to James S. Paul and Henrietta Paul an absolute fee-simple title to the land without condition or contingency. Our opinion is that, whether we construe that clause of the will as vesting in James Paul and Henrietta Paul a life estate, or an estate in fee, it is immaterial to the issues in this case. If a life estate only vested, then upon their deaths, the absolute title passed to their children, if any, and if none survived, then to the heirs of James Sanders, and in that event, the children took under the will of James Sanders, and not from their parents. If a fee was transferred, then such estate was liable to be defeated upon the contingency of them dying without children.

Gannon v. Pauk, 200 Mo. 75, 98 S. W. 471; Gannon v. Albright, 183 Mo. 238, 81 S. W. 1162, 67 L. R. A. 97, 105 Am. St. Rep. 471; Yocum v. Siler, 160 Mo. 281, 61 S. W. 208; Haring v. Shelton (Tex.) 122 S. W. 13; Hopkins v. Hopkins (Tex.) 122 S. W. 15. The abstract did not show whether James Paul or Henrietta Paul was ever married, or that either of them was dead, and, if so, whether or not any children survived. If they died without leaving children, then under the terms of the will, as we have construed it, the title to the real estate willed to them vested at their death in the heirs of James Sanders. The heirs of James Sanders were not made parties to this suit, and neither were the heirs of James Paul, and therefore the title shown by the abstract was not the title that Ives agreed to give in his written contract.

It is claimed by respondent, Ives, that the court found in its judgment that the title was perfected in Ives by limitation. Should we concede that the judgment perfected a title in Ives as against all the parties named in the suit in which they were rendered, yet the heirs of James Sanders were not parties to that suit, and therefore their interests in the property were not affected thereby. Under the laws of this state a purchaser of lands has the right to demand the title which shall protect him from anxiety. He should have a title which would enable him, not only to hold his land, but to hold it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value. Mastin v. Grimes, 88 Mo. 478. Under the contract between the parties Ives agreed to furnish a full and complete abstract of the title, showing a perfect title to said lands in him. Speaking of a similar contract in Bruce v. Wolfe, 102 Mo. App. 389, 76 S. W. 724, the Kansas City Court of Appeals said: "The contract called for a clear abstract of title; that is, a perfect title. Whereas he may have had a good title in law by reason of his occupation under color and claim of title, it could not be so shown by an abstract. The purchaser was not bound to take the land and incur the risk of successfully defending the title."

It is claimed by respondent, Ives, that by the parol agreement made after the written contract was entered into it was agreed that the \$1,000 was to be paid, not when Ives presented an abstract showing perfect title, but when the attorney, Harrison, pronounced the abstract good after an examination by him. It is true, as contended by respondent, that where the parties have agreed to submit to and rely upon the judgment of an attorney whom they have selected, they cannot, in the absence of fraud or collusion, afterwards ask to substitute the judgment of the court for that of the party selected. And it may be further stated that, where a contract provides that the title of the vendor shall be such as

shall be approved by an attorney, then the approval and judgment of such attorney, in the absence of fraud or collusion, is binding upon the parties, even though the attorney's opinion is wrong. But in this case the testimony of the party relying on the agreement to submit the abstract to the attorney selected by Espenchied shows that this agreement was made on the day the original contract was entered into, and subsequently an abstract was delivered to Harrison, who examined the same and rejected it. The further fact stands admitted that it was agreed that the abstract did not convey a good title, and the same was to be perfected by suits in the courts. After this was done, Harrison became the attorney of the vendor in the litigation to perfect the title, and under such circumstances it is doubtful whether the agreement first made to accept his judgment would apply after he had rejected the abstract and had become the attorney of the vendor for the purpose of perfecting the title. It is not necessary, however, to decide this proposition in determining this controversy. The original contract required an abstract showing a perfect title; and, when this was delivered, the \$1,000 in controversy was to be paid.

The claim of the respondent Ives to the \$1,000 is not upon this contract, but upon an alleged subsequent parol agreement, by the terms of which the \$1,000 was to be paid when Harrison approved the abstract, and a title approved by Harrison was to become the title appellant's assignor was to accept, whether good or bad, and as a substitute for the title he was to have under the terms of the legal contract. When the testimony of this parol agreement was offered, the appellant objected, and has preserved his objections and exceptions, claiming that the parol agreement, under the laws of this state, was not admissible to vary the terms of the previously executed written contract. In this contention he is undoubtedly correct. *Warren v. Meyer Mfg. Co.*, 161 Mo. 112, 61 S. W. 644; *Rucker v. Harrington*, 52 Mo. App. 481. In *Rucker v. Harrington*, supra, Judge Ellison reviewed the authorities at length upon the question, and clearly declared the law as follows: "It is true that at common law, while you could not vary the terms of a written contract by prior agreements or stipulations, yet you might do so, on sufficient consideration, by subsequent oral agreement. But in such case the original agreement, as has been already stated, need not have been in writing; but, in a case under the statute, an entirely different phase is presented. It should be apparent that if the original contract must be in writing, to be capable of enforcement, any subsequent change therein must likewise be in writing. It is difficult to find argument to sustain this proposition, simply from the fact that it is self-evident. It will not do to say that the statute only has reference to or prohibits an entire new

deal or change of contract, for we have already seen that the entire contract, substantially as made, is within the terms of the statute. And, as applied to this case, it must be admitted that the original contract could never have been enforced by plaintiff, since he did not have the title he therein agreed to convey. He is thus compelled to sustain his cause of action by the subsequent oral contract, the subject-matter of which oral contract is found in the original writing, while the contract itself is found in the subsequent oral agreement, connecting itself with the writing for a part of its terms. To enforce such a contract would be to practically nullify the statute." This decision is reviewed by the Supreme Court in *Warren v. Meyer Mfg. Co.*, supra, and its doctrine declared by that court to be the law of this state. The decisions of our state are in perfect harmony with the majority of the opinions of other states upon the same subject. For a list of these authorities reference is made to the note of *Nonamaker v. Jacob J. Amos*, 73 Ohio St. 163, 76 N. E. 949, 4 L. R. A. (N. S.) 980, 112 Am. St. Rep. 708.

Counsel for respondent has cited us to a number of decisions in this state holding that a written contract may be modified by subsequent parol agreements. By an examination of these cases it will be found that they have reference to contracts which the law did not require to be in writing in the first instance.

The claim is also made that the subsequent agreement does not vary the terms of the written contract. We think differently. By the terms of the original contract the vendee was to have an abstract showing a perfect title, and when this was furnished to him, the \$1,000 should be paid. By the terms of the subsequent parol agreement the \$1,000 was to be paid when Harrison said the title was good, and, in addition thereto, the vendee was to accept a title pronounced good by Harrison, whether it was in fact good or not. The abstract furnished did not show the title required by the terms of the written agreement, and therefore, under the terms of the written agreement, the \$1,000 was not due, and the vendee was not required to complete the purchase of the land. In *Warren v. Meyer Mfg. Co.*, supra, by the written contract defendant agreed to sell plaintiff 30 or 40 tons of iron at \$9 per ton, and was not bound to pay for it until the whole amount was delivered. By the subsequent oral agreement plaintiff agreed to pay cash for the iron as fast as delivered. It was held that this verbal agreement imposed a new burden, and was not admissible as varying the written agreement. In *Rucker v. Harrington*, supra, a written contract was executed for the sale of land, by the terms of which the purchaser was to have a marketable title. It was sought to show that when the abstract was examined, such title was not shown, and thereupon the parties agreed that \$300 should

be deducted from the purchase price, and the defect would be waived in consideration thereof. The court held the oral agreement was void, and that it should not have been admitted in evidence.

The respondent insists that the assignment by Espenchied to Kimlin does not give to Kimlin the right to the \$1,000 in controversy. The contract is signed by Espenchied, and by its terms there was sold and assigned to Kimlin all the right and interest that Espenchied had in and under the written contract between him and Ives, and a copy of the written contract was attached or written on this assignment, and in addition to the assigning of his rights and interest, "all relief concerning the same was also assigned." We believe this sufficient to give to Kimlin the right to the \$1,000 paid by his assignor.

The respondent, Ives, asked that the appeal be dismissed because the appellant's abstract of the record does not show the filing of the bill of exceptions. The abstract of the record recites that the time for filing the bill of exceptions expired on the 31st day of December, 1909, and "on the 19th day of October, 1909, interpleader, appellant, presented to said Woodside, the judge of said circuit court, his bill of exceptions, being the same as hereinafter set forth, and the same was then by said Woodside as said judge, after being found correct by said Woodside as said judge, allowed, signed, sealed, and ordered to be filed and made a part of the record of said cause, and a part of the record of said circuit court, and the same was thereupon so filed, and was made a part of said record." This court has heretofore held that an abstract of the record which states in narrative form the filing of the bill of exceptions in the manner above set forth is sufficient. If the respondent claims that the bill of exceptions was not, in fact, filed in time, then he should file an additional abstract in order that the court may determine the fact.

From what we have said, the judgment of the trial court is for the wrong party. It is therefore ordered that the same be reversed, and the cause remanded to the circuit court, with directions to enter judgment in favor of the interpleader, Kimlin, for the \$1,000. All concur.

**MOUND CITY ENGRAVING CO. v.  
MOBILE & O. R. CO.**

(St. Louis Court of Appeals. Missouri. Jan. 4, 1910.)

**1. GARNISHMENT (§ 97\*)—DEFECTS IN RETURN—MANNER OF RAISING—MOTION TO QUASH.**

Defects appearing on the face of the return in garnishment must be raised by motion to quash, and not by answer or plea in abatement.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 196, 197; Dec. Dig. § 97.\*]

**2. GARNISHMENT (§ 104\*)—DEFECTS—WAIVER—ANSWERING TO MERITS.**

The garnishee, by answering to the merits after his motion to quash a return for defects on its face is overruled, loses the benefit of his motion, though he excepts to the ruling and alleges the same defects in his answer by way of plea in abatement.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 213; Dec. Dig. § 104.\*]

**3. GARNISHMENT (§ 96\*)—RETURN—CONCLUSIVENESS.**

The return in garnishment proceedings is conclusive as to the truth of recitals therein; the remedy for a false return being a suit on the officer's bond.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 193; Dec. Dig. § 96.\*]

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Action by the Mound City Engraving Company against the Mobile & Ohio Railroad Company, as garnishee. From a judgment for plaintiff, the garnishee appeals. Affirmed.

This case originated in a justice's court, brought there by attachment against the defendant, Horse Show Monthly Publishing Company, on an account for \$176.70. Summons and writ of attachment against defendant issued on the 4th of December, 1906. Thereafter summons and notice of attachment and garnishment was issued, and in due form, against the Mobile & Ohio Railroad Company, as garnishee. Return of service of summons and notice of garnishment as against the railroad company (hereafter referred to as "garnishee"), which return will hereafter be noted. On the day named the garnishee appeared before the justice and filed a motion to quash the writs and the return of the constable as indorsed on the summons and writ of attachment, for reasons set forth in a motion hereafter to be set out. Thereupon the constable, by leave of the justice, filed amended returns on both the writ of attachment and the summons of garnishment, and the garnishee refiled its motion to quash. The justice overruled the motion. The garnishee thereupon filed its answer, hereafter set out, and, the cause being heard before the justice, judgment was rendered against the garnishee for the sum of \$40 and costs of garnishment. An appeal was duly taken to the circuit court by the garnishee. There the garnishee renewed and refiled its motion to quash.

The return of the constable on the summons, etc., before amended, recited the execution of the writ of attachment, by summoning the Mobile & Ohio Railroad Company, a corporation, as garnishee, to appear before the justice on the day, hour, and place named, then and there to answer on oath such interrogatories as might be exhibited against it on the part of plaintiff, touching its indebtedness to or possession or control of property, etc., and by declaring to the garnishee that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the constable attached in its hands any goods, etc., and any debts due from it to the defendant, etc. The amendment to the return, so far as it related to the service upon the garnishee, is as follows: "For amended return I hereby certify that I served the within summons of garnishee in the city of St. Louis, Mo., on the 4th day of December, 1906, by delivering a true copy thereof to H. H. Rauth, chief clerk of the Mobile & Ohio Railroad Company, in the city of St. Louis, Mo.; neither the president, secretary, treasurer, cashier, or any other chief or managing officer higher than chief clerk being present at the office of said railroad company, and the said H. H. Rauth being at the time of said service the chief or managing officer of said corporation in charge of its office in the said city of St. Louis, Missouri."

The motion to quash is as follows: "Comes now the Mobile & Ohio Railroad Company, garnishee in above cause, and appearing for this purpose only, moves the court to quash the amended return of the constable on the writ of garnishment herein and the return of the constable on the writ of attachment herein and to quash said attachment and garnishment writs for the following reasons: First. Said writs show upon their faces that the service is insufficient in law to confer jurisdiction over said garnishee. Second. The said return fails to show that the said garnishee was summoned by the said constable declaring to it that he summoned it to appear at the return term of the writ to answer the interrogatories which may be exhibited by the plaintiff, and fails to show that said writ of garnishment was read to said garnishee. Third. The said return fails to show that the said constable declared to the garnishee that he attached in its hands all debts due from it to the defendant or so much of such debts as shall be sufficient to satisfy the debt and interest or damages and costs, or that he summoned said debtor as garnishee in accordance with subdivision 5 of section 388 of the Statutes of 1899 of Missouri. Fourth. The return of the officer upon the attachment writ simply shows that said writ was executed in the city of St. Louis by attaching as the property of said defendant, 'the within named defendants.' Fifth. Neither the returns of the officer upon the garnishment or the attachment writs are sufficient to confer jurisdiction over the res and to authorize the court to pronounce judgment against the garnishee. Sixth. Said return on the garnishment writ fails to show that the notice of garnishment was served by delivering such notice, or a copy thereof, to the president, secretary, treasurer, cashier, or other chief or managing officer of said Mobile & Ohio Railroad Company. Seventh. Said return shows upon its face that the writ was executed by delivering a copy thereof to the chief clerk of the Mobile & Ohio Railroad

Company, and was not executed upon any chief or managing officer of said company. Eighth. Said return fails to show that said notice of garnishment was served by delivering the same, or a copy thereof, to the nearest station or freight agent of the said Mobile & Ohio Railroad Company in the city of St. Louis, state of Missouri, where the cause of action was pending."

The court overruled this motion, the garnishee duly excepting. Thereafter the cause came on for trial upon the garnishee's answer; a jury having been waived. The answer is as follows: "Now comes the Mobile & Ohio Railroad Company, garnishee in the above cause, and for answer herein says that: (1) At the time of the service of the garnishment herein, it did not have in its possession or under its control any property, money, or effects of the defendant. (2) At the time of the service of the garnishment herein, it did owe the defendant herein the sum of \$40 on account of advertising done and performed by the defendant for the said garnishee. But the said garnishee denies that any jurisdiction has been obtained over it or the res to authorize this court to pronounce judgment against said garnishee for the following reasons: (1) Said return on the garnishment writ fails to show that the garnishment was served by delivering such notice, or a copy thereof, to the president, secretary, treasurer, cashier, or other chief or managing officer of said Mobile & Ohio Railroad Company. (2) Said return shows upon its face that the writ was executed by delivering a copy thereof to the chief clerk of the Mobile & Ohio Railroad Company, but was not executed upon any chief or managing officer of said company. (3) Said return fails to show that the said notice of garnishment was served by delivering the same, or a copy thereof, to the nearest station or freight agent of the said Mobile & Ohio Railroad Company in the city of St. Louis, state of Missouri, where the cause of action was pending. The said garnishee denies the return of the officer herein on the writ of garnishment, and says that the facts set forth in said return are untrue, denies that on the 4th day of December, 1906, at the time the writ of garnishment was served upon H. H. Rauth, the said H. H. Rauth was at said time the chief or managing officer of the said Mobile & Ohio Railroad Company in charge of its office in the city of St. Louis, Mo., and denies that the said H. H. Rauth was the chief clerk of the said Mobile & Ohio Railroad Company in the office of the said company in the city of St. Louis, but says that the said Rauth was simply a clerk in the office of the general passenger agent of the said Mobile & Ohio Railroad Company in the city of St. Louis."

The answer was duly verified. It was stipulated that the Rauth mentioned in the

return of the officer on the attachment writ and garnishment notice was, at the time of the service of said writ, a clerk in the office of the general passenger agent of the garnishee railroad company. There was no evidence other than the summons, etc., the returns, and the above stipulation. The court found in favor of plaintiff and entered up judgment against the garnishee for \$40, the amount admitted as due in the answer, to which action and ruling of the court the garnishee duly excepted. A motion for new trial was filed in due time and was overruled, and the garnishee, excepting, thereafter duly prayed for and perfected an appeal to this court.

R. P. & C. B. Williams, for appellant.  
Walther & Muench, for respondent.

REYNOLDS, P. J. (after stating the facts as above). On the authority of the case of *Wicecarver v. Mercantile Town Mut. Ins. Co.* (Mo. App.) reported in 117 S. W. 698, and of *Thomasson v. Insurance Co.*, 114 Mo. App. 100, 89 S. W. 564, 1135, the opinion of the majority of the court being afterwards affirmed by the Supreme Court in the same case, reported in 217 Mo. 485, 116 S. W. 1092, the judgment of the circuit court in the case at bar must be affirmed. All of the matters complained of in the motion to quash the return appeared on the face of the return, and hence, as in the above cases determined, must be and could only be reached by a motion to quash. It is further decided in those cases that, when such motion has been filed and is overruled, the garnishee, although excepting, loses the benefit of it if he answers over or appears to the merits, and that such is the result even when he sets up these same grounds in the answer by way of plea in abatement, also answering to the merits. This is held to be the law under our Code, for defects appearing on the face of the papers must be taken advantage of by motion or demurrer, and cannot be by answer which includes a plea in abatement. The motion to quash here before us, in every one of the paragraphs or reasons assigned, refers to the alleged defective recitals, as being facts shown "upon the face of the return" to the summons and attachment.

In so far as it is attempted in and by the answer to attack and put in issue the truth of the recitals in the constable's return, it is sufficient to say that, for the purposes of this case, that return is conclusive. If the return is false in fact, the remedy is by suit on the officer's bond. *Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481; *Taussig v. Railroad*, 186 Mo. 269, 85 S. W. 378; *Cornwall v. Bottling Co.*, 128 Mo. App. 163, 106 S. W. 591.

The judgment of the circuit court is affirmed. All concur.

STATE ex rel. ARMOUR PACKING CO. v. DICKMANN et al.

(St. Louis Court of Appeals. Missouri. Jan. 4, 1910.)

1. DAMAGES (§ 4\*)—PRESUMPTION—BREACH OF DUTY—NOMINAL DAMAGES.

The law presumes that nominal damages result from breach of an officer's duty to make a true return to a summons.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 3; Dec. Dig. § 4.\*]

2. APPEAL AND ERROR (§ 1171\*)—DENIAL OF RIGHT TO JUDGMENT FOR NOMINAL DAMAGES—EFFECT.

As a judgment for nominal damages carries costs, refusal to award nominal damages for breach of an officer's duty is the denial of a substantial right and ground for reversal, though a substantial recovery may not be allowed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4553; Dec. Dig. § 1171.\*]

3. DAMAGES (§ 11\*)—NOMINAL OR SUBSTANTIAL.

In tort there can be no recovery other than nominal damages, unless there is some damage, and there must be not only a wrong done, but a consequent injury, to permit a recovery.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 21; Dec. Dig. § 11.\*]

4. SHERIFFS AND CONSTABLES (§ 170\*)—FALSE RETURN—LIABILITY.

An action on the bond of a sheriff for a false return to a summons sounds in tort, and only nominal damages are recoverable unless substantial injury has resulted as a result of the false return, and the measure of recovery in such cases is the actual damages entailed, unless the officer acted maliciously or in bad faith.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 410; Dec. Dig. § 170.\*]

5. DAMAGES (§ 11\*)—MATTER IN MITIGATION AS DEFEATING SUBSTANTIAL DAMAGES.

Facts in mitigation of damages may defeat a substantial recovery.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 29; Dec. Dig. § 11.\*]

6. DAMAGES (§ 59\*)—MITIGATION—SATISFACTION OF DEBT.

Where defendant's acts resulted in a default judgment against plaintiff, which judgment he paid, and the evidence showed that defendant acted in good faith, defendant could show in mitigation that plaintiff's payment of the judgment liquidated a just debt against him, and hence entailed no damage to him.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 108; Dec. Dig. § 59.\*]

7. DAMAGES (§ 155\*)—MITIGATION—PLEADING.

Matter in mitigation, to be available, must be pleaded.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 409; Dec. Dig. § 155.\*]

8. LANDLORD AND TENANT (§ 1\*)—NATURE OF RELATION.

Though the relation of landlord and tenant may arise by implication, the relation must be created through contract, express or implied, and the tenant must occupy the premises of another in subordination of his title and with his consent, express or implied.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

# 9. USE AND OCCUPATION (§ 1\*)—GROUND OF OBLIGATION.

An action for use and occupation cannot be maintained unless the relation of landlord and tenant, express or implied, exists, and, where one occupies premises under a lease from a trespasser or one asserting an adverse right, the owner may not sue the occupant for use and occupation.

[Ed. Note.—For other cases, see Use and Occupation, Cent. Dig. § 213; Dec. Dig. § 1.\*]

# 10. HUSBAND AND WIFE (§ 138\*)—ACTION—PRESUMPTIONS.

In an action for use and occupation by an occupant holding under a lease authorized by the husband of the owner, a title adverse to the wife will not be presumed, nor will it be presumed that the husband had authority to make the lease, especially where she knew nothing of the occupancy, but the facts must be proved.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 524-537; Dec. Dig. § 138.\*]

# 11. HUSBAND AND WIFE (§ 125\*)—RIGHTS OF HUSBAND.

Where the right of the wife, married prior to the Married Woman's Act (Rev. St. 1890, § 4340 [Ann. St. 1906, p. 2382]) was a common-law estate, the husband was entitled to the rents and profits thereof.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 453-458; Dec. Dig. § 125.\*]

# 12. EVIDENCE (§ 43\*)—JUDICIAL NOTICE.

The court, in an action on the bond of a sheriff, for false return to summons in an action by a third person against plaintiff, which resulted in a judgment against plaintiff, does not judicially know that plaintiff appeared in that suit merely because that fact appears in the report of the case on appeal in such action.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 62-65; Dec. Dig. § 43;\* Appeal and Error, Cent. Dig. §§ 2959, 2960.]

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

Action by the State of Missouri, on the relation of the Armour Packing Company, against Joseph F. Dickmann and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

George B. Webster, for appellant. Johnson, Houts, Marlatt & Hawes, for respondents.

**NORTONI, J.** This is a suit on the sheriff's official bond. The finding and judgment were for the defendant, and plaintiff appeals. The breach alleged relates to the fact that the sheriff, through one of his deputies, made a false return on a writ of summons, to the effect that he had personally served the present plaintiff, the Armour Packing Company, in a suit pending in the circuit court where the Regent Realty Company was plaintiff and the Armour Packing Company was defendant. As a result of the false return, a judgment was given in that case against the plaintiff for several hundred dollars. The judgment and the costs were afterwards paid and discharged, and the defendant in that case instituted the present action on the sheriff's bond, seeking to recover the amount of the judgment and costs it was compelled

to pay as a result of the false return referred to.

It appears that one Annie E. Kerr owned a certain lot of ground and store building, situate thereon, in the town of Osceola, Mo., and that plaintiff, the Armour Packing Company, occupied the same as its egg and produce depot at that point for several years from and after January 25, 1901. The evidence goes to show that the Armour Packing Company occupied the building referred to under a lease with one Orr, who claimed to be the agent of George M. Kerr, and that it paid Orr rent each and every month during the period of its occupancy. Annie E. Kerr afterwards sold the property at Osceola, Mo., to the Regent Realty Company and assigned whatever claim she had for rent accrued to her against the Armour Packing Company, because of its several years' occupancy of the premises. The Regent Realty Company, having succeeded to the title of Annie E. Kerr, the true owner of the property, and her rights touching any rents therefor accrued for its occupancy, made a demand upon the Armour Packing Company for \$10 a month rent for all of the time it had occupied the premises from and after January 25, 1901. The Armour Packing Company insisted that it had rented the property from Orr, acting as agent of one George M. Kerr, and that it had paid such agent the rent during all the time of its occupancy and declined to comply with the demand of the Regent Realty Company. The Regent Realty Company thereupon instituted its suit in the circuit court of the city of St. Louis against the Armour Packing Company for the rent of the premises referred to at the rate of \$10 per month during the full period of the Armour Packing Company's occupancy thereof from and after January 25, 1901. Process was duly issued against the Armour Packing Company and placed in the hands of the sheriff of the city of St. Louis. It appears that the Armour Packing Company maintained no business office in the city of St. Louis at that time, but another corporation under a very similar name did; that is to say, Armour & Co. maintained a business office in St. Louis, and the sheriff's deputy delivered a copy of the petition and writ in the case referred to to the person in charge of the office of Armour & Co. in St. Louis. The deputy sheriff thereupon, in the name of the defendant, his principal, made a return on the summons to the effect that he had served the same upon the Armour Packing Company, defendant in that case. The return referred to was regular in all respects, but untrue in point of fact. Afterwards, the case of the Regent Realty Company against the Armour Packing Company came on for trial. The Armour Packing Company failing to appear thereto, judgment was given against it for the full amount sued for, together with interest and costs, which afterwards was

fully paid and discharged. Having thus been compelled to pay the claim of the Regent Realty Company and interest and costs incident thereto, through the fault of the sheriff, as alleged, the Armour Packing Company instituted this suit on the officer's official bond, seeking to recover the amount of its expenditure in that behalf.

Upon a trial of the issue the circuit court refused all of the instructions requested and referred the case to the jury upon the facts. It is unnecessary to examine the instructions and determine whether or not they embody appropriate principles of law touching the facts in controversy, as it is obvious the judgment must be reversed and the cause remanded for the reason the plaintiff is entitled to have nominal damages at any rate. That the defendant sheriff, through his deputy, made a false return, on which judgment was afterwards given against the plaintiff in the present action, is conclusively established; no one denies or disputes. The law imposes the duty upon the officer to make a true return, and, where this duty is breached, it presumes damages in every instance. Even though no substantial damages accrued to the plaintiff on account of the defendant's false return, the plaintiff is entitled to a nominal recovery at least on the presumption of damage which the law affixes for a breach of official duty to the end of enjoining an efficient and true service. *Sedgwick on Damages* (8th Ed.) §§ 547, 103; *State ex rel. Rice v. Harrington*, 28 Mo. App. 287; *State, to Use, v. Rayburn*, 22 Mo. App. 303. The doctrine obtains with full force when the cause of action relied upon relates to a false return of meane process, as will appear by consulting the judgment in *State ex rel. Rice v. Harrington*, 28 Mo. App. 287. Indeed, in this state nominal damages are allowed against officers for the most barren infraction of legal rights. As a judgment for nominal damages carries the costs of the litigation with it, the right to have nominal damages allowed for a breach of duty is regarded as a substantial right, for the invasion of which a judgment will be reversed even though it appear a substantial recovery may not be allowed. *State, to the Use, v. Rayburn*, 22 Mo. App. 303; *State ex rel. Rice v. Harrington*, 28 Mo. App. 287.

On the trial the defendant sought to mitigate the damages by introducing evidence tending to prove that the plaintiff, the Armour Packing Company, actually owed the rents for which a recovery was had in the case of Regent Realty Company against it, and that therefore plaintiff suffered no substantial damages, as it was compelled only to pay a just debt. This testimony was objected to by plaintiff, and it is argued here that it is not competent for the defendant to show in this case that plaintiff actually owed the rent, the payment of which was enforced in the case wherein the defendant made a false return. It is said that to permit the

defendant in this case to show the Armour Packing Company owed the Regent Realty Company the rent sued for in that case permits the introduction of a collateral issue in the present controversy. There is some force in the suggestion that such a defense introduces a collateral issue between the Armour Packing Company and the defendant sheriff. The courts are prone to confine the issue to as narrow limits as possible. However, we are not persuaded by the argument advanced that it is incompetent for the sheriff to show in mitigation the plaintiff suffered no substantial damage. Many cases are cited by counsel touching the measure of recovery when the action is against an officer for failure to levy, or for a wrongful release of property, or for permitting the escape of a prisoner held for debt. These authorities are not in point. It may be in such cases that the measure of recovery is the amount of the judgment, debt, and costs appearing from the writ when the officer has permitted the execution to expire in his hands without making a levy. And it may be, in other cases where the officer has wrongfully released property held under the writ of attachment or execution, the measure of recovery is the value of the property released. *Sedgwick on Damages* (8th Ed.) § 545. However, at common law, in a suit against an officer for failure to return an execution, a recovery may be had only for the amount of the damages sustained. *Bennett v. Vinyard*, 34 Mo. 216. Be this as it may, we are not concerned with the rule in such cases, for the facts in judgment present another question. Although the present action is on the sheriff's bond, there can be no doubt that it sounds in tort. *Sedgwick on Damages* (8th Ed.) § 543. Aside from the proposition heretofore stated, that the law presumes some damage from the dereliction of official duty, and at least awards a nominal recovery therefor, it is fundamental throughout the law of torts that there shall be no substantial recovery unless there is some damage. In other words, the principle which pervades the entire doctrine of liability for tort, with more or less influence in every form of action, is to the effect that there must not only be a wrong done to one person by another, but a consequent injury or loss, as well, in order to permit a recovery on account of the wrong committed. It is true the law may presume damages in some cases and allow a nominal sum for the wrong, as in trespass, when no particular injury appears. Be this as it may, there must appear a real injury to sustain a substantial recovery. And a suit against an officer for a false return presents no exception to the rule. Indeed, in an action against an officer for a false return, no recovery other than nominal is allowed unless it appear that substantial injury or loss has resulted to the party as a result of the false return. And the measure of recovery in such cases is the actual damage entailed by the wrongful act,

unless it appear the officer acted maliciously or in bad faith. *Stimson v. Farnham*, 7 Q. B. 175; *Green v. Ferguson*, 14 Johns. (N. Y.) 389; *Mechem's Public Officers*, § 746.

As a corollary to this doctrine, it is, of course, competent for the officer to show, to the end of defeating a substantial recovery, that no injury or loss resulted to the plaintiff from his dereliction. If the officer may show that no loss accrued to the plaintiff, he is, of course, entitled to show as well that, even though loss did accrue because of his breach of duty, it was slight and unimportant; that is to say, the officer may show relevant facts in mitigation of the damage to the end of defeating so much of a substantial recovery as is proper. When the officer acts in good faith, as here, the claim of the plaintiff is founded upon the justice and conscience of the case, and it is certain that the most elementary principles of justice forbid a recovery beyond the actual damage or loss sustained. Now, in such cases, it is clear that every consideration of justice demands the officer shall be permitted to show such relevant facts as he may to elucidate the true amount of the plaintiff's actual damage or loss. To this end, we entertain no doubt whatever that the officer may show in mitigation of a substantial recovery that the plaintiff's expenditure liquidated a just indebtedness against itself, and therefore entailed no loss or damage upon it for such amount as was applied to the payment of an outstanding obligation. Such seems to have been the opinion of a court of very high authority. See *Green v. Ferguson*, 14 Johns. (N. Y.) 389.

If, on a retrial, the defendant is able to show that the Armour Packing Company justly owed the Regent Realty Company the rent, or any part thereof, sued for and recovered by the Regent Realty Company, such evidence is competent in mitigation of damages and should be received to that extent.

There was a plea in mitigation contained in the original answer. This plea seems to have been stricken out, and the case was tried upon a general denial only. It should be stated that matter in mitigation, to be available as a defense, should be pleaded. 5 Enc. Pl. & Pr. 773, 774. Upon a retrial, the answer may be amended in this respect if the defendant be so advised.

It is insisted by the plaintiff that the Regent Realty Company had no valid claim against it for the rent referred to, and that therefore the facts relied upon by defendant in mitigation, as tending to show that the judgment on the false return operated only to compel plaintiff to pay a just debt, are insufficient for that purpose. To determine this matter, it will be essential to notice those facts more particularly. As said before, it appears Annie E. Kerr owned a store building, in Osceola, which was occupied by the Armour Packing Company. The evidence is not entirely clear; but it appears

that the Armour Packing Company leased the premises from one Orr, who claimed to be the agent of George M. Kerr, a nonresident. After having leased the premises from Orr, the Armour Packing Company continued to occupy the same for several years from and after January 25, 1901, and it is said paid him rent monthly therefor. We gather from the record that George M. Kerr was the husband of Annie E. Kerr, who owned the property, and it does not appear that they were divorced or living apart. It may be that George M. Kerr had authority from his wife, Annie E. Kerr, to confer an agency upon Orr for the purpose of renting the property and collecting the rent; but it is not shown in the evidence. The facts touching this whole matter are meagerly developed in the proof. Of course, if George M. Kerr had authority to constitute Orr agent to rent the property of his wife, Annie E. Kerr, and the Armour Packing Company rented the property and paid the rent to such agent, this of itself would acquit the Armour Packing Company from further responsibility on that account. Nothing appears, however, tending to show any right in George M. Kerr to confer authority upon Orr to rent the property, and, indeed, it is fairly inferable that Orr was an impostor; that he had no authority whatever from George M. Kerr or any other person to rent the property. It is to be inferred from the testimony that Annie E. Kerr had no knowledge whatever on the subject of Orr's alleged agency.

The evidence tended to prove that Orr rented the property and collected the rent without any authority and wholly failed to account to any one therefor. Afterwards Annie E. Kerr conveyed the property to the Regent Realty Company, and, upon discovering that the Armour Packing Company was occupying the same, assigned whatever claim she had for rents to the Regent Realty Company by a writing to that effect. It does not appear that the Armour Packing Company ever attorned to the Regent Realty Company. It does not appear that the Armour Packing Company occupied the premises as the tenant of Annie E. Kerr, who owned the same at the time it took possession, nor as the tenant of the Regent Realty Company, which succeeded to her title. What may be shown on this score at another trial, we are, of course, not advised; but it is clear, from what appears in the present record, that the Regent Realty Company had no valid and enforceable demand against the Armour Packing Company at the time of the institution of the suit for use and occupation, as the relation of landlord and tenant did not exist between the parties. If Orr, the alleged agent of George M. Kerr, from whom the Armour Packing Company leased and under whom it occupied the premises, was an intruder and without authority to lease the same from Annie E. Kerr, the owner, then, of course, the re-

lation of landlord and tenant was not thereby created between Annie E. Kerr and the Armour Packing Company. In such circumstances both Orr and the Armour Packing Company were trespassers. There is no proof in the case tending to show that the Armour Packing Company occupied the premises under a lease with Annie E. Kerr, the owner, or with any one authorized by her to lease the same. And it is certain the Armour Packing Company did not occupy the premises as the tenant of the Regent Realty Company. It is true the relation of landlord and tenant may arise by implication, but even then it must be created through contract express or implied; that is to say, the tenant must occupy the premises of another in subordination of his title and with his assent, express or implied. 18 Am. & Eng. Enc. Law (2d Ed.) 262, 263; Underhill on Landlord & Tenant, 519, 578.

If it appears to have been the intention of the tenant to enter or occupy the premises in subordination to the title of another, where there is no express contract touching the matter, it is said the relation of landlord and tenant arises by implication. 18 Am. & Eng. Enc. Law, 262-265. Nothing in the record indicates an intention on the part of the Armour Packing Company to occupy the premises as the tenant of, or in subordination to, the title of either Annie E. Kerr or the Regent Realty Company. Indeed, it seems the packing company occupied the premises in subordination to the title of George M. Kerr, if he had or claimed any title, and it may be, from all the record discloses, that he was an adversary of Annie E. Kerr, that is to say, it may be that the title under which the Armour Packing Company occupied the premises was one adverse to the true owner, Annie E. Kerr. If this hypothesis is true, then, of course, the Armour Packing Company was a mere trespasser against Annie E. Kerr, the real owner of the property, and her successor in title, the Regent Realty Company.

It is the established law that an action for use and occupation of premises cannot be maintained unless the relation of landlord and tenant, express or implied, exists between the parties. Where one occupies premises under a lease from a trespasser or one asserting an adverse right, compensation for their use and occupation may not be recovered from the occupant by the true owner for the reason the relation of landlord and tenant does not exist. The owner may have a cause of action in such circumstances, but it is in tort for the wrong, and not on an implied contract for use and occupation. Edmonson v. Kite, 43 Mo. 176; Hood v. Mathis, 21 Mo. 308; Cohen v. Kyler, 27 Mo. 122; Sturges v. Botts, 24 Mo. App. 282; 18 Am. & Eng. Enc. Law, 429.

It is certain that the true owner may not recover for use and occupation on an implied relation of landlord and tenant where

the tenant occupies in subordination to a title adverse to the true owner. Underhill on Landlord & Tenant, 582; Sturges v. Botts, 24 Mo. App. 282. Of course, it is not to be presumed that George M. Kerr, for whom Orr claimed to act as agent, was asserting an adverse title to Annie E. Kerr, his wife. But neither is it to be presumed that George M. Kerr had authority to confer an agency upon Orr in respect of his wife's property. This is especially true in view of the showing in the case tending to prove that Annie E. Kerr knew nothing whatever of Orr's alleged agency or that the Armour Packing Company was occupying the premises. However, it may be that the right of Annie E. Kerr was a common-law estate, and that the marriage between Kerr and wife was prior to our Married Woman's Act of 1889 (section 4340, Rev. St. 1899 [Ann. St. 1906, p. 2382]), in which event George M. Kerr is entitled to the rents and profits of the wife's realty. Dillenberger v. Wrisberg, 10 Mo. App. 465; Smith v. White, 185 Mo. 590, 65 S. W. 1013. The facts do not appear. If such be the fact, and Orr was authorized by George M. Kerr to make the lease, it is valid, and the payments of rent to Orr were made to a proper party. In such circumstances Annie E. Kerr had no claim for rents to assign to the Regent Realty Company, and that company no valid claim to assert against the Armour Packing Company. The important point on the testimony is that it fails to appear the relation of landlord and tenant existed between the Armour Packing Company and either Annie E. Kerr or her grantee and assignee, the Regent Realty Company, and, in the absence of such relation appearing, no valid claim could be asserted against the Armour Packing Company for use and occupation. This being true, of course, the evidence wholly fails to constitute proper matter of mitigation in this suit against the sheriff for a false return. This matter has been particularly noticed in the opinion for the reason it looks as though relevant facts were omitted from the proof which may be brought forward on another trial. In this view, we have commented upon the principles of the law pertaining to the relation of landlord and tenant, assuming that proof may be supplied showing that relation to have existed.

There is a considerable argument in the defendant's brief to the effect that the Armour Packing Company appeared in the case of the Regent Realty Company against it, and is therefore estopped by that judgment to further dispute the validity of the claim there established. Upon reading the record several times, we have been unable to discover anything whatever therein tending to support this argument. It seems the counsel on both sides have briefed it as though it appeared in the case. The questions thus argued upon the assumption that such fact appears in the present record will

not be noticed for the reason they are not relevant to the case made by the proof. The facts referred to appear in the report of the former case of Regent Realty Company v. Armour Packing Company, 112 Mo. App. 271, 86 S. W. 880. However that may be, we are unable to judicially know those facts in the present controversy.

The judgment should be reversed, and the cause remanded.

It is so ordered. All concur.

### KIRBY v. LOWER.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

#### 1. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

While, in an action for breach of promise of marriage, aggravated by seduction, evidence that, two months after the alleged promise, plaintiff stated that she was engaged to be married to another person, was admissible for consideration in mitigation of damages, its rejection was harmless, only \$800 damages having been allowed, and defendant, while denying the promise of marriage, admitting that when plaintiff entered his employ he promised her parents to look after her conduct, and that he debauched her.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4191; Dec. Dig. § 1056.\*]

#### 2. TRIAL (§ 280\*)—INSTRUCTIONS—SUFFICIENCY OF OBJECTIONS.

A general objection to an instruction is not sufficient to call the court's attention to the fact that a word used therein should be defined.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 692; Dec. Dig. § 280.\*]

#### 3. TRIAL (§ 256\*)—INSTRUCTIONS—NECESSITY OF REQUESTS.

A party desiring a word used in an instruction to be defined should prepare one properly defining it, and ask that it be given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 639; Dec. Dig. § 256.\*]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

Action by Girty Kirby against Albert W. Lower. Judgment for plaintiff. Defendant appeals. Affirmed.

G. Purd Hays and G. A. Watson, for appellant. G. W. Thornberry and Fred W. Barrett, for respondent.

COX, J. Action for \$10,000 damages for breach of promise with seduction alleged as aggravation. Trial by jury, verdict for plaintiff for \$800, and defendant has appealed.

Error is assigned in the exclusion of testimony offered by defendant and in instructions given for plaintiff. Plaintiff testified to the promise of marriage having been made in April, 1905, and on cross-examination was asked if she had not said to Mrs. Whitsett about harvest time, 1905, that she was going to be married to one Shelton. The witness answered, "No," but on objection of plaintiff's attorney the answer was stricken

out. Defendant later offered to prove by Mrs. Whitsett that plaintiff had said to her, in June, 1905, that she was engaged to be married to Jesse Shelton, a single and unmarried man. This offer was rejected. If this conversation occurred at all, it was after the alleged promise of defendant, yet we think it should have been admitted. While it would not constitute a complete defense, yet, if true, it would have been proper for the consideration of the jury in mitigation of damages, and if this were a close case, or the damages assessed had been to any extent excessive, we should reverse this case for this error. We find, however, that the uncontradicted testimony shows that this plaintiff lived at home with her parents and kept company with no one until she went to work for defendant, and that when her parents consented for her to go to work for defendant at his home, where he lived with another man and his wife, he was admonished by her parents to see that she kept good company, and he promised to do so, and if she did anything out of the way he would report to her parents. Defendant did not deny this agreement upon his part, but simply denied that he promised to marry the plaintiff. He admits that he debauched the plaintiff, and said, "I had sexual intercourse with her, I do not recollect how many times." In view of the fact that, upon the undisputed testimony and the admissions of defendant, he had promised the parents of this young woman to look after her conduct, and had violated that obligation in the most reprehensible manner possible, and yet the jury only assessed plaintiff's damages at \$800, our conclusion is that the exclusion of this testimony did not result in injury to the defendant, and hence the error was harmless.

The instructions complained of told the jury that, if they found for the plaintiff, they should assess her damages "at whatever amount they may believe from the testimony she has sustained, not to exceed the sum of \$10,000." That, in determining the amount of damages plaintiff is entitled to, they should take into consideration the injury to plaintiff's feelings, affections, and wounded pride, as well as loss of marriage, and, if they believed that by virtue of the promise of marriage defendant seduced the plaintiff, then they might take that fact into consideration as an aggravation of damages. Complaint is now made the word "seduced" was not defined in the instructions. The defendant objected to these instructions in a general way only. He did not call the court's attention in any way to the fact that the term "seduced" had not been defined in the instructions. A general objection to an instruction is not sufficient to call the court's attention to the fact that a word used in the instruction should be defined. If defendant

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

wanted this term defined, he should have prepared an instruction properly defining it and asked the court to give it to the jury. Having failed to do so, he cannot now complain. The instructions fairly declared the law, and the evidence is ample to sustain the verdict. The judgment is affirmed. All concur.

### WALKER v. PETERS et al.

(Kansas City Court of Appeals. Missouri. Dec. 6, 1909. Rehearing Denied Jan. 10, 1910.)

#### 1. INSURANCE (§ 785\*)—MUTUAL BENEFIT—RIGHT TO PROCEEDS—"LEGAL REPRESENTATIVES."

Two beneficiary certificates were payable to testator's mother, who died before he did. The certificates provided that in such case they should be payable to the "legal representatives" of the member. The articles of incorporation declared the object of the association to be the equitable distribution of the fund among the "families or beneficiaries" of deceased members, and declared that each certificate entitled "the heirs or legal representatives or designated beneficiaries" to \$2,000. Testator's will gave each of his two sisters such of his property as they might have in charge at his death, and all the "residue of which I may die seized, real, personal and mixed," absolutely to his affianced. Held that, while the words "legal representatives" might sometimes be interpreted as "legal heirs," here they must be given their usual meaning and carried the certificates to the executor, and they went to the affianced by the residuary clause.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1943, 1974; Dec. Dig. § 785.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4070-4079; vol. 8, p. 7704.]

#### 2. INSURANCE (§ 785\*)—MUTUAL BENEFIT—RIGHT TO PROCEEDS—"FAMILY."

The relation of brother and sisters alone would not make them his "family" or of his family within the meaning of the certificates or articles.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1974; Dec. Dig. § 785.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2673-2691; vol. 8, p. 7661.]

#### 3. INSURANCE (§ 785\*)—MUTUAL BENEFIT—RIGHT TO PROCEEDS—"HEIRS"—LEGAL REPRESENTATIVES.

The various provisions showed that the word "heirs" was used in its proper sense and a distinction clearly drawn between "heirs" and "legal representatives," and the use of the words was not mere tautology.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1974; Dec. Dig. § 785.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3265; vol. 8, pp. 7677, 7678.]

#### 4. WORDS AND PHRASES—"SEIZED."

The word "seized," in its technical sense, is not generally applied to personal property, but pertains to real property.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6395, 6396; vol. 8, p. 7797.]

#### 5. EXEMPTIONS (§ 50\*)—MUTUAL BENEFIT—RIGHT TO PROCEEDS.

Rev. St. 1899, § 7908 (Ann. St. 1906, p. 3761), exempting the funds from beneficiary certificates from debts of the beneficiary, does not prevent a certificate payable to "legal representatives" of the insured from becoming a part of his estate or require that the words be inter-

preted as "legal heirs" in order to enforce the exemption.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 50.\*]

Appeal from Circuit Court, Howard County; A. H. Waller, Judge.

Proceedings by A. W. Walker, executor, against Marian N. Peters and others, as beneficiaries and legatees of plaintiff's decedent, to determine the right to the proceeds of insurance. From a judgment against defendant Marian N. Peters, she appeals. Reversed and remanded, and judgment directed.

Edward E. Reidleman, E. W. Henry, and W. F. Spottswood, for appellant. Scarritt, Scarritt & Jones, for respondents Hendrix. W. M. Williams, for respondent Walker.

ELLISON, J. A. F. Hendrix died in Howard county, unmarried. In his lifetime he made a will and appointed the plaintiff as his executor. As such executor plaintiff received payment of two beneficiary certificates of insurance for \$2,000 each. The defendant Marian N. Peters was engaged to be married to deceased, and the other defendants, Mary H. Hall and Magdalen L. Hendrix, are deceased's only sisters and heirs. Defendant Marian claimed the fund under the will, and the other defendants denied her right and themselves made claim thereto as only heirs of deceased. In this situation plaintiff, as executor, brought this action to have the court determine to whom it should be paid. The defendants Mary and Magdalen answered jointly, and Marian filed her separate answer. The circuit court rendered judgment for the former and against the latter.

The two certificates were made payable to Hendrix's mother, who died before he did. The certificates provide that "in the event of the death of the beneficiary prior to that of the member, or in case none is named, the benefit then to be payable to the legal representatives of the member." We are thus left to the provisions of the incorporation and by-laws of the association and the will to determine to whom the money should be paid. The will reads that:

"First, I desire that my funeral expenses and just debts be paid out of my estate as soon as practicable after my decease.

"Second, I give and bequeath to my beloved sister, Mary H. Hall, of Carthage, Missouri, all my furniture, jewelry and other articles or personal property of which she may have charge at the time of my death, absolutely, and likewise, I give and bequeath to my beloved sister, Magdalen L. Hendrix, of Fayette, Missouri, all of my furniture, jewelry and other articles of personal property of which she may have charge at the time of my death, absolutely.

"Third, I give, devise and bequeath all the rest and residue of the property of which I

may die seised, real, personal and mixed, absolutely, to Marian N. Peters, of Middletown, Dauphin county, Pennsylvania."

Under the provisions of the third clause Marian will get about \$4,500; but, as already stated, she claims the will also gives her the funds arising from the two beneficiary certificates.

The articles of incorporation declare that the object of the association is "the equitable distribution of the fund among the families or beneficiaries of deceased members." They further declare that any number of certificates not exceeding three "may be issued to one member, and each certificate shall entitle the heirs, or legal representatives or designated beneficiary," of a deceased member to \$2,000 benefit. They further provide that a change of beneficiary may be made with the consent of the association, but that "no change shall be consented to unless the new beneficiary shall be the wife, relative, legal representative, heir or legatee of the member, except that if the certificate was issued for the benefit of others than the wife and children of the member, it may be changed so as to be payable to creditors."

It will be seen that, the certificates naming the deceased's mother as beneficiary, and, in case she died, then his "legal representatives," there could not be a failure of a beneficiary, for if the one named died, or if none were named, the legal representatives were designated as the beneficiary. But defendants the sisters claim that the object of the association was for the protection of the family of deceased, and therefore the term "legal representatives" should not be given its usual and general meaning (executors or administrators), but should be said to mean the legal heirs of deceased. Frequently the words "legal representatives," on account of the connection in which used, are given an interpretation different from what they generally signify. They are frequently shown to mean heirs, as here claimed. *Loos v. Insurance Co.*, 41 Mo. 538. But the connection in which used in this instance will not justify a meaning differing from that usually given them. *Insurance Co. v. Bank*, 121 Mo. App. 479, 487, 97 S. W. 195.

The statement of the object as being to provide and distribute a fund for the families of the members, or their beneficiaries, does not afford ground for a departure from the usual meaning. In the first place, there is no showing that the sisters were of deceased's family. That relation to him, alone, would not necessarily make them his "family" or "of his family." And, if it did, they would still not be helped by the declared object, for the statement is not absolutely to provide for the families of deceased members, but for such families or beneficiaries of the members. In addition, the further connection in which the words are used show we ought not to allow them a meaning different from that

generally given. The other provisions above quoted from the articles of association show that the word "heirs" is used where "heirs" are meant, and a distinction is clearly made between that word and the term "legal representatives," for both designations run through the articles, following one another, and it cannot be said in any reason to be a mere fault of tautology. *Sulz v. Insurance Co.*, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379.

But it is claimed that the statute itself (section 7908, Rev. St. 1890 [Ann. St. 1906, p. 3761]) carries out the idea that heirs are meant, and not legal representatives in the sense of executors or administrators, for it is said, if that could be, then creditors could take that which was primarily intended for the family, and thus would result an interpretation which would be in the face of a statutory declaration of policy. But the statute only prevents creditors from taking the fund belonging to a debtor beneficiary. The statute, while exempting the fund from debts of the beneficiary, in no wise prevents a fund payable to the member's legal representatives from being a part of his estate; the only difference would be in the manner of distribution. *Kelley v. Mann*, 56 Iowa, 625, 10 N. W. 211. It reads that the proceeds of such certificates shall not be taken or seised by process of law for any debt of a certificate holder or beneficiary.

While the statute means that a creditor cannot appropriate the fund to the payment of his claim against the beneficiary, yet it does not apply, of course, to a case where the beneficiary is himself the creditor. And so it has been held by the St. Louis Court of Appeals, in an opinion by Judge Barclay, that the statute did not disable a member of such association from making his creditors his beneficiaries; and that too by the designation of "executors or administrators." *Pietri v. Seguenot*, 96 Mo. App. 258, 69 S. W. 1065; *Williams v. Carson*, 9 Baxt. (Tenn.) 516. It thus appears clear that the policy of the statute is not to prohibit the estate, or even the creditors, from being the beneficiary of a benefit certificate. The result of these observations is to show that there is nothing emanating from the deceased, or the association, to signify that any but the ordinary and usual meaning was to be given to the words "legal representatives"; and since those words would mean, in effect, the deceased's estate, it follows that the provision of the will bequeathing the residue of the estate to his fiancée gave her the fund in controversy. *People v. Phelps*, 78 Ill. 147.

It is perhaps well to say that while the articles of incorporation of this company permit creditors to be designated as beneficiaries, as already stated, yet, in the absence of such designation, and the legal representatives or estate are designated, it does not follow that creditors could take the fund under the provisions of the statute. The fund

would belong to the estate free from debts. *Suls v. Insurance Co.*, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379.

But we are cited to the case of *Graham v. Allison*, 24 Mo. App. 516, decided by this court, as controlling the question in favor of the sisters. We do not think the case applies. There the policy of insurance was payable to the "legal heirs" of the insured unless otherwise directed by his will. He died leaving a will that the balance of his "property of all kinds" be divided between his brother and sister. It was held that the fund arising from the policies was not deceased's property; that it belonged to all the "legal heirs" as designated in the policy; and that the power of change of beneficiary was a naked power of appointment which the will did not attempt to execute. But in this case the designation in the benefit certificates themselves is to the legal representatives of the deceased, and thereby the fund became a part of the estate, and in that way became a subject for application of the will in disposing of the estate to deceased's fiancée.

An additional argument against the fiancée getting the fund is based on the terms of the will itself, which, as shown above, reads that the deceased bequeathes to her "all the rest and residue of the property of which I may die seised, real, personal and mixed." The point is made on the effect which should be given to the word "seised." It is insisted that, since there is nothing to explain what was meant by the use of that word, we must give to it its technical meaning. Much high authority is cited to sustain this view.

In *Leach v. Jay*, 6 Ch. Div. 496, plaintiff brought suit to recover certain real estate, claiming as devisees under the will of Anne Roberts. While Anne was entitled to the property in question and was in law the owner of it, she had never entered into possession; the property being claimed and occupied by the widow of one Roberts, whose title Anne had as his sole heir. Anne devised to plaintiff "all real estate of which I may die seised." The court held that such a devise did not pass the property in question, saying: "I have to construe this very concise devise. \* \* \* There is no context. Now what is the rule of law? The rule of law is, no doubt, to ascertain the meaning of the expressions used by the testator—not to speculate or guess what the meaning may have been. The primary rule of construction \* \* \* is this: That where there is no context you are to construe the will according to the ordinary grammatical meaning of the words used. Then there is a subsidiary rule laid down in *Roddy v. Fitzgerald*, 6 H. L. C. 823, that technical words shall have their legal effect, unless, from the context it is shown they bear another meaning. In this particular will the testatrix, for what reason I know not, has used a technical word—a word not only tech-

nical, but a word that has no signification in ordinary language at all. It is a purely technical word; and it appears to me that the whole of my duty consists in ascertaining whether she was, at the time of her death, 'seised'—according to the technical meaning of that technical term—of this real estate. The facts as stated in the claim are these: \* \* \* Therefore the possession has been held adversely to Anne Roberts and her devisee from the time of the death of Robert Roberts. That being so, it is clear, according to law, that the legal seisin \* \* \* was destroyed and not restored at the time of her death. She had not then, either in law, or in fact, any seisin. As far as this question is concerned, it was not real estate of which she died seised, and, that being so, whatever I may guess as to her meaning, however odd or capricious I may think such a will may be, I have no means of correcting it, or altering it, but I must decide it upon its literal meaning." On appeal this decision was affirmed, and in the opinion (9 Ch. Div. 42) it is said: "I do not think we can differ from the master of the rolls in this case. This lady, for some reason or motive of her own, or for no reason, chose to use one of the most technical words in our law. The word has acquired no other meaning than its technical meaning; it has never got into ordinary use; therefore we are not at liberty to attribute to it any other meaning merely because we suppose that the testatrix did not know the true meaning of the word." Another justice, in concurring, said: "I will only add one observation with respect to an argument of Mr. Davey which impressed me. He said that in all probability the testatrix did not know the technical meaning of the word seisin, and that the court ought not to attribute to her a meaning which she did not herself attach to it. But we must attach some meaning to the word, and if we are not to take the proper meaning, but some other meaning, what other meaning is it to be? If we are to guess at the meaning which the testatrix attached to the word, where are we to stop? Therefore it seems to me that the word must either be meaningless, or else must have its proper technical meaning."

It is therefore urged, under cover of these and other adjudications, that, as deceased could not have been seised—could not have died seised—of the funds arising out of these certificates of insurance, for the reason that he was never possessed of them, he could not have intended to pass or bequeath them by the will. But the rule cannot be allowed to have any effect on this controversy for the reason that, allowing its full force, it has no application, since the word "seised," in its technical sense, is generally not applied to personal property. In its technical general sense it pertains to real estate, as in the cases from which we have taken the foregoing extracts.

The truth doubtless is that the word was

intended to apply to real estate if the testator had any at his death. Cases are not infrequent where one has title or interest in real estate of which he is not aware when he makes his will. So one may become possessed of real estate after he makes his will. Therefore, when he provides that all his property shall go to a certain party, he very properly uses terms which will cover all that he may have at the time of his death. Thus viewed, the will reads properly enough, and the word "seised" finds its proper application to the contingency of the testator having real estate.

But, be these suggestions as they may, and without standing on what the word might apply to, we are satisfied that where the amount of an insurance policy is payable to the assured's legal representatives—that is, to his estate—unburdened by a trust or charge for any one, he may dispose of it by will.

The judgment will be reversed, and cause remanded, with directions to enter judgment for defendant Marian N. Peters. All concur.

#### WRAY et al. v. HALE et al.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

#### 1. JUSTICES OF THE PEACE (§ 86\*)—PLEADING—ATTACHMENT—CLAIM BY THIRD PERSON.

Where, in attachment before a Justice of the peace, a third person intervened and claimed the property on the ground that he had been induced to sell it to the attachment defendant by fraudulent representations, his interplea was not insufficient because it did not allege the facts constituting the fraud; the statute merely providing that the interpleader shall make claim to the property attached, and that the claim shall be verified.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 291; Dec. Dig. § 86.\*]

#### 2. ATTACHMENT (§ 287\*)—CLAIMS BY THIRD PERSONS.

Where in attachment a third person intervened and claimed that he had been induced to sell the property to the attachment defendant by fraudulent representations, the fact that he had taken a chattel mortgage and not recorded it did not render him a party to the fraud and bar his recovery; he not asserting any right under the mortgage, and the statute going no further than making the mortgage fraudulent against the creditor.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1012; Dec. Dig. § 287.\*]

#### 3. INFANTS (§ 31\*)—CONTRACTS—RIGHTS OF THIRD PERSONS.

Where an infant purchased property under fraudulent representations that he was of age and failed to pay for it, the seller was entitled to recover the property as against attaching creditors of the infant.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 31.\*]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

Action by one Wray and another against one Hale and another. In which J. D. Wrights-

man interpleaded. From a judgment against interpleader, he appeals. Reversed.

Fred W. Barrett, for appellant. G. Purd Hays, for respondents.

GRAY, J. In June, 1907, the interpleader was conducting a secondhand store in Springfield, Mo., and at said time Carl Hale, one of the defendants, came to him and represented that he was of age, and thereby induced interpleader to sell to him an oven and bakery outfit, for which he gave a note and chattel mortgage of \$100. Hale moved the outfit to Ozark, Mo., where he and defendant Ryan entered into a partnership for the purpose of conducting a bakery business. They contracted debts with the plaintiffs herein, who were conducting a grocery store at Ozark. Shortly afterwards both Hale and Ryan left the state, and on the 22d day of July plaintiffs herein attached the bakery outfit in an action against them, before a justice of the peace. In August, and before the trial day, the appellant herein filed his interplea for said property. The chattel mortgage given to the interpleader was recorded in Greene county, Mo., instead of Christian county, where the mortgagor lived. In a trial before the circuit court, without a jury, the judgment was against the interpleader, and he has appealed.

The following facts may be stated: That Hale was a minor, and, for the purpose of obtaining the property, he falsely represented to the interpleader that he was of age; that the interpleader was deceived thereby, and delivered the property to him; that the plaintiffs had a bona fide debt against the defendants; and that the defendants had left the state so that their property was subject to attachment.

It is claimed by the respondents that the interplea filed is insufficient, because it does not allege the facts relating to the fraud. This suit was commenced before a justice of the peace where no form of pleadings were required, and, in addition thereto, the statute simply provides that the interpleader shall make claim to the property attached, and that the claims shall be verified. This is all the statute requires. Grocery Co. v. Goetz, 57 Mo. App. 8.

It is also asserted that, inasmuch as the interpleader took a chattel mortgage and did not record it, he is a party to the fraud, and hence is barred of his right to recover the property. The interpleader is not asserting any right under the mortgage, and the statute goes no further than making the mortgage, itself, fraudulent and void, as against the creditor. The interpleader bases his claim upon the theory that, as Hale obtained the property from him through false representation, the title never passed to Hale, but always remained in the interpleader, and in such case he has better right to it than

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the attaching creditor. *Stein, Block & Co. v. Hill*, 100 Mo. App. 33, 71 S. W. 1107.

As the facts stand admitted in this case, it was a fraud for Hale to represent to the interpleader that he was of age when he was not. The interpleader had the right to believe he was contracting with an adult. In *Ryan v. Growney*, 125 Mo., loc. cit. 483, 28 S. W. 189, 190, 755, our Supreme Court said: "Neither coverture nor infancy will constitute any excuse for the party guilty of concealment or misrepresentation. In the same opinion it is further said: "Where an infant fraudulently represents himself to be of age, and thus obtains credit for goods, he is liable in equity, though not in law."

We are of the opinion that the false representation as to age made by an infant and relied upon and acted upon by an adult is as much of a fraud as where an adult represents himself to be solvent and obtains goods on credit. We do not find any decision squarely in point in this state, but the rule in other jurisdictions is that under such circumstances the title does not pass, and that the seller may reclaim the property in a proper action. *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Bennett v. McLaughlin*, 13 Ill. App. 349; *Nolan v. Jones*, 53 Iowa, 387, 5 N. W. 572.

Inasmuch as the property was obtained from the interpleader by false and fraudulent representation upon which he relied, the title thereto did not pass, but remained in him, and his title is superior to that of the attaching creditors.

The judgment of the trial court was wrong and will be reversed, with instructions to enter judgment in favor of the interpleader. All concur.

#### THETFORD v. GENERAL ACCIDENT ASSUR. CORPORATION, Limited.

(Springfield Court of Appeals. Missouri. Jan. 8, 1910.)

#### 1. CONTRACTS (§ 176\*)—CONSTRUCTION—QUESTION FOR COURT OR JURY.

The construction of written instruments is for the court, except where there is an ambiguity which must be solved by extrinsic facts uncontroverted, or where the writing is merely adduced as containing evidence of certain facts from which different inferences may be drawn; but, where the ambiguity cannot be solved by reference to other parts of the contract, and when the surrounding circumstances are controverted, the question is for the jury under proper instructions.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 767-770, 1097; Dec. Dig. § 176.\*]

#### 2. JUDGMENT (§ 603\*)—MERGER AND BAR—SEPARATE ACTIONS—MONEY PAYABLE IN INSTALLMENTS.

Where payments are to be made periodically, separate actions can be maintained in succession for the installments as they mature.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1118; Dec. Dig. § 603.\*]

#### 3. EVIDENCE (§ 450\*)—PAROL EVIDENCE—AMBIGUOUS RECEIPT.

A receipt, given to an accident insurance company, reciting that it was "in full settlement for any and all claims under policy No. 109931 to this date," is so ambiguous as to warrant admission of parol evidence to show it was only intended to partially settle for a second injury, demands for which were not all due at the time.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2082; Dec. Dig. § 450.\*]

Appeal from Circuit Court, Jasper County; Henry L. Bright, Judge.

Action by Emerson N. Thetford against the General Accident Assurance Corporation, Limited. From a judgment for plaintiff, defendant appeals. Affirmed.

Fred W. Kelsey, for appellant. John J. Wolfe, for respondent.

GRAY, J. This cause is here on appeal by the defendant from a judgment of \$160 against it, rendered by the circuit court of Jasper county, in a trial before the court without a jury. The suit was commenced on the 19th day of November, 1908, and the plaintiff alleges that on the 2d day of June, 1906, appellant delivered to him an insurance policy, insuring him against total disability by reason of accident, and agreeing to pay, in case of such disability, the sum of \$60 per month, for a period not exceeding 24 consecutive months; that on the 28th day of January, 1908, while in the act of walking down a certain stairway in a hotel where he was a guest, he slipped and fell, and sustained injuries which totally disabled him until the 23d day of May, 1906, and praying for judgment in the sum of \$190, less the sum of \$25 paid to him by defendant, on the 19th day of February, 1908. The answer was a general denial, followed with the special plea of payment and settlement, and that the plaintiff executed and delivered his contract of settlement as follows: "Joplin, Mo., Feb. 19, 1908. Received of General Accident Assurance Corp., Ltd., Philadelphia, a sight draft for the sum of four hundred and twenty-five dollars (\$425.00) which when honored by the said General Accident Assurance Corporation shall be in full settlement for any and all claims under policy No. 109931 to this date. E. N. Thetford." The reply was a general denial. Appellant's contention that the judgment should be reversed and a new trial granted is founded upon the action of the court in permitting parol testimony explaining the receipt above set forth. If the court was right in this matter, then the judgment should be sustained, and if the court's action was wrong, a reversal must follow.

The respondent had received an injury in January, 1907, and in February, 1908, settlement had not been made. It is claimed by the respondent that the settlement receipt

above set forth was executed by him in full settlement for his first injury, and \$25 on his claim growing out of his second injury. The appellant's contention at the trial was that it was in full settlement for both claims, and including everything that respondent might have been entitled to for time lost subsequent to the date of settlement. The rule is that the construction of written instruments is for the court, except where there is an ambiguity which must be solved by extrinsic facts which are unconceded, or where the writing is merely adduced as containing evidence of certain facts, from which different inferences may be drawn. *Blanke v. Dunnermann*, 87 Mo. App. 591. And where the ambiguity cannot be solved by reference to other parts of the contract, and when the surrounding circumstances are controverted, the question is for the jury under proper instructions from the court. *Deutmann v. Kilpatrick*, 46 Mo. App. 624.

In the case above cited plaintiff contracted to erect a building for the defendant in conformity with certain plans and specifications for \$3,400. When he received the last installment, he executed a receipt containing the following recital: "The above is in full for all claims against R. J. Kilpatrick and against the building and property upon which said work was and is done, and all time, labor and material furnished therefor and thereon." Subsequently the plaintiff instituted a suit to recover \$104.75 for extra work on the building. The plaintiff claimed that the receipt only was in full settlement for work done under the first contract, and the defendant claimed it was in full settlement for all work. The court construed the contract, and, for so doing, the cause was reversed and remanded for new trial. In this case the parties differed as to the construction to be placed upon the last words of the receipt, to wit, "to this date." The respondent insists that the words mean for sums due him to date. The appellant claims the words mean full settlement for all injuries received previous to the date of settlement, whether due or not. If all of the respondent's demand against appellant on account of his second injury had been due at the time of this settlement, then we do not believe the receipt or contract so ambiguous as to justify the introduction of parol testimony. But where payments of money are to be made periodically, separate actions may be maintained in succession for the installments as they mature. *Puckett v. National Annuity Ass'n*, 134 Mo. App. 501, 114 S. W. 1039. And, therefore, if a partial settlement had been made for the second injury, it is likely the receipt would have read very much as it does, as it would have been only in settlement for sums then due. We believe the contract is ambiguous, and the court did not err in permitting parol testimony to explain

what was meant by the terms. We have not overlooked the fact that after the signing of this receipt the respondent indorsed a draft upon which there was written a release for injuries received contracted prior to the date. This release was not relied on by the defendant in its answer.

The evidence in behalf of the plaintiff is uncontradicted that at the time the receipt was given it was fully understood that it only covered \$25 on his second claim, and that he refused to sign it until he was assured that it would not be in settlement of his second claim, except to the date of the agreement. Mr. Wolfe, who was present, corroborated the respondent's testimony in this behalf. The court gave three instructions in behalf of the appellant, and they were indeed favorable to appellant.

Upon the whole, the case was well tried, and in our judgment, no reversible error was committed. The judgment will be affirmed. All concur.

#### STATE v. SWEARINGEN.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

#### WEAPONS (§ 15\*)—SHOOTING FIREARMS ALONG HIGHWAY.

One who shot at a dog for the purpose of killing it was not guilty under Rev. St. 1899, § 2164 (Ann. St. 1906, p. 1388), which provides that every person who shall shoot at a mark or any object or at random along or across public highways shall be guilty of a misdemeanor.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 18; Dec. Dig. § 15.\*]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

William Swearingen was convicted of shooting on the public highway, and he appeals. Reversed.

G. Purd Hays, for appellant. Fred W. Barrett, for the State.

COX, J. Indictment for shooting at a dog on the public highway in Christian county. Defendant was convicted and has appealed.

The first question to be determined on this appeal is whether or not shooting a dog on the highway is prohibited by the statute under which this indictment is drawn. The statute (section 2164, Rev. St. 1899 [Ann. St. 1906, p. 1388]) reads as follows: "Every person who shall shoot at a mark or any object, or at random along or across a public highway, shall be adjudged guilty of a misdemeanor and shall, on conviction, be fined the sum of five dollars." It is apparent from the reading of this statute that the Legislature did not intend to prohibit all shooting on a highway. Its evident purpose was to prevent reckless or careless shooting along a highway. Hence, unless the evidence shows the shooting to come within the prohibition of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the statute, the person cannot be convicted under this section. To shoot at a mark or at random along or across a highway is readily understood. The only difficulty arises when we are called upon to determine what is meant by the words "or any object." If we keep in mind the purpose of the statute, and the fact that it is only intended to prevent reckless or careless shooting along the highway, it will appear at once that the words "or any object" are only intended to prohibit a character of shooting that might be denominated reckless or careless. While a dog or any other animal might be used as a mark or might come under the designation "any object" when shot at in a reckless or careless manner or for mere sport, yet we do not think that it was the intention of the Legislature to make this statute apply to the shooting of a dog or any other animal upon the highway when the purpose of the shooting was to kill the animal.

The evidence in this case shows that the shooting was done not in sport, nor for the purpose of using the dog for a target, but the shooting was done with the intent to kill the dog, and we therefore hold that this act is not forbidden by this statute. This being true, it becomes unnecessary to pass upon the other questions appearing in the record in this case.

The judgment is reversed and the defendant discharged. All concur.

#### STATE v. BOWERMAN.

(Springfield Court of Appeals. Missouri. Jan. 8, 1910.)

#### 1. INTOXICATING LIQUORS (§ 239\*)—PROSECUTION—INSTRUCTIONS.

In a prosecution for violating the local option law, an instruction authorizing conviction if the jury found that defendant "directly or indirectly" sold liquor without telling the jury what was meant by those words was erroneous.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 331-347; Dec. Dig. § 239.\*]

#### 2. CRIMINAL LAW (§ 1172\*)—HARMLESS ERROR—INSTRUCTIONS.

Where an instruction authorized conviction of defendant if he "directly or indirectly" sold whisky, error in not defining the meaning of those words was harmless where the evidence clearly showed the sale to have been made by defendant passing the liquor to the purchaser and receiving from him the money therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.\*]

#### 3. CRIMINAL LAW (§ 676\*)—LIMITING NUMBER.

A statute allowing costs against a county or state, providing that there shall be only three witnesses to prove any one fact, does not require the court to limit the number of witnesses to three on any question that may be in issue in the trial of a case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1608; Dec. Dig. § 676.\*]

#### 4. CRIMINAL LAW (§ 676\*)—LIMITING NUMBER—JUDICIAL DISCRETION.

The trial court may use a sound discretion in the matter of limiting the number of witnesses, especially on questions of impeachment merely.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1608; Dec. Dig. § 676.\*]

Appeal from Circuit Court, Stone County; John T. Moore, Judge.

Perry Bowerman was convicted of a violation of the local option law, and he appeals. Affirmed.

T. L. Viles and G. W. Thornberry, for appellant. Wm. E. Renfro, for the State.

COX, J. Information filed in the circuit court of Stone county by the prosecuting attorney, charging the defendant with violation of the local option law. The trial resulted in a conviction, from which the defendant has appealed.

No briefs are filed in this court, but we have carefully examined the entire record to ascertain whether or not the defendant has been accorded a fair trial, and whether the evidence is sufficient to sustain his conviction. We find the information to have been in approved form. The evidence showing the adoption of the local option law in Stone county is sufficient. The evidence further proves the sale of whisky within a year before the filing of the information. The instructions were unobjectionable except in one particular. The general instruction defining the offense is as follows: "Gentlemen of the jury, if you find from the evidence that Perry Bowerman, in the county of Stone and the state of Missouri, on or about the 24th day of May, 1908, or at any time within one year before the filing of this information, to wit, September 21, 1908, did directly or indirectly sell intoxicating liquor in any quantity, you will find the defendant guilty and assess his punishment at a fine of not less than \$300 nor more than \$1,000, or by imprisonment in the county jail for not less than 6 months nor more than 12 months, or with both such fine and imprisonment." The words "directly or indirectly" should have been omitted from this instruction. In order to convict the defendant upon a charge of this kind, the sale must be proven, and, so far as the result is concerned, it is immaterial whether the sale is shown to have been made directly from the defendant to the purchaser or whether it was made by indirection. Should the testimony be such as to require the court by an instruction to declare what would constitute a sale, then it would be proper for the court to so declare, but it is not proper to tell the jury that if the evidence shows that defendant did "directly or indirectly" sell without any explanation as to what was meant by these words. However, in this

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

case, the evidence clearly shows the sale to have been made by the defendant passing the liquor to the purchaser and receiving from him the money therefor. This being true, the error in this instruction was harmless in this case.

Complaint is made in the motion for a new trial that the court erred in refusing the defendant the right to offer more than three witnesses to prove the bad reputation of the prosecuting witness, Jack Whitlock. The only provision of the statute upon this question is that in allowing costs against a county or state only three witnesses to prove any one fact shall be allowed. This does not require the court to limit the number of witnesses to three upon any one question that may be in issue in the trial of a case, but the court may use a sound discretion in that matter, especially on questions of impeachment merely, as was done in this case, and, unless there is something to indicate that this discretion has been abused or that the defendant has suffered in some way by the restriction placed upon the number of witnesses allowed to be used in his behalf, it cannot be said to be reversible error.

On an examination of the entire record we conclude that no injustice has been done the defendant in this case, and therefore the judgment will be affirmed. All concur.

#### STATE v. DONAHUE.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

##### 1. CRIMINAL LAW (§§ 1103, 1130\*)—APPEAL—ABSTRACT—BRIEF.

Under Rev. St. 1899, § 2716 (Ann. St. 1906, p. 1595), providing that no assignment of error or joinder in error shall be necessary on any appeal or writ of error in a criminal case, etc., but the court shall enter judgment on the record before them, where neither party files an abstract of the record or brief, the state having filed a complete record of the case, including the information, plea in abatement, demurrer, and ruling of the court thereon, the court on appeal will examine the record, including all the motions and everything that was done in the trial court as shown by the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2881, 2965; Dec. Dig. §§ 1103, 1130.\*]

##### 2. CRIMINAL LAW (§ 1024\*)—APPEAL—ORDER SUSTAINING PLEA IN ABATEMENT—RIGHT OF STATE TO APPEAL.

Under the rulings of the Supreme Court, the state has no right to appeal from an order of the trial court sustaining a plea in abatement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2599-2602; Dec. Dig. § 1024.\*]

Appeal from Circuit Court, Jasper County; Henry L. Bright, Judge.

D. J. Donahue was indicted for unlawfully keeping his dramshop open on Sunday. From a judgment sustaining a plea in abatement, the State appeals. Appeal dismissed.

B. H. Coon, for the State. Walden & Andrews, for respondent.

GRAY, J. On the 2d day of November, 1908, a special grand jury in Jasper county returned an indictment against the respondent, charging him with unlawfully keeping his dramshop open in said county on the first day of the week, commonly called "Sunday." The defendant appeared and filed a plea in abatement, alleging a number of grounds in support thereof. The prosecuting attorney filed a demurrer to this plea in abatement, which was by the court overruled. After the overruling of the demurrer, the prosecuting attorney refused to plead further, and the court rendered a judgment sustaining the plea in abatement, and discharging the defendant. The prosecuting attorney filed an affidavit for an appeal, and the court allowed the same.

We have not been favored with any printed abstract of the record or brief by either side. The state has, however, filed with the clerk of this court a complete record of the case, including the information, plea in abatement, demurrer, and the ruling of the court thereon, and therefore it is our duty to examine this record, including all the motions and everything that was done in the trial court, as shown by the record. Section 2716, Rev. St. 1899 (Ann. St. 1906, p. 1595); State v. Tuller, 122 S. W. 318.

Can the state appeal from the judgment of the court sustaining a plea in abatement to an indictment? At the same time the court sustained the plea in abatement in this case, it did so in a number of other cases returned by the same grand jury, and in which the same pleas and demurrers were filed that were filed herein. The plaintiff appealed some of these cases to the Supreme Court, and on the 23d day of November, of this year, the Supreme Court sustained motions to dismiss the appeals, and held that the state has no right to appeal from an order of the court sustaining a plea in abatement.

The cases passed upon by the Supreme Court are State of Missouri, Appellant, v. Ivis Craig, Respondent, 122 S. W. 1006, and State of Missouri, Appellant, v. Fred Firey, Respondent, 122 S. W. 1007. In passing upon the case of State v. Craig, Judge Gantt said: "It being obvious in this case that the indictment was not quashed on a motion to quash, nor was a demurrer thereto sustained, nor has the indictment been adjudged insufficient on a motion in arrest, and as an appeal is only permitted the state in these cases, the motion to dismiss the appeal must be sustained, and it is so ordered."

We have no other duty to perform but to follow the decision of the Supreme Court in these cases, and hence the appeal will be dismissed. All concur.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**DENNISON v. GAULT.**

(Springfield Court of Appeals. Missouri. Jan. 8, 1910.)

**BROKERS (§ 67\*)—COMPENSATION—ACTING FOR BOTH PARTIES.**

A broker is not permitted to act for both purchaser and seller of property without the knowledge and consent of both the purchaser and seller, and by so acting he loses his right to compensation from the seller.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 49, 52-54; Dec. Dig. § 67.\*]

Appeal from Circuit Court, Jasper County; David E. Blair, Judge.

Action by R. L. Dennison against H. W. Gault. Judgment for plaintiff. Defendant appeals. Affirmed.

Thomas P. Burns, for appellant. R. M. Sheppard and C. V. Buckley, for respondent.

COX, J. In this action plaintiff seeks to recover for expenses of a trip to the East, made, as he claims, under a contract with defendant and others, by which they had agreed to pay his expenses if he should go East and undertake to secure purchasers for certain property which was in their hands for sale as real estate agents. Judgment was for plaintiff, and defendant has appealed. This is the second verdict for plaintiff and the second appeal. The first is reported in 132 Mo. App. 301, 111 S. W. 844. On that appeal the judgment of the lower court was reversed and the cause remanded because the trial court had refused to instruct the jury that the plaintiff could not recover if he acted as the agent of both seller and the purchaser, unless it be shown that both had knowledge of his acting in the dual capacity and consented thereto.

Upon this trial that issue was submitted to the jury by the following instruction: "The court declares the law to be that an agent or broker is not permitted to act for both the purchaser and seller of property without the knowledge and consent of both the purchasers and sellers, and, if you find that the plaintiff Dennison represented the purchasers of the brewery property mentioned in the evidence and received a commission therefor, and that defendants were the agents or brokers of the seller, and that Dennison acted in the dual capacity of agent for both the buyer and the seller, without the knowledge and consent of defendants, then your verdict must be for the defendant."

For a statement of the facts detailed in evidence which made this instruction necessary, reference is made to the decision of this case upon the former appeal. The instruction given correctly declares the law applicable to the facts in this case, the jury has again found for the plaintiff, and this ought to settle the matter.

Judgment affirmed. All concur.

**CLOVER v. JOPLIN & P. RY. CO.**

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

**1. APPEAL AND ERROR (§ 997\*)—REVIEW—DEMURRER TO TESTIMONY.**

Where the only error assigned on appeal is that the court erred in refusing to sustain a demurrer to the testimony, if the evidence will sustain the verdict upon any theory of the law applicable thereto, judgment must be affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4023, 4024; Dec. Dig. § 997.\*]

**2. STREET RAILROADS (§ 90\*)—OPERATION—DUTY OF MOTORMAN—PRECAUTIONS AS TO VEHICLE ON TRACK.**

The motorman of a street car must use ordinary care to discover persons or vehicles on the track, and in a populous section of the city cannot expect a clear track, and, if he discovers a vehicle on the track, he should give notice so as to afford the driver an opportunity to get off the track, and if such driver does not do so, and it becomes apparent to the motorman that he does not intend to get off, it is the motorman's duty to stop the car rather than run into and injure him, and the car should be kept under control so that it may be so stopped.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 192; Dec. Dig. § 90.\*]

**3. STREET RAILROADS (§ 81\*)—OPERATION—DUTY TO USE LIGHT AT NIGHT.**

A street railroad company must keep lights on its cars at night to enable its motormen to see ahead a sufficient distance to discover persons on the track.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 173; Dec. Dig. § 81.\*]

**4. STREET RAILROADS (§ 103\*)—INJURY TO PERSONS ON TRACK—DISCOVERED PERIL.**

If plaintiff, about 10 o'clock at night, driving a gentle, slow-traveling horse, drawing a high, open buggy, turned into a street on which defendant operated a street car line, and, after going west about 255 feet was struck by a car going in the same direction in a populous residence section in the city, while crossing the track diagonally from the north side in a walk, after having traveled for some distance on the track, the left rear wheel of the buggy being struck when almost across the track, and plaintiff being thrown to the south side of the track, and there was a light on the front end of the car so that the motorman could see 40 to 50 feet, and could stop the car in 20 feet at the rate it was going, the motorman was not using ordinary care to discover vehicles on the track, and plaintiff, under the humanitarian doctrine, could recover, regardless of her possible contributory negligence.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 219; Dec. Dig. § 103.\*]

Appeal from Circuit Court, Jasper County; David E. Blair, Judge.

Action by Susan P. Clover against the Joplin & Pittsburg Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Perkins & Blair and Edward C. Wright, for appellant. McAntire & Scott, for respondent.

COX, J. Action for damages resulting from an injury claimed to have been caused by defendant's car striking a buggy in which

plaintiff was riding and throwing her to the pavement on Seventh street in the city of Joplin. Judgment for plaintiff for \$750, and defendant has appealed.

The only error assigned by appellant is that the court erred in refusing to sustain a demurrer to the testimony; hence, if the evidence will sustain a verdict upon any theory of the law applicable thereto, the judgment must be affirmed, and, if not, the judgment must be reversed.

It is contended by appellant that the evidence conclusively shows that plaintiff was guilty of contributory negligence, and hence she cannot recover. The respondent denies that plaintiff was guilty of contributory negligence, and insists that, even if she were, defendant is still liable under the humanitarian doctrine, that defendant's motorman either did or by the use of ordinary care upon his part could have discovered plaintiff's position of peril in time to have stopped the car and avoided the injury. The humanitarian doctrine is so well grounded in the jurisprudence of this state that it is not necessary to elaborate upon it or to cite authorities to sustain it. It is equally well settled that it is the duty of a court in passing upon a demurrer to the testimony to give the party the benefit of every reasonable inference that can be drawn from the testimony in his or her favor. Keeping this rule in view, and considering the testimony in this case in the light thereof, what do we find? We shall first look to the question of the application of the humanitarian doctrine to the facts of this case. The undisputed facts, as far as necessary to consider in determining whether or not this is a proper case for the application of the humanitarian doctrine, are as follows: Seventh street runs east and west in the city of Joplin, and is crossed by Jackson and Sergeant avenues and other streets running north and south. Defendant's car line runs east and west along Seventh street. About 10 or 10:30 p. m., July 3, 1908, the plaintiff and her daughter were driving home in a high, open buggy, drawn by a gentle, slow-traveling horse. They drove south on Sergeant avenue to Seventh street, and then turned west on Seventh street and drove toward Jackson avenue, which was the next street west of Sergeant. Midway between Sergeant and Jackson avenues was an alley 20 feet in width. The lots are 125 feet deep, making the distance from Sergeant to Jackson avenue 270 feet. They drove in a walk, and, when within about 15 feet of Jackson avenue, their buggy was struck by a car of defendant passing from east to west along Seventh street, and plaintiff was thrown out and injured. The place of the accident is in a populous residence section of the city. As to these facts there was no controversy. The other testimony upon which plaintiff must rely to sustain her case under the humanitarian doctrine may be briefly stated, in substance, as follows:

For plaintiff, Josephine Clover, the daughter, testified, in part, to the effect that they drove south on Sergeant avenue to Seventh street and turned west on Seventh street and drove on the north side of the street car track. About the alley, or just beyond it, they drove onto the track and continued west on the track until near Jackson avenue, when they discovered a car coming very close behind them, and they then tried to get off the track, but were struck by the car which caused the injury to her mother; that they were within about 15 feet of Jackson avenue when struck; that she heard no bell of any kind before the car struck them.

John D. James, witness for plaintiff, testified, in substance, that he was walking west on the south side of Seventh street and saw the accident, and that they drove along on the north side of the track until they got to Jackson avenue, or approximately to it. On cross-examination, he stated he thought they must have been halfway between the alley and Jackson avenue when they commenced to turn diagonally across the street, and that they then drove toward the corner southwest at a pretty slow angle. The car struck the left hind wheel of the buggy first, the horse ran away with a part of the buggy, and the women and one wheel were then on the south side of the track. He was near at the time of the accident and heard no bell, gong, or warning of any kind. The car was running very fast—about 30 miles per hour.

Plaintiff testified that, when near Jackson avenue, they went onto the track, and that they had not more than got onto the track when her daughter hallooed, "There is the car," that they drove diagonally across the track, and were almost across when struck. They were driving slowly until they discovered the car, when the daughter began to urge the horse to try to get across the track. She heard no bell or warning.

William M. Baker, a motorman of defendant in charge of propelling the car, was put on the stand by the defendant, and testified, in substance, as far as we think material to the phase of the case now under consideration, that there was a light on the front end of the car, and that he could see 40 to 50 feet, that he did not see the buggy drive onto the track, but that it drove on from the north and went across diagonally, and was almost across when he saw it, and that his car was then within 8 or 10 feet of the buggy when he immediately applied the brake, but could not stop before the car struck the buggy; that he was running not more than six miles per hour; and that at that rate he could stop the car in twenty feet by reversing.

There was evidence tending to contradict some of this testimony, but we cannot now weigh it and pass on its preponderance.

All the witnesses who testified in relation to the manner in which the horse was driven across the track agreed that they passed

diagonally across from north to south; that, when struck, the horse was going in a walk. This being true it would necessarily take some little time for them to pass so far over from the north side that the car would strike the left hind wheel first and throw the buggy and its occupants to the south of the track. Hence, if the version of the old lady be accepted as showing the true state of facts, then her testimony, in connection with that of the motorman, would sustain a verdict upon the humanitarian doctrine. This doctrine requires that the motorman in charge of propelling a street car along a street in a city shall use at all times ordinary care to discover whether or not persons or vehicles may be upon the track in front of him, and in a populous section of the city, as the evidence shows the place of this accident to have been, he has no right to expect a clear track, for the residents of the city have the right to use the street as well as the street car company, and it is not negligence per se for one to drive within the rails of the track, and, should the motorman of a car discover a vehicle in this position, it would be his duty to give notice in some way that the car was coming and give the party in charge of the vehicle an opportunity to get off the track, and then if the party did not get off the track, and it became apparent to the motorman that he did not intend to get off, it would be his duty to stop the car rather than run into and injure him. *Goff v. Transit Company*, 199 Mo. 694, 98 S. W. 49, 9 L. R. A. (N. S.) 244, and cases there cited. And when running a street car at night the exercise of ordinary care would require the company to keep a light upon the car which would enable the motorman to see ahead a sufficient distance; that, in case he should discover any one upon the track, he might give notice by sounding the gong or otherwise, and give the party an opportunity to get off the track, and it is the duty of the motorman to keep his car under control so that, if a party on the track does not get off when warned, the car can be stopped before injury is inflicted. *Baird v. Citizens' Railway Co.*, 146 Mo. 265, 48 S. W. 78. This is a reasonable rule, for the preservation of human life is of vastly more importance than the preservation of an established time schedule in the running of street cars.

But, laying aside the testimony of the plaintiff and following the rule that in this case she is entitled to the benefit of the strongest evidence in her favor, and to every reasonable inference therefrom in her favor, and accepting the testimony of either the daughter or Mr. James, the jury would be warranted in finding that these parties had driven on the track in front of the car for some distance before being struck, and, if this were true, then all doubt as to the application of the humanitarian doctrine to the

facts in this case is removed. If it be true that plaintiff traveled in a walk for some distance on the track before being struck, and the motorman, as he testified, could see forty to fifty feet in front, and could stop his car in 20 feet, and there is no explanation as to why he did not see their perilous position and stop the car and prevent the injury, the conclusion is irresistible that he was not using ordinary care, and that the want of such care upon his part after this plaintiff's position became perilous caused the injury.

Having reached this conclusion upon this phase of the case, a discussion of the evidence which tended to show that plaintiff was guilty of contributory negligence becomes unnecessary, for if we concede, as we do, when the humanitarian doctrine is applied, that the plaintiff was guilty of contributory negligence, the defendant is still liable, and the judgment will therefore be affirmed. All concur.

#### KIRN v. E. E. SOUTHER IRON CO.

(St. Louis Court of Appeals. Missouri. Jan. 4, 1910.)

##### 1. TRIAL (§ 244\*) — INSTRUCTIONS — UNDUE PROMINENCE TO PARTICULAR FACT.

In an action against an iron company for injuries to plaintiff while employed in the construction of a building, one of the issues was whether the building was being constructed by the iron company or by a realty company organized by the same persons that owned and controlled the iron company, and there was evidence that before plaintiff's injury the officers and stockholders of the iron company determined to organize the realty company, but that the realty company was not incorporated until after a building permit had been issued for the building on which plaintiff was injured, the permit being taken out by the agent of the iron company. *Held*, that an instruction that the realty company was not incorporated until a date specified, which was the date shown by the evidence as the date of the incorporation, was not objectionable as giving undue prominence to the date of the corporation of the realty company.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.\*]

##### 2. MASTER AND SERVANT (§ 268\*)—ACTION FOR INJURIES TO SERVANT—ADMISSIBILITY OF EVIDENCE.

In an action for injuries to an employé while at work on a building, one of the issues was as to whether the building was being constructed by defendant iron company or by a realty company, which had been organized by the same persons, who were officers of the defendant iron company, and there was evidence that the supervising architect of the building, on a date specified, in company with defendant's president went to the assessor's office for the purpose of obtaining a permit to construct the proposed building. *Held*, that an application for a building permit by the supervising architect which states that he was the duly authorized agent for the defendant iron company, and the permit issued to the defendant iron company, were admissible in evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 910; Dec. Dig. § 268.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

### 3. MASTER AND SERVANT (§ 284\*)—ACTION FOR INJURIES—QUESTIONS FOR JURY.

Evidence in an action for injuries to an employé while engaged in the construction of a building, *held* sufficient to take the case to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1132; Dec. Dig. § 284.\*]

### 4. APPEAL AND ERROR (§ 999\*)—REVIEW—QUESTIONS OF FACT—CONCLUSIVENESS OF VERDICT.

In an action for injuries to an employé, the facts in connection with the accident being before the jury under correct instructions their finding thereon is conclusive as to the negligence of the master and whether defendant was erecting the building where plaintiff was injured.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3924; Dec. Dig. § 999.\*]

### 5. MASTER AND SERVANT (§ 276\*)—ACTION FOR INJURIES—SUFFICIENCY—EVIDENCE.

Evidence in an action for injuries to a servant *held* sufficient to sustain verdict for plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-996; Dec. Dig. § 276.\*]

### 6. APPEAL AND ERROR (§ 1004\*)—CONCLUSIVENESS OF VERDICT—AMOUNT OF RECOVERY.

Where the amount of recovery in an action for personal injuries to an employé has been sustained by the trial court in full, or a remittitur ordered, the verdict will not be disturbed by the appellate court, except in a clear case of abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3945; Dec. Dig. § 1004.\*]

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Action by Joseph Kirn against E. E. Souther Iron Company. Judgment for plaintiff and defendant appeals. Affirmed.

Action for damages for personal injuries. The petition avers that on the 10th of February, 1908, defendant was engaged in the erection of a building in St. Louis county, whereon plaintiff was employed by defendant to work as a mechanic, under the direction and command of a foreman, who was also employed as such foreman by defendant; that on the date above mentioned the foreman directed plaintiff to carry certain rolls of roofing paper to the roof, and in obedience to the order, plaintiff took a roll, and, going to the roof, went onto a platform or scaffolding, which had been erected on the outside of the building and which was the ordinary and usual way of reaching the roof; that when the plaintiff stepped on the platform, the boards tilted and plaintiff was precipitated a great distance to the ground and injured; that the platform before the accident had been supported on several cleats and bars, and that the foreman of defendant under whom plaintiff was working had shortly before the occurrence of the injury caused one of the cleats or bars to be removed; that plaintiff had no knowledge of this fact,

and that the platform tilted by reason of the absence of the supporting bar or cleat. It is charged that the removal of the cleat, and leaving the platform in the condition it was, was actionable negligence on the part of defendant's employé.

The answer, after a general denial, was an averment of contributory negligence, as also lack of knowledge on the part of the foreman that plaintiff intended using the scaffold, he having heretofore performed the same work without doing so. The reply is a general denial.

At the trial before the court and jury it appeared that in May, 1907, the officers and stockholders of the E. E. Souther Iron Company determined to organize a separate corporation to be known as the Woodruff Realty Company, which was to acquire title to ground and construct thereon factory buildings, which, when completed, would be occupied by the Iron Company as tenant of the proposed Realty Company, and immediately began preparations to put that plan into operation. At that time Albert G. Souther was president of the Iron Company, Frank E. Coddling, vice president, and W. M. Scudder, its secretary and treasurer. Mr. Coddling was president of the Realty Company when it was organized, Mr. Souther vice president, and Mr. Scudder, secretary and treasurer. Owing to complications not explained by the record, the Realty Company was not incorporated until the 27th day of July, 1907, and on the 29th day of the same month, the ground upon which the building in the erection of which plaintiff was injured was conveyed to the Realty Company. In the meantime the erection of the building had been commenced, the supervising architect, Mr. McCormack, having entered into a contract as supervising contractor, under which he was to receive seven and one-half per cent. of the cost of the building when erected. On the 9th of July, Mr. McCormack, in company with Mr. Souther, went to the assessor's office at Clayton for the purpose of obtaining a permit to construct the proposed building. The application was in writing and signed by Mr. McCormack and in part is as follows: "I, the undersigned Chas. B. McCormack, duly authorized agent for E. E. Souther Iron Company, hereby make application to the assessor of St. Louis county for a permit to build a brick and concrete building as designated below." It is stated in the application that the construction of the building is to be commenced July 9, 1907, to be completed January 1, 1908, estimated or actual cost \$20,000, building to be occupied as manufacturing plant, dimensions of building 230 by 280 feet, and the extreme height of building to be 16 feet. The building permit, dated the same day, No. 33, in part, reads thus: "This is to certify that permission

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was granted this 9th day of July, 1907, to E. E. Souther Iron Company to build a brick and concrete building to be used for manufacturing plant." The application and the permit both describe the premises. When the application and the permit were first offered in evidence they were excluded by the court. Subsequently, on testimony being introduced tending to show that Mr. Souther was present in the assessor's office along with Mr. McCormack when the application was made and permit issued and accepted by Mr. McCormack, and that Mr. Souther had gone to the office of the assessor with Mr. McCormack when McCormack had gone there for the purpose of obtaining the permit, the court reconsidered its action and allowed the two papers to be read in evidence. It may as well be here noted that there was no evidence tending to show that either Souther or McCormack transacted any business at the office of the assessor, other than that McCormack applied for and took out this permit. It was in evidence that on the 20th of July, 1907, the promoters of the Realty Company, who were all the stockholders and officers of the Iron Company, had taken out two casualty insurance policies, indemnifying them against liability for damages which might be incidentally suffered by workmen or other persons on or about the work of construction, and deeds conveying the property to the Realty Company were also introduced, all dated July 29, 1907, and recorded in the office of the recorder of deeds on the 20th of August, 1907. It was in evidence that the Banner Lumber Company had furnished practically all of the lumber for the building which, instead of the estimated cost of \$20,000, it appears, ultimately cost \$70,000, and defendant introduced a receipt from the lumber company acknowledging to have received \$315.97 from the Woodruff Realty Company in full of all demands for lumber furnished McCormack in erecting the building referred to. Defendant also introduced a paper acknowledging the receipt from the Woodruff Realty & Investment Company of \$144.09, as a balance on account for grading. It also introduced a paper acknowledging the receipt by the superintending architect, McCormack, from the Woodruff Realty Company of \$195 in full of all demands for construction of the building. The receipt of the grading contractor is dated July 21, 1907. The receipt of the Banner Lumber Company is dated June 5, 1908. The receipt of Mr. McCormack is dated August 13, 1908.

The petition in this case was filed April 4, 1908. These are all the receipts introduced, nor was there any other testimony other than these and the deeds and insurance policies introduced by defendant on the issue of ownership. There was no testimony introduced or offered apart from these, as to who had paid the balance of the \$70,000, which it is in evidence was the cost of

the improvement. On the part of plaintiff there was evidence from two or more of the workmen, to the effect that when they were paid for their labor, they were paid at different times, partly in cash and partly in checks, upon which latter the name of the E. E. Souther Iron Company appeared; in what capacity, however, is not shown. There was evidence tending to support plaintiff's statement in the petition as to the happening of the accident, and as to the extent of the injuries sustained; and on part of defendant there was evidence tending to sustain the matter set up in the answer by the defendant which, if true, constituted contributory negligence. At the conclusion of the plaintiff's evidence, and again at the conclusion of all the evidence, defendant asked for an instruction for nonsuit, which being refused, defendant duly excepted.

At the instance of plaintiff the court gave five instructions. It is sufficient to state only such parts of them as relate to the matter in controversy. The first instruction, after instructing the jury that if they "believe from the evidence that on the 10th of February, 1908, plaintiff was employed by defendant to work under the direction and command of one James Ette, as foreman, and that said Ette was also employed by defendant as such foreman upon a building then being constructed," and correctly instructing the jury as to the substantive facts of the accident necessary to be found, concludes with the direction that if the jury believed and found affirmatively on these matters, the verdict should be for plaintiff. The second instruction defines ordinary care. The third and fourth instructions are as follows: "(3) The jury in determining whether plaintiff was working for defendant, or for the Woodruff Realty Company, at the time of his alleged injury should take into consideration all of the facts and circumstances proven by the evidence in this case, including all the transactions between said McCormack and the officers of said two companies, of whatever nature or kind. (4) The jury are instructed that the Woodruff Realty Company was not incorporated until the 27th day of July, 1907." The fifth instruction was as to the measure of damages. At the instance of defendant the court gave the following instruction: "(1) The court instructs the jury that a corporation is an artificial person created by law and having a legal existence separate from all other corporations or individuals. The jury is further instructed that the E. E. Souther Iron Company and the Woodruff Realty Company being distinct corporations, are two entirely different persons in contemplation of law, and this is in no wise altered by the fact that the stockholders and directors in both corporations may be the same. Therefore, if the jury shall find and believe from all the evidence that the building about which plaintiff was working at

the time of his injuries was being erected for, and under contract with the Woodruff Realty Company, your verdict must be in favor of defendant."

As above stated, the court declined to give an instruction in the nature of a demurrer to the evidence. These were all the instructions given or asked. The jury returned a verdict in favor of plaintiff for \$2,000. Pending a motion for new trial the court, as a condition to its being overruled, required plaintiff to remit \$665 of the verdict. This was done, and judgment entered for plaintiff in the sum of \$1,335. From this defendant has appealed, having duly filed its motion for a new trial, and saved exceptions to the adverse rulings of the court.

Rogers, Tralles & Wurdeman, for appellant. R. L. Shackelford, for respondent.

REYNOLDS, P. J. (after stating the facts as above). In the brief presented to us five points are urged for a reversal. The first is as to instruction No. 4. That is objected to on the ground that it singles out and gives undue prominence to a particular fact—that is to say, the date of the incorporation of the Woodruff Realty Company. It is a well-settled rule of practice in our state, that an instruction singling out and giving undue prominence to a fact is erroneous. We do not think that applies to this instruction, under all the facts and the other instructions in the case.

The second assignment of error is to the admission in evidence of the application for and taking out of the building permit, which, it is insisted, is not shown to have been the act of the defendant or its authorized agent. We cannot sustain this assignment. There was evidence to connect the president of the defendant company, as such president, with making the application for and issuance of the permit, to entitle it to go to the jury along with other evidence in support of the contention of plaintiff that the work done by him was under the employment of an employé of this defendant. The papers on their face were in the name of the defendant. The facts attendant upon their execution were before the jury. The jury were properly instructed to cover this.

The third assignment of error is on the refusal of the court to give the peremptory instruction for nonsuit. Following what we have before stated, this assignment necessarily must fall. Reading all the testimony in the case, we are satisfied that there was substantial evidence entitling the plaintiff to go to the jury.

The fourth error assigned is that the verdict is so contrary to all the evidence that it must have been the result of passion or prejudice on the part of the jury; that there was no substantial evidence that the defendant was erecting the building where plaintiff was injured, or was in any manner neg-

ligent. We cannot agree to this assignment. The facts attendant upon the accident were before the jury. The evidence as to them was conflicting. The jury were correctly instructed concerning this phase of the case. Their finding on them is conclusive, as it is supported by substantial evidence. As to the issue of employment as to whom was the real employer, that was supported for plaintiff by substantial evidence. This case presents the not uncommon one of proving itself as much by what was not in evidence as by what actually was in evidence before the jury. The Realty Company was incorporated with a capital stock of \$10,000. The incorporators of that company were the stockholders of the Iron Company. The officers of the two companies were identical, titles only changing, the president of one being the vice president of the other, and vice versa. Before the incorporation of the company, plans were entered upon for the construction of this building, and a permit taken out in the name of the Iron Company by the superintending contractor or builder, the man of all others who might be supposed to know his employer. The building was to be erected for the use of the defendant. Confessedly the building was to and did cost \$70,000. The presumption is, in the absence of evidence to the contrary, that this was paid for by some one. Certainly the receipted bills which have been introduced in evidence by the defendant tend to show that, because all of them are for balances on account. Two of them are dated after the institution of this suit. By whom the great bulk of the \$70,000 construction was paid for is not in evidence, and yet it must have been evidence not only accessible to, but in the possession of, the real parties in interest in this case, whether those parties were called E. E. Souther Iron Company or Woodruff Realty Company. The jury had a right, which undoubtedly they exercised, to assume that, if these bills for over \$60,000 had been paid by the Realty Company, the production of the receipts would have been easy, and would show that fact. The failure to produce them is certainly a very strong and persuasive argument in support of the contention of plaintiff that the real owner and constructor of the building was the E. E. Souther Iron Company. Furthermore, it was before the jury as a fact in the case that the Realty Company, with \$10,000 capital, was erecting a \$70,000 building. That was a circumstance which the jury had a right to take into consideration in determining the question of the real ownership of the property. On consideration of the record in the case, and of the testimony as abstracted by counsel, we conclude that this assignment should not be sustained.

The concluding assignment of error is that the verdict is excessive in amount, even after remittitur. To sustain this assignment in this, as in all other cases of like character,

where this point is made, requires this court to substitute its judgment for that of the jury as well as of the trial judge, in measuring the damages and in arriving at a correct estimate of them. To do this, while clearly within our right (*Chitty v. Railway*, 143 Mo. 64, 49 S. W. 868), imposes a duty upon us that we are always reluctant to exercise. If satisfied from the evidence in the case that a verdict is the result of prejudice or passion, it is the duty of the trial court not to rest at merely ordering a remittitur, but to set the entire verdict aside. When the question is presented of scaling it down, it is to be remembered that not only the jury, but the trial judge, heard the testimony, and saw the witnesses by whom it was given. The opinion of each of them as to the damage sustained, when the case is submitted under proper instructions, is entitled to great consideration, and will only be disturbed by us in a clear case. The trial court expresses his opinion on it, when he sustains it in full or orders a remittitur. He acts not alone within his great discretionary power, but with the great advantage that he has over this court. Except in a clear case of abuse of discretion, this court will not undertake to interfere with this exercise of that discretion. We cannot sustain this final assignment.

The judgment of the circuit court is affirmed. All concur.

# McCORMICK HARVESTING MACH. CO. v. BLAIR.

(St. Louis Court of Appeals. Missouri. Jan. 4, 1910. Rehearing Denied Jan. 18, 1910.)

## 1. PAYMENT (§ 16\*)—PAYMENT BY NOTE—EFFECT.

While the giving of a note for a pre-existing debt suspends the right to sue upon the indebtedness, without producing the note at the trial for cancellation, or accounting for its non-production, the note does not wholly extinguish the indebtedness in absence of an express agreement to that effect.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 63-69; Dec. Dig. § 16.\*]

## 2. PAYMENT (§ 67\*)—PAYMENT BY NOTE—BURDEN OF PROOF.

The burden is upon one seeking to defeat a recovery on the original indebtedness to show that the parties expressly agreed that the indebtedness should be discharged by the giving of a note.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 198; Dec. Dig. § 67.\*]

## 3. ALTERATION OF INSTRUMENTS (§ 23\*) —NOTES—EFFECT—RIGHT TO SUE ON DEBT.

Unless an alteration of a note given for goods sold was fraudulently made, the seller could sue in assumpsit for the value of the goods, though the alteration invalidated the note so as to prevent an action thereon.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 192-207; Dec. Dig. § 23.\*]

## 4. ACTION (§ 45\*)—JOINDER OF CAUSES OF ACTION—COMMON COUNT AND SPECIAL CONTRACT.

A count in assumpsit for goods sold may be joined with a count on a promissory note given for the goods, claimed to have been invalidated by alteration, since if judgment is for plaintiff on the note, it should go for defendant on the count on the debt and vice versa.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 430-448; Dec. Dig. § 45.\*]

## 5. JUDGMENT (§ 203\*)—DIFFERENT JUDGMENTS ON SEPARATE COUNTS.

In an action in which a count for goods sold was joined with one on a note given for the goods, the direction of a verdict, at plaintiff's request, for defendant on the latter count, before allowing a recovery on the first count, canceled defendant's obligation on the notes, and sufficiently protected him, as plaintiff would be bound in a subsequent action by the verdict and judgment for defendant on the notes.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 203.\*]

## 6. ALTERATION OF INSTRUMENTS (§ 2\*)—NOTES—EFFECT—IMMATERIAL ALTERATION.

Even an immaterial alteration of a note without authority by the holder avoids it.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. § 4; Dec. Dig. § 2.\*]

## 7. ALTERATION OF INSTRUMENTS (§ 5\*)—NOTES—INTEREST—MATERIAL ALTERATIONS.

The alteration of a note without the maker's knowledge, so as to require the payment of interest from date, instead of from maturity, was a material alteration which would prevent its enforcement, even if an alteration must be material to have that effect.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. § 24; Dec. Dig. § 5.\*]

## 8. ALTERATION OF INSTRUMENTS (§ 29\*) —NOTES—FRAUDULENT ALTERATION—MATERIALITY.

Every material alteration of a promissory note is *prima facie* fraudulent.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 259-263; Dec. Dig. § 29.\*]

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Action by the McCormick Harvesting Machine Company against Joseph H. Blair. From a judgment on a directed verdict on one count for plaintiff, after directing a verdict on the other counts for defendant defendant appeals. Reversed and remanded.

Dempsey & McGinnis, for appellant. R. L. Motley, for respondent.

NORTONI, J. In this case the petition contains three counts. The first two declare upon promissory notes and the third count declares in assumpsit for an amount alleged to be due for a harvesting machine sold to the defendant. The indebtedness sued for in the third count is for the same consideration as that represented by the two promissory notes declared upon in the first and second counts. The defendant admitted having purchased the harvesting machine mentioned in the third count and the original indebtedness therefor, but pleaded that he had executed the promissory notes declared upon

in the first and second counts for that indebtedness. He pleaded, too, that after the execution of the notes the defendant had materially altered the same, and that such alteration operated to discharge him from all liability. Upon the conclusion of the evidence, at the request of plaintiff, the court peremptorily directed the jury to return a verdict for the defendant on the first and second counts of the petition—that is, on the notes—and likewise peremptorily directed a verdict for the plaintiff on the third count; that is, on the count for goods sold and delivered. The jury returned a verdict in accordance with the directions of the court, and the defendant prosecutes the appeal.

It appears the defendant purchased a harvesting machine from the plaintiff in the summer of 1902 at the agreed price of one hundred and five dollars. A few months thereafter he executed to the plaintiff his three promissory notes for \$35 each, to cover the indebtedness contracted in purchasing the machine. The first note fell due September 1, 1903, the second note, September 1, 1904, and the third note, September 1, 1905. Although all the notes were actually executed in October, 1902, they were dated June 23d of that year at Bowling Green, Mo. The first note was paid when due, and the other two are involved here. The testimony on the part of the defendant tends to prove that none of the notes mentioned were to draw interest prior to maturity—that is to say, each and all of them were to draw interest at 6 per cent. per annum from and after the date of maturity—and that plaintiff's agent, without defendant's knowledge or consent, changed or altered the same in this respect, after their execution and delivery to defendant, by the insertion of certain words so as to make them draw interest at 6 per cent. from and after date instead of from maturity. Upon paying the first note the defendant discovered the alteration, and refused to pay the others. If the notes were altered at all, the alteration was made by the plaintiff's agent who had charge of its notes and collections, for there is evidence that the words inserted are in his handwriting. The evidence on the part of plaintiff tended to prove the writing therein was done prior to execution, and that there was no alteration.

It is argued that as the court directed a verdict for the defendant on the first two counts of the petition—that is, on the notes—there can be no recovery on the third count, for the reason the indebtedness therein sued for was extinguished by the notes. The law is well settled to the effect that the giving of a promissory note for a pre-existing debt does not operate to extinguish the indebtedness for which the note is given without a special or express contract imparting to the transaction that effect. It is true the giving of the note in such circumstances suspends the right to sue upon the indebtedness during the time the note has to run, and it is treat-

ed as a payment thereof to the extent that the party to whom the note has been given cannot recover upon the original cause of action without producing the note on the trial for cancellation, or properly accounting for its nonproduction. But in the absence of an express agreement to that effect, the note does not operate to extinguish the indebtedness. *Howard v. Jones*, 33 Mo. 583; *Howard v. Shirley & Hawkins*, 75 Mo. App. 150; *Steamboat Charlotte v. Lumm*, 9 Mo. 64; *Bertiaux v. Dillon*, 20 Mo. App. 603; *Schepflin v. Dessar*, 20 Mo. App. 569; *McMurray v. Taylor*, 30 Mo. 263, 77 Am. Dec. 611; *Holland v. Rongey*, 163 Mo. 16, 67 S. W. 568; *O'Bryan v. Jones*, 38 Mo. App. 90.

When it is sought to defeat a recovery in assumpsit for the original consideration by showing the indebtedness was discharged or extinguished through the giving of the note, the burden is, of course, on the defendant to show an express agreement to that effect. *McMurray v. Taylor*, 30 Mo. 263, 77 Am. Dec. 611. There is not a word of testimony in the present record tending to show any such special agreement between the parties. It appears only that defendant purchased the machine from the plaintiff at the agreed price of \$105, in the early summer of 1902, and executed his three several notes therefor for \$35 each later in the fall. The notes were antedated to June 23, 1902, and fell due at the various dates hereinbefore stated. The defendant paid the first when due, and says upon discovering that the plaintiff had altered the same, declined to pay the others for that reason. In the absence of an express agreement to the effect that the notes were given in liquidation of, or to extinguish, the original indebtedness, the suit may be maintained in assumpsit on the third count for the price of the machinery on the original consideration, unless the alteration in the notes was fraudulent, in which event, we believe, the plaintiff, by its own act, forfeited the right of a recovery on the original consideration. But it is said the law requires the plaintiff to deliver the notes as for cancellation before it may sue in assumpsit on the original consideration, and therefore no recovery should be allowed on the third count. The argument is that by suing upon the notes the plaintiff, instead of delivering them up for cancellation, is seeking their enforcement. There can be no doubt that a count in assumpsit for goods sold and delivered may be joined with a count on a promissory note, and it seems to be the practice, in cases of the character here involved, to permit the suit to proceed on the note in a separate count, and the original cause of action in another. Of course in those circumstances each cause of action asserted in the separate counts arises out of the original consideration, and the law will only permit one recovery for the same indebtedness. Therefore, if the recovery is allowed on the notes, a judgment should always be given against

the assertion of the indebtedness on the original consideration, and vice versa, if the recovery is allowed on the count in assumpsit, the judgment should go against the notes.

If a recovery is had on the notes, and there is a verdict for the defendant on the count seeking a recovery on the original consideration, then no harm has befallen the plaintiff. On the other hand, if the recovery is allowed on the count for the original indebtedness, and against the assertion of the notes, the notes are thus effectually canceled and discharged, and it seems the requirements of the law in this behalf are sufficiently met and complied with. We find numerous cases in the books indicating the doctrine referred to. In the early case of *Whitmer v. Frye*, 10 Mo. 348, the declaration, besides containing a count on the instrument, contained as well a separate common money count on the original consideration. See, also, *Howard v. Shirley & Hawkins*, 75 Mo. App. 150, and *Martendale v. Follet*, 1 N. H. 95, where the point is expressly ruled. It appearing that the court peremptorily directed a verdict for the defendant at the plaintiff's request on the notes declared upon in the first and second counts of the petition, before a recovery was allowed on the original consideration sued for in the third count, this sufficiently operated to effectually cancel and discharge the obligation of the notes. The requirements of the law and the ends of justice were thereby fully met and satisfied. See authorities *supra*. In this connection it should be said here that, in the event of another trial, the case should proceed only on the third count of the petition, as by the judgment given at the plaintiff's instance in requesting a verdict for the defendant on the notes the right to further assert the notes as valid obligations has passed into the realm of *res adjudicata*. The plaintiff is bound by that judgment, as it invited it, and abides the result without appeal.

As to the action of the court in peremptorily directing a verdict for the plaintiff on the third count of the petition: This we believe to have been error for which the judgment should be reversed. There was evidence tending to prove that the defendant's agent having charge of its notes and collections altered the notes in suit after their execution, and without the knowledge or consent of the defendant maker thereof, so as to change their legal effect; that is to say, that he wrote certain words therein which operated to change the contract from one requiring interest payable at 6 per cent. at maturity to require such interest to be paid from date. Such constituted a material alteration of the notes. *Washington Savings Bank v. Ecky*, 51 Mo. 272; *McMurtrey v. Sparks*, 71 Mo. App. 128. Such an alteration as that referred to under the circumstances stated would operate to defeat the enforcement of the instrument altered in every jurisdiction with which we are familiar. However, in

this state, it seems that any alteration made in a negotiable promissory note by one claiming thereunder, without the knowledge and consent of the other, renders the same unenforceable. The doctrine in Missouri seems to be different from that which obtains generally throughout other jurisdictions. There was at one time a considerable conflict in this jurisdiction on the question of the effect of immaterial alterations. But this no longer obtains. The courts have in a number of cases expressed their approval of the rule that even an immaterial alteration of a writing made therein, without authority by the person claiming thereunder, avoids the instrument.

In *Haskell v. Champion*, 30 Mo. 136, Judge Scott, in delivering the opinion of the court, said: "The law, in dealing with the subject of the alteration of written instruments, looks further than to the materiality or immateriality of the alteration. Aware of the danger of countenancing the most trifling change, it has not permitted those intrusted with such instruments to alter them and afterwards defend their conduct by alleging the immateriality of the alteration." In that case the alteration consisted of the addition of the words "& Co." to the name of the maker of the note. In *Evans v. Foreman*, 60 Mo. 449, the doctrine that even an immaterial alteration in an instrument avoids it seems to be favored, but in that case it was not pretended that the alteration, which consisted of the addition of the words "after due 10%" was immaterial. In the case of *Western Building Ass'n v. Fitzmaurice*, 7 Mo. App. 283, this court pointedly held that an immaterial alteration of a bond did not have the effect of discharging the surety. *Lewis, P. J.*, in delivering the opinion reviews the two cases cited above, and arrives at the conclusion that the expressions of the judges therein favorable to the stricter rule are mere dicta, and refers to the case of *State v. Dean*, 40 Mo. 464, as a case where the question was directly before the Supreme Court. In this last-cited case the name of the claimant mentioned in an indemnifying bond had been altered from "Francis" to "Franklin," and it was held that the alteration was immaterial, and therefore did not avoid the instrument as to principal or surety. But in the still later case of *Springfield First National Bank v. Fricke*, 75 Mo. 178, 42 Am. Rep. 397, where the alteration was said to be palpably material, it was said that the remarks of Scott, J., quoted above could not, considering that it was contended that the added words were material, be regarded as mere obiter, since they were necessary to a proper determination of the case in all its aspects. While expressly holding that the alteration in that case was material, the rule that a written contract is avoided by an immaterial alteration is strongly favored. And there are a number of other cases which contain dicta favoring the rule that an im-

material alteration will have this effect, however innocently it may have been made. See *German Bank v. Dunn*, 62 Mo. 79; *Moore v. Hutchinson*, 69 Mo. 429; *Morrison v. Garth*, 78 Mo. 434; *Moore v. Macon Savings Bank*, 22 Mo. App. 694; *Allen v. Dornan*, 57 Mo. App. 288.

As a result of the reasoning in the above cases, after more or less conflict the doctrine is now finally settled in this state, in accordance with the view that any alteration, whether material or not, will operate to defeat the enforcement of the obligation of the instrument altered. *Hord v. Taubman*, 79 Mo. 101; *Bank v. Bosserman*, 52 Mo. App. 269. In those states where the distinction obtains between material and immaterial alterations to the extent that only material alterations will defeat the enforcement of the obligation, it is wholly immaterial as to what the motive was if the alteration is material. In the event a material alteration is made, the law denounces the act, and refuses its aid to enforce the instrument, even though no actual fraud was intended. However, the fraudulent intent becomes material even in those jurisdictions when it is sought to enforce the original indebtedness which affords the consideration for the subsequently altered instruments. 2 Am. & Eng. Enc. Law (2d Ed.) 186, 187. The rule which generally obtains is to the effect that, although a material alteration of a written instrument may avoid the same, it does not necessarily prevent a recovery by the person entitled thereto on the original consideration. 2 Am. & Eng. Enc. Law (2d Ed.) 200. This rule is sound and just, and we believe it should find appropriate application here; for, unless there was fraud in the alteration, the party ought not to lose his right to recover on the original consideration. In other words, an alteration of an instrument, innocently made, which in some instances will defeat a recovery on the instrument ought not, in and of itself, defeat a recovery on the original consideration. The law denounces the act, and refuses a recovery in every case to the end of preserving the sanctity of the instrument. However, where no fraudulent intent intervenes, we believe the original consideration ought not to become contaminated as a result of an innocent act so as to defeat its enforcement. It is true, in this and every other case where the alteration is material, it is *prima facie* fraudulent. *Whitmer v. Frye*, 10 Mo. 349; 2 Am. & Eng. Enc. Law (2d Ed.) 185, 186.

Notwithstanding the alleged alteration was *prima facie* fraudulent, the court peremptorily directed a verdict for the plaintiff on the third count, to the extent of the original indebtedness for which the notes were given, as though the original consideration were not inoculated or infected by the fraudulent act of the plaintiff in materially altering the notes. This was error under the established rule of law. It is true that plaintiff is en-

titled to recover on the third count, even though the instruments were altered, if there was no fraudulent purpose or intent in such alteration, but if the notes were designedly changed with a fraudulent purpose, then, as a result of such misconduct, the law not only forbids a recovery on the notes, but denies relief on the original consideration as well. The doctrine is thus succinctly stated in 2 Am. & Eng. Enc. Law (2d Ed.) 200: "The right to such recovery is dependent on whether the alteration was innocently made, without any intent to defraud, or was made for a fraudulent purpose. Where a written instrument is altered without any fraudulent intent, although the writing is avoided, the promisee may recover upon the original consideration." Again in the same treatise (volume 2, p. 202) the rule is thus stated: "Where the holder of a written security, or evidence of debt, has, with intent to defraud his debtor, altered the instrument in a material respect, no recovery can be had on the original consideration. Hence a fraudulent, as well as material, alteration of a promissory note by the payee will prevent him from recovering on either the note or the original consideration." *Trow v. Glen Cove Starch Co.*, 1 Daly (N. Y.) 280; *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *Green v. Sneed*, 101 Ala. 205, 18 South. 277, 46 Am. St. Rep. 119, citing 1 Am. & Eng. Enc. Law (1st Ed.) 520; *Black v. Bowman*, 15 Ill. App. 166; *Wallace v. Wallace*, 8 Ill. App. 69; *Ballard v. Franklin L. Ins. Co.*, 81 Ind. 239; *Warder, etc., Co. v. Willyard*, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250; *Smith v. Mace*, 44 N. H. 553; *Booth v. Powers*, 56 N. Y. 22; *Kennedy v. Crandell*, 3 Lans. (N. Y.) 1; *Blade v. Noland*, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126; *Clute v. Small*, 17 Wend. (N. Y.) 238.

The only authority we have been able to find in this state on the precise question here presented is *Whitmer v. Frye*, 10 Mo. 348. In that case it is said: "Where a party, by his own act, renders an instrument so that it cannot be the foundation of any legal remedy, he will not be permitted to prove the covenant or promise contained in it by any other evidence. This principle will prevent a resort to the common counts in order to sustain the plaintiff's right of recovery." 1 Greenleaf, 634. From a casual reading of this case it would seem to indicate that the principle forbids a recovery on the original consideration asserted in the common counts, even though the alteration were not fraudulently made, but upon a close study of the opinion we believe the court had in mind and asserted the doctrine which obtains in every other jurisdiction, so far as we have been able to ascertain, that a recovery may not be had on the original consideration where there was fraud in altering the instrument. It appears in the opinion referred to that the alteration was there declared to be *prima*

facie fraudulent, and no doubt the court had this fact in mind when stating the principle in the language above quoted.

By reference to the authorities cited by the Supreme Court for the doctrine there asserted, it is obvious that no variation from the principle which generally obtains was intended. 1 Greenleaf (Edition of 1842) 634, is the only authority cited. By reference to that authority it appears that Professor Greenleaf states the doctrine precisely as stated in the excerpt from 2 Am. & Eng. Enc. Law (2d Ed.) 200; that is to say, it is only where it appears the alteration was made with a fraudulent design no recovery can be had on the original consideration. Then, too, upon an examination of the authorities cited by Professor Greenleaf, to support the doctrine, the principle is fully illustrated and applied. See *Martendale v. Follet*, 1 N. H. 95, and *Newell v. Mayberry*, 3 Leigh (Va.) 250, 23 Am. Dec. 261. Instead of instructing a verdict for the plaintiff on the third count, the court should have submitted the question as to whether or not the notes were altered by the defendant after execution without the plaintiff's consent, and, if so, whether such alteration was designedly done with a fraudulent intent. In the event the jury finds the alteration to be fraudulent, then a recovery should be denied on the original consideration; otherwise it may be allowed on that count in the petition.

For the error referred to, the judgment will be reversed, and the cause remanded. It is so ordered. All concur.

### COOPER WAGON & BUGGY CO. v. CORNELL.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

#### CORPORATIONS (§ 672\*)—FOREIGN CORPORATIONS—COMPLIANCE WITH LAWS—PLEADING.

That a foreign corporation has not complied with the laws of the domestic state, incapacitating it to sue, is a matter of defense, and that it has need not be alleged by the corporation suing as plaintiff.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2646, 2647; Dec. Dig. § 672.\*]

Appeal from Circuit Court, Barton County; B. G. Thurman, Judge.

Action by the Cooper Wagon & Buggy Company against C. A. Cornell. From a judgment for defendant, entered on a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

See, also, 131 Mo. App. 344, 111 S. W. 521.

The petition in this case alleges that plaintiff is a corporation incorporated under the laws of the state of Iowa, but makes no statement as to whether or not it has complied with the laws of this state relating to foreign corporations. The petition then de-

clares upon two promissory notes alleged to have been executed by defendant. To this petition the defendant demurred upon the ground that it did not show that plaintiff had capacity to sue and that it did not state a cause of action. This demurrer was sustained, and plaintiff has appealed.

J. B. McGilvray, for appellant. Cole, Burnett & Moore, for respondent.

COX, J. As the cause of action stated was in proper form, the court must have sustained the demurrer to this petition upon the ground that it did not state that plaintiff had complied with the laws of this state authorizing foreign corporations to do business in this state. It is true that a foreign corporation who has not complied with the laws of this state cannot maintain an action in the courts of this state, but this is a matter of defense, and, to be available, must be pleaded by the defendant; hence it is not necessary for plaintiff to allege in this petition that it had complied with the provisions of our statutes in relation to foreign corporations, and a demurrer ought not to be sustained for that reason. *Scientific American Club v. Horchitz*, 128 Mo. App., loc. cit. 579, 106 S. W. 1117; *Parlin & Orendorf v. C. V. Boatman*, 84 Mo. App., loc. cit. 78; *American Insurance Co. v. Smith*, 73 Mo., loc. cit. 371, 39 Am. Rep. 517; *United Shoe Machinery Co. v. Ramlose*, 210 Mo. 631, 109 S. W. 567. The action of the court in sustaining this demurrer was error.

The judgment is therefore reversed, and the cause remanded. All concur.

### COCHRAN v. CITY OF SPRINGFIELD.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

#### 1. MUNICIPAL CORPORATIONS (§ 821\*)—TORTS—DEFECTS IN STREETS—ACTIONS FOR INJURIES—QUESTION FOR JURY.

In an action for injuries from defects in a city street, evidence held sufficient to take the question of plaintiff's contributory negligence to the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 821.\*]

#### 2. APPEAL AND ERROR (§ 1001\*)—REVIEW—SUFFICIENCY OF EVIDENCE.

Where the evidence is sufficient to warrant the submission of an issue to the jury, and it is submitted with appropriate instructions, the finding of the jury is conclusive.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 822\*)—TORTS—DEFECTS IN STREETS—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action for injuries from defects in a city street, where evidence of notice to the city clerk of the defect was admitted without objection, and the clerk called as a witness to deny that he received notice, it was proper to refuse to instruct that, as a city clerk had nothing to

do with the repair of the street, notice to him was not notice to the city.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 822.\*]

**4. APPEAL AND ERROR (§ 1067\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

In an action for injuries from a defective sidewalk, a refusal to charge that notice of the defect given to the city clerk, which was in evidence, was not notice to the city, the clerk having nothing to do with the repair of streets, was harmless error, where it was also in evidence that the defect had existed from one to four months; that the street commissioner had passed over the place several times prior to the accident, and a day or two before it, had ordered the defect repaired.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1067.\*]

**5. MUNICIPAL CORPORATIONS (§ 803\*)—TORTS—DEFECTS IN STREETS—NEGLIGENCE.**

A city is required to keep all of its walks in a reasonably safe condition, and a person using them need not exercise greater care while on a cross-walk than upon ordinary sidewalks.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1673, 1682; Dec. Dig. § 803.\*]

Appeal from Circuit Court, Greene County; A. B. Lovan, Special Judge.

Action by Martha L. Cochran against the City of Springfield. Judgment for plaintiff, and defendant appeals. Affirmed.

Action for damages alleged to have been received by plaintiff by reason of a fall upon a cross-walk across Lynn street on the west side of Boonville street in the city of Springfield. The evidence shows that this cross-walk was constructed out of planks some 12 feet long, with crosspieces under the ends, to which the planks had been nailed. That at the time of the accident these crosspieces had rotted. The boards were then lying upon the ground, and the ends, by the action of the sun, had cupped up. And that the plaintiff, in passing over this walk stepped near the end of one board, which gave down with her weight. She then tripped upon the end of the other board, fell, and was injured. Trial was had before a jury, resulting in a verdict for plaintiff for \$750, and defendant has appealed.

J. H. Mason and O. E. Gorman, for appellant. Hamlin & Seawell, for respondent.

COX, J. (after stating the facts as above). Appellant contends that this cause ought to be reversed for the reason that the evidence conclusively shows that the plaintiff was guilty of contributory negligence, and hence, cannot recover. It is also contended that the court committed error in refusing instructions asked by defendant.

Appellant asked an instruction in the nature of a demurrer to the testimony, upon the theory that plaintiff's negligence would preclude a recovery. We have carefully gone over the testimony in this case, and do not think this position of appellant can be sustained by the testimony. Plaintiff testified

that she knew that the boards on the walk cupped up at the ends, but did not know they were rotten underneath, and did not know that the boards would give down when stepped upon, that she and other persons had passed over this walk a number of times, and that on the occasion of the accident she was walking along with care, as she usually did. The evidence also shows that this cross-walk was located in a populous section of the city, and was traveled over a great deal by residents of the city. These facts, if true, would not show the plaintiff guilty of contributory negligence, but rather would show that she was using proper care at the time of the accident. The fact that the boards were cupped up at the ends would not necessarily convey information to the traveler that they were not supported underneath, and hence would give down if stepped upon. This point must be ruled against appellant. The question of plaintiff's contributory negligence was one for the jury under the evidence, and was submitted to them by appropriate instructions. The jury found in her favor, and that is binding upon us.

The next question is that of notice to the city of the defective condition of the walk, and opportunity to repair it before the injury. On this issue there was ample testimony that the walk had been out of repair a sufficient time that knowledge on the part of the city could be inferred therefrom. The only difficulty lies in the fact that a witness was permitted to testify that he had notified the city clerk of the condition of the walk some time before the injury. It is now contended by appellant that it was no part of the duty of the city clerk to look after the repair of the city walks, and hence notice to him was not notice to the city, and an instruction to that effect was asked by defendant and refused by the court. We agree with the appellant that the city clerk was not the proper official to notify of the condition of the walk, but we are confronted with the following facts: When this testimony was offered it was allowed to go in without objection, and defendant placed the city clerk on the stand to deny that such notice had been given him. After having treated the question of notice to the city clerk as an issuable fact during the taking of testimony, we are of the opinion that it was not error to refuse the instruction asked, which told the jury that notice to the city clerk was not notice to the city. This instruction, if given, would have had the same practical effect as one withdrawing the objectionable testimony from the jury, and a party who allows testimony to go in without objection should not be heard to complain if a court should afterward refuse to withdraw it. *Maxwell v. Railway*, 85 Mo. 95; *Flanagan Mill & Elevator Company v. Adams Grain Company*, 115 Mo. App. 542, 90 S. W. 1035. In this case, the evidence

showed that the walk had been out of repair for from one to four months, and the city street commissioner had passed by it several times before the injury, and had ordered it repaired one or two days before the injury, and the question of notice, as shown by this testimony, was submitted to the jury by correct instructions. Hence the verdict could hardly have been otherwise than as it was, even if this objectionable testimony had been excluded.

The defendant also asked an instruction to the effect that plaintiff was required to exercise greater care while passing over a cross-walk than upon an ordinary sidewalk. This instruction was refused, and, we think, rightly so. It is the duty of a city to keep all its walks in a reasonably safe condition for travel, and we know of no rule of law, nor can we see any reason that would justify the position, that a party is required to use greater care upon a cross-walk than upon any other walk.

The case was fairly tried, the evidence is ample to sustain the verdict, and the judgment will be affirmed. All concur.

### STATE v. REED.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

#### 1. WEAPONS (§ 17\*) — CARRYING CONCEALED WEAPONS—INSTRUCTIONS.

In a prosecution for carrying concealed weapons, the court properly instructed the jury that if they found from the evidence that accused, in a certain county in the state of Missouri, on or about a specified date, did unlawfully carry and conceal on or about his person a certain dangerous weapon, to wit, a revolving pistol, they would find him guilty and assess his punishment at a fine not less than \$50 or imprisonment in the county jail not less than five days, nor more than six months, or by both such fine and imprisonment.

[Ed. Note.—For other cases, see Weapons, Dec. Dig. § 17.\*]

#### 2. WEAPONS (§ 17\*)—CARRYING CONCEALED WEAPONS—INSTRUCTIONS.

As the statute provides it shall be a good defense to a prosecution for carrying concealed weapons if defendant shall show that he has been threatened with great bodily harm, or had good reason to carry the same in the necessary defense of his person, home, or property, an instruction which required the jury not only to find that he had been threatened with great bodily harm, but also that he carried the weapon in the necessary defense of his person or property, and omitted the words "good reason to carry the same," is erroneous.

[Ed. Note.—For other cases, see Weapons, Dec. Dig. § 17.\*]

#### 3. WEAPONS (§ 17\*)—CARRYING CONCEALED WEAPONS—BURDEN OF PROOF.

The defense that accused carried a concealed weapon because he had been threatened with great bodily harm, or had good reason to carry it in the necessary defense of his person or property, is affirmative, and the burden is on him to prove it.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 26; Dec. Dig. § 17.\*]

#### 4. WEAPONS (§ 13\*)—CARRYING CONCEALED WEAPONS—THREATS AS A DEFENSE.

In a prosecution for carrying a concealed weapon, defended on the ground that accused had been threatened with great bodily harm justifying him in carrying it in good faith and on account thereof, the mere fact that he can prove that some one has uttered words against him amounting to a threat does not entitle him to an acquittal, but he should offer testimony showing the threat was made under circumstances justifying him in carrying the weapon in good faith and on account thereof.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 17; Dec. Dig. § 13.\*]

Appeal from Circuit Court, Stone County; John T. Moore, Judge.

John Reed was convicted of carrying concealed weapons, and he appeals. Reversed.

G. W. Thornberry and Viles & Scott, for appellant. W. E. Renfro, for the State.

GRAY, J. On the 5th day of October, 1908, the prosecuting attorney of Stone county filed an information charging the defendant with the offense of carrying concealed weapons and in the presence of certain persons, exhibiting the same in a rude and threatening manner. On November 5th the defendant, having entered a plea of not guilty, was tried and convicted by a jury on a charge of carrying such weapon, and his punishment assessed at five days' imprisonment in the county jail.

There was uncontradicted testimony that the defendant carried concealed upon his person a revolver, prior to the filing of the information in this case. He defended on the ground that his life had been threatened, and that he had good reasons to carry the same in the necessary defense of his person and property. The prosecuting attorney testified in behalf of the state, and on cross-examination he admitted that the defendant had come to him and told him of the threats against his life that certain persons had made, and also testified that one Harmon had come to him and told him of the threats that he had heard certain persons make against the life of the defendant. He further testified that the defendant asked him permission to carry a revolver on account of these threats. The defendant testified in his own behalf of the threats he heard certain persons had made against his life, and that he carried his revolver on account thereof.

The court, in behalf of the state, gave the following instruction: "If you find and believe from the evidence that John Reed, in the county of Stone and state of Missouri, on or about the 29th day of July, 1908, did unlawfully carry concealed upon or about his person a certain dangerous and deadly weapon, to wit, a revolving pistol, you will find the defendant guilty and assess his punishment at a fine not less than \$50, or imprisonment in the county jail not less than five days, nor more than six months, or by

both such fine and imprisonment." This instruction meets with our approval.

The court also gave the following instruction: "The law permits a man to carry concealed weapons under certain conditions, if you find and believe from the evidence that the defendant had been threatened with great bodily harm, and he carried said weapon in the necessary defense of his person or property, then in that case you should acquit the defendant." This instruction is in two particulars wrong. The statute reads: "It shall be a good defense if a defendant shall show that he has been threatened with great bodily harm, or had good reason to carry the same in the necessary defense of his person, home or property." The instruction required the jury not only to find that he had been threatened with great bodily harm, but also that he carried the weapon in the necessary defense of his person or property. Again, the statute only required him to show that he had good reason to carry the same in the necessary defense of his property, but the instruction entirely omitted the words, "good reason to carry the same."

The defendant claims that the cause should simply be reversed without remanding. The defense that he carried the weapon because he had been threatened with great bodily harm, or that he had good reason to carry the same in the necessary defense of his person or property, is an affirmative defense, and the burden is upon him to prove the same. *State v. Levisay*, 30 Mo. App. 633; *State v. Hovis*, 135 Mo. App. 544, 116 S. W. 6.

It was claimed by him that the threats against his life were made to one Harmon, who told him and the prosecuting attorney thereof. Harmon was not placed upon the stand, and it may be, upon another trial, that Harmon's testimony may be produced, and it may be shown that the threats were not made. And we do not believe that the mere fact that a person can prove that some one has uttered words against him amounting to a threat entitles him to an acquittal of the charge herein made. The threat may have been made as a joke, and the defendant so understood it. The defendant should offer testimony showing that the threat was made under such circumstances that justified him in carrying the weapon in good faith and on account thereof. The judgment is therefore reversed and the cause remanded. All concur.

#### CURTIS et al. v. LAUGHLIN.

(St. Louis Court of Appeals. Missouri. Jan. 4, 1910.)

#### 1. TRUSTS (§ 61\*)—INTEREST OF TRUSTEE—SUIT TO TERMINATE TRUST.

Where a divorce decree provided that to secure payment of alimony to the wife the husband should convey property to a trustee, to be designated by the wife, and thereafter under such decree and designation and agreements be-

tween the parties, property was held by the trustee, he was not a trustee with an interest, and a court of equity had jurisdiction of a suit to terminate the trust.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 83; Dec. Dig. § 61.\*]

#### 2. APPEAL AND ERROR (§ 173\*)—REVIEW—THEORY OF CAUSE IN TRIAL COURT.

Where, in a suit by the beneficiary against the trustee to terminate the trust, defendant declared in the trial court that he was anxious to be relieved of the trust, and it appeared that the cause was an amicable one and instituted to relieve him of the funds, he cannot defend on appeal that there was no trust, or that, if there was one, the court had no jurisdiction, etc.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1079, 1080; Dec. Dig. § 173.\*]

#### 3. APPEAL AND ERROR (§ 179\*)—PRESENTATION OF QUESTIONS IN TRIAL COURT.

Where, in a suit by the beneficiary to terminate a trust, the trustee merely asked in the trial court sufficient compensation as a fee for his attorney, and he introduced no evidence to show what services the attorney had rendered, or what would be a reasonable fee, and saved no exceptions, except to the overruling of a motion for new trial, and made no objection to any ruling of the court, or to the court's taking the case under advisement without hearing evidence as to a fee, on appeal, fee fixed by the trial court would not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1137, 1139; Dec. Dig. § 179.\*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by Matilda Curtis and others against Henry D. Laughlin. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

John W. Wood, for appellant. P. P. Mason, for respondents.

GOODE, J. At the April term, 1883, of the circuit court of the city of St. Louis, a decree of divorce was entered in favor of plaintiff Matilda Curtis, then Matilda Weyl, against her then husband August Weyl, which decree, among other things, provided that to secure payment of alimony decreed in favor of Matilda Curtis (Weyl) said Augustus Weyl should convey to such trustee as she should denominate, improved real estate in the city of St. Louis, which would produce a monthly income of \$100 a month, to be held by said trustee during her natural lifetime and at her death to vest in Kate Lucile Gould and Mary Field Weyl, children of the two parties, share and share alike. The person selected to act as trustee was defendant, and he continued to act from the time he was chosen in 1883, to the date of the filing of the present suit. Augustus Weyl and Laughlin owned certain residences on Lucas avenue in the city of St. Louis, the title to which stood in Laughlin's name, and at the request of said Weyl, Laughlin conveyed to Mrs. Curtis, then Mrs. Weyl, a life estate in the premises covered by two of the houses, in order to comply

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

with the decree for alimony, and afterwards he collected the rents and profits of those premises, and paid the same to her to March 9, 1892. On December 6, 1892, Matilda Curtis, or Weyl, Augustus Weyl, and Laughlin had a settlement of the trust, and ascertained that to said date Laughlin had paid to Mrs. Curtis \$10,200, in monthly payments of \$100 each, had paid certain special and general taxes on the premises in which she had a life estate and other expenses as trustee, so that the disbursements by him to said December 6th, exclusive of the money paid directly to Mrs. Weyl, were \$5,757.74. The parties also found the total receipts of Laughlin as trustee to said date amounted to \$12,656.99, and his total disbursements \$15,957.74, leaving a balance in his favor of \$3,300.05, in which amount Augustus Weyl was indebted to him. On July 28, 1893, the same three parties, Mrs. Curtis, Augustus Weyl, and Laughlin, entered into a written agreement regarding the trust in which they recited the settlement had on December 6, 1892; found that since said date Laughlin had paid out \$700 and was chargeable with \$574 of receipts, leaving a balance in his favor which had accrued between December 6, 1892, and July 28, 1893, of \$126, which Augustus Weyl owed him; also that Matilda Curtis owed him \$150 for moneys advanced to her. The agreement recited a prior agreement of March 8, 1892, between Laughlin and Mrs. Curtis, pursuant to which she had quitclaimed to him all her right, title, and interest in certain buildings on Lucas avenue. This interest consisted of the life estate which Laughlin had conveyed to her at the request of Augustus Weyl in lots owned by Weyl, the title to which stood in Laughlin's name. The agreement of July 28, 1893, recited further that Mrs. Curtis consented to the sale of the premises in which she had quitclaimed a life estate to Laughlin, "with a view to reinvesting the proceeds in other property in which she was to be given a life estate in lieu of the life estate quitclaimed; and on the 19th day of said month (March, 1892) they did, as an added feature of said contract, agree that, in lieu of said interest in said property, said Laughlin should convey to her (Mrs. Curtis) a life estate in the premises immediately east of Nos. 2803, 2825, Lucas avenue, which contract was confirmed by said Augustus Weyl; the aggregate proceeds of the sale of said premises by said Laughlin being \$8,000." The agreement of July 28th further recited that since March 19, 1892, Mrs. Curtis had changed her mind and preferred not to have conveyed to her an interest in the premises last described, but in lieu thereof that Laughlin should reinvest the sum of \$8,000 in other property, in which he should convey to her a life estate in lieu of her former life estate; wherefore it was agreed the indebtedness of Matilda Curtis to Laughlin was canceled and obliterated; that Augustus Weyl should con-

vey to Laughlin the premises Nos. 2825, 2827, and 2829 Lucas avenue in St. Louis, and in consideration of the conveyance Laughlin should receipt in full for the moneys advanced to Matilda Curtis over and beyond the sums he had received as trustee from the property; which surplus had been ascertained to be \$3,426.75; that it should be the obligation of Laughlin to invest \$8,000, the proceeds of the premises sold by him; and which had been quitclaimed to him by Mrs. Curtis, in real estate to be approved by her, and when so invested it should be his obligation to convey to her a life estate in such premises, and until the investment was made, he should not be liable for any interest on the fund of \$8,000; but in lieu of interest should be chargeable from month to month with an amount equal to the monthly net income of Nos. 2827 and 2829 Lucas avenue; that on the death of Matilda Curtis, Laughlin should be entitled to charge the remainder over of her life estate, with whatever sums he might have advanced to her, either for her account or the account of Augustus Weyl, over and above any moneys he might be chargeable with under his contract, and after he had been thus reimbursed, he should convey by quitclaim deed, the remainder of the property, after the death of Mrs. Curtis, to her two children Mrs. Gould and Mrs. Mamie Townsend (née Weyl). These, in substance, were the provisions of the contract of July 28, 1893. Laughlin never invested the \$8,000 in real estate, because the other parties to the contract, Matilda Weyl and Augustus Weyl, preferred him to keep the money in his hands. This suit was instituted by Mrs. Curtis and the children and heirs of her daughter Mrs. Gould and her daughter Mrs. Humes to terminate the trust, and have Laughlin pay over the fund in his hands to the life tenant, Mrs. Curtis. It was alleged and proved the other parties in interest—that is to say, Mrs. Humes and her grandchildren, the children of her daughter Mrs. Gould, and Augustus Weyl, her former husband—had transferred to Mrs. Curtis all their right, title, interest, and claim in and to the fund. The petition alleges Laughlin had signified his willingness and anxiety to surrender his trust and pay over the life interest to any trustee that might be appointed, but feared he would not have the right to do so without the consent of a court of equity. The prayer of the petition was that the court decree the plaintiff Matilda Curtis was the owner in fee, by purchase, of the trust fund balance held by Laughlin, and was entitled to receive the same from said trustee and release him from further liability; that said trustee be directed to pay over to her any balance of said fund in his hands, and that he be discharged as trustee upon making said payment. The answer filed was a general denial. At the trial defendant Laughlin was put on the stand by plaintiffs, and identified the contract of July 28, 1893,

which contract was then introduced in evidence. The witness identified also an account which he had had audited. This work was done in Chicago where Laughlin resided and at his request, by an audit company, and showed his transactions in reference to the trust from December 19, 1899, to October 28, 1908, the day of the trial of this cause, and a balance in Laughlin's hands on said day of \$2,774.18. Laughlin testified that, for the purposes of this case, the account was sufficient to base an admission on by him that he had said balance in his hands. Other evidence was then introduced to prove the assignment by the remaindermen of their interests to Matilda Curtis, and plaintiffs rested. No evidence was introduced by defendant, but, instead, he addressed the court, stating that he contended the contract of July 28, 1893, did not create a trust in express terms, though he said he had administered a trust for Augustus Weyl for a quarter of a century; had treated the trust as one coupled with an interest and a discretion, and under his discretion the fund had dwindled from the sum it was originally to \$2,700, on account of advances made to Mrs. Curtis to provide for her. He said further he did not believe he had power to relieve himself of his contract obligation, but the court had power to accept his resignation and make a decree which would discharge him from further liability; that if the court had power to discharge him, he was willing to resign and turn over the fund to the court, and let the court do with it as it saw fit; that he insisted on the payment of a lawyer's fee, as he had discharged the trust without compensation, because he was entitled to none if it was a trust coupled with an interest, but if it was a naked trust, he was entitled to compensation; that plaintiffs' attorney had refused to concede compensation in the way of a lawyer's fee; that if defendant was forced to turn over the money he was "entitled to enough compensation to pay a lawyer to come in here and defend the case"; that if it was a trust coupled with an interest, and he was not entitled to compensation, the only thing which could be done was to turn the case out of court and leave the parties where they were, because he was not answerable for the fund until the death of Mrs. Curtis; that as a matter of fact he wanted to be rid of it, but in the right way, and, if force was applied, he would stand on his legal rights. After those remarks had been made, the court took the cause under advisement, and subsequently entered a decree finding plaintiffs were entitled to relief, decreed the trust theretofore existing with reference to the fund of \$8,000 in the hands of defendant should be terminated; that upon the accounting had and submitted in evidence, the court found defendant had in his hands \$2,774.18, which he was ordered to pay to Matilda Curtis, after deducting the costs of the present cause to

the date of the decree, and the sum of \$50 allowed defendant as an attorney's fee; that upon defendant's paying said judgment as rendered, he should be discharged from all further liability or accounting as such trustee. A motion for new trial was filed, which being overruled, an appeal was prosecuted to this court.

We have been forced into a long statement of this case in order to show the attitude of defendant in the court below in comparison with the points made on the appeal. It is perfectly evident the cause was an amicable one, and was instituted to enable defendant to relieve himself of the fund in his hands without being subsequently liable to any persons interested in it. In fact defendant said so in his oral argument before this court upon the appeal. He declared to the court below he was anxious to be relieved, but insisted on a fee for his attorney in the present case. On the appeal many points are made against the judgment which are inconsistent with the position taken below, and which we do not feel called upon to examine. It is contended there was no trust in respect of the \$8,000 fund; or if there was, it was a trust coupled with an interest; that in the former contingency a court of equity would have no jurisdiction, and in the latter would have no right to remove the trustee; further, that if it was a naked trust, with no interest in the trustee, defendant could not be removed on the mere request of the beneficiaries and without showing some cause; that in any event, if he was removed, he should have been allowed reasonable compensation for his services ranging over the twenty-five years he had administered the trust. This case must be treated here as it was presented to the court below, and nothing can be made of the argument, action, and testimony of defendant there, except that, whatever the nature of his obligation, he wished to be discharged from it, and only insisted on a fee for his attorney in the present case. He declared he asked no compensation for his services. Indeed, after making all the foregoing points against the judgment, and others, the brief says: "If the above promises be correct, it follows the court had no jurisdiction to terminate the trust other than with the consent of the trustee himself. But that consent was coupled with the contention that the court make him an allowance for services rendered (for a quarter of a century) sufficient to enable him to acquit himself of liability to his attorney." What defendant demanded in the court below was "enough compensation to pay a lawyer to come in here and defend the case"; and he declared he had discharged the trust without compensation. The real gist of the contention, if we rid it of all the accessories attached to it on the appeal, was that defendant should be allowed a fee for his attorney in this suit, and the real grievance here is the insufficiency of the fee al-

lowed. We will have to dispose of the case with reference to this grievance solely; and with the best will in the world to aid the learned counsel for defendant to obtain a reasonable fee in the present case, we can find no ground to interfere with the allowance below, whether it was reasonable or not. The defendant was trustee and had no interest in the trust fund, and a court of equity has jurisdiction of this cause. Not a particle of evidence was introduced to show what services the attorney had rendered, whether he had rendered any, or what would be a reasonable fee. Not only was no evidence introduced on the subject, but defendant did not offer any; indeed, offered no evidence at all, or even made a suggestion as to what would be a reasonable fee. Not an exception was saved in the case except the one to the overruling of the motion for a new trial, and no objection was made to any ruling of the court or to the court's taking the case under advisement without hearing evidence about a fee. It no doubt would have been correct practice for the court to hear evidence as to what services the attorney had rendered, and to take the opinion of experts about what would be a reasonable fee for the services. The real point for decision is whether it is reversible error, on the complaint of defendant, that the court did not do these things when it was not asked to do them. We are perfectly clear a negative answer must be given to this inquiry. There might be some ground for complaint by plaintiffs that the attorney was allowed a fee without showing what his services were, or their value; but that defendant can complain when he put forward no offer of evidence, or demand for any particular allowance, is an untenable position. Indeed, it seems doubtful if the plaintiffs could complain, unless they had offered evidence on the question. *Dorn v. Ross*, 177 Ill. 225, 52 N. E. 321.

But it is insisted the proper procedure was for the court to order defendant to account as trustee, and then let plaintiffs surcharge or falsify the account, if they desired; that if this had been done, defendant would have been afforded an opportunity to put in a claim for allowance of compensation to his attorney. Considering the suit was an amicable one and defendant was anxious to be relieved of his trust, and only asked for a fee for his attorney, and the further fact that he had prepared an account of his stewardship down to the date of the trial, admitted it showed a balance in his hands, and as the court accepted this showing made by defendant himself, we cannot put the court in the wrong for not ordering another and wholly unnecessary accounting, even if ordinarily the right practice is as defendant says. Clearly it was incumbent on defendant, if he insisted on a specific allowance to

his attorney, to prove what fee had been agreed on between him and his attorney, and that it would be a reasonable remuneration for what the latter had done in the case. Having omitted to take any steps to enlighten the court on the subject or ask any action except the allowance of a fee, he appears to have chosen to leave the amount to the court's discretion, unaided by testimony.

We are compelled to affirm the judgment. It is so ordered. All concur.

### MUDD v. MISSOURI, K. & T. RY. CO.

(St. Louis Court of Appeals. Missouri. Jan. 4, 1910.)

#### 1. RAILROADS (§ 244\*)—OPERATION OF TRAINS—NEGLIGENCE—"LOCOMOTIVE ENGINE."

An inspection car, operated by a steam engine placed in the center thereof, and designed to run from place to place for use by the officers of the railroad in making inspections, is a locomotive engine within a city ordinance limiting the speed of engines, and requiring the giving of signals, and within Rev. St. 1899, § 1102 (Ann. St. 1906, p. 933), requiring the giving of signals at crossings, though the term "locomotive engine" usually signifies a steam engine used to draw a car or train of cars along a railroad.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 755; Dec. Dig. § 244.\*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4222, 4223.]

#### 2. APPEAL AND ERROR (§ 882\*)—INVITED ERROR—SUBMISSION OF ISSUES.

A plaintiff, suing for damages caused by his team becoming frightened by an inspection car on a railroad track, who requests an instruction asking for a finding whether the railroad ran the car at the time and place in question, does not thereby invite a submission of the question whether the car is a locomotive within a municipal ordinance regulating the speed of locomotive engines; and he may complain of the error of the court in submitting the question to the jury, instead of deciding as a matter of law that the car is within the ordinance.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3604; Dec. Dig. § 882.\*]

#### 3. EVIDENCE (§ 586\*)—WEIGHT AND SUFFICIENCY—POSITIVE OR NEGATIVE EVIDENCE.

The testimony of a driver of a team, frightened by an inspection car operated on a railroad track, that the bell was not rung nor whistle sounded until the car was on the crossing, and that he did not see the car because he was behind a building, is positive, and is for the jury to weigh in comparison with contradictory testimony.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2432, 2434; Dec. Dig. § 586.\*]

Appeal from Circuit Court, Monroe County; David H. Eby, Judge.

Action by H. B. Mudd against the Missouri, Kansas & Texas Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

The first paragraph of the petition, on which alone plaintiff went to the jury, declared for damages resulting from alleged violations of two municipal regulations of the city of Monroe, one of which prohibited a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

person, corporation, or company owning or operating any railroad cars or locomotive engine from running the same within the corporate limits of the city at a greater speed than 10 miles an hour, and the other required every person, corporation, or company owning, operating, or controlling any locomotive engine or railroad cars in the city limits to attach a bell to every such engine running or being propelled through the city, and cause said bell to be continuously rung while passing through the city. A breach of either of the regulations was declared to be a misdemeanor and punishable by fine. The purpose of this action is to recover for injuries to a team, road wagon, and harness belonging to plaintiff, which injuries are ascribed to the team running away from fright at a locomotive engine operated on defendant's railway in disregard of the aforesaid regulations. The fright and runaway are alleged to have been caused by the team being driven too near an engine operated at a speed in excess of the ordinance rate, and without giving warning of its proximity by the ringing of a bell. The second paragraph of the petition counts on injuries charged to have been due to the engineer in charge of the engine carelessly and unnecessarily sounding, when near plaintiff's team, a steam whistle while the engine was passing over a crossing, and after it had passed over. A brother of plaintiff was driving the team northward on Main street in said city, and toward defendant's track. This street was 1,000 feet west of defendant's depot, where two freight trains were at the time, and cars were being switched. A quarter of a mile west of Main street was another street running north and south and parallel to it, called Kennedy street, and one-half mile west was the city boundary, along which ran a thoroughfare known as Border street. Defendant's railway extends east and west through the town, intersecting the north and south streets we have mentioned at right angles. The railroad runs on a dump considerably higher than Main street is south of the track, and probably a locomotive on the track would have been visible to the driver of plaintiff's team as far west as Border street, at most points; but a cabin standing about 60 feet south of the track, with some trees behind it, more or less cut off a view of the tracks to the westward, though the extent of the obstruction is in dispute in the testimony. The driver said his attention was attracted by the two freight trains at the station to the east as he drove northward, and he stopped at a culvert 150 feet south of the railroad crossing until he saw he could go ahead without danger to the team from these trains. He testified he neither saw nor heard an approaching train from the west, and knew nothing of the proximity of the engine which frightened the horses, until it was nearly on him at the crossing, though he looked and listened for a train from the west; that his view was

obstructed by the cabin and trees mentioned; that when within 20 or 30 feet of the crossing an engine ran over the crossing from the west, whistling and ringing the bell, and thereby frightening the horses, which ran back, pitched him over, and ran away. There was testimony that prior to this incident the horses were gentle, not afraid of trains, and never had run away, but afterwards could not be driven near an engine, and on two occasions took fright and ran away; that before the first fright they were reasonably worth \$700, and afterwards were only worth \$300; that plaintiff paid small sums for repairs to the wagon and harness. The engine or vehicle at which the horses took fright is denominated an "inspection car," and was used by the officials of the company to ride over the road when inspecting culverts and bridges. It was 12 feet high, 20 feet long; had an upright boiler in the middle with a canopy top; had a carrying capacity of six passengers; was operated by steam; had a bell and whistle like those on an ordinary locomotive. Its average running speed was 12 to 18 miles an hour, and its weight 16,000 pounds when equipped with coal and water. One witness described it as resembling a large automobile car, with two seats in front facing forward, and immediately back of those seats the engine and boiler. The engineer rode in the rear of the car, and was both engineer and fireman. The water was carried in a tank on top or at the sides of the boiler, the coal in a bin in the rear of the car, and the boiler was about 4 feet in diameter. The roof was 7 feet from the floor, and the floor six inches from the track. The wheels were on the sides of the vehicle, with the rear seat extending over them. It carried a headlight a little smaller than a regular engine, and a bell about as large as an engine bell. Both briefs concede there was contradictory testimony on the main issues of fact, but perhaps do not entirely agree what those issues were.

The first instruction was as follows: "(1) The court instructs the jury that, if you find and believe from the evidence in the cause that on or about the 2d day of May, 1904, one William Mudd was at the instance and direction of the plaintiff driving a team of horses and road wagon belonging to plaintiff, north on Main street in Monroe City, Mo., toward the point where said street is crossed by defendant's railroad tracks; that said team was a reasonably safe one to drive in the proximity of railroad tracks being operated by railroad companies, and that as he approached the defendant's said track he stopped at a reasonably safe distance therefrom, considering the character and disposition of said team, and looked and listened for the approach of engines or trains, and saw and heard none; that after so stopping, looking, and listening, he, while in the exercise of ordinary care and caution, if such is the fact, continued to approach said track, and

when within a few feet thereof defendant's agents, servants and employes ran a locomotive engine over its track at said point, and in front of said team, thereby frightening it, on account of its close proximity to the said railroad track, and causing it to run away, by which it was injured, and plaintiff's road wagon and harness were broken and injured; and if you further find that the close proximity of said team to defendant's track at said time and place (if so the jury find) was caused or brought about by defendant's running its said locomotive engine (if it did run one) at a greater rate of speed than 10 miles an hour within the corporate limits of Monroe City, or by the failure, if any, of the defendant company to cause to be continuously rung a bell attached to such engine while it was passing through the corporate limits of said city—then your verdict must be for the plaintiff on the first count of the petition." A verdict was returned for defendant, and plaintiff appealed, assigning for errors that the court compelled him to elect between two counts of his petition, and gave two misleading instructions at defendant's request.

Ragland & McAllister and James P. Boyd, for appellant. Geo. P. B. Jackson, for respondent.

GOODE, J. (after stating the facts as above). The court advised the jury, if they found from the evidence the vehicle called by the witnesses an "inspection car" was not a locomotive engine, then it was not subject to the statutory regulation requiring a whistle to be sounded or a bell rung when approaching a road or street crossing in the city of Monroe. The petition counted on a municipal regulation, and not on the statute, as the instruction implied. However, we have no doubt the car or engine which frightened the team was a locomotive engine within the meaning both of the city ordinance and of the statute, requiring a bell to be rung or a whistle sounded by a locomotive when within 80 rods of the intersection of a railroad and a road or street. Rev. St. 1899, § 1102 (Ann. St. 1906, p. 938). The statute and the ordinance were alike intended for the protection of persons and property crossing or about to cross railway tracks. *Evans v. Railroad*, 62 Mo. 49. Every reason for exacting a warning by whistle or bell, when an ordinary locomotive draws near a crossing, applied to the inspection car, which was as dangerous to travelers as a common locomotive. Besides it was, by strict definition, a locomotive engine, being a vehicle moved by a steam engine and designed to run over the track of a railroad from place to place. *Jarvis v. Hitch* (Ind. App.) 65 N. E. 608; *Fallon v. Railroad*, 171 Mass. 249, 50 N. E. 536; *Stranahan v. Railroad*, 84 N. Y. 308; *Webster's Int. Dict.* (1910 Ed.) p. 1267, word "Locomotive." It is true the name "locomotive engine" is usually understood to signify a steam engine used to draw a car or train of

cars along a railroad track (*Murphy v. Wilson*, 52 L. J. Q. B. 534), and the engine in question drew neither, but, being in the middle of the car, propelled it along the track. This unlikeness to an ordinary locomotive should not be held to constitute it an engine of another sort than a locomotive engine within the meaning of the municipal ordinance or the statute. Plainly such an engine could do the very mischief at a crossing which both the statute and the ordinance were enacted to prevent. In *Henson v. Railroad*, 110 Mo. App. 595, 85 S. W. 597, this court held a vehicle called a "speeder," which was like a hand car, and operated by a small gasoline engine underneath the floor of the car, was not a locomotive engine within the intention of section 1106, Rev. St. 1899, saying the word "locomotive" was used in the section in connection with the word "train," and meant a steam locomotive in common use by railroad companies for the purpose of moving trains and cars. That contrivance was altogether different from the vehicle in question, which, as said, was a car intended to carry passengers, and to be propelled over railroad tracks by a steam engine. Moreover, it was equipped with a bell and steam whistle of the ordinary size, to be rung or blown as those on common locomotives are. We hold the court committed error prejudicial to plaintiff in leaving it to the jury to say whether or not the inspection car was a locomotive engine.

Counsel for defendant insists plaintiff ought not to be heard to complain of this instruction, because, in the first instruction granted at his request, he made an issue for the jury as to the character of the engine in the last paragraph. Defendant's counsel reasons that, by the words "if it did run one" (i. e. a locomotive engine), etc., plaintiff left it to the jury to say whether the inspection car was a locomotive engine, because, as the fact that defendant ran the inspection car in the city of Monroe at the time alleged was not disputed, plaintiff's counsel could only have meant by the words "if it did run one" to submit the question of whether the inspection car, which was conceded to have been run, was a locomotive engine in the sense of the statute and the ordinance. If it could fairly be said plaintiff invited the submission of this question, his complaint would not be heeded; but we cannot say this is the effect of the first instruction. We grant it was unnecessary to ask the jury to say whether the inspection car was operated over defendant's track in Monroe City at the time of the accident. But the sense of the words "if it did run one," when read in connection with the remainder of the instruction, would be strained by holding they made the character of the car a question for the jury. Those words were meant to reiterate the hypothetical fact the jury were required to find in the preceding portion of the instruction, namely, that "defendant's agents, servants, and em-

ployés ran a locomotive engine over its track at said point," etc., meaning not to ask a finding of whether the inspection car was a locomotive engine, but to ask what was, perhaps, an unnecessary finding, of whether defendant ran it at the time and place in question.

It is contended all the substantial evidence on the issue tended to prove the bell on the inspection car was rung continuously as it approached the crossing, but this position is untenable. The driver of the team testified unequivocally the bell was not rung or the whistle sounded until the car was on the crossing, and he did not see the car because he was behind the shanty, and it gave him no warning. That testimony was of a positive instead of a negative character, and was for the jury to weigh in comparison with contradictory testimony.

Plaintiff voluntarily, and not by compulsion of the court, elected to stand on the first count of the petition.

We say nothing about whether the supposed alteration in the disposition of the horses in consequence of their fright is a proper element of damages, as the point had not been briefed, and there were items of damages consisting of money paid for repairs to the wagon and harness.

The judgment is reversed, and the cause remanded. All concur.

#### STATE v. FAUGHT et al.

(Springfield Court of Appeals. Missouri. Jan. 10, 1910.)

#### 1. CRIMINAL LAW (§ 1159\*)—REVIEW—QUESTIONS OF FACT.

A conviction will not be reversed on the ground that the verdict is against the evidence, unless there is a total absence of evidence, or it fails so completely to support the verdict that the necessary inference is that the jury acted from prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. § 1159.\*]

#### 2. WITNESSES (§ 246\*)—RELUCTANCE TO TESTIFY—EXAMINATION BY JUDGE.

Where a witness shows a reluctance to tell the whole truth, the court may ask such questions as are calculated to assist the jury to ascertain the truth.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 852, 856; Dec. Dig. § 246; \* Criminal Law, Cent. Dig. § 1525.]

#### 3. CRIMINAL LAW (§ 721\*)—TRIAL—REMARKS OF COUNSEL.

Remarks of the prosecuting attorney that all the jury has to consider in this case "is the evidence on the part of the state, because there is no evidence on the part of defendants," cannot be construed as referring to the failure of defendants to testify in their own behalf.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.\*]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

Lon Faught, William Beverage and Nelse

Fisher were convicted of gambling, and appeal. Affirmed.

G. Purd Hays, for appellants. Fred W. Barrett, for the State.

NIXON, P. J. At the August term, 1908, of the circuit court of Christian county, Mo., the following information was filed by the prosecuting attorney (formal parts omitted): "Fred W. Barrett, prosecuting attorney within and for the county of Christian, in the state of Missouri, informs the court under his official oath, and upon his best information and belief, that Lon Faught, William Beverage, and Nelse Fisher, on or about the 15th day of August, 1908, in the said county of Christian, in the state of Missouri, did then and there unlawfully, willfully, play at a game of chance, to wit, a game of poker, with each other for money, to wit, 10 cent ante, and for property and gain, which said game of poker was a game of cards, and played therewith, adapted to, and used in playing games of chance for money, property, and gain, and which said game of poker was a game of chance, and which chance was a material element, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state." It will be seen that this was a charge for playing a game of poker by appellants with a 10 cent ante for property and gain with cards, charged to be a gambling device. On November 18, 1908, upon a trial before a jury, the defendants filed a demurrer to the evidence introduced by the state, which was by the court overruled and exceptions saved. The jury assessed the punishment of the defendants at \$25 each. They have perfected an appeal to this court.

Three points are made by appellants why this appellate court should reverse the judgment and grant a new trial: (1) Because the trial court erred in overruling their demurrer to the evidence; (2) Because of improper remarks of the trial judge; (3) Because of improper remarks by the prosecuting attorney in his closing argument.

1. The objection that there was not sufficient evidence is wholly without foundation. There was sufficient evidence from which the jury were authorized to find the guilt of the defendants, and their finding is well supported by the testimony in the case. The witness for the state testified that the defendants were playing cards for money, and the facts and circumstances detailed in evidence amply warranted the finding that they were guilty of playing a game of poker as charged in the information. It has been repeatedly held in this state that an appellate court will not weigh the evidence if there is substantial testimony from which the jury might reasonably have found their verdict; and an appellate court will not reverse a judgment in a criminal case, on the ground that the verdict is

against the evidence, unless there is a total absence of evidence or it falls so completely to support the verdict that the necessary inference is that the jury must have acted from prejudice and partiality. *State v. Musick*, 71 Mo. 401; *State v. Preston*, 77 Mo. 294; *State v. Glahn*, 97 Mo. 679, 11 S. W. 260. The demurrer to the evidence was properly overruled.

2. It is charged as a ground for reversal that the court in examining the witness George Lawson remarked to the witness, in the presence of the jury, that he thought the witness knew what the game of poker was. To this the reply is sufficient that no remark of this kind appears in the record brought here for our consideration. Another error alleged to have been committed by the trial judge was that he tried to make the witness George Lawson say that the witness knew the game played with cards was poker, when the witness said he did not know. This contention is equally flimsy. The conduct of the trial judge throughout the trial, and in the examination of this witness and in asking the questions, was such as the law allows. The court had a right, when the witness displayed a reluctance to tell the whole truth, in furtherance of justice and in a proper manner, to ask questions calculated to assist the jury in ascertaining the truth. His conduct in this respect is not subject to the criticism of appellants' counsel, but was in the line of his duty, and receives the approval and commendation of this court.

3. The remarks of the prosecuting attorney in his closing argument, to which objection was made, and on which a reversal of the judgment is demanded, were as follows: "Gentlemen of the jury, all you have to consider in this case is the evidence on the part of the state, because there is no evidence on the part of the defendants." This statement by the prosecuting attorney is not subject to any adverse criticism. It is impossible to construe the above remarks of the prosecutor as referring to the fact that the defendants did not testify. There are no substantial grounds of objection to this statement.

The record in this case discloses that the Code of Criminal Procedure has been faithfully followed, that the defendants had a fair trial by a jury of their countrymen, and that upon a full investigation of the crime with which they were properly charged they have been duly and properly convicted. The judgment is accordingly affirmed. All concur.

#### HILBURN v. PHOENIX INS. CO.

(Springfield Court of Appeals. Missouri. Jan. 10, 1910.)

#### 1. INSURANCE (§ 634\*)—ACTIONS—PETITION—ALLEGATIONS—SELF-SERVING ALLEGATIONS.

Where in a suit on a fire policy the petition alleged that insured submitted to an examination under oath by defendant's agents, and offer-

ed to arbitrate the amount of loss, both of which the policy required, the allegations were not self-serving for the purpose of prejudicing defendant, but were proper to show compliance with the conditions of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1593, 1608; Dec. Dig. § 634.\*]

#### 2. PLEADING (§ 426\*)—DEFECTS—PETITION—WAIVER—WAIVER BY ANSWERING.

By answering the petition after its motion to strike out parts thereof as self-serving allegations had been overruled, and going to trial, defendant waived any error in denying the motion to strike.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1426; Dec. Dig. § 426.\*]

#### 3. APPEAL AND ERROR (§ 1042\*)—HARMLESS ERROR—REFUSAL TO STRIKE—CURE BY VERDICT.

Any error in refusing to strike as self-serving allegations averments of the petition in an action on a fire policy that plaintiff submitted to an examination under oath by the company, and had offered to arbitrate the amount of the loss, would not be material after verdict for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4114; Dec. Dig. § 1042.\*]

#### 4. EVIDENCE (§ 213\*)—ADMISSION—OFFER OF COMPROMISE.

In order to make an offer of compromise inadmissible, it must have been expressly made without prejudice or during negotiations for a settlement to bring about which the offer was made, and, where there was no proof of negotiations for compromise, plaintiff could testify that defendant made her an offer of settlement, but they did not settle; such testimony being merely the recital of a fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 745; Dec. Dig. § 213.\*]

#### 5. TRIAL (§ 96\*)—OBJECTIONS—ADMISSION OF EVIDENCE—EVIDENCE ADMISSIBLE IN PART.

A motion to strike the whole of an answer of a witness which was in part admissible was properly denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 248; Dec. Dig. § 96.\*]

#### 6. INSURANCE (§ 665\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a fire policy, evidence held not to show that insured kept gasoline within the building containing the insured property, in violation of a warranty against doing so.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1714; Dec. Dig. § 665.\*]

#### 7. INSURANCE (§ 645\*)—ACTIONS—FAILURE TO PROVE LOSS—PLEADING—NECESSITY.

Failure to make proof of loss according to the terms of a fire policy should have been specially pleaded in the answer to be available as a defense to an action on the policy, so that an allegation in the petition of compliance therewith was not put in issue by a general denial.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1639; Dec. Dig. § 645.\*]

#### 8. INSURANCE (§ 559\*)—FIRE INSURANCE—PROOF OF LOSS—WAIVER.

An insurance company waived proof of loss as required by the policy by denying liability thereon and refusing to pay.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1391; Dec. Dig. § 559.\*]

#### 9. TRIAL (§ 143\*)—JURY QUESTION—WEIGHT OF EVIDENCE.

The jury are the sole judges of the weight and the credibility of conflicting testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.\*]

**10. APPEAL AND ERROR (§ 1002\*)—FINDINGS—CONCLUSIVENESS—CONFLICTING EVIDENCE.**

The findings of the jury on conflicting evidence are conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3935; Dec. Dig. § 1002.\*]

**11. INSURANCE (§ 378\*)—ESTOPPEL—KNOWLEDGE OF AGENTS—OWNERSHIP OF BUILDING.**

Notice to an agent acquired during his agency of facts relating to a transaction within its scope is notice to the principal, and, where an agent issued an insurance policy with the understanding that insured did not own the building in which the property was, but merely rented it, the company cannot claim that insured made any misrepresentation or warranty as to its ownership by accepting the policy which stipulated that insured was the sole owner of the building.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 969; Dec. Dig. § 378.\*]

**12. INSURANCE (§ 500\*)—FIRE INSURANCE—VALUED POLICY.**

Where the value of personal property insured is fixed by the policy, its value cannot thereafter be questioned, Rev. St. 1890, § 7969,<sup>1</sup> prohibiting defendant in suits on fire insurance policies from denying that the property was worth when the policy was issued the full amount insured therein, and making the amount insured the measure of damages in case of total loss, less depreciation in value since the policy was issued.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1275, 1276; Dec. Dig. § 500.\*]

**13. INSURANCE (§ 669\*)—FIRE INSURANCE—ACTIONS—INSTRUCTIONS—VALUE OF PROPERTY—NECESSITY OF STATING.**

In an action on a valued fire policy, it was not necessary to state the value of the insured goods in the instructions, where there was no evidence that it had depreciated since the policy was issued.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1780; Dec. Dig. § 669.\*]

Appeal from Circuit Court, Barton County; J. B. McGilvray, Special Judge.

Action by Susan Hilburn against the Phoenix Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 129 Mo. App. 670, 108 S. W. 576.

Susan Hilburn, the respondent, on the 14th day of June, 1906, was living at Mindemines, Barton county, Mo. One H. C. Chancellor was the local agent of the Phoenix Insurance Company at that place. The appellant through its said agent issued the respondent a policy of insurance against fire for a period of three years from that date, whereby, in consideration of the payment by respondent of a premium and policy fee, respondent was insured against fire in an amount not to exceed \$500 upon household and other goods while contained in a building specified in the policy in the town of Mindemines.

The petition alleges the taking out of the policy, the payment of the premium, the amount of the policy—\$500—a description of the property insured, and that the building in which the articles insured were kept was a shingle roof frame building; that the articles insured were of the value of \$800, and

that the insurance was to run for a period of three years from June, 1906; further, that at the time the policy was issued she was the sole and unconditional owner of the property insured; that in August, 1906, after the policy was issued and while it was in force, the property was totally destroyed by fire, and that respondent's damage and loss amounted to the sum of \$800, the value of the goods on that date; that within 6 days after the loss by fire she gave the defendant notice in writing of the loss, and within 30 days from the date of the fire rendered a particular and specific account of such loss, which was signed and sworn to by her, stating that there was no other insurance on the property and gave the written portion of such policy thereon; that she also gave thereon the actual cash value of such property, specifically stated, and her interest therein, and that it was not incumbered, and when and how the fire originated. Respondent further alleged that, at the request of appellant, she submitted to an examination under oath by agents and representatives of the appellant, and subscribed to such examination when reduced to writing, and that she exhibited to the agents of appellant all that remained of the property that was covered by the policy for their examination; that she and the appellant failed to agree on the value of and damage to the property covered by said policy, and that she afterwards offered to submit the amount of loss or damage to competent arbitrators, as provided for in said policy, but that appellant refused; that she had performed fully all the conditions of the policy in due time after the fire. She asked judgment for \$500, with interest at 6 per cent. from the 19th day of September, 1906. A general demurrer was filed to this petition, which was by the court overruled.

Subsequently the defendant below filed a motion to strike out parts of the petition on the ground that the matter sought to be stricken out was irrelevant and frivolous, and was merely an effort to create prejudice against the defendant. The language sought to be stricken out is as follows: "Plaintiff further states that she has submitted at the request of the defendant to examination under oath by agents and representatives appointed by the defendant, and subscribed to such examination when reduced to writing and exhibited to the agents and representatives of the defendant all that remained of the property that was covered by this policy, damaged or not damaged, for their examination for this defendant. Plaintiff further states that she and the defendant failed to agree upon the amount of sound value and of damage to the property covered by said policy, and she afterwards offered to submit the amount of loss or damage to competent and impartial arbitrators, as provided for in said policy, but that the defendant has failed,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup> Ann. St. 1906, p. 3789.

refused, and neglected to submit to such arbitration the amount of loss or damage to the property covered by said policy." This motion was by the court overruled.

The answer filed by the appellant pleaded seven separate defenses—after setting up a general denial—which are briefly stated as follows:

(1) That whereas the policy covered the goods "while situate on and confined to, premises actually owned and occupied by assured," she never owned the premises, but was tenant only.

(2) That plaintiff was not the sole owner of the goods; her husband having an interest therein.

(3) That in her oral application she had misrepresented as to previous fires, stating that she had had none, whereas she really had had three.

(4) That in her application she had grossly misrepresented as to the value of the goods she wanted insured.

(5) That the day before the fire she had purchased and taken home a gallon of gasoline, in violation of the policy; she having no gasoline stove.

(6) That in her alleged proof of loss she grossly misrepresented the value of the property destroyed, to mislead defendant.

(7) That in her previous examination under oath she falsely testified that among the articles lost were a steel range of the value of \$65 and one organ of the value of \$125, and many other articles, whereas they had been lost in her previous fire at Springfield.

Defendant tendered back the premium, with interest, and asked that the policy be canceled and for naught held. The plaintiff below filed a replication, being a specific denial of the new matter set up in the answer. Plaintiff obtained judgment in the trial court for \$570 and costs, and the defendant perfected its appeal to this court in due form. After a former trial this case was appealed to the Kansas City Court of Appeals and decided at the October term, 1907, the decision appearing in 129 Mo. App., at page 670, 108 S. W. 576. The judgment for plaintiff was there reversed, and the cause remanded for a new trial. The plaintiff amended her petition to meet the requirements of the decision of the Kansas City Court of Appeals. The answer of the defendant tenders practically the same issues as the answer in the former case, with the addition of the first special defense that the goods were in a building not owned by the plaintiff and in which she was only a tenant.

Fyke & Snider, Cole, Burnett & Moore, for appellant. H. W. Timmonds, for respondent.

NIXON, P. J. (after stating the facts as above). 1. The trial court did not commit an error in overruling appellant's motion to strike out part of the amended petition. The part sought to be stricken out alleged that plaintiff had submitted to an examination under oath by the agents and rep-

resentatives of the defendant, and that she had offered to arbitrate the amount of the loss or damage. The policy issued to plaintiff required her to submit to such examination and it also provided for an arbitration. These allegations were not self-serving acts, but the fulfillment of the conditions required by the contract and the appellant should not be allowed to object to the fulfillment of the conditions imposed upon respondent by the policy. The appellant waived this error, if any there was, by answering to the petition after its motion to strike out parts of the petition had been overruled, and going to trial. *Walser v. Wear*, 141 Mo., loc. cit. 462, 42 S. W., loc. cit. 932; *Scovill v. Glasner*, 79 Mo. 449; *Davis v. Boyce*, 73 Mo. App., loc. cit. 565; *School District v. Wallace*, 75 Mo. App., loc. cit. 322. Besides this, the answer of the appellant subsequently sets up the same matter as to the examination under oath. At any rate, it would not be material error after trial and judgment.

2. The appellant claims that, when parties in good faith make offers of compromise but fail to effect a settlement, the evidence of such offers of compromise was incompetent, and that the trial court committed material error in allowing evidence in this case as to an offer of compromise. The objectionable evidence was given at the trial by plaintiff as to a conversation with Mr. Thomas, who was admitted by the appellant company to be their state agent. The following appears in the record: "Q. Did he [meaning Thomas] come to see you with reference to that fire? A. Yes, sir. Q. Did you and Mr. Thomas come to any settlement about the fire? A. No, sir. He made me an offer, but we didn't settle." The rule as to the receipt of evidence of this character is well stated in the case of *Moore v. Gaus*, 113 Mo. 98, 20 S. W. 975, as follows: "The rule excluding offers of compromise is stated by Greenleaf, § 192, 'that confidential overtures of pacification and any other offers or propositions between litigating parties, expressly stated to be without prejudice, are excluded on grounds of public policy.' 'But, in order to exclude distinct admissions of facts, it must either appear that they were expressly made without prejudice, or, at least, that they were made under the faith of a pending treaty and into which the party might have been led by the confidence of a compromise taking place.' The rule has always been recognized and enforced in the practice of our courts, but is not applicable to this case. There was no negotiation for a compromise." So in this case there is no proof of an offer to buy peace or any negotiation for peace. The answer of the witness was merely the recital of a particular fact and admissible. The action of the trial court in overruling the motion to strike out the answer of the witness might well be sustained on another ground. The motion was, in effect, to strike out the whole answer, not a part of it. If

a part of the answer was admissible and a part inadmissible, the motion should have been directed to the incompetent part only, and not against both the competent and the incompetent evidence. The statement of the witness that there had been no settlement was competent. We do not think there was any error committed by the court in overruling this motion.

3. Appellant contends that there is a warranty in the policy of insurance held by respondent that no gasoline will be kept within the building, and that this warranty was violated. Unfortunately for this objection there is no evidence in the record to sustain it. The respondent's testimony on this point is undisputed. It was as follows: "Q. The day before the fire you had bought a gallon of gasoline at Usher's store, had you not? A. Yes, sir. Q. Took it home with you? A. I didn't take it. Q. Who took it? A. My little boy. Q. You sent for it? A. Yes, sir. Q. He brought it, did he? A. He brought it in a little wagon. You know what I told you, Mr. Moore, the other time, what that was for—to kill bedbugs." On redirect examination she testified: "Q. Mrs. Hilburn, you were asked about whether you bought some gasoline on your examination—cross-examination—Saturday evening. Did you take that gasoline in the house? A. No, sir; I never had it in the house. Q. Where did you put it? A. I had it in the old tool box where there were some tools kept out behind the house, quite a little distance from the house. Q. What did you get that gasoline for? A. I got it as a preventative from bedbugs."

4. The policy required that proof of loss be submitted within 30 days. The petition alleged compliance, and there was a general denial in the answer. It is claimed by appellant that the general denial put in issue the question whether the proof of loss required by the terms of the policy had been made within that time. This seems to be a misapprehension of the law governing cases of this kind. The failure to make the proof of loss according to the terms of the policy was a matter of defense, and should have been pleaded in the answer specially to have made it issuable. *Burgess v. Insurance Co.*, 114 Mo. App., loc. cit. 188, 89 S. W., loc. cit. 574; *Hester v. Fidelity & Casualty Co.*, 69 Mo. App., loc. cit. 194; *Stephens v. Fire Association of Philadelphia* (decided at this term of court) 123 S. W. 63. The appellant waived the necessary proof of loss by denying all liability and refusing to pay. It pleaded seven special defenses, but did not specify the failure to furnish proof of loss as one of them. The general denial did not put in issue the allegation in the petition that respondent had complied with the condition requiring proof of loss to be furnished in a certain manner or within a certain tie.

But, aside from the matter of pleading, the evidence tended to show that respondent did, in fact, furnish a proof of loss in strict com-

pliance with the terms of the policy; that she had put it in an envelope with the company's address on it, stamped it, and deposited it in the post office. The envelope used was furnished by the agent and was one which had been furnished by the company to him. Besides, the proof of loss was in appellant's possession thereafter. Not only is all this true, but the answer filed in the case concedes that a proof of loss was furnished, but objects to it and complains that it exaggerated the value of the goods destroyed. There is no substance in this objection, and it borders on the frivolous.

5. Another contention of appellant is that the respondent was not the absolute owner of the property insured. There was evidence tending to prove that respondent bought the property with money inherited from her father and mother and from money paid to her by an insurance company in an amicable settlement for a previous loss. There was sufficient evidence to take this question to the consideration of the jury, and the question is not now open for review in an appellate court.

6. It is contended that the demurrer to the evidence should have been sustained because of the respondent's false and contradictory swearing. There was evidence to show that she made contradictory statements, and the question as to the sufficiency of the evidence was for the determination of the jury. They were the sole judges of the weight and credibility of the testimony, and it was their province to give the evidence such weight as they thought it was entitled to. As we have said, the appellate court cannot reconsider it. The finding of the jury as to the facts is conclusive on us.

7. Objection is also made to the instructions given by the court. We have examined the instructions carefully, and find that no just criticism can be made against them. They fairly and fully submitted the issues to the determination of the jury.

8. It is contended that the court erroneously instructed the jury that, although the property insured was in a house of which the plaintiff was not the actual owner, such facts would not constitute a defense if the agents of the defendant at the time of taking the risk knew such facts. The evidence in regard to the extent of the knowledge of the company's agent appears from the following testimony of H. C. Chancellor, the agent who issued the policy: "Q. This defendant company has applications for insurance in some cases, have they not? A. Certain class of risks they have. Q. These applications when they are made are signed by the insured or parties applying for the insurance? A. Yes, sir. Q. Did Mrs. Hilburn sign any application for this insurance? A. No, sir. \* \* \* Q. You knew whose house she was living in? A. Well, I knew who it was supposed to belong to, but I didn't know anything positive about it. Q. Who? A. Williams. Q. You

knew it wasn't her house, did you? A. No; I didn't know it wasn't hers. Q. That was your understanding when you were there—that it belonged to Williams? A. Yes, sir; I understood it was Williams' house. I didn't understand it was her house. Q. When you wrote the daily report and wrote the policy, you didn't understand that Mrs. Hilburn owned the house? A. No, sir. Q. You wrote it with the understanding she was renting it? A. Yes, sir." Knowledge of or notice to an agent acquired by the agent during his agency and referring to a transaction within the scope of his agency is knowledge and notice to his principal. *Hayward v. Insurance Co.*, 52 Mo. 181, 14 Am. Rep. 400; *Hedrick v. Beeler*, 110 Mo. 91, 19 S. W. 492; *Thompson v. Traders' Insurance Co.*, 169 Mo., loc. cit. 25, 68 S. W., loc. cit. 892; *Kenneth Inv. Co. v. Bank*, 96 Mo. App., loc. cit. 142, 70 S. W., loc. cit. 178; *Columbia Planing Mill Co. v. Insurance Co.*, 59 Mo. App. 204; *Hamilton v. Insurance Co.*, 94 Mo., loc. cit. 368, 7 S. W. 267; *Mers v. Insurance Co.*, 68 Mo. 127; *Riley v. Insurance Co.*, 117 Mo. App. 229, 92 S. W. 1147.

Appellant's instruction No. 1 was therefore properly modified by the court. As it was originally written, it left out and ignored a fact that the evidence tended to establish—that at the time of issuing the policy the agent of the company knew that respondent was a tenant, renting the house in which she lived, and that the household goods were not in a house belonging to her, and the policy was issued and the money received with the understanding that the property insured was in a house in which the plaintiff was a tenant and not owner. The appellant, with that knowledge and that understanding, cannot now be heard to say that the respondent made any misrepresentation or warranty by accepting the policy and that she represented that she owned the premises which she occupied. This point must also be ruled in respondent's favor.

9. The further contention is made that there is no proof of the value of the property insured. Where an insurance company takes a risk on property in this state and the value is fixed by the policy and the risk is taken on a given amount, that sum cannot be questioned in any proceeding. Section 7969, Rev. St. 1899;<sup>1</sup> *Gibson v. Insurance Co.*, 82 Mo. App. 515; *Gragg v. Insurance Co.*, 132 Mo. App. 405, 111 S. W. 1184; *Crossan v. Insurance Co.*, 133 Mo. App. 537, 113 S. W. 704. Section 7969 of the Revised Statutes of 1899 applies to personal property, and a policy covering personal property is a valued policy. *Gibson v. Insurance Co.*, supra; *Howerton v. Insurance Co.*, 105 Mo. App., loc. cit. 562, 80 S. W., loc. cit. 29; *Burge v. Insurance Co.*, 106 Mo. App. 244, 80 S. W. 342; *Hanna v. Insurance Co.*, 109 Mo. App., loc. cit. 158,

82 S. W., loc. cit. 1116; *Gragg v. Insurance Co.*, supra; *Crossan v. Insurance Co.*, supra. There was no evidence of any depreciation of the value of the goods insured so that it was not necessary to incorporate the value of the goods in respondent's instructions.

There are some other errors assigned by appellant, but upon careful examination we find them to be without merit.

We find no error committed by the trial court materially affecting the merits. The judgment is therefore affirmed. All concur.

#### STATE v. RAMSAUER.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

#### 1. INDICTMENT AND INFORMATION (§ 140\*)— MOTION TO QUASH—EFFECT OF ALLEGATIONS.

Allegations in a motion to quash an indictment which sets up facts dehors the record do not prove themselves, and the pleader should offer proof of them, otherwise they will not be noticed.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 475; Dec. Dig. § 140.\*]

#### 2. INDICTMENT AND INFORMATION (§ 110\*)— FOLLOWING LANGUAGE OF STATUTE.

An indictment charging the commission of a statutory offense is generally good if it follows the language of the statute.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 289-294; Dec. Dig. § 110.\*]

#### 3. INDICTMENT AND INFORMATION (§ 110\*)— FOLLOWING LANGUAGE OF STATUTE—EXCEPTIONS.

If a statute in creating an offense uses generic terms in defining it, and does not individuate the offense with such particularity as to notify defendant of what he is to defend against, then an indictment in the language of the statute is not sufficient.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 293; Dec. Dig. § 110.\*]

#### 4. INDICTMENT AND INFORMATION (§ 110\*)— FOLLOWING LANGUAGE OF STATUTE—PLACE OF OFFENSE—SUFFICIENCY—GAMING.

Under Rev. St. 1899, § 2196 (Ann. St. 1906, p. 1405), making it an offense to permit a gaming table, bank, or device to be set up or used for the purpose of gaming, in a house, building, shed, booth, shelter, lot, or other premises to him belonging, or by him occupied, or of which he has at the time the possession or control, an indictment charging defendant with having permitted a certain gaming device to be set up and used for the purpose of gaming in a certain building and room by him occupied and under control of him, the said, etc., the indictment follows the language of the statute and is sufficient as to the place of offense.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 294; Dec. Dig. § 110.\* *Gaming*, Cent. Dig. §§ 226, 250.]

#### 5. CRIMINAL LAW (§ 825\*)—INSTRUCTIONS— REQUEST.

Where the court charges as to all questions which are apparently in issue, if defendant wishes instructions on other questions which he thinks are involved he should request them.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2005; Dec. Dig. § 825.\*]

<sup>1</sup>For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

<sup>1</sup>Ann. St. 1906, p. 3789.

Appeal from Circuit Court, Jasper County; Henry L. Bright, Judge.

Bart Ramsauer was convicted of a misdemeanor, and he appeals. Affirmed.

M. R. Lively, for appellant. Byron H. Coon, for the State.

COX, J. Defendant was indicted, tried, and convicted of a misdemeanor under section 2196, Rev. St. 1899 (Ann. St. 1906, p. 1405), and has appealed to this court. The indictment, omitting the caption, is as follows: "The grand jurors for the state of Missouri, impaneled, and sworn and charged to inquire within and for the body of the county of Jasper and state aforesaid, upon their oath, present and charge that Bart Ramsauer, late of the county aforesaid, did on the ——— day of October, 1907, at the county of Jasper and state of Missouri, then and there unlawfully permit a certain table and gaming device called a pack of cards, designed and used for the purpose of playing games of chance for money and property, to be set up and used for the purpose of gaming in a certain building and room there situate and by him occupied and under control of him, the said Bart Ramsauer, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state."

Defendant filed a motion to quash, alleging the following grounds: "The indictment fails to charge defendant with any offense against the laws of the state of Missouri, and for the reason the indictment fails to charge the place where defendant did permit a table and gaming device to be set up and used, and fails to charge the time. The indictment is illegal and void for the reason the grand jury that returned the same was without authority in law, not having been lawfully and legally impaneled and drawn, and for the reason that the grand jury permitted to be present during the examination of the witnesses upon which said indictment is based, permitted Miss Anna Campbell to be present, a stenographer, during such examination, and to take such evidence in shorthand and take such notes away from such grand jury, she not being a member of such grand jury, said indictment being void." This motion was overruled, which action of the court is now assigned as error. Error is also assigned in the giving of the instructions, and it is also claimed that the court failed to instruct the jury upon all questions of law necessary for their information in arriving at a verdict as provided by statute, session acts 1901, page 140. Error is also assigned in the admission and exclusion of testimony.

Upon a careful examination of this record we conclude there was no error in admitting or rejecting testimony, nor was there any error committed by the court in not instructing the jury upon all questions of law. The jury were instructed in a way that defined the offense, placing the burden of proof upon the

state to prove the defendant guilty beyond a reasonable doubt, and, also, that circumstantial evidence must be so strong that no other reasonable conclusion could be drawn therefrom than that of the guilt of the defendant, the credibility of the witnesses, the competency of defendant as a witness in his own behalf; all of which instructions were unobjectionable, and we see nothing in the record which would require an instruction upon any other question. Furthermore, if defendant desired instructions upon any other questions that he thought might have been involved in the case, he should have prepared instructions covering those questions and presented them to the court. The statute referred to requiring the court to instruct the jury upon all questions of law arising in the case which are necessary for their information in giving their verdict can only be taken advantage of in a motion for a new trial in felony cases. The statute so provides.

We come now to the consideration of the sufficiency of the indictment. In the motion to quash defendant raised two questions. One is that the indictment is void for the reason that the grand jury was unlawfully and illegally impaneled and drawn, and that they permitted Miss Anna Campbell, a stenographer, to be present in the grand jury room during the examination of witnesses and to take their testimony in shorthand and take such shorthand notes away from the grand jury room with her. As to this objection it is sufficient to say that allegations in a motion to quash which set up facts dehors the record do not prove themselves, and if the pleader desires the court to consider those questions, he should offer proof of those allegations. In the absence of such proof they are not before the court for consideration. No evidence was offered in support of this motion, and hence that objection must fall. *State v. Faulkner*, 185 Mo., loc. cit. 695, 84 S. W. 967.

It is also urged that the indictment is bad for the reason that it fails to charge the place where defendant permitted a table and gaming device to be set up and used. The statute, section 2196, Rev. St. 1899, under which this indictment is drawn, reads as follows: "Every person who shall permit a gaming table, bank or device to be set up or used for the purpose of gaming in any house, building, shed, booth, shelter, lot or other premises to him belonging or by him occupied, or of which he hath at the time the possession or control, shall, on conviction."

It will be observed that this indictment charges this defendant with having permitted a certain gaming device to be set up and used for the purpose of gaming in a certain building and room by him occupied, and under control of him, the said Bart Ramsauer. This is a literal following of the statute. The general rule is that an indictment charging the commission of an offense that is created by statute is good if it follows the

language of the statute. The exception is that if the statute creating the offense uses generic terms in defining the offense and does not individuate the offense with such particularity as to notify the defendant of what he is to defend against, then an indictment in the language of the statute is not sufficient. Thus an indictment drawn under a statute making it a misdemeanor to shoot at a mark or at random along or across a public highway is not good if drawn in the language of the statute. *State v. Hogan*, 81 Mo. 340. But the particular highway upon which the shooting occurred must be named. Likewise, an indictment for operating a ferry without license must name the stream upon which the ferry is charged to have been operated; but it has never been held to be necessary to designate the particular place upon the highway or stream named at which the forbidden act was done. The designation of the particular highway or stream was notice to the defendant to be ready to meet proof of the forbidden act at any place thereon within the county. So in indictments charging burglary or arson by breaking into or setting fire to a building, the property of another, it has never been thought necessary to describe the location of the building with any greater accuracy than to charge it as being located in the county, and give the name of the owner, and this would notify the defendant to be ready to meet proof as to a burglarizing or burning any building in the county belonging to the person named even though that person might be the owner of a great number of buildings.

In this case the statute is leveled against the permitting to be set up of gaming devices, and is individuated by being confined to a building to defendant belonging or by him occupied, or of which he hath at the time the possession or control. Certainly the designation of a building in the language of the statute, as one occupied and controlled by the defendant, is as particular and notifies defendant of what proof he may be expected to meet as definitely as does the indictment held to be good in either of the cases above mentioned. Furthermore, indictments in the same form as this one, under the same or a similar statute, have been held good in a number of cases in this state. See, *State v. Scaggs*, 33 Mo. 92; *State v. Fulton*, 19 Mo. 680; *State v. Mohr*, 55 Mo. App. 325; *State v. Dyson*, 39 Mo. App. 297. In the case of the *State v. Hunt*, 190 Mo. 353, 88 S. W. 719, defendant was charged with burning a house of public worship under section 1875, Rev. St. 1899 (Ann. St. 1906, p. 1289). The only designation in the information of the location of the building was that it was a Baptist Church located in the county. This was held to be sufficient. Surely the designation of a building, as one occupied and controlled by defendant and situate in the county, is as

definite as to location as to describe it as a Baptist Church situate in the county, as was done in the *Hunt Case*.

We are referred by appellant's counsel to the case of *State v. McLaughlin*, 160 Mo. 33, 60 S. W. 1075, as an authority to sustain his position in this case. The indictment in that case was under a different section, to wit, section 2201, Rev. St. 1899 (Ann. St. 1906, p. 1407), which employs different words in defining the offense from the statute now under consideration and the learned judge who wrote the opinion in that case makes no reference to the cases above cited wherein indictments under this and similar sections of the statutes have been held good and we, therefore, conclude that he did not intend to overrule them nor did he intend to lay down any rules of construction that would be applicable to any section of the statutes other than the one then under consideration. We shall hold this indictment good. If it be claimed that we are in conflict with the decision of the Supreme Court in the *McLaughlin Case* our answer is that we are in harmony with that court in the *Hunt Case*, supra, and as this is the later case it is our duty to follow it. There is no pretense in this case that he did not as a matter of fact know what the charge against him was. The record shows that he did make his defense. The jury has found against him as the result of a trial which, as shown by the record, was fair and impartial, and we do not feel called upon to apply a strained construction to the indictment upon which the defendant was convicted in order that he may now escape the penalty of the law. Nor is there anything in the record to indicate that any right guaranteed to him by the Constitution or statutes of this state has been denied him. The evidence abundantly shows the guilt of the defendant.

The judgment is affirmed. All concur.

#### BRADLEY v. MODERN WOODMEN OF AMERICA.

(St. Louis Court of Appeals. Missouri. Jan. 4, 1910.)

##### 1. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

In an action on a death benefit certificate, an instruction which assumes the death of insured is erroneous where there is no evidence of his actual death, and the presumption of death from seven years' absence is not mentioned.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 423; Dec. Dig. § 191.\*]

##### 2. DEATH (§ 2\*)—EVIDENCE OF DEATH—PRESUMPTIONS FROM ABSENCE.

The statutory presumption of death from seven years' absence from the state (Rev. St. 1899, § 3144 [Ann. St. 1906, p. 1786]) does not arise until it is conclusively shown that decedent left the state.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 2; Dec. Dig. § 2.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

### 3. DEATH (§ 2\*)—EVIDENCE—PRESUMPTIONS—DILIGENCE.

Evidence that the wife and relatives of insured sought information from all possible sources after his disappearance, that he was advertised for in his lodge journal, which circulated in more than 1,000 lodges throughout the country, and the secretary of his lodge wrote more than 50 letters of inquiry, shows the exercise of sufficient diligence to discover what had become of him, to give rise to the presumption of death after the lapse of seven years.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 2; Dec. Dig. § 2.\*]

### 4. DEATH (§ 2\*)—EVIDENCE—PRESUMPTIONS FROM ABSENCE—REBUTTING EVIDENCE.

The presumption of death from seven years' absence of a person may be rebutted by evidence of his unhappy domestic relations.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 1; Dec. Dig. § 2.\*]

### 5. DEATH (§ 2\*)—EVIDENCE—PRESUMPTIONS FROM ABSENCE—TIME OF DEATH.

There is no presumption that a person who has been absent for more than seven years died at any particular date, or before the lapse of his life insurance for nonpayment of assessments two or three months after his disappearance.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 3; Dec. Dig. § 2.\*]

### 6. DEATH (§ 2\*)—EVIDENCE—PRESUMPTIONS FROM ABSENCE.

The presumption of death from seven years' absence does not depend on the absentee's exposure to some peril which would be apt to shorten his life.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 2; Dec. Dig. § 2.\*]

### 7. DEATH (§ 2\*)—PRESUMPTION FROM ABSENCE—TIME OF DEATH—BURDEN OF PROOF.

Where it appears in an action on a life policy that insured disappeared and has not been heard from for more than seven years, the burden is on plaintiff to show that death occurred before the lapse of the policy for nonpayment of assessments.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 3; Dec. Dig. § 2.\*]

### 8. DEATH (§ 2\*)—PRESUMPTION FROM ABSENCE—TIME OF DEATH.

In determining whether death occurred before the lapse of the policy, the jury should take into consideration insured's condition in life, character, habits, and domestic relations.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 3; Dec. Dig. § 2.\*]

### 9. EVIDENCE (§ 269\*)—PRESUMPTION FROM ABSENCE—DECLARATIONS OF ABSENTEE.

In such action, evidence of declarations by insured when he left home, of the purpose of his trip, and when he would return, was admissible as bearing on the presumption of death from absence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1063-1067; Dec. Dig. § 269.\*]

### 10. EVIDENCE (§ 322\*)—HEARSAY—RUMORS.

Evidence of rumors in the vicinity of the home of a person who has not been heard from for more than seven years, as to the cause of his leaving home, is hearsay, and inadmissible, as bearing on the presumption of death from absence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1207; Dec. Dig. § 322.\*]

### 11. INSURANCE (§ 815\*)—ACTION ON BENEFIT CERTIFICATE—PETITION.

Where the action on a benefit certificate is based on the presumption of insured's death from his absence for more than seven years, the

petition should allege that death occurred before date of the lapse of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1996; Dec. Dig. § 815.\*]

Appeal from Circuit Court, Knox County; Chas. D. Stewart, Judge.

Action by Martha E. Bradley against the Modern Woodmen of America. Plaintiff had judgment, and defendant appeals. Reversed.

Benj. D. Smith, Chas. K. Hart, and F. H. McCullough, for appellant. E. R. McKee and F. E. Robinson, for respondent.

GOODE, J. Plaintiff, who is the wife of a man named Bradley, was formerly the wife of Abe Mills. She sues on a benefit certificate issued June 27, 1899, to Mills by defendant, and agreeing to pay plaintiff the sum of \$1,000 on the death of said Mills, if he then was in good standing with all dues and assessments discharged on his certificate. Mills' family consisted of his wife and several children, with whom he lived on and prior to October 27, 1900, near Locust Hill, in Knox county, Mo. He was a farmer, but did odd work for other persons at times. His circumstances were rather poor, not much property having been accumulated by him, and on the date last mentioned he owned a wagon and team and \$50 or \$60 in money; also some other property of trivial value. On that day he left his home with his wagon and team, professedly to go to Canton, in Lewis county, to purchase a load of fish which he intended to bring home and sell to persons in the vicinity. From the time he left home, or at least after he reached Canton, no tidings of him were ever received, as far as the evidence shows. After waiting until more than seven years after his disappearance, and on April 29, 1908, the petition in the present action was filed by plaintiff to recover the indemnity the benefit certificate promised she should be paid at her former husband's death in good standing. The petition speaks in several places of the death of Mills, but nowhere formally avers he had died or was dead, or the time and place of his death. It alleges the facts regarding his departure from home to go to Canton for the purpose stated, says no trace or information pertaining to him had since been obtained by his family, acquaintances or friends, though diligent search and inquiry had been made through all sources and by all possible means; says further his family relations and surroundings were pleasant at the time he left home; he had no business complications to oppress or annoy him, and there was no cause why he should not return home or give information as to his whereabouts if he continued to live. In its answer defendant admitted issuing the benefit certificate, and denied the other averments of the petition; then alleged Mills

had become suspended on February 2, 1901, and all rights under the certificate forfeited, for the nonpayment of a benefit assessment duly levied and payable by him on or before the 1st day of February, 1901; alleged Mills had abandoned his membership in the society on February 1, 1901, and never, after that date, had attempted to be reinstated in the manner required by the by-laws; that during the seven years since his disappearance, nearly 70 assessments had been levied against the members of the society, and he had not paid, tendered, or in any manner attempted to pay any of said assessments, or any dues which would have accrued on his certificate during the seven years, had he continued a member. In the replication plaintiff admitted the assessment for the year 1901 had been levied by the society and had not been paid by Mills or any one for him, but denied the benefit certificate had become null or forfeited on account of nonpayment of the assessment or for any other reason, inasmuch as the insured had died prior to the date—February 1, 1901—when the assessment fell due. Many of the facts of the case were stipulated by the parties. It was agreed defendant is a fraternal beneficial society organized under the laws of Illinois and now authorized to do business in the state of Missouri; what the by-laws of the company are, and that one of them forfeited, ipso facto, and rendered null and void a certificate if an assessment was not paid when due; that on December, 1900, assessment No. 1, for the year 1901, for the benefit fund of defendant, was levied on all members, including Abe Mills; regular notice of the levy was furnished to him (i. e., constructive notice as provided in the by-laws), and neither said Mills, nor any one for him, had paid said assessment; that more than 70 assessments had been levied by the board of directors against beneficial members of the order during the seven years succeeding October 27, 1901, and neither Mills, nor any one for him, had tendered or offered to pay any of said assessments after January, 1901, or to pay any dues as required by the by-laws of defendant; that Mills had paid all dues and assessments levied against him subsequent to the date of the benefit certificate and until January 1, 1901. Plaintiff, in March, 1908, furnished proof to defendant of his death.

Defendant objected to evidence being received on the ground the petition stated no case, did not say or state facts to advise defendant of the date of Mills' death, and did not show whether plaintiff was proceeding under the statute or under the common-law presumption in respect of his death. Oral testimony was introduced tending to prove the disappearance of Mills as stated; that he was then 36 years old, had been married 18 years, and had 3 young children; he was a farmer, but owned no farm, had not thriv-

ed financially, was working at what he could get to do, and had been accustomed to go to Canton to get fish to peddle; had no trouble with his family, kissed his wife good-bye on leaving her, and said he would be back in three or four days if it did not rain, and, if it did, would be gone longer; that Mills' character was good; he supported his family and was affectionate with them, had made several other trips from home, one to Oklahoma and one to Dakota, but during those absences his family had heard from him regularly; had talked of enlisting in the army; took his money—\$60 or \$70—with him, and the wagon and team, and horse feed. After he left, his wife paid his dues in defendant order for November and December. There is some testimony that in the spring prior to his disappearance, Mills had had a disagreement with his wife, and had declared he could not stand it at home any longer; that his wife did not keep the house clean and make the children mind, but would allow them to tear things up and do as they pleased; that these statements were made in his wife's presence, and she said she "wished he had a woman." His relatives had endeavored to find him or learn of his whereabouts and had failed. One witness testified to a hearsay statement that a man of Mills' description about the time he disappeared, tried to buy, but could not get any fish in Canton, and "crossed the river." Defendant endeavored to prove by witnesses that rumors were afloat in the community where Mills lived about the cause of his disappearance, and excepted to the exclusion of the testimony. Defendant also makes a point about the efforts put forth to find or trace him having been inadequate to base a presumption of death on. His wife and many of his relatives had sought information from all probable sources, and he had been advertised for in a journal of the defendant society which circulated throughout the United States in more than 1,000 lodges; the secretary of his lodge had written 50 or more letters of inquiry about him, and various neighbors and relatives testified they had never seen or heard of him after his disappearance.

The court refused to direct a verdict for defendant, and ruled as follows on the other requests: At the request of plaintiff the court gave the following instructions: "(1) The court instructs the jury that all questions are eliminated from this case, except the question of date of his death, of the said Abe Mills. If, therefore, you find from the greater weight of the evidence that it is more probable that he died prior to February, 1901, than after that date, then you will find for the plaintiff. (2) The court instructs the jury that the plaintiff in this case is not required to establish beyond a reasonable doubt the death of the insured prior to February, 1901. She is required merely to furnish proof which tended to show that fact,

and to make it appear to the jury more probable or credible than otherwise. If, therefore, you find and believe from the evidence in the cause that plaintiff has done this, your verdict should be for the plaintiff." Defendant objected to the action of the court in giving said instructions, the objection was overruled and exceptions saved.

At the request of defendant the court instructed as follows: "The court instructs the jury that, although the sudden disappearance and unexplained absence from his home in this state without being heard from of said Abe Mills for the period of seven years raised the legal presumption of his death, yet that presumption cannot arise until the end of the seven-year period from the date of his departure, and that there is also a presumption of continued life in this case which the plaintiff must overcome with the presumption of death of said Mills, prior to February 2, 1901, and unless the plaintiff has shown by the greater weight of the evidence facts and circumstances surrounding the disappearance of said Abe Mills, which make it more probable that he died prior to said February 2, 1901, than that he did not die prior to said last-named date, then your verdict must be for defendant. The court instructs the jury that, before you can find for the plaintiff in this case, you must find and believe, from the greater weight of the evidence, that said Mills died before the second day of February, 1901, and, unless you so find, your verdict must be for the defendant."

The following instruction was requested by defendant and refused, and defendant excepted: "The court instructs the jury that the mere fact that said Abe Mills disappeared from his home before February 2, 1901, and has been absent and unheard from for more than seven years, if you find from the greater weight of the evidence that he did so disappear and has not been heard from, is not sufficient to warrant you in finding that said Abe Mills died before said date, February 2, 1901, and unless you believe, from the greater weight of the evidence, that said Abe Mills encountered some danger or peril, before said last-named date, which would make it more probable that said Abe Mills died before said date than that he did not so die, then your verdict must be for the defendant."

The jury returned a verdict for plaintiff for \$1,000, and defendant appealed.

We have this statute: "If any person who shall have resided in this state go from and do not return to this state for seven successive years, he shall be presumed to be dead in any case wherein his death shall come in question, unless proof be made that he was alive within that time." Rev. St. 1890, § 3144 (Ann. St. 1906, p. 1786).

1. The main errors assigned in this case are upon the rulings on requests for instruc-

tions, and in support of those rulings plaintiff's counsel invoke both the presumption enacted in the statute quoted in the statement (Rev. St. 1890, § 3144) and also the common-law presumption of the death of a person who has not been heard of after an absence of seven years from his home. Nothing was said in the instructions for plaintiff about presumptions, and whatever clouding of the true issue in the minds of the jury may have resulted from mentioning them was due to defendant's requests; which referred to the presumption of death after seven years of unexplained absence. But the court must have relied on a presumption, in instructing upon plaintiff's request, that all questions were eliminated from the case except as to the date of the death of the insured, for it was not conclusively proved he was dead. This essential fact was taken for granted in the instructions, and erroneously, even if either the statutory or the common-law presumption was relevant to the case. The statutory presumption could only arise if it was conceded, or conclusively shown, Mills had left the state, and had not returned for seven successive years. It was denied he had left it, and the evidence on the point was a vague and inconclusive hearsay statement, which, if competent because not objected to, would be for the triers of the fact to weigh in passing on the issue of whether he had left the state; but no issue of the kind was submitted, and, if the statutory presumption of death was relied on, it was applied arbitrarily and without finding the essential fact on which its relevancy depended.

The first instruction for plaintiff misapplied, if it counted on, the common-law presumption for a reason to be stated infra. We reject the argument based on the supposed inadequacy of the search made for the insured, against plaintiff's right to rely on the presumption, if it had been applicable. Testimony was given tending to prove enough diligence was exercised to discover his whereabouts or what had become of him to satisfy the law, even if we accept as sound recent decisions which hold the presumption only arises when due efforts have been made to learn the fate of a missing person. *Hitz v. Ahlgren*, 170 Ill. 60, 48 N. E. 1068; *Modern Woodmen v. Graber*, 128 Ill. App. 585; *Modern Woodmen v. Gerdorn*, 72 Kan. 391, 82 Pac. 1100, 2 L. R. A. (N. S.) 809; *Prudential Assur. Co. v. Edmunds*, 2 App. Cas. 487; *Bailey v. Bailey*, 36 Mich. 185; *Stinchfield v. Emerson*, 52 Me. 465, 83 Am. Dec. 524. The insured left home avowedly for a temporary purpose and with the intention to return. There was much evidence to show he had no motive which, according to human nature and experience, would induce him to leave permanently, and he had not returned or been heard of after the lapse of seven years by his family, other kin, or acquaint-

ances. Those circumstances bring the presumption of death into operation when it is relevant; at least, if reasonable but fruitless inquiry for the absentee has been made by those interested in him. *Biegler v. Supreme Lodge*, 57 Mo. App. 419, 423; *Lawson, Presumptive Evidence*, rule 44, p. 264; rules 5, 6, 29 Alb. Law J. pp. 426, 464.

But there was testimony in the record which ought to have been submitted to the jury as tending to dispel the presumption. A witness said the insured declared five or six months before his departure that he had endured his family troubles as long as he could; and, if this testimony was true, it conduced to prove the thought was in his mind to abandon home and family; and later his discontent may have induced him to leave home ostensibly for a temporary purpose, but with a secret resolve not to return. According to the cases most favorable to plaintiff's cause, the court, with this evidence before the jury, should not have eliminated from their inquiry all issues except the date of the death of the insured, but should have left to them the task of finding whether or not he was dead. That is to say, the presumption of death indulged because of his long absence from home and lack of information about him was rebuttable, and this evidence of unhappy domestic relations tended to rebut it; for such infelicity occasionally induces a husband and father to desert his family. *Dickens v. Miller*, 12 Mo. App. 408; *Carpenter v. Sup. Council*, 79 Mo. App. 597; *Winter v. Sup. Lodge*, 96 Mo. App. 1, 69 S. W. 662; *Biegler v. Sup. Council*, supra; *Modern Woodmen v. Graber*, 128 Ill. App. 585, 588; *Garwood v. Hastings*, 88 Cal. 216, 229; *Bowden v. Henderson*, 2 Smal. & G. 360; *Lawson, Presumptive Evidence*, rule 53, p. 294; *Greenleaf, Evidence*, § 278f.

2. But the essential fact to be established by plaintiff and found by the jury was that Mills had died prior to February 2, 1901. The action was not filed until after more than seven years of unexplained absence; but it stands as to the task of making out a case for recovery, as though it had been begun at any time after the date mentioned. The aid plaintiff derives from the seven years of absence and lack of information is not by way of presumption at the end of said period that her husband is dead, which would be the all-important fact if her case depended solely on his death having occurred before the suit was filed. But as the case stands, it does not help her at all, inasmuch as recovery depends on his being dead within about two months after he left home. What help plaintiff gets from his protracted absence without having been heard of is due to the tendency of those two facts to prove he was dead within the two months previous to the default in payment of an assessment; that is, before February 2, 1901. On this point a court of the highest authority said, in an action where the date of death was the vital

fact: "Mr. Taylor in the first volume of his *Treatise on the Law of Evidence* (section 157) says that, 'although a person who has not been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his death; and therefore, if any one has to establish the precise period during those seven years at which such person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, nor, on the other, upon the presumption of the continuance of life.' These views are in harmony with the settled law of the English courts. In *re Phene's Trust*, Law Rep. 5 Ch. 139; *Hopewell v. De Pinna*, 2 Camp. N. P. 113; *Reg. v. Lumley*, Law Rep. 1 C. C. 196; *Re Lewes' Trusts*, Law Rep. 11 Eq. 236; 32 Law J. Ch. 104; 40 Law J. Ch. 507; 29 Law J. Ch. 286; 37 Law J. Ch. 265. In the leading case in the Court of Exchequer of *Nepean v. Doe ex dem. Knight* (2 Mee. & W. 894), in error from the Court of King's Bench, Lord Denman, C. J., said: 'We adopt the doctrine of the Court of King's Bench that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof.' To the same effect are *Mr. Greenleaf* and the preponderance of authority in this country. 1 *Greenl. Evid.* § 41; *Montgomery v. Bevans*, 1 Sawyer, 653 [Fed. Cas. No. 9,735]; *Stevens v. McNamara*, 36 Me. 176 [58 Am. Dec. 740]; *Smith v. Knowlton*, 11 N. H. 191; *Flynn v. Coffee*, 12 Allen (Mass.) 133; *Loring v. Steineman*, 1 Metc. (Mass.) 204; *McDowell v. Simpson*, 1 Houst. (Del.) 467; *Whiting v. Nicholl*, 46 Ill. 230 [92 Am. Dec. 248]; *Spurr v. Trimble*, 1 A. K. Mar. (Ky.) 278; *Doe ex dem. Cofer v. Flanagan*, 1 Ga. 538; *Smith v. Smith*, 49 Ala. 156; *Prinum v. Stewart*, 7 Tex. 178; *Gibbes v. Vincent*, 11 Rich. Law (S. C.) 323; *Hancock v. Am. Life Ins. Co.*, 62 Mo. 26, 121; *Stouvenel v. Stephens*, 2 Daly (N. Y.) 319; *McCartee v. Camel*, 1 Barb. (N. Y.) Ch. 456." (Emphasis ours.) *Davie v. Briggs*, 97 U. S. 628, 634, 24 L. Ed. 1088.

The courts of this state hold there is no presumption regarding the date when a person died who has been absent and unheard of for seven years, or as to whether he died at the end of the period or during it. *Hancock, Adm'r. v. Ins. Co.*, 62 Mo. 26; *Winter v. Lodge*, supra. In the first of those cases it was important, as it is here, to show the death of the insured happened prior to a day when, if he was alive, the policy lapsed for nonpayment of a premium. This day fell about three months after the insured disappeared, or a month longer than in the case at bar, and in both cases early in the seven-year period. Among other things the Supreme Court said: "Whoever finds it important to establish death at any particular period must do so by some kind of evidence. The evidence need not be direct or positive; it may depend upon circumstances, but it should be of such a character as to make it

more probable that the person died at a particular time, than that he survived. When a person is known to be alive at a certain time, there is a presumption of the continuance of his life, and, to overcome this presumption, evidence must be adduced tending to show at what particular period he died. Mere absence, unattended with other circumstances, will not be sufficient. In *Eagle's Case*, 3 Abb. Prac. 218, it was said that, if it was attempted to apply the presumption short of seven years, special circumstances would necessarily have to be proved; as, for example, that at the last accounts the person was dangerously ill, or in a weak state of health, was exposed to great perils of disease or accident; that he embarked on board of a vessel which has not since been heard from, though the length of the usual voyage has long since elapsed. In all such cases, if the circumstances known are sufficient to authorize the conclusion, the decease may be placed at a time short of seven years." 62 Mo., loc. cit. 32.

The rule invoked at this point partakes of the character of what Prof. Thayer denominates presumptive evidence, rather than of the character of a rebuttable legal presumption, like that of death at the end of seven years' absence. Thayer, *Evidence*, Appendix A. The learned author shows the presumption of death belongs to the class of rebuttable, as distinguished from conclusive, legal presumptions. Loc. cit. 541 et seq. He says presumptions of the rebuttable kind "are certain assumptions, or legal rules, defining the amount of evidence requisite to support a particular allegation; which facts being proved may be either explained away or rebutted by evidence to the contrary, but are conclusive in the absence of such evidence; \* \* \* are definitions of the quantity of evidence, or the state of facts, sufficient to make out a prima facie case; in other words, of the circumstances under which the burden of proof lies on the opposite party." Further on in this connection it is said: "It should be carefully remarked that in both kinds of legal presumption (meaning the conclusive and the rebuttable) there is no inference; the rule of law merely applies or attaches to the circumstances when proved and is not deduced from them." Loc. cit. 545. The author then proceeds to discriminate both classes of legal presumptions from presumptive evidence or that rule of law which permits a jury to infer the fact in issue from indirect, instead of direct, evidence of its occurrence; as, "where a person was found standing over a wounded man with a bloody sword in his hand, there is a presumption (or it may be probably inferred) that the one stabbed the other."

The argument for defendant counts on the supposed lack of evidence conducing to prove the insured died even before the expiration of seven years after his departure from home, and the greater lack of proof that he

died previous to the 2d day of February, 1901, as the instructions required. The insured was not afflicted with any disease, was not shown to have been exposed to unusual peril, to have meditated upon suicide, or to be in a despondent mood which might lead to that act. Conditions such as those affecting a person who disappears unaccountably were regarded in the older cases as prerequisites of the inference of death when the absence had not lasted the full period, and perhaps in most jurisdictions the inference of earlier death would not be allowed now, except on proof of similar facts. But the law in this state is more liberal to parties with demands dependent on a finding of earlier death. Our Supreme Court has adopted the doctrine of *Tisdale v. Ins. Co.*, 26 Iowa, 170, 96 Am. Dec. 136, wherein the Supreme Court of Iowa held the jury might infer the death of the missing person had occurred before seven years had expired, even though he was not threatened by any of the dangers mentioned supra; and that the conclusion of death at an earlier period could be drawn upon proof of any facts, which, according to common experience, made it probable the party, if alive, would have communicated with his friends. After postulating the facts in evidence, the Supreme Court of Iowa said: "Must seven years pass, or must it be shown that he was last seen or heard of in peril, before his death can be presumed? No greater wrong could be done to the character of a man than to account for his absence, even after the lapse of a few short months, upon the ground of a wanton abandonment of his family and friends. He could have lived a good and useful life to but little purpose, if those who knew him could even entertain such a suspicion. The reasons that the evidence above mentioned raises a presumption of death are obvious; absence from any other cause, being without motive and inconsistent with the very nature of the person, is improbable."

According to those views an instruction was declared wrong which said it must appear, in order to prove death prior to the lapse of seven years, the person alleged to be dead was subject to some specific peril which reasonably might be supposed to have caused his death; and our Supreme Court adopted the reasoning in the *Hancock Case* "that evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard of may be inferred, without regard to the duration of such absence." 62 Mo., loc. cit. 34. In *Lancaster v. Ins. Co.*, 62 Mo. 121, 128, the Supreme Court of Missouri reiterated its concurrence in the Iowa doctrine, and rejected the rule that, for the conclusion of death to be indulged before seven years

have expired, there must be proof the absentee was exposed to some peril apt to shorten his life. The question is whether the principle of those authorities, and others which might be cited, would permit the jury to find, on the facts in the present record, the death of the insured occurred earlier than February 2, 1901. This question can be answered best by comparing the facts of the case at bar with the facts of cases wherein the same problem was solved one way or the other. In *Hancock v. Ins. Co.*, it was held there was no room for a presumption of death before seven years had run, for these reasons: "Morris (the insured person) had no family, he had no fixed and permanent place of abode. For years he had been residing in the South, being in different states and engaged in different places. He told his relatives that he was going back to the South. He made arrangements to introduce a patent there. He was warm in his sympathies for the Southern cause, and expressed his determination to take arms in its defense. No intention was ever shown of staying in New York, or with his friends in the North. According to his declared design, he was going South, as thousands of others did in those times." In *Lancaster v. Ins. Co.*, the facts indicated death by drowning, as the insured was sick and weak while on a ship and was not seen to leave it when it reached port. In *Winter v. Supreme Lodge*, the insured had talked of making way with himself, and circumstances pointed to the conclusion that he had done so. The same was true in *Carpenter v. Supreme Council*, 79 Mo. App. 597. The last three cases are not a guide in this one, for in them the missing parties were in great peril; but the *Tisdale Case* is a guide and a controlling precedent. Without reflecting at all on the credibility of the witness who testified regarding the quarrel between Mills and his wife and his threat to leave home, it is obvious the jury were not bound to believe this testimony; or, if they believed it, might not believe Mills carried out his threat; and especially is this so because there was much other evidence tending to prove the insured was happy in his domestic relations, strongly attached to his wife and children, and without any motive to abandon them. His departure from home was several months after the date of the supposed quarrel, and there was no testimony of any family discord meanwhile. He left on an errand similar to others he had gone on before, and in the prosecution of a business he was pursuing at the time. He was not dejected in spirit. Though in humble circumstances, he was free from debt, and was getting along apparently as well as usual. He declared he would be back in a few days, kissed his wife when he departed, and apparently left no feeling in her mind of doubt about his return as promised. He was a moral man, a church member, and, according to the opin-

ion of his neighbors, a good provider and an industrious citizen. He told not only his wife, but others, why he was taking the trip to Canton, and no one who saw him received an impression against the truth of what he said, or that his leaving home would be permanent, or was at all remarkable. The journey was not a long one in miles, but he contemplated an absence of several days. From the time of his departure there is no authentic evidence of his having been seen alive, or his wagon and team having been found, though diligent efforts were made to obtain information. These facts by themselves, and without their influence being broken by the testimony regarding the quarrel between the insured and his wife, which the jury were free to reject, would range the case by the side of *Tisdale v. Ins. Co.*, as there is no material difference between the facts of the two cases. As that decision has been approved by our Supreme Court, we decide on its authority there was evidence from which the jury might find the insured died prior to the first default in an assessment; though we think the Iowa doctrine an extreme one, which tends to transfer an issue of fact from the region of proof to that of surmise.

3. In holding the case is for the jury, we emphasize the point that, in order for plaintiff to recover, she must prove by the weight of evidence her former husband died prior to February 2, 1901, and it is better to say nothing about probabilities in the instructions. In determining the question of whether his death occurred prior to said date, the jury should take into consideration his condition in life, character, habits, and domestic relations, the circumstances attending his departure from home, and the fact that none of his friends, relatives, or acquaintances have heard of him since; and unless, in view of those circumstances and others which may appear in evidence, the jury believe from the evidence Mills died prior to February 2, 1901, the verdict should be for defendant.

4. An exception was saved to the admission of the statements of Mills when he left home of the purpose of his trip and when he would return. The contention is he might be prosecuted for abandoning his family, and, if he meant to do so, those declarations were self-serving. In our judgment the right rule to apply is the one thus stated by a learned commentator: "Whenever the demeanor of a person at a given time becomes the object of inquiry, his expressions, as constituting part of that demeanor, and as indicating his present intent and disposition, cannot properly be rejected in evidence as irrelevant." Evans' note to Pothier on Obligations, II, 242. That passage is quoted in 1 Greenleaf (16th Ed.) § 108, and shown to be applicable to numerous instances, including those where a person "is upon a journey or leaves home, or returns thither, or re-

mains abroad." The rule was followed in every case cited, supra, and the point was passed on in *Carpenter v. Sup. Council*, 79 Mo. App. 597, 603. If the statements of an absentee concerning why he is leaving home are excluded from a jury, they will be deprived of illuminating evidence upon the main inquiry. That the person who uttered the statement of purpose may have intended to safeguard himself should be taken account of in weighing the statement.

5. An exception was taken to the exclusion of testimony sought to be elicited from a witness on cross-examination concerning rumors he had heard in the vicinity of the plaintiff's home about the cause of Mills leaving home. These neighborhood rumors were but hearsay, and do not fall within any exception we are aware of, to the rule excluding hearsay testimony. The only authority cited on this point is *Dowd v. Watson*, 105 N. C. 476, 11 S. E. 589, 18 Am. St. Rep. 920, where it was said: "To rebut the presumption of death from absence for more than seven years without being heard from, evidence of a general report among the missing person's friends and acquaintances that he is alive and in the United States army is admissible."

\* \* \* Evidence by a witness that he had seen the missing person, and he was alive, is admissible." Those rulings are irrelevant to the proposition in hand. If defendant wished to avail itself of the knowledge of neighbors regarding the cause of Mills' departure, the rumors on the subject should have been traced to their source, and the person who started them have been called as a witness.

6. The petition ought to be amended by alleging Mills died prior to February 2, 1901.

The judgment is reversed, and the cause remanded. All concur.

#### MERCHANTS' NAT. BANK v. BRISCH et al.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

#### 1. BILLS AND NOTES (§ 538\*)—ACTION—INSTRUCTIONS.

In an action on notes given for the price of a threshing machine, the answer alleged that the agent of the payee guaranteed that the freight on the machine would not exceed \$100, and represented that a contract he presented for defendant's signature contained such provision, that the freight did exceed such sum, and defendant refused to accept the machine. The contract signed was not offered in evidence. *Held*, that an instruction that, if the note was obtained by fraud, it devolved on the holder to show itself a bona fide purchaser, was not warranted.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 538.\*]

#### 2. FRAUD (§ 11\*)—WHAT CONSTITUTES—REPRESENTATIONS.

A representation by the seller of a machine that the freight upon it would not be over a certain amount, when in fact the freight did ex-

ceed that amount, was not a representation on which an action for fraud could be based.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.\*]

#### 3. SALES (§ 21\*)—FAILURE OF CONSIDERATION.

Where the seller of a machine guaranteed that the freight thereon would not be over a certain amount, and, when the purchaser tried to get possession of the machine, the same was forbidden by the carrier until he had paid freight in excess of the amount stipulated, and the purchaser refused to take the machine, the consideration for notes given for the purchase price failed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 33-38; Dec. Dig. § 21.\*]

#### 4. SALES (§ 177\*)—PERFORMANCE OF CONTRACT.

Under the facts, the purchaser had a right to refuse to take the machine.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 445-450; Dec. Dig. § 177.\*]

#### 5. SALES (§ 339\*)—BREACH BY PURCHASER—RIGHT OF SELLER.

Where the purchaser of a machine refused to accept it, and the seller resold it together with a secondhand machine given as part of the purchase price, the purchaser would be liable for any balance of the purchase price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 924, 926; Dec. Dig. § 339.\*]

#### 6. BILLS AND NOTES (§ 146\*)—STATUTORY PROVISIONS.

The negotiable instrument law of 1905 has no application to a note executed prior to the taking effect of the statute.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 146.\*]

#### 7. BILLS AND NOTES (§§ 493, 497\*)—ACTION ON NOTE—BURDEN OF PROOF.

Prior to the negotiable instrument law of 1905, in an action on a note as against a purchaser before maturity, the maker was bound to show, by a greater weight of evidence, a want of consideration, but plaintiff was bound to show that he purchased without knowledge of fraud.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652-1662, 1675-1687; Dec. Dig. §§ 493, 497.\*]

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

Action by the Merchants' National Bank against Gottlieb Brisch and another. From a judgment in favor of defendants, plaintiff appeals. Reversed and remanded.

Jones Bros. and C. H. Shubert, for appellant. Watson & Holmes, for respondents.

GRAY, J. This is a suit on a promissory note bearing date June 12, 1905, for \$630, due on or before the 1st day of October, 1907, payable to the order of Russell & Co., an Ohio corporation, and payable at the Rolla State Bank, Rolla, Mo., with interest from date at the rate of 6 per cent. per annum, payable annually. The suit was commenced by the Merchants' National Bank, claiming to have purchased the same for value, in the usual course of business, on the 9th day of February, 1907. The answer alleged that in April, 1905, one H. W. Mitchell, an agent of the payee, persuaded the defendants to purchase a threshing outfit to be delivered to the de-

defendants about the 1st of June, at the town of Russell, state of Kansas. It was alleged that the defendants agreed to give for said machine a secondhand separator and to execute their three promissory notes, amounting to \$1,910; that at the time said contract was entered into the said agent represented and guaranteed that the freight on the new outfit to the point where it was to be delivered would not exceed \$100. It was further alleged that the defendants were foreigners, wholly unable to read or write the English language, or to talk or understand the same, and that the said Mitchell, knowing these facts, prepared a written contract, and falsely represented to the defendants that said written contract contained only the agreements heretofore set out, and that the defendants, being unable to read said contract, relied upon the representation of said Mitchell. It was further alleged that the defendants went to the town of Russell in June to receive said machine, but the same did not arrive until July 3 of said year, and, when it did arrive, a bank at Russell, in behalf of the payee, presented a bill of lading for freight charges, amounting to over \$300. The defendants further alleged that they then had the written contract examined, and found that it did not contain the conditions of the trade in regard to the freight, and that, when they discovered said fraud, they renounced and repudiated the contract, and that said Russell & Co. took possession of said machine and returned the same to their branch house at St. Joseph. The defendants' answer closed with the following language: "Wherefore defendants say that said note sued upon in this cause was obtained from them by fraud, as hereinbefore alleged, and that the same was wholly without consideration and void." The reply was a general denial. Judgment was for defendants, and plaintiff appealed.

The testimony in behalf of the plaintiff was limited to one witness—the cashier of the appellant bank. This witness testified that J. W. McClymonds was the president of the appellant bank, and also the president of Russell & Co., payee; that the note was purchased in the usual course by his bank from the payee without any notice of anything wrong in connection therewith. On cross-examination the witness testified that the bank discounted much paper for the payee company, and that the payee company did its principal banking business with the said Merchants' National Bank; that the note was presented for discount by one Pitts, treasurer of the company, and that he discounted the note, but asked no questions and made no inquiries about the financial standing of the defendants; that, when he bought the note, he knew that interest was due and unpaid.

In behalf of the defendants, the testimony showed that they were foreigners with very little knowledge of the English language; that Mitchell came to their place and brought two or three quarts of whisky, and after they

had agreed on the terms of the contract, as set out in their answer, he presented a contract to them, and they were all drinking, and he induced them to sign the contract; that, when they went to Kansas to get the machine, possession was refused unless they would pay two freight bills, amounting to \$370. In addition to their testimony, other witnesses testified that they were present and heard Mitchell represent and guarantee that the freight on the machine would not be more than \$100.

We find no fault with the instructions given to the jury in behalf of the appellant. In behalf of the respondents, the court gave the following instruction: "The court instructs the jury, if you find and believe from the evidence in this case that the note sued upon was obtained from the defendants by fraud, it devolves upon the plaintiff to show by a preponderance of the evidence that it acquired the note from Russell & Co., the payee therein, before the maturity thereof, and without knowledge of such fraud, and for a valuable consideration before it can recover." Under the evidence and pleadings, nothing can be found upon which to base this instruction. The allegations of fraud in the answer are simply that the agent guaranteed that the freight would not be over \$100, and that he represented to them that a contract he was presenting for their signature contained those provisions. And the evidence shows that the freight was over \$100. The contract signed was not offered in evidence, and therefore, as to whether there is any difference between the oral contract and the written one, the evidence does not disclose. The guaranty of the agent that the freight would not be over \$100 was not a fraudulent representation upon which an action for fraud could be based. The action of the court in giving this instruction necessitates the reversal of the judgment.

The facts testified to by the defendants show a failure of consideration. If the agent guaranteed that the freight would not be over \$100, and, when the respondents tried to get possession of the machine, the same was forbidden until they had paid freight amounting to over \$300, then as between them and the seller they had a right to refuse to take the machine. The undisputed evidence shows that the payees then took the machine, together with the secondhand machine, and disposed of them. If the contract was as testified to by the defendants, then the machine was never delivered and the consideration for the notes failed. On the other hand, if there was no guaranty that the freight would not exceed \$100, yet the company took the machine, and as between it and the respondents it would not be entitled to recover for all the notes, but, if the secondhand machine and the new machine have been sold and disposed of, then the respondents might be liable for the balance on the notes, if any. This note was executed prior to the taking

effect of our negotiable instrument law of 1905. And therefore the provisions of that act must not be considered in determining the law of this case. The cause was tried by both parties on the theory that the burden of proof is the same wherein the defendant alleges the note was procured by fraud and when he alleges failure of consideration. As the law stood prior to 1905, there was a difference as to the burden of proof in the two defenses, which should be borne in mind on a retrial. *Bank v. Rominee*, 136 Mo. App. 57, 117 S. W. 105; *Hahn v. Bradley*, 92 Mo. App. 399; *Hamilton v. Marks*, 63 Mo. 187.

For the action of the court in giving the instruction above set forth, the judgment is reversed, and the cause remanded. All concur.

### STATE v. McCOY.

(Springfield Court of Appeals. Missouri. Jan. 8, 1910.)

#### 1. INDICTMENT AND INFORMATION (§ 52\*) — FORMAL REQUISITES — VERIFICATION — STATUTES.

Under Ann. St. 1906, § 2477, requiring informations to be signed and verified by the prosecuting attorney, which verification may be made upon information and belief, or by the oath of a competent witness in the case, or supported by the affidavit of the witness filed with the information, an information followed by an affidavit stating that the prosecuting attorney makes oath that the facts stated in the information are true, according to his best knowledge, information, and belief, but signed by the prosecuting witness, was insufficient, since it cannot be taken as the affidavit of the prosecuting attorney, not being signed by him, and, if taken as the affidavit of the prosecuting witness, it is insufficient as only being on information and belief.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 163-168; Dec. Dig. § 52.\*]

#### 2. INDICTMENT AND INFORMATION (§ 47\*) — REQUISITES AND SUFFICIENCY OF ACCUSATION—LANGUAGE AND FORM.

In an information, it is insufficient for the prosecuting attorney to state that he is informed of the commission of an offense, but he must state that the offense has been committed.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 157; Dec. Dig. § 47.\*]

#### 3. INDICTMENT AND INFORMATION (§ 47\*) — REQUISITES AND SUFFICIENCY OF ACCUSATION—LANGUAGE AND FORM.

Where a prosecuting attorney bases an information upon the affidavit of a private person, he must so state in the information, and file the affidavit with the information.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 157; Dec. Dig. § 47.\*]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

George McCoy was convicted of assault, and appeals. Reversed and remanded.

G. Purd Hays, for appellant. Fred W. Barrett, for the State.

COX, J. Defendant was convicted of the offense of common assault upon an information filed by the prosecuting attorney in the circuit court of Christian county, and from the conviction has appealed.

The only question before us for consideration is the sufficiency of the information. The information is as follows:

"Fred W. Barrett, prosecuting attorney within and for the county of Christian, in the state of Missouri, informs the court, under his official oath and upon his best information and belief; that he is informed by the affidavit of H. William Friebe that George McCoy, on or about the second day of December, 1907, in the said county of Christian in the state of Missouri, did then and there unlawfully and willfully assault, strike, beat and wound the said H. William Friebe on the head with his fist contrary to the form of the statute in such cases, made and provided against the peace and dignity of the state. [Signed] Fred W. Barrett, Prosecuting Attorney.

"Fred W. Barrett, prosecuting attorney, makes oath and says that the facts stated in the foregoing information are true according to his best knowledge, information and belief. [Signed] H. William Friebe."

"Subscribed and sworn to before me, the second day of December, A. D. 1907. [Signed] S. D. Maples, Circuit Clerk."

The statute authorizing the filing of informations in the circuit court by the prosecuting attorney so far as applicable to this information is as follows: "Informations may be filed by the prosecuting attorney as informant during term time or with the clerk in vacation of the court having jurisdiction of the offense specified therein. All information shall be signed by the prosecuting attorney and be verified by his oath, or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person which shall be filed with the information." Ann. St. 1906, § 2477.

Verification by the prosecuting attorney may be upon information and belief. It will be observed, first, that an information filed by the prosecuting attorney in the circuit court must be verified, or be based upon the affidavit of some person. In the latter case the affidavit must be filed with the information. In this case no affidavit was filed, but the only verification is what appears in the affidavit at the close of the information above set out. This affidavit is drawn as if it were to be executed by the prosecuting attorney, but is not signed by him, but is signed by the prosecuting witness. It is apparent that this is not sufficient, for, if it is to be taken as the affidavit of Friebe, it is insufficient for the reason that it is made upon information and belief only which is not a sufficient verification when made by a private person, but would only be sufficient when made by the

prosecuting attorney himself. It is not a verification by the prosecuting attorney for the reason that he does not sign the affidavit, and, so far as the record shows, was not sworn to it. This information is therefore bad for the want of a proper verification.

It is also bad for another reason. The prosecuting attorney, in the body of the information does not purport to inform the court that the defendant has committed an assault upon Friebe, but he informs the court that he is informed by the affidavit of Friebe that an offense has been committed. This is not sufficient. The prosecuting attorney may base an information upon the affidavit of a private person, but, when he does so, he should so state in his information and file the affidavit with the information as the statute requires, but, even in that case, a party cannot be tried upon the affidavit of an individual. The duty of informing the court by a proper information rests with the prosecuting attorney. He cannot shift or evade this duty. It is his duty to first inform himself, and satisfy himself that an offense has been committed, and then, if he desires to prosecute this offense, he must inform the court that the offense has been committed, and it is not sufficient for him to inform the court that some one else has informed him that an offense has been committed. Therefore no proper charge that defendant had committed an assault was made in this case, and, for that reason, as well as for the reason that the information was not properly verified, the motion in arrest of judgment should have been sustained. It therefore follows that the judgment must be reversed.

But it may be that the defendant can be convicted if a proper information is lodged against him, and, as this one is amendable the cause will be remanded to permit the prosecuting attorney to file an amended information if he so desires. All concur.

### STATE v. POUNDSTONE.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

#### 1. INDICTMENT AND INFORMATION (§ 133\*)—OBJECTIONS.

Where accused offered on trial to show that a warrant was issued on the affidavit of a certain person, and that the prosecuting attorney thereafter filed an information on his own knowledge and belief when as a matter of fact he had no knowledge, the offer was properly refused, since, if the court could investigate the matter at all, it would only do so on a plea in abatement.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 455; Dec. Dig. § 133.\*]

#### 2. CRIMINAL LAW (§ 402\*)—EVIDENCE—BEST EVIDENCE.

On a prosecution for selling liquor on Sunday as a dramshop keeper, notice was served on defendant to produce his license, and, when called upon to answer to such notice, he stood mute.

*Held*, that it was proper to permit the county court records and the petition and application for license signed by defendant to be read in evidence, and to permit the officials to testify as to the delivery of the license, etc.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 888; Dec. Dig. § 402.\*]

#### 3. CRIMINAL LAW (§ 790\*)—INSTRUCTIONS—LAW OF CASE.

Laws 1901, p. 140 (Ann. St. 1906, p. 1556), requiring the court to instruct on all questions of law arising in the case, does not apply to misdemeanors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. § 790.\*]

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

N. E. Poundstone was convicted of a violation of the liquor law, and he appeals. Affirmed.

Currey, Owen & Farris, for appellant. H. C. Compton, for the State.

OOX, J. Information filed before a justice of peace, charging the defendant with selling liquor on Sunday as a dramshop keeper. Defendant was convicted and appealed to the circuit court, where he was again convicted, and has appealed to this court.

We are not favored with a brief by either appellant or respondent in this case, but have carefully read this long record with a view to ascertain whether or not the defendant was accorded a fair trial, and to find what, if any, error is charged to have been committed against him. We find:

1. Defendant offered on the trial to prove that one George D. Thornton had filed an affidavit before the justice of peace charging defendant with this offense. That a warrant was issued on this affidavit and the defendant arrested thereon and required to give bond for his appearance, and that the prosecuting attorney afterward filed an information based on his own knowledge and belief, and that, as a matter of fact, the prosecuting attorney had no actual knowledge of the commission of this offense. This offer was refused and properly so; for, if the court could investigate the matter contained in this offer at all, it could only do so upon a plea in abatement, but could not do so upon a trial of the merits.

2. Complaint is made as to the matter of proving that defendant was a dramshop keeper. Notice was served upon the defendant to produce his license as a dramshop keeper, and, when called upon to answer to the said notice, he stood mute. The court then permitted the county court records and the petition and application for license signed by defendant to be read in evidence, and the officials to testify as to the delivery of the license, etc. Having notified the defendant to produce his license, and he having failed to do so, secondary evidence was admissible, and there was no error committed in that respect.

3. Complaint is made that the court failed to instruct the jury upon all questions of law arising in the case. The statute imposing this duty upon the court does not apply to misdemeanors. Sess. Acts 1901, p. 140 (Ann. St. 1903, p. 1556).

4. Some objections were made during the progress of the trial to the admission of certain testimony, all of which we have carefully examined and find no error therein.

The information is sufficient, the instructions were fair to the defendant, the evidence is ample to sustain the verdict, and the judgment is therefore affirmed.

NIXON, P. J., concurs. GRAY, J., not sitting.

#### MORIUND v. JOHNSON et al.

(Springfield Court of Appeals. Missouri. Jan. 10, 1910.)

#### 1. REPLEVIN (§ 8\*)—RIGHT OF ACTION—TITLE AND RIGHT OF POSSESSION.

Plaintiff in replevin must show a general or special interest in, and a right to immediate and exclusive possession of, the property detained.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 45-68; Dec. Dig. § 8.\*]

#### 2. REPLEVIN (§ 12\*)—DEFENSES—TITLE IN THIRD PERSON.

Defendant in replevin may show title or right of possession in a third person.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 103; Dec. Dig. § 12.\*]

#### 3. JUSTICES OF THE PEACE (§ 104\*)—REPLEVIN—EXECUTION AS DEFENSE—BURDEN OF PROOF.

Though plaintiff in replevin in a justice's court must state that the property was not taken on execution, etc., he does not have the burden of disproving defendant's answer alleging that he claims the right of possession under an execution against the property, but such burden is on defendant.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 345; Dec. Dig. § 104.\*]

#### 4. FRAUDULENT CONVEYANCES (§ 222\*)—RIGHT TO ATTACK—EXECUTION OFFICER.

A constable as defendant in replevin, who seeks to justify his possession under an execution against a third person, cannot attack, as fraudulent as to the execution creditor, a sale by such third person to plaintiff, unless he shows a valid execution issued on a valid judgment.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 652; Dec. Dig. § 222.\*]

Appeal from Circuit Court, Stone County; John T. Moore, Judge.

Action of replevin by John Moriund against James Johnson and Frank Jackson. Defendants had judgment, and plaintiff appeals. Reversed.

This was an action commenced before a justice of the peace at Monett in Barry county, where appellant filed on the 26th day of May, 1906, the following statement and affidavit in replevin (formal parts omitted): "Plaintiff states that he is lawfully entitled

to the possession of one white cow about four years old, hole in right ear; one red cow about four years old, hole in right ear; four red heifers, with a hole in right ears; two red steers two years old, marked with hole in right ear; one black yearling steer, hole in right ear, of the value of one hundred dollars; that the same is wrongfully detained by the defendants at the county of Barry aforesaid; that the same has not been taken under any process, execution or attachment against the property of the plaintiff; that the said property has been injured by being taken out of pasture and driven away, and that for the taking and detention of said property, and for all injuries thereto, the plaintiff is damaged twenty-five dollars. Plaintiff further states that he will be in danger of losing his said property unless it be taken out of the possession of the defendants. That the said property was wrongfully taken, and plaintiff's right of action accrued within one year. Wherefore, plaintiff prays judgment for the recovery of said property, and twenty-five dollars damages for the taking and detention thereof, and for all injuries thereto. John Moriund, plaintiff, makes oath and says that to the best of his knowledge and belief the facts and allegations contained in the above statement are just and true; that said property was wrongfully taken, and plaintiff's right of action accrued within one year."

The appellant also filed a delivery bond, duly approved, and the writ was issued and the property taken from the respondents and delivered to appellant. The respondents filed the following answer (formal parts omitted): "Now come the defendants in the above-entitled cause and deny each and every allegation of plaintiff's claim to the property described in plaintiff's complaint. Further answering specially the defendants say that the ownership of the aforesaid property is in Joe Moriund, and that it was subject to levy and sale under a certain execution in the hands of James Johnson as constable of Shoal township, whereby Frank Jackson, one of the defendants herein, obtained judgment against the said Joe Moriund on a certain promissory note given by the said Joe Moriund for the sum of \$50; that plaintiff, John Moriund, and his brother Joe Moriund, who pretended to sell all his property to John Moriund, the plaintiff, intending to aid Joe Moriund in his fraudulent purpose pretends to own same, but in fact the aforesaid property is the property of Joe Moriund, which the said Johnson levied on by virtue of a writ of execution in his hands to satisfy said judgment against the said Joe Moriund. Wherefore, defendants pray that the property be restored to them and that they have twenty-five dollars damage for the wrongful taking of said property."

A trial was had before the justice of the peace which resulted in a verdict in favor of the plaintiff. An appeal was taken by the defendants to the circuit court of Barry county, and a change of venue was granted to Stone county where a trial was had and judgment rendered for the defendants. From that judgment, the plaintiff has appealed.

The testimony on the part of the respondents tended to show that the respondent, James Johnson, as constable, took the property in question from the plaintiff, John Moriund. It also tended to show that John Moriund was the owner of the property in question and that the same was in his pasture when taken by James Johnson and was taken from his farm in his absence, and that as soon as he learned of the taking of the property, he demanded its return; that upon refusal, this action in replevin was brought to recover possession. As we have seen, the respondent, James Johnson, undertook to justify his seizure and possession of the property by asserting that his co-respondent, Frank Jackson, had obtained a judgment against the appellant for \$50, and that he seized the cattle under an execution issued upon that judgment as the property of Joe Moriund; but at no time during the trial was any judgment or execution offered in evidence. Evidence was introduced by respondents tending to show that the property in question at one time had belonged to Joe Moriund, who was the common source of title, and who had transferred it to his brother, John Moriund, for the fraudulent purpose of hindering and delaying his (Joe's) creditors, and the trial court gave instructions on this theory of the case.

T. D. Steele, for appellant. Mayhew & Sater, for respondents.

NIXON, P. J. (after stating the facts as above). This action, as we have seen from the statement, was commenced before a justice of the peace, and an inspection of the statement and affidavit of the plaintiff, as filed before the justice, reveals that he almost literally copied the form of the statement and affidavit provided by section 3902 of the Revised Statutes of 1899 (Ann. St. 1906, p. 2158). The answer of the defendants contained a general denial and also set up a plea of justification that the defendant, James Johnson, was a constable, and as such officer had seized the property in question and held it under an execution. The other defendant interpleaded, and on his own motion was made codefendant.

Under the issues in this case, the defendants having denied the allegations of plaintiff's statement, the plaintiff was required, in order to maintain his action of replevin, to prove a general or special property interest in and the right to immediate and exclusive possession of the property detained, and it was permissible for the defendants to show

that plaintiff had no exclusive right to possession, or that some other party had such exclusive right to possession, or that plaintiff had no general or special property interest in the stock taken. *American Metal Co. v. Daugherty*, 204 Mo. 71, 102 S. W. 538.

It is conceded by both parties that Joe Moriund, the brother of the plaintiff, was the common source of title of the property in question. The plaintiff claims through him, and the defendants at the trial sought to impeach the validity of the transfer from Joe Moriund to the plaintiff. The defendants had the right to show that plaintiff and Joe Moriund were jointly interested in the property or jointly in possession of the same, and such a showing would have been a good defense to plaintiff's action whether defendants had a valid execution or not, since the action of replevin, under our statutes, can only be maintained by one having the right to immediate and exclusive possession. *Stockman v. Galt State Bank*, 126 Mo. App. 664, 105 S. W. 674; *McCabe v. Black River Transp. Co.*, 131 Mo. App. 531, 110 S. W. 606. Over these questions of law there can be no real controversy in this case. But the defendants also pleaded as a defense that they had an execution against Joe Moriund, and that the property was taken from Joe Moriund by the defendant Johnson under an execution. The serious controversy in this case, upon which the action of the trial court in receiving evidence and giving instructions is principally challenged, arises from this allegation of the defendants' answer. At the trial, the following colloquy took place concerning the introduction of a certain check given by Joe Moriund to one Jaques in payment for a horse, the amount of the check being \$50: Mr. Thornberry (attorney for respondents): "If we can show a judgment, the presumption is that it is legal." Mr. Steele (attorney for appellant): "There is no presumption arising from a judgment of a justice of the peace. The witness cannot go on and answer that he had a judgment and execution. We would like to see them if they have one." Mr. Mayhew (attorney for respondents): "That would be immaterial." Mr. Thornberry: "We don't have to show any title." Mr. Viles (attorney for appellant): "You ought to show some right to take this property." Mr. Mayhew: "Did Mr. Moriund give you his note for this money?" Mr. Steele: "Plaintiff objects. They plead a judgment and execution. If they have a judgment, let us see it." Mr. Mayhew: "This is a case of fraud, and it vitates everything." The Court: "Have you a copy of the judgment and execution?" Mr. Mayhew: "No, sir; I have not." The Court: "I think the burden is on the plaintiff to show that. Go ahead with the witness."

While there was some controversy in the trial court as to whether appellant's attorney in his opening statement had admitted that he presumed there was an execution, no such

admission appears in our present record of the case, and no such execution, as a matter of fact, was offered in evidence during the trial, presumably on the ground that the ruling of the trial court, which we have given, rendered it unnecessary. It is true that in all cases of replevin commenced before justices of the peace under our statutes, the form prescribed by law requires that the plaintiff shall state, and verify the statement, that the property has not been taken under any execution, attachment, etc. But it will be noticed that such statement only goes as to process issued against the plaintiff, and is not a general denial that the property is not in the custody of the law by reason of its process. This allegation, however, is jurisdictional, and does not constitute an estoppel in any way, or throw the burden in such case upon the plaintiff to prove the negative allegation that an officer taking the property did not have a valid execution or other process. If the officer had a writ which authorized the seizure of the property, it was a matter of defense to be shown by such officer and need not be produced by the plaintiff in the first instance. *Knoche v. Perry*, 90 Mo. App., loc. cit. 488; *Cobbey on Replevin*, § 982, p. 551, in which the law is stated as follows: "In a suit before a justice of the peace to recover personal property, the plaintiff need not prove the averments in his affidavit that it 'had not been taken by virtue of any tax, etc., nor seized on execution,' etc. If such is defendant's claim, it should be set up affirmatively as a defense." But, as we have stated, no process, such as was mentioned in defendants' answer, was in fact introduced in evidence. Nevertheless, the case was tried upon the theory that such process had been introduced in evidence, or, upon the theory, supported by the ruling of the trial court, that it devolved upon the plaintiff to prove the negative fact that the officer did not have such writ.

Defendants' plea of justification was virtually a confession and avoidance, admitting the taking of the property. In any event, in this action in which the defendants sought to prove that Joe Moriund was the common source of title, there would be no legal objection to their showing the title to be in the plaintiff; but unless the constable, James Johnson, had a writ authorizing him to seize the property of Joe Moriund, he could not attack or invalidate for fraud any sale from Joe Moriund to the plaintiff. Without such showing, the defendants did not stand in any such relation to the property referred to as to permit them to assail the validity of the transfer. It would be a legal transfer between Joe Moriund and his assignee, John Moriund, the plaintiff, and before the defendants could attack the good faith of such a sale, the defendant, James Johnson, as constable, must have had such a valid writ as would have made him the representative of the creditors. Otherwise, it was no concern

of his whether the sale was valid or not. As was said by Mr. Justice Cooley in the case of *Matthews v. Densmore*, 43 Mich. 461, 5 N. W. 669: "But if he has no such writ, it is no concern of his whether the mortgages are valid or not. The first step in his justification is therefore to show not a writ merely, but a valid writ."

In the case under consideration, there was evidence tending to show that Joe Moriund made the plaintiff a bill of sale to the property and transferred possession to him; and so far as any execution against Joe Moriund was concerned, the plaintiff was a stranger to it, and his evidence tended to show that he was a purchaser for value and had exclusive possession of the property at the time the same was taken from him by the defendant, James Johnson. As we have said, plaintiff was a stranger to any legal proceedings against his brother, Joe Moriund. Where an officer under an attachment or writ of execution seizes property which is in the possession of a stranger, he is only entitled to question the validity or good faith of the transfer attempted to be avoided on the ground that he has a valid writ and represents the creditors who have instituted a proceeding entitling them to attack the transaction as herein stated. Not only is there no presumption that an officer, acting under such circumstances, has a valid writ, but it is incumbent upon the officer, when sued in replevin by a stranger to recover possession of the property, to show affirmatively not only that the writ is valid on its face, but the entire regularity of the proceedings. *Jones v. McQueen*, 13 Utah, 178, 45 Pac. 202; *Drake on Attachment*, § 185a; *Thornburgh v. Hand*, 7 Cal. 554; *Horn v. Corvarubias*, 51 Cal. 524; *Matthews v. Densmore*, 43 Mich. 461, 5 N. W. 669; *Van Etten v. Hurst*, 6 Hill (N. Y.) 311, 41 Am. Dec. 748; *Brichman v. Ross*, 67 Cal. 601, 8 Pac. 316; *Williams v. Eikenberry*, 25 Neb. 721, 41 N. W. 770, 13 Am. St. Rep. 517; *Cobbey on Replevin*, § 1009; *Marrinan v. Knight*, 7 Okl. 419, 54 Pac. 656; *James v. Van Duyn*, 45 Wis. 512; *Bogert v. Phelps*, 14 Wis. 95; *Shinn on Replevin*, §§ 535, 537; *Cheeseman v. Fenton*, 13 Wyo. 436, 80 Pac. 823, 110 Am. St. Rep. 1010. Where an officer justifies under an execution, and seeks to attack the title of the plaintiff in replevin on the ground of fraud—the plaintiff being a stranger to the judgment upon which the execution is based—the officer must show that his execution issued upon a valid subsisting judgment. While an execution, fair on its face, is sufficient to protect an officer against personal responsibility in serving it, yet when he claims property under it he must show that he was warranted by judgment. *Cobbey on Replevin*, § 806; *Clarke v. Laird*, 60 Mo. App. 289. And yet, notwithstanding the evidence in this case, the defendants did not show that they took the property in question under any execution.

The court gave the following instructions for the defendants:

"(1) The court instructs the jury that fraud vitiates all contracts, and in order to find that the title of the property in question was transferred from John [Joe] Moriund to the plaintiff in the case you must find that the transfer in this case was in good faith and for a valuable consideration."

"(3) The court further instructs the jury that it is not necessary for the defendants to prove by direct and positive evidence that the plaintiff had knowledge or notice of any fraudulent purpose on the part of his brother Joe Moriund, in making the transfer, to hinder, delay, or defraud his creditors, but if the jury should be satisfied from the evidence that such fraudulent purpose on the part of Joe Moriund did exist, and if they find the facts and circumstances attending the transfer were such as naturally put a person of ordinary caution upon inquiry, which would lead to a knowledge of the truth, then the jury may infer that the plaintiff had knowledge and notice of his brother's purpose in making the transfer." And instructions numbered four, six, and seven given for the defendants proceed upon the same theory, namely, that the defendants were in a position to attack the validity of the transfer from Joe Moriund to the plaintiff without having introduced any evidence of a valid writ of execution. Under the authorities cited, such instructions were unquestionably not authorized by law, and the giving of them constituted material error. Instruction numbered three given for appellant, and instruction numbered two given for respondents, are apparently conflicting which should be corrected in case of a new trial.

The judgment is reversed and the cause remanded. All concur.

#### HESS v. FOX.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

#### 1. JUSTICES OF THE PEACE (§§ 73, 74\*) — CHANGE OF VENUE—NOTICE OF TRIAL.

Where the venue of a cause pending before a justice of the peace was changed, and the cause sent to another justice, service of notice of the trial day of the cause on defendant's attorney was not sufficient.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. §§ 73, 74.\*]

#### 2. JUSTICES OF THE PEACE (§ 122\*) — JUDGMENT—VALIDITY.

The want of such notice was not jurisdictional and did not render void a default judgment thereafter entered.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 382-388; Dec. Dig. § 122.\*]

#### 3. JUDGMENT (§§ 461, 463\*)—EQUITABLE RELIEF.

In an action to set aside a default judgment, where the defense is an affirmative one, the chan-

cellor should not try the case upon its merits, but should require plaintiff to offer enough proof to show that if given a fair trial he could at least make a prima facie case.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 892-895, 896; Dec. Dig. §§ 461, 463.\*]

#### 4. JUSTICES OF THE PEACE (§ 123\*) — JUDGMENT—ACTION TO SET ASIDE.

Plaintiff sued to set aside the default judgment of a justice of the peace on the ground that after the venue was changed to another justice he was not served with any notice of the day of trial. There was evidence tending to show that the change of venue was taken by him in order to give him time to make a trip to California, and that he did not return until after the judgment was rendered, when he went to the home of the justice and examined his docket in time to have taken an appeal. When he left he did so without leaving any one to look after his lawsuit. *Held*, that a refusal to set aside the judgment was not erroneous.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-406; Dec. Dig. § 123.\*]

Appeal from Circuit Court, Cedar County; B. G. Thurman, Judge.

Action by G. W. Hess against J. H. Fox. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The petition alleges that on August 27, 1907, defendant filed suit against this plaintiff before J. H. Asher, a justice of the peace in Cedar county, in which he claimed plaintiff was indebted to him in the sum of \$200. Summons was duly issued and served, and the case was set for trial September 6, 1907, on which date, this plaintiff, who was defendant in that action, appeared before said justice of the peace, and filed an application for a change of venue, which was granted and the case sent to N. Dale, another justice of the peace. Said Dale set the hearing for September 16, and on that day, rendered judgment by default against this plaintiff in favor of this defendant. That upon the same day a transcript of this judgment was filed with the circuit clerk of Cedar county. Plaintiff then alleges that he had no notice of the rendition of said judgment until long afterward. That he has a just and legal defense against the demand of defendant set out in his complaint before the justice aforesaid. That, prior to the institution of said suit, he had paid said demand in full to said J. H. Fox, and at the time held and now holds his receipts for the same. That the judgment before said justice was obtained either through a mistake or neglect of the justice in failing to serve this plaintiff with the notice of the trial day of such cause, or else it was obtained through collusion with this defendant. Then follows a prayer that the judgment of the justice be set aside, and he be given an opportunity to appear and make his defense. The answer alleges that proper notice of the time set for trial in the court of N. Dale, justice, was served, and that this plaintiff through his attorney, R. H. Bannis-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ter, had agreed that the case might be set for September 16th, and that within ten days after the judgment was rendered, plaintiff had actual knowledge that the judgment had been rendered in ample time to have perfected an appeal, and denies the other allegations of the petition. Trial was had, and relief asked by plaintiff denied, and he has appealed.

J. H. Davidson and M. T. January, for appellant. D. Walker Smith, for respondent.

COX, J. (after stating the facts as above). The evidence in this case shows that the notice of day of trial before Esquire Dale, after the case reached him on change of venue, was served on Bannister as attorney for this plaintiff, and this is the sole reliance of plaintiff for a reversal of this judgment. It is true that service of such notice upon the attorney of a party is not sufficient, and, hence, is the same as no notice. The want of such notice, however, is not jurisdictional and does not render the judgment, entered without such notice, void. *Cullen v. Collison*, 110 Mo. App. 174, 80 S. W. 290. This judgment, then, was not void, but was irregular. The object of requiring the service of this notice is to give the parties an opportunity to appear at the trial and prosecute or defend as the case may be, and if a party can make a fair showing that the want of such notice prevented his appearance, and that if given an opportunity to defend, he has a meritorious defense, the proof of those facts ought to entitle him to relief. Two things, however, are necessary in order to invoke the aid of a court of equity. These are that he have a meritorious defense and that his failure to assert it at the trial was not the result of his own negligence. As to the showing of a meritorious defense, the authorities all agree that this showing must be made, but as to how it is to be made they are not clear—that is, whether it is sufficient to allege in the petition that the plaintiff has a meritorious defense, or whether he should go farther and offer proof to the chancellor of the facts constituting his defense.

It has been uniformly held in this state that a general allegation in the petition that

the plaintiff has a meritorious defense to the original suit is not sufficient, but the pleader must set out the facts which constitute his defense, and there have been some intimations that he must go farther, and prove to the chancellor the truth of his allegations. See *Sauer v. City of Kansas*, 69 Mo. 46; *Steyermark v. Landau*, 121 Mo. App. 402, 99 S. W. 41; *Goldie Construction Co. v. Rich Construction Co.*, 112 Mo. App. 147, 86 S. W. 587. In cases like this, in which the defense is an affirmative one, we think the correct rule to be that while the chancellor should not try the case upon its merits, he should require the plaintiff to offer enough proof of his alleged defense to show that if given a trial upon the merits he could, at least, make a prima facie case. This is but a reasonable requirement, for unless he is able to furnish such proof, a trial would avail him nothing, and a court of equity should not be asked to do a useless thing. In this case, the petition alleges that the debt had been paid, and that plaintiff held a receipt for the same, but he offered no proof of these facts. Our conclusion is that for this reason the court was right in refusing the relief prayed for.

The court may also have found that the failure of plaintiff to make a defense or to appeal from the judgment against him was the result of his own carelessness. There was evidence tending strongly to show that the change of venue was taken by this plaintiff in order to give him time to make a trip to California, and that he did go to California, and did not return until after the judgment was rendered, but did return and went to the home of the justice and examined his docket in time to have taken an appeal after the judgment was rendered. When he left for California, he did so without leaving any one to look after his lawsuit, and, considering all these circumstances, the court may very well have found that, had this plaintiff used the care which an ordinarily prudent business man would use in his own business affairs, he could have protected his rights without resorting to a court of equity, and such finding would of itself sustain this judgment.

The judgment is affirmed. All concur.

**HOUSTON OIL CO. OF TEXAS et al. v. KIMBALL et al.**

(Supreme Court of Texas. Jan. 19, 1910.)

On motion for rehearing. Overruled.

For former opinion, see 122 S. W. 533.

**BROWN, J.** In the opinion in this case we said: "Besides, we are of opinion that the evidence as to the reputation of Parmer would have been inadmissible if the witness had been present at the trial." It was not necessary to the decision of the point then being discussed to decide upon the admissibility of the proposed evidence of Parmer's general reputation as a forger of land titles. That sentence will be erased, leaving the question unaffected by this opinion.

The motion is overruled.

**WESTERN UNION TELEGRAPH CO. v. HUDSON.**

(Supreme Court of Texas. Jan. 12, 1910.)

**COURTS (§ 247\*)—COURT OF APPELLATE JURISDICTION—CERTIFICATE OF DISSENT.**

A motion to certify points of dissent in the Court of Civil Appeals to the Supreme Court, under Rev. St. 1895, arts. 1040, 1042, providing for such motions, must be made during the term at which the case is heard and determined.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 247.\*]

Certificate of Dissent from Court of Civil Appeals of Second Supreme Judicial District.

Action by Claude Hudson against the Western Union Telegraph Company. Judgment for plaintiff was reversed and remanded by the Court of Civil Appeals by a divided court (120 S. W. 1112), and plaintiff moves to certify the point of dissent to the Supreme Court. Certificate denied.

Jno. W. Veale, N. L. Lindsley, and Geo. H. Fearons, for appellant. C. J. Carter and D. B. Hill, for appellee.

**GAINES, C. J.** This is a certificate of a dissent as to the disposition of this case in the Court of Civil Appeals.

The case was submitted to the Court of Civil Appeals, and there was a judgment reversing the judgment of the district court and remanding the cause by a majority of the judges of that court. One of them, however, dissented. There was a motion for a rehearing, which was overruled by a majority; the same judge still dissenting. The motion for a rehearing was overruled on the 3d day of July, 1909, and on the same day the court adjourned for the term. There was no further action taken in the case until July 21, 1909, when the attorney for the appellee filed a motion in the Court of Civil Appeals requesting them to certify the point of dissent to this court for decision.

We are of opinion that the motion to certify was filed too late. The motion for a rehearing had been overruled, and without any other action in the case the court had adjourned for the term. When a court finally adjourns for the term, all matters finally disposed of at that time become fixed, and the court has no power to set aside, alter, or amend a final judgment. That the Legislature might have provided for a certificate of a dissent after the adjournment for the term, we have no doubt; but as to this we think it sufficient to say that in our opinion they have not done so. There is nothing in articles 1040, 1041, and 1042 of our Revised Statutes of 1895 which intimates that this may be done.

For the reason given, the certificate is dismissed.

**WILLIAMS v. ROBISON, Land Com'r.**

(Supreme Court of Texas. Jan. 19, 1910.)

**PUBLIC LANDS (§ 173\*)—TEXAS SCHOOL LANDS — ABANDONMENT OF CLAIM — REINSTATEMENT.**

Where the purchaser of school land, after his purchase was canceled for abandonment, voluntarily made a second application and was awarded a second allotment, he acquiesced in the cancellation of his first purchase and abandoned that claim, and the Commissioner could not reinstate it.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 549; Dec. Dig. § 173.\*]

Application for mandamus by J. W. Williams against J. T. Robison, Land Commissioner. Writ denied.

D. E. Simmons and W. B. Crockett, for relator.

**WILLIAMS, J.** Relator's first purchase of school land was canceled by the Commissioner for alleged abandonment, whereupon relator, instead of demanding a reinstatement and insisting upon his contract, voluntarily made a second application and received a second award which is in full force. He now asks us to compel the Commissioner to reinstate the former sale. It is quite plain that this cannot be done. When relator entered into a new contract of purchase, he acquiesced in the cancellation of the old and abandoned his claim under that. The Commissioner has no authority to destroy the rights of the state which thus arose.

Mandamus refused.

**WANDRY v. WILLIAMS.**

(Supreme Court of Texas. Jan. 19, 1910.)

**1. TRIAL (§ 380\*)—FILING CONCLUSIONS OF FACT AND LAW.**

Laws 1907, p. 448, c. 7, giving the trial judge 10 days after the adjournment of the term to prepare his conclusions of fact and law when

demand is made therefor, only requires that a request for findings of fact and conclusions of law shall be filed, and without any order the trial judge may file his conclusions in 10 days after the adjournment of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 913; Dec. Dig. § 390.\*]

## 2. APPEAL AND ERROR (§ 108\*)—CONCLUSIONS OF FACT AND LAW—REFUSAL TO FILE.

Refusal of the trial judge to file, as required by Laws 1907, p. 446, c. 7, conclusions of fact and law when a demand is made therefor, is reviewable by the Court of Civil Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 108.\*]

## 3. MANDAMUS (§ 48\*)—CONCLUSIONS OF FACT AND LAW—REFUSAL TO FILE.

The remedy for the failure of the trial judge to file within 10 days, as required by Laws 1907, p. 446, c. 7, his conclusions of fact and law, is not by mandamus to compel the filing of the conclusions.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 95; Dec. Dig. § 48.\*]

## 4. APPEAL AND ERROR (§ 1169\*)—REFUSAL TO FILE CONCLUSIONS OF FACT AND LAW.

Refusal of the judge to file on request conclusions of law and fact, under Laws 1907, p. 446, c. 7, is reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4537; Dec. Dig. § 1169.\*]

Certified Questions from Court of Civil Appeals of Sixth Supreme Judicial District.

Action by J. S. Williams against Albert Wandry. From a judgment for plaintiff, defendant appealed, and the Court of Civil Appeals certifies questions. Questions answered.

F. M. Brantly, for appellant. Baskin, Dodge & Baskin, for appellee.

GAINES, C. J. These are certified questions. The statement and certificate of the Court of Civil Appeals are as follows:

"Appellee instituted suit against the appellant in the county court to recover a certain stated sum of money claimed to be due him on a contract to construct a dam, and in a trial before the court without a jury a judgment was entered in his favor. The trial of the case was begun on April 29, 1908; and was ended, and the judgment entered, on May 1, 1908. The court adjourned finally for the term May 2, 1908. On May 2, 1908, and before the final adjournment of the court, the appellant made a written request to the court, and which was by it granted and entered of record, for an order granting 20 days after adjournment of the court within which to prepare and have filed a statement of the facts and bills of exception, and for the court to reduce to writing his conclusions of fact and of law found by him on the trial of the case. There is no statement of facts, nor conclusions of fact and of law, by the trial judge, in the record on this appeal. The record does not show that an application for mandamus was made to have the trial court discharge his duty in filing his conclusions of fact and of law. The following bill of excep-

tion appears incorporated in the record, duly approved by the trial judge on May 22, 1908, being on the twentieth day after the adjournment of court and being the day the same was presented to him by appellant: 'Be it remembered that on the rendition of the judgment by the court in said cause during said term of said court, to wit, on the 1st day of May, A. D. 1908, and immediately following the rendition of said judgment, and prior to the expiration and final adjournment on the following day of said term of said court, the said defendant caused to be filed therein with the papers in said cause, and presented to the court, a written request in behalf of defendant that the court and the judge thereof reduce to writing and file with the papers therein its findings of fact and conclusions of law, respectively, therein; that said court and the judge thereof having failed to comply with said request, the defendant on, to wit, the 12th day of May, A. D. 1908, the same being within 10 days following the time of the final adjournment of said term of said court, caused to be presented to the judge thereof, at the latter's office in the courthouse where said court is held, further request for findings of fact, with request that the said judge of said court approve the same or act thereon; but that the said judge of said court failed to comply with said request, or to act thereon in any respect, or to file any of its findings of fact or conclusions of law thereon, during the said term or within 10 days after the final adjournment thereof; to which said several acts and omissions defendant desires to except, and prays that this be now taken and approved as his bill of exceptions thereto.' This said bill of exception, being signed and approved by the judge, was filed with the clerk of the county court on the same day that it was approved by the judge. The appellant filed in the lower court, and there is incorporated in the transcript and set out in his brief filed in this court, the following assignment of error: 'The court erred in failing and refusing to either state in writing or cause to be filed in said cause any of its findings or conclusions of fact and conclusions of law thereon, or any such conclusions of fact separately from the conclusions of law, and in refusing defendant's request in that respect.' The contention of the appellant under the assignment is that the failure or refusal of the trial judge to reduce to writing and file his conclusions of fact and of law operated as a denial of a legal right to appellant, in that it deprived him of the right and opportunity of having incorporated in the record of the case for revision on appeal the conclusions of the trial court of the facts proven and of the conclusions of the trial court on the law with reference to the same, and that such failure was such material error as requires a reversal of the case by the appellate court.

### "Questions.

"(1) Is this court authorized to consider and review on appeal the subject-matter set out in the bill of exception and the assignment of error predicated thereon?

"(2) If so, is there reversible error?

"(3) In order to avail himself of the failure of the trial judge to reduce to writing and file his conclusions of fact and of law in the case, should the appellant have applied for a writ of mandamus against the county judge?"

We are of the opinion that the first two questions should be answered in the affirmative. In May, 1907, the Legislature passed an act which contains the following provisions:

"Section 1. That parties to causes tried in the district and county courts of this state may, by having an order to that effect entered on the docket, be granted twenty days after the adjournment of the term at which said cause may be tried to present and have approved and filed a statement of facts, bills of exception, and the judges of such courts shall also have ten days after adjournment of the term at which said causes may be tried, in which to prepare their findings of fact and conclusions of law in cases tried before the court; when demand is made therefor. And judges whose terms of office may expire before the adjournment of the term of said court at which said cause is tried, or during said period of twenty days after the adjournment of the term, may approve such statement of facts, bills of exceptions, and file such findings of facts and conclusions of law, as above provided."

Laws 1907, p. 446, c. 7.

It is to be noted that, in order to obtain 20 days after adjournment for filing a statement of facts or bills of exception, an order must be entered to that effect; but not so as to the filing by the judge of his conclusions of fact and law. The statute only requires that a request shall be filed that the judge shall make out his conclusions of fact and law. Hence without an order he has the power to file his conclusions in 10 days after the adjournment of the court. We conclude that the action of the trial judge in failing and refusing to file his conclusions of fact and law is subject to review by the Court of Civil Appeals, and, where it is found that he has not done so, the judgment ought to be reversed.

In regard to the third question, we fail to see how a mandamus would be applicable to the case. After 10 days have elapsed from the adjournment of the court, the power of the trial judge to file conclusions of fact and law ceases. We do not perceive how in so short a time a mandamus suit could be instituted and prosecuted to a recovery. Besides, the trial judge having 10 days after adjourn-

ment to file his conclusions, the party who has been cast in the suit may not know until the time has elapsed that he will not do so.

So we think that there is no remedy for the error, except to reverse and remand the cause for a new trial.

### POITEVENT et ux. v. SCARBOROUGH.

(Supreme Court of Texas. Jan. 19, 1910.)

#### 1. APPEAL AND ERROR (§ 679\*)—QUESTIONS REVIEWABLE—SUFFICIENCY OF PETITION.

Where it does not appear from the record on appeal that the general demurrer to the petition was acted on below in any way, the question of the sufficiency of the petition is not presented.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2878, 2879; Dec. Dig. § 679.\*]

#### 2. APPEAL AND ERROR (§ 837\*)—REVIEW—MATTERS CONSIDERED—EVIDENCE IN RECORD.

On motion for new trial in trespass to try title, the ground set up was that the petition and judgment did not contain sufficient description by which the land could be identified. The judgment set up one call "thence B. 49° W.," the letter B. being a mistake for either the letter "N." or the letter "S." The facts on which the judgment was based were in the record and conclusively showed that the call should be "thence N. 49° W." *Held*, that in testing the validity of the judgment, on appeal, when the facts on which it was based were in the record, the Supreme Court could look to the evidence to interpret the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3262; Dec. Dig. § 837.\*]

#### 3. ESTOPPEL (§ 32\*)—GRANTEE IN DEED—LAND CONVEYED.

A grantee who accepts a second deed, which gives definite boundaries of the land, and which recites that the land is the same land sold to the grantee and described in the former deed and is made to give a more complete description of the land, is, as a matter of law, estopped from claiming any land not embraced in the second deed.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 69, 81; Dec. Dig. § 32.\*]

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by A. P. Scarborough against Junius Poltevent and wife. There was a judgment of the Court of Civil Appeals (117 S. W. 443) affirming a judgment for plaintiff, and defendants bring error. Reversed and remanded.

Hill & Hill, T. F. Meece, and S. H. German, for plaintiffs in error. F. Campbell, for defendant in error.

BROWN, J. The defendant in error sued Poltevent and wife in the district court of Polk county, Tex., to recover of them a tract of land containing 109 acres, a part of the survey in the name of J. B. Win in said county. The land was described in the petition and judgment as follows: "Being a part of the J. B. Win league situated in Polk

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

county, Texas, and described thus: Beginning on the N. E. line of the Thompson survey, where the N. W. line of the Win crosses the Thompson line. Thence N. 60° E. with the said W. line, 2,094 varas, to a stake on N. W. line of A. Viesca four league survey, pine 8 in. in dia. pine 4 in. in dia. and a post oak, all marked X. Thence B. 49° W. with said Thompson line, 616 varas, to the place of beginning. Containing 100 acres of land." In 1882 the plaintiffs in error made to Scarborough a deed by which they conveyed to him all of the land which they then owned in the Viesca and Win surveys in Polk county. The grantors at that time owned the land sued for. That deed was never recorded and had been lost at the time of the trial. In 1892 Scarborough desired to borrow money upon the land conveyed to him by Poltevent and wife, but it was objected that the description in the deed was not satisfactory. A new deed was made, by which Poltevent and wife conveyed to Scarborough two distinct tracts of land, one containing 333 acres, and the other 851 acres. The land in controversy was not embraced in that deed. Plaintiffs in error claim that the land sued for was not embraced in the first deed, and that the second deed was accepted in lieu of the first. The second deed made by Poltevent and wife to Scarborough contained the following clause, which followed the description given of the two tracts: "These lands being the same lands sold to said A. B. Scarborough on the 2d of March, 1881, and described in said deed dated March 2d, 1881, and delivered to said Scarborough, conveying said lands to him. This deed being made to give a more full and complete description of the said land." It was also recited in that deed that the consideration for the conveyance was the payment of the purchase-money notes mentioned in the first deed. The Court of Civil Appeals finds as follows: "There was evidence sufficient to show that in fact the purpose of the second deed was, as alleged by appellee, solely to give a more full and specific description of the two tracts on which he wished to procure a loan, the loan company objecting to the description given in the first deed of the said two tracts, and that it was not the intention that the title already conveyed to the tract in controversy should be affected by this second deed." The plaintiff recovered judgment in the court below, in which the land was described as given above.

It does not appear from the record that the general demurrer offered by the defendants below to the plaintiff's third amended petition was presented to the court, or acted upon in any way. Therefore the question of the sufficiency of the petition as pleading is not before us for consideration.

In the motion for a new trial in the district court, one of the grounds set up was that the petition and judgment did not contain sufficient description by which the land could be identified; therefore the judgment

was void. In determining the validity of the judgment, the same rule of construction is applicable that would apply if it were a deed. *Mansell v. Castles*, 93 Tex. 414, 55 S. W. 559. The rule for construction of deeds is: That, where there is an evident mistake in the calls, the court must, if practicable, find and correct the error, so as to give effect to the deed. There is a manifest mistake in this call, "Thence B. 49° W.," which cannot be correct. It must either be, "Thence N.," or "Thence S." "B." does not indicate any course. The land to be surveyed is a part of the Win survey, and no part of that survey could lie north of its northwest line. If the call be considered "S. 49° W.," then, to find the third corner, we must reverse the call and run from the beginning corner, following the Thompson line N. 49° W., 616 varas, which would place the corner north of Win's northwest line. A straight line between that point and the second corner would not embrace any of the Win survey. Therefore it is conclusive that the call at the third corner should be "thence N. 49° W.," which would place the third corner on the north line of the Thompson survey, 616 varas S. 49° E. from the beginning corner. The end of the first line being upon the northwest line of the Viesca survey, and the second line called for running from the beginning corner southeast, the third corner is located on the north line of the Thompson and would form a triangle by connection between the Viesca's northwest line and the Thompson north line. The line of the Viesca must cross the Thompson north line, for the courses of the two would produce that result if they were projected far enough. It is reasonably certain that the call omitted was, thence with the Viesca, running in a southerly direction to the intersection with the Thompson north line. This conclusion is sustained by the fact that all of the land lying in the triangle must have been a part of the Win survey, because none of the Thompson survey could be north of its north line, nor could any part of the Viesca be west of its northwest line.

The construction that we have given to the field notes corresponds with the evidence before the court upon which the judgment was rendered. We are of opinion that in testing the validity of a judgment of a court, when the facts on which it was based are in the record, this court may look to the evidence to aid it in the interpretation of the judgment. We conclude that the judgment is not void for want of description, and for that reason overrule the assignment of error which presents that proposition. *Mansell v. Castles*, cited above, is very much in point in this case and, in fact, lays down the rule upon which we have based our decision. We believe that case is sound and therefore adhere to it.

The trial court submitted to the jury the question whether the plaintiff was estopped by accepting the second deed to claim land

embraced in the first, but omitted from the second deed. This action of the trial court was assigned as error in this court. The description in the second deed gave definite boundaries to two tracts of land and recited, "these lands being the same lands sold to said A. B. Scarborough on the 2d day of March, 1881, and described in the said deed, dated March 2d, 1881, and delivered to the said Scarborough, conveying said lands to him. This deed being made to give a more full and complete description of the said land." The land now sued for was not included in the field notes given in the second deed. The plaintiff Scarborough claimed that it was embraced in the first deed, and that he was entitled to all of the land embraced in both deeds. He claimed that the second deed was made only to give definite description to the land for the purpose of securing a loan upon it. Looking to the terms of the deed and the recitals in it, it is very clear that the second deed was substituted for the first, and by its very terms it is stated that the land described therein was the very land conveyed in the first. The plaintiff is estopped by the terms of the second deed from claiming any of the land which is not embraced therein.

Upon a state of facts very similar to this case, the same question was before this court in the case of Doty v. Barnard, 92 Tex. 104, 47 S. W. 712, in which this court said: "By accepting the deed from Doty and wife and selling the land within a short time according to the description given in the said deed, Rowland estopped himself to claim under the deed from Williams to Odom any land not included in the deed from Doty and wife to him." We refer to that case for authorities there cited which fully sustain the proposition laid down by the court. Again this court said in that case: "The recitals in the deed from Doty and wife to Rowland constitute a clear declaration on the part of the grantors, and by acceptance an admission on the part of the grantee, that the land sold by Williams was the 266 acres embraced in the last deed, and that the land sued for was not embraced in the assignee's deed. It would be inequitable to allow Rowland, after availing himself of the benefits of the correcting deed, to repudiate it so far as it imposed an obligation upon him and claim the land in controversy by virtue of the deed from Williams to Odom which he virtually abandoned by accepting the deed from Doty and wife." The effect of the second deed made to the plaintiff was a question of law for the court to decide, and it was error to submit that issue to the jury. The court should have instructed the jury to return a verdict for defendants.

The other assignments of error in the application relate to rulings on the admissibility of evidence, which probably will not arise

on a second trial of this case, and which must be along different lines from the last trial. The issue presented herein cannot arise, and therefore the question of evidence which arose upon the last trial will not probably arise again, for which reason we decline to discuss the other assignments of error.

The judgments of the district court and of the Court of Civil Appeals are reversed, and this cause is remanded.

HOBBS v. ROBISON, Land Com'r, et al.

(Supreme Court of Texas. Jan. 19, 1910.)

PUBLIC LANDS (§ 173\*)—SCHOOL LAND—PURCHASE.

Petitioner mailed his bid for school lands by registered letter as required by law, and it reached the post office in time to have been taken out by the Commissioner and to have been before him when the bids were opened. It was in the post office on Friday, the public offices of the state were closed on Saturday on account of the death of the Governor, and on Monday, when the bids were opened, the bid of another person was the only one which had been received. *Held*, that such person was entitled to an award as against the petitioner.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 547; Dec. Dig. § 173.\*]

Mandamus, on the relation of W. H. Hobbs, to compel J. T. Robison, as Commissioner of the General Land Office, to cancel an award of certain school lands to one Kell, and to accept relator's bid. Writ refused.

James & Yelser, for relator. R. V. Davidson, Atty. Gen., Wm. E. Hawkins, Asst. Atty. Gen., L. A. Dale, Sp. Asst. Atty. Gen., and J. D. Cunningham, for respondents.

GAINES, C. J. This is an application for the writ of mandamus to compel J. T. Robison, Commissioner of the General Land Office, to cancel an award of a certain portion of school land to one Kell, and to accept relator's bid for the land as being the highest and best bid for the same. But the petition shows that, on the day the bids were to be opened, his application to purchase and his bid for the land had not in fact been received in the General Land Office. His bid was mailed as required by law to the Commissioner of the General Land Office by registered letter, and it reached the post office in Austin in time to have been taken out by the Commissioner and to have been before the Commissioner when the bids were opened. It was in the post office on Friday, and the public offices of the state were closed on Saturday on account of the death of Governor Lanham. On Sunday no public business was transacted, and Monday was the day for opening the bids, when the bid of co-respondent Kell was the only one which had been received. The relator's bid was not received until Tuesday.

The case of *Byrne v. Commissioner of the*

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

General Land Office, 122 S. W. 256, decided at a former day of this term presented a similar state of facts. In that case the relator Byrne's application and his bid was on file in the land office on the day the bids were to be opened; but Mrs. Nannie May Williams had mailed her application and bid, which reached the post office in Austin in time to have been taken out and to have been with the Commissioner at the time the bids were opened; but by reason of the fact that the employé of the land office, whose business it was to attend the post office and procure the mail for the General Land Office, had been granted a vacation and had neglected to instruct his substitute to call at the registry window of the post office for the registered mail, the latter failed to do so, and the package of Mrs. Williams was not delivered. We held in that case that, Byrne's application and bid being the only one on file on the day for opening the bids, he was entitled to have the land awarded to him, and the mandamus was granted. In accordance with the rule thus laid down, the correspondent Kell's bid being the only bid on file in the land office when the bids were opened, his bid was the only one to be considered, and he is entitled to an award of the land.

The mandamus is therefore refused.

#### TEXAS & P. RY. CO. v. MOSLEY.

(Supreme Court of Texas. Jan. 5, 1910.)

##### 1. STATUTES (§ 159\*)—REPEAL—REPUGNANCY.

The repugnancy essential to the repeal of an old statute by a new one is that which exists between the continuance of the old in force in opposition to the obvious intent that the new should supplant it, and that is sufficient to operate a repeal, though there be no inconsistency in language.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 229, 230; Dec. Dig. § 159.\*]

##### 2. DEPOSITIONS (§ 78\*)—MAILING—INDORSEMENT OF POSTMASTER.

Sayles' Ann. Civ. St. 1897, art. 2286, requires the postmaster at the post office where depositions are mailed to the clerk of court to indorse on the envelope containing them that he received them from the officer before whom they were taken. Rev. St. 1895, art. 2284, as amended by Act April 12, 1907 (Gen. Laws 1907, p. 186, c. 91, § 1), requires the officer to certify on the envelope inclosing depositions taken in answer to written interrogatories that he in person deposited the same in the mail, stating the date when and the post office in which the same are deposited. Article 2291f of such act provides that depositions shall be certified, etc., as is provided for depositions in Rev. St. 1895, art. 2284, as amended by this act, etc., except that there shall be no requirement that, if sent by mail, the postmaster shall make any indorsement thereon. *Held*, that such provision is not restricted to depositions taken on oral examination, but is intended as a substitute for article 2286, and hence the indorsement of the postmaster is unnecessary.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 201; Dec. Dig. § 78.\*]

##### 3. DEPOSITIONS (§ 75\*)—CERTIFICATE OF OFFICER.

Since the statute does not so require, it is not necessary for the officer taking depositions to designate in his certificate the office he holds.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 167, 194-196; Dec. Dig. § 75.\*]

Certified Questions from Court of Civil Appeals of Sixth Supreme Judicial District.

Action by Willie Mosley against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant appealed. Questions certified from Court of Civil Appeals, Sixth District. Questions answered.

F. H. Prendergast, for appellant. S. P. Jones, for appellee.

WILLIAMS, J. Certified questions from the Court of Civil Appeals for the Sixth District, as follows:

"In an action for damages for personal injuries alleged to have been suffered by him as the result of appellant's failure to discharge its duty to him as a passenger on one of its trains, Mosley, the plaintiff below and appellee here in the above-styled cause, recovered a judgment, which on appeal to this court was reversed on the ground alone that the trial court erred in overruling a motion by appellant to quash the depositions of J. H. Ferguson, Allen Fears, and Dr. J. G. Hendricks, witnesses for appellee, in reply to written interrogatories propounded to them, and in admitting as evidence on the trial of the cause the depositions of said witnesses. It appeared from the motion to quash and the bill of exceptions approved by the court in the record that the depositions had been returned by mail, and that neither the postmaster nor his deputy at the post office where they were respectively deposited in the mail for transmission to the clerk of the court in which the cause was pending for trial had indorsed thereon that he received them from the hands of the officer before whom they were taken, as required by article 2286, Sayles' Ann. Civ. St. 1897. It further appeared from the bill of exceptions that the officer before whom the depositions of the witnesses Ferguson and Fears were taken certified that he 'deposited the same in the post office at Dallas on the 14th day of February, 1908, addressed to the district clerk of Harrison County, as required by the Revised Statutes, article 2284, and so indorsed by him as amended by the Legislature in 1907' (Gen. Laws, p. 186, c. 91, § 1), and that the officer before whom the depositions of the witness Hendricks were taken certified on the envelope inclosing same, as follows: 'I, John P. Slaton, the officer before whom the inclosed depositions were taken, hereby certify that I in person deposited this package in the post office at Hereford, in Deaf Smith County, Texas, for transmission in the U. S. mail, on the 16th day of February, A. D. 1908. [Signed] Jno.

P. Slaton.' It further appeared from the bill of exceptions that the motion to quash was overruled by the court below because he was of the opinion that said article 2286 in so far as it required the postmaster or his deputy at the post office where the depositions were deposited in the mail for transmission to the clerk of the court in which the same was pending for trial to indorse on the envelope inclosing them that he had received them from the hands of the officer before whom they were taken had been repealed by the Act April 12, 1907 (Gen. Laws, p. 186). This court held that the requirement of said article 2284, as so amended that the officer shall certify on the envelope inclosing depositions taken in answer to written interrogatories 'that he in person deposits the same in the mail for transmission, stating the date when and the post office in which the same are deposited for transmission,' is not inconsistent with the requirement in said article 2286 that when such depositions are so deposited the postmaster or his deputy 'shall indorse thereon that he received them from the hands of the officer before whom they were taken.'

"The cause being yet pending before it on a motion for a rehearing, the Court of Civil Appeals for the Sixth Supreme Judicial District, in view of the importance of the ruling as one of practice, certifies to the Supreme Court for its determination the following questions:

"(1) Did the trial court err in overruling appellant's motion in so far as it sought on the ground stated to quash the depositions of the witnesses Ferguson and Fears, and in permitting said depositions to be read as evidence in the case?

"(2) Did the trial court err in overruling appellant's said motion in so far as it sought on the ground stated to quash the deposition of the witness Hendricks, and in permitting said deposition to be read as evidence in the case?"

We answer both questions in the negative.

We think it clear from the provisions of the act of 1907, which are too lengthy to be inserted or even condensed, that the certificate of the officer taking a deposition "that he in person deposits the same in the mail for transmission" is substituted for that which was before required, viz., the certificate of the postmaster or his deputy "that he received them from the hands of the officer before whom they were taken." It is true that the old requirement, which is the last above stated, is found in article 2286 of the Revised Statutes, and that this has not in terms been amended either by the act of 1905 or that of 1907, and that the new provision is contained in article 2284, as amended in 1907, and that the latter article does not expressly dispense with the postmaster's certificate, so that, if this were all, it might be plausibly contended that the Legislature

had only added another requirement leaving the pre-existing one undisturbed. But we think such a contention is met by article 2291f of the act of 1907, which is as follows: "Such depositions shall be certified and returned by the officer taking same, and opened as is provided for depositions in article 2284 of the Revised Civil Statutes of Texas, 1895, as amended by this act, and as is provided for by articles 2286 and 2287 of said Revised Civil Statutes, except that there shall be no requirement that if sent by mail the postmaster or his deputy mailing the same shall make any indorsement thereon, and the same rules shall apply to the use of such deposition as is provided by articles 2288, 2289, 2290 and 2291 of said Revised Civil Statutes." We think this cannot be restricted to depositions taken upon oral examination. There are provisions in the statute of which this is a part relating to both kinds of depositions, and the words, "such depositions," relate to both, as is made plain by the evident purpose here evinced to make the same provision as to the manner of returning them. It is true, as is said in the opinion of the Court of Civil Appeals (124 S. W. 485), that the original provision of article 2286 might stand, as applying to the return of depositions taken upon written interrogatories, consistently with a different one in the new act applying to those taken upon oral examination, although no reason would be apparent for making such a difference; but one of the designs of the Legislature disclosed by the acts of 1905 and 1907 in providing for the first time for oral examinations was to so expand the pre-existing regulations as to admit the change and adapt them to it. No intent whatever is disclosed to require different modes of returning the depositions through the mail; but, on the contrary, both amendatory acts show the purpose to apply the same rule throughout. The new provision found in article 2284 is intended as a substitute for the old found in article 2286, and provides the evidence to be furnished that depositions of both kinds returned through the mail came from the proper hands. When such a legislative intent is apparent from the law, it matters not that the old provision might stand consistently with the language of the new. The repugnancy essential to the repeal of an old statute by a new one, in such instances, is that which would exist between the continuance of the old in force in opposition to the obvious intent that the new should supplant it. That is sufficient to operate a repeal, although there be no inconsistency in language. In this instance, however, the intention applicable to all the depositions to which the provisions of the act of 1907 relate is not left to implication, but is expressed in article 2291f.

The answer to the further contention as to the Hendricks deposition is sufficiently stated by the Court of Civil Appeals thus: "The statute did not in terms require the officer to

so designate the office he held, and we think the court properly refused to quash the depositions merely because he failed in his certificate to name the office he held."

### SINGLETON v. STATE

(Court of Criminal Appeals of Texas. Dec. 8, 1909. Rehearing Denied Jan. 12, 1910.)

#### 1. CRIMINAL LAW (§ 608\*)—CONTINUANCE.

A continuance for absence of a witness was properly refused, where the affidavit of the witness filed in opposition to the motion denied that she would testify to the facts stated in the application.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1368; Dec. Dig. § 608.\*]

#### 2. CRIMINAL LAW (§ 597\*)—CONTINUANCE.

A continuance for absence of a witness was properly refused, where the testimony of all witnesses rendered it certain such witness was not seen at the time of the homicide and would not have given the testimony expected, or, if he had done so, that the same would have been manifestly untrue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1331, 1332; Dec. Dig. § 597.\*]

#### 3. CRIMINAL LAW (§ 597\*)—HOMICIDE—CONTINUANCE.

In a trial for homicide, where none of the state's testimony showed, or tended to show, that accused was flourishing his pistol about deceased's head at the time of the killing, and it appeared that a witness on account of whose absence a continuance was asked was not in a position to see the killing, and it further appeared that there was uncertainty as to the name of the witness or as to his testifying to the facts expected to be proven, a refusal of a continuance for testimony of such witness showing that accused did not threaten deceased with his pistol was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1331, 1332; Dec. Dig. § 597.\*]

#### 4. WITNESSES (§ 41\*)—COMPETENCY—SANITY.

A witness, who, though he had been adjudged insane, had been out of the insane asylum more than six years, and who satisfied the court that he had recovered and was in every way competent to testify intelligently, was competent, though the judgment establishing his lunacy was not shown to have been vacated.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 99; Dec. Dig. § 41.\*]

#### 5. HOMICIDE (§ 158\*)—MALICE—EVIDENCE—THREATS.

In a trial for homicide, testimony that before the killing, and immediately after certain angry language was addressed to deceased by accused, accused drew back his coat and showed witness his pistol, telling him that he had a "damn good gun," and that he "was laying for some God damn son of a bitch," was admissible as showing malignity; it sufficiently appearing that the language was spoken with reference to deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. § 158.\*]

#### 6. CRIMINAL LAW (§ 396\*)—HOMICIDE—EVIDENCE—THREATS.

Where certain alleged threats made by accused in a trial for homicide were in part inquired about at accused's suggestion, the state

was entitled to have all the testimony touching the same matter introduced in its behalf.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 861, 862; Dec. Dig. § 396.\*]

#### 7. HOMICIDE (§ 156\*)—EVIDENCE—MOTIVE.

Where there was a plea of accidental homicide and an issue as to whether the shooting was intentional, any circumstance or declaration showing accused's state of mind and which would throw light on such issue was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 286, 287; Dec. Dig. § 156.\*]

#### 8. CRIMINAL LAW (§ 787\*)—INSTRUCTIONS—FAILURE OF ACCUSED TO TESTIFY.

In a trial for homicide, a charge that the law allows defendant to testify in his own behalf, but a failure to do so is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part, and the jury will not mention, discuss, or even refer to the fact that defendant failed to testify, was proper, and not objectionable as not in terms instructing the jury that they could not consider defendant's failure to testify.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1902, 1903; Dec. Dig. § 787.\*]

#### 9. HOMICIDE (§ 250\*)—SUFFICIENCY OF EVIDENCE.

In a trial for murder, evidence held sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.\*]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

D. P. Singleton was convicted of murder, and appeals. Affirmed.

W. E. Allen, W. F. Smith, and F. S. Eberhart, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. The appeal in this case is prosecuted from a conviction in the district court of Palo Pinto county, wherein D. P. Singleton was found guilty of murder in the second degree and his punishment assessed at confinement in the penitentiary for a period of 10 years.

The killing occurred in a saloon in the little town of Lyra in Palo Pinto county on the night of the 1st of December, 1908. It seems that both parties were drinking somewhat and met by appointment, or otherwise, in the saloon on the night in question. They had some conversation with reference to some chickens and about visiting each other, in the course of which deceased said that the chickens that he wanted to show appellant did not belong to him, but that he owned an interest in them. Whereupon appellant replied, "By God, I invited you to come to my house, and I propose to give you some good music, and what I propose to show you belongs to me and no one else," and added, "I am no pauper, and I am well fixed." This witness also states: That at the time appellant told Taylor, deceased, he was no pauper, he seemed a little "rowled" up some way like he was not in a good humor. Just after

this conversation appellant drew his pistol from his pocket and was in front of deceased, showing it to him. That deceased told him to put it up and went over and sat down on a bench by the wall. That appellant went over and got down in front of deceased, or knelt down in front of him, and soon thereafter the pistol was fired. Some of the witnesses say that at the time and before the fatal shot appellant had taken some of the cartridges out of his pistol, and raise the issue strongly that the shooting was accidental. At the time he was shot, deceased said, "Pat, you have got me." Almost immediately appellant left the room, but soon returned and sat down on the bench close to where deceased's body lay and remarked: "Ain't that hell? Somebody has killed as good a man as there is in this camp," and asked, "Who could it be?" That the witness said he did not know. That appellant then said, "Some one had it in for me and shot at me and hit Taylor." Appellant also stated he was not armed and could be searched. The evidence further showed that appellant hid his pistol a short distance from the saloon some 80 yards south of the saloon in the side of a dirt dump running out from a coal shaft; that at this time it was entirely empty of cartridges with the exception of one empty shell; and that this showed to have been recently fired. The statement of appellant voluntarily made before the grand jury was offered in evidence in which he accounted for his having a pistol by reason of having a difficulty with one Halifax, with whom he was expecting trouble, and explained that he had carried this pistol every time he went down town at night since 1889; that at the time of the killing he had taken out, as he believed, the cartridges in his pistol, and said to deceased he wanted to show him what a fine gun he had; that he then began to snap the pistol, and at the third snap it fired and shot Taylor. Others of the witnesses say that appellant and Taylor seemed to be entirely friendly with each other all the time. This is perhaps a sufficient statement of the evidence.

1. When the case was called for trial, appellant filed his application for continuance based on the absence and for the want of the testimony of three witnesses, Mrs. W. W. Ledbetter, Richard Moreland, and one Brown, who was alleged to reside in Palo Pinto county, Tex., but to be at the time of the trial at Capitan, N. M. It becomes unnecessary to state either the diligence, or the testimony of Mrs. Ledbetter, for the reason that, in opposing appellant's motion for a new trial, an affidavit of this witness was filed in which she distinctly denied the truth of the testimony which it was assumed that she would give, and in terms denied that she would testify to the facts or any of them stated in the application. It is also unnecessary, we think, to discuss the application at length in so far as it relates to the absence of Richard More-

land, for the reason that all the testimony of all the witnesses renders it certain that he was not seen at the time of the homicide and would not have given the testimony expected, or, if he had done so, that the same would have been manifestly untrue. As to the witness Brown a somewhat more serious difficulty presents itself. No diligence was exercised to secure his attendance. It is averred that appellant did not know until after the case was called for trial that Brown was a material witness in his behalf, and that none of his counsel knew this fact. It is averred: That Brown is now at Capitan, N. M., at which place his deposition could be taken; that he was present in the saloon where Taylor was killed, standing within 10 or 12 feet from the parties and with his face towards them so that he could see and know what each of them was doing; that this witness had been in the saloon for an hour or more next preceding the killing and heard the conversation between them, and if present would testify that appellant was not in any way mad or angry at deceased; that all their conversations were in a friendly way; that appellant did not in a threatening manner flourish his pistol before deceased before he was shot; that a few minutes before the accident which resulted in the death of said Taylor the defendant was kneeling in front of the deceased, and while so kneeling took from his pocket his pistol, and in plain view of said witness broke same for the purpose of removing the cartridges therefrom, and as witness believed at the time, and as this defendant believed as shown by his acts, removed therefrom all the cartridges with which same was loaded, placed said cartridges in his pocket, and was showing the deceased how said pistol would work, and was snapping same at the time of the accident; and that the killing was accidental and without any intent on his part to kill Taylor. It is stated that the materiality of the testimony of this witness would appear, in this: That the state has alleged, and will attempt to prove, that the defendant shot and murdered the deceased with malice aforethought; that a short time before said killing of the deceased defendant had made threats against the said Taylor, and had flourished a pistol near the head of deceased, as previously stated herein; that the shot which resulted in the death of said Taylor was fired by this defendant deliberately and with the intention on his part to kill the said Taylor. It is further stated in the application that if this cause is continued until the next term of this court, and the witness fails to return to Texas, appellant could and would secure the testimony of said witness by deposition as the law permits, and further that said Brown was a coal digger at Strawn, for the Strawn Coal Mining Company, where defendant can and will obtain his full name.

In this connection it should be stated that none of the testimony of the state showed,

or tended to show, that appellant was flourishing his pistol about deceased's head at the time of the killing. As to the witness Brown, the state contested the motion on the ground that it would show, if said Brown were present and testified to facts as alleged in said application, that the same would be untrue; and further that the state would show that he was not present at the time of the homicide. In approving the bill of exceptions evidencing the court's action in overruling this application, the following statement is made: "If there was such a man as Brown in the house at the time of the killing, he was not in a position to see it, and undoubtedly did not see it, as defendant's witness McDonald places Brown at the time of the shooting 10 or 12 feet away, facing north and west, while the shooting was done by defendant, who was south of Brown this distance sitting on a soda box case, facing south with his back to Brown, and with his pistol as low down as his waist immediately in front of him, his body would have necessarily hid the pistol, and his (defendant's) hands from Brown's view; Brown would not therefore possibly testify, if present, to the things set out in the application. In aid of this explanation, I refer to and make the state's resistance to the defendant's motion for a new trial, with the affidavits and exhibits thereto attached, part of my explanation to this bill." There was testimony of several witnesses containing references to a man named Brown who was described as being a man about 25 years old, of light complexion, and rather tall and slender. In resisting the motion for a new trial, a number of witnesses testified: That they were well acquainted in the immediate vicinity of Lyra, and that no such man—that is, no man of that name and description—ever lived there or worked in the mines; that there was a man named Arnold Brown, a citizen living there, but he is wholly unlike, in appearance, the person described. The testimony of the witnesses who do refer to Brown, especially appellant's witness McDonald, places him in such position that he could not, in the nature of things, have seen the difficulty. As stated, several of the witnesses do say that there was present a man named Brown. Any inquiry of them would have developed his presence and would have suggested, if that was his name and such person was present, the necessity and importance of suing out process to compel his attendance. In view of the uncertainty as to his name, the showing of the state that he would not have testified to the facts expected to have been proven, the failure of the state to make proof as to flourishing his pistol which appellant stated rendered his testimony important, the showing of his location rendering it unlikely that his testimony would have been important, all constrain us to believe and hold that the trial court did not abuse the discretion with which

the law invests him in overruling appellant's motion for a continuance.

2. The next ground relied upon for reversal is the action of the court in permitting the witness W. W. Ledbetter to testify. When tendered as a witness, appellant proved, in limine, that he had been adjudged a lunatic in Erath county on the 23d day of February, 1903. From inquiry of the witness it was ascertained further that he had gotten out of the asylum, but the objection was made that there was no showing made that the judgment establishing his lunacy had ever been in any way vacated. Thereupon appellant objected to said witness testifying to any fact or facts in this cause, for the reason that he was not a competent witness to testify to any fact, but was presumed to be insane, as it had been shown that he was adjudged insane by a court of competent jurisdiction, and there was no proof going to show that said witness was sane at the time he so testified. The court approved this bill of exceptions with the explanation and statement that the witness had been out of the asylum more than six years and was intelligent and perfectly sane. This explanation implies, of necessity, that the court had satisfied himself that the witness had fully recovered his mental balance and was sane and in every respect mentally competent to give an intelligent account of the circumstances about which he was testifying. We do not think, under the court's explanation, there was any merit in this contention.

3. Again, it is urged that the court erred in admitting in evidence certain testimony of the witness Zack Stallings. This statement occurred in conversation had just a short while before the killing, during which appellant drew his coat back on the right side and showed witness his pistol and told him that he (defendant) had a "damn good gun," and that he "was laying for some God damn son of a bitch." This testimony was objected to for many reasons, and among others because it was not shown to be directed to the deceased or in the class which would include him; that it was irrelevant, incompetent, and immaterial, and calculated to prejudice appellant before the jury. The bill evidencing this matter is allowed, with the following explanation: "That during the examination of the witness by the defendant's counsel they proved by him that in conversation with Stallings, immediately preceding the killing, the defendant drew his coat back on the right side and showed witness his pistol, and on cross-examination the state was permitted to draw out the balance of the conversation that took place in connection with the act of exhibiting to the witness the pistol. In other words, the defendant having proved this act and some statement of the defendant in connection therewith, the court permitted the state to draw out other

parts of the same conversation relating to the same subject and explanatory of the act and conduct of the defendant, which had been put in evidence by the defendant. The court thought this testimony also admissible because the statements were made immediately preceding, and within a very few seconds of, the shooting, and, in the light of the circumstances that immediately followed, the court was of the opinion that this was a threat that embraced within its malignity the deceased." It should be further stated that the language objected to was made immediately after the angry language addressed to deceased by appellant testified to by the witness Ledbetter, and as a continuance of the same provocation, and was under all the circumstances, we think, sufficient to show that same was spoken with reference to deceased. Again, the testimony was clearly admissible as stated by the court, in that, the same matter having been in part inquired about at the suggestion of appellant, the state was entitled to have all the testimony touching the same matter introduced in its behalf. Besides this, in view of the plea of accidental homicide, and the issue as to whether the shooting was intentional, any circumstance or declaration showing appellant's state of mind which would throw light on this issue was both pertinent and admissible.

4. The next complaint relates to the charge of the court in respect to the failure of the defendant to testify. This charge was in this language: "The law allows a defendant to testify in his own behalf, but a failure to do so is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part, and the jury will not mention, discuss, or even refer to the fact that the defendant failed to testify." The objection to the charge is that it does not, in terms, instruct the jury that they cannot consider the failure of the defendant to testify. We think the complaint is hypercritical. The charge approved in the case of *Leslie v. State*, 49 S. W. 73, is more full and complete than the one here complained of. See, also, *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750; *Anderson v. State*, 53 Tex. Cr. R. 341, 110 S. W. 54.

5. Complaint is also made of the charge of the court in that it did not submit negligent homicide of the second degree. We think, under the facts of the case, that the charge of the court submitting negligent homicide and accidental killing was sufficient, and in the light of the record, in view of the submission of these issues, the failure of the court to so instruct the jury evidently could not and did not injure appellant. *Friday v. State*, 79 S. W. 815.

6. Finally, it is urged that the verdict of

the jury is contrary to and unsupported by the testimony. Particular stress, in connection with this complaint, is laid upon the absence of any adequate motive. The motive shown is, indeed, slight, and there are some circumstances tending strongly to support appellant's contention that the killing was accidental. On the contrary, there were significant and potent circumstances tending to show his guilt. There was evidence of anger and ill will, and resentment on the part of appellant. The fact of his denial that he had done the shooting and his falsely attributing Taylor's death to an intended assault upon himself by some one outside of the house; the fact of his leaving the place and hiding his weapon—are all circumstances at variance with his contention of an accident. We cannot determine guilt, always by inadequacy of motive. We are daily witnesses, in the records that reach us, of the light esteem in which life is held, and the shocking murders on motive so inadequate as to both excite surprise and horror. These were matters for the jury. We feel that we ought not, in the light of the entire record, to interfere.

The appellant seems to have had a fair trial, and we have found no error in the record which would justify us in reversing the conviction.

It is therefore affirmed.

#### O'HARA v. STATE.

(Court of Criminal Appeals of Texas. Dec. 15, 1909. Rehearing Denied Jan. 12, 1910.)

#### 1. CRIMINAL LAW (§ 775\*)—"ALIBI"—INSTRUCTIONS.

An instruction "among other defenses set up by defendant is what is known in legal phraseology as an 'alibi'; that is, that if the offense was committed as alleged, and defendant was at another and different place \* \* \* at the time of the commission thereof, and therefore was not, and could not have been, the person who committed the crime. Now, if the evidence raises in your mind a reasonable doubt as to the presence of defendant at the place where the offense was committed, if any such was committed, at the time of the commission thereof, you will give defendant the benefit of such doubt and acquit him"—was proper.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1833-1837; Dec. Dig. § 775.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 298-299.]

#### 2. CRIMINAL LAW (§ 787\*)—INSTRUCTIONS—FAILURE OF DEFENDANT TO TESTIFY.

An instruction that the law allows a defendant to testify in his own behalf, but a failure to do so is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part, and the jury will not mention, discuss, or even refer to the fact that defendant failed to testify, was proper.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1902, 1903; Dec. Dig. § 787.\*]

### 3. CRIMINAL LAW (§ 1090\*)—APPEAL—BILL OF EXCEPTIONS—NECESSITY.

On appeal, matter not evidenced by bill of exceptions will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803-2861; Dec. Dig. § 1090.\*]

### 4. CRIMINAL LAW (§ 938\*) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

In order to entitle defendant to a new trial for newly discovered evidence, the evidence must be such as might change the result, must go to the merits, and constitute not merely a technical defense; it must be material and not merely cumulative, corroborative, or collateral, have been discovered since the trial, and be such as, with reasonable diligence on defendant's part, he could not have discovered at the former trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2317; Dec. Dig. § 938.\*]

### 5. CRIMINAL LAW (§ 939\*) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

On a trial for robbery, a new trial for alleged newly discovered evidence that the night on which the robbery occurred was dark, etc., was properly refused; it appearing that the scene of the robbery, the location of the lights, and the state of the weather were matters known to most witnesses, and that information concerning such matters could have been obtained from a large number of persons on the slightest inquiry.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.\*]

### 6. CRIMINAL LAW (§ 1160\*)—APPEAL.

A verdict which has received the approval of the trial court will not be interfered with in the absence of abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Dan O'Hara was convicted of robbery, and he appeals. Affirmed.

W. S. Payne and Penix & Eberhart, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged by indictment filed in the district court of Palo Pinto county on March 23d of this year with making an assault upon and taking by violence from one J. B. Richardson \$35. He was put upon his trial on the 26th day of the same month, and as a result thereof found guilty, and his punishment assessed at confinement in the penitentiary for a period of five years.

No application for a continuance was made, but when the case was called both the state and appellant announced ready for trial. The evidence of the state was largely adduced through the complaining witness Richardson, who testified that he was in the town of Strawn on the 19th day of March, and that about 10 o'clock that night left the saloon where the parties had been most of the evening and drove by and crossed the railroad track from 60 to 70 steps from the saloon,

and that he was robbed about 100 yards from the depot. His testimony is to the effect that he had exhibited some money in having a bill or two changed during the night, and that after passing the depot, and about the distance stated above from same, he first saw an object to his left in the edge of the electric light, and that when he got close enough he recognized this person as appellant. Thereupon he testifies as follows: "He climbed up on the back of my buggy, threw his arm around my neck, and covered my mouth with his hand, and with the other hand took from my vest pocket \$35 in money of the value of \$35 by force and without my consent." He also testifies there was another person present, but this man he did not recognize. He testifies further that he was drinking somewhat, but was not drunk, and knew what was going on. Touching the place and the surroundings where the robbery occurred, he makes this statement: "This trouble occurred about 100 yards from the depot, right over in front of the depot. The light there was good enough for me to see, and it was starlight also, and I think I can see as well as any one." The testimony further shows that within 30 minutes from the time he first left the saloon he returned with the statement that he had been robbed. During the night appellant was arrested. By the Deputy Sheriff Si Bradford it was shown that about the time Richardson left the saloon he saw appellant go out of the back door of the saloon, and it was something like 30 minutes before he saw him again. This witness also testifies as to the location of lights, substantially, in this language: "The place where the robbery occurred is 400 or 500 feet from the saloon, and there are some lights around there, sufficient, I think, to identify a man by. One of the lights—electric—is at the back end of the saloon, up on a post 15 or 18 feet high; the other lights coming from the windows back there and from a glass door. The electric light on the pole, referred to, is about 250 feet or not over 300 feet from the front of the saloon." He further testified, when he saw Richardson, he seemed to be in fairly good condition, but had been drinking some. It was also shown by the testimony of I. B. Davidson, one of the proprietors of the saloon, that when appellant was arrested Bradford, the deputy sheriff, took from him \$19.20 in money. Touching this matter he makes this statement: "I think the money was handed by defendant to the officer, instead of being taken off of him. The officer had run his hands in defendant's pocket and took out some silver, and the defendant said, 'Don't get my money,' and Bradford said to the defendant that, 'Money is what we are after.' Then defendant said, 'Here is \$10 more,' and handed out the money, and also got from his pocket 20 cents more. When the officer started to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

search him, he got his knife, at which defendant said something about not to get his money, and then the officer said money is what we are after."

Appellant introduced a considerable number of witnesses who made a strong case of alibi. The testimony of some of these witnesses does not exclude the idea that it was possible for appellant to have committed the robbery. The testimony of many of them does, substantially, exclude the possibility of his being present at the scene of the robbery, and altogether the evidence makes a strong showing on this question, and sufficient, if believed, undoubtedly to have defeated the prosecution. A number of questions are raised in the motion for a new trial, some of which we will discuss.

1. The principal complaint of the charge of the court is in respect to the submission of the issue of alibi. On this issue the court thus instructed the jury: "Among other defenses set up by the defendant is what is known in legal phraseology as an 'alibi'; that is, that if the offense was committed as alleged, and the defendant was at another and different place from that which the same was committed at the time of the commission thereof, and therefore was not, and could not have been, the person who committed the crime. Now, if the evidence raises in your mind a reasonable doubt as to the presence of the defendant at the place where the offense was committed, if any such was committed, at the time of the commission thereof, you will give the defendant the benefit of such doubt and acquit him." It is complained that this charge was erroneous, and was calculated to and did prejudice the rights of appellant, and that it presented the issue negatively, and was substantially a failure on the part of the court to submit the issue to the jury. We see no error in the charge of the court. It stated, in substance, the nature of appellant's defense, and then instructed the jury that, if the evidence raised a reasonable doubt in their minds as to his presence at the scene of the robbery, they should acquit. What more favorable charge the court could have given in this connection it is difficult to see.

2. Complaint is also made of the following portion of the court's charge: "The law allows a defendant to testify in his own behalf, but a failure to do so is not even a circumstance against him, and no presumption of guilt can be indulged in by the jury on account of such failure on his part, and the jury will not mention, discuss, or even refer to the fact that the defendant failed to testify." This charge has during this term of the court received consideration and has been adjudged to be no deprivation of any of appellant's rights. *Singleton v. State* (decided at the present term) 124 S. W. 92; *Anderson v. State*, 53 Tex. Cr. R. 341, 110 S. W. 54; *Leslie v. State*, 49 S. W. 73; *Fulcher v. State*, 23 Tex. App. 465, 13 S. W. 750.

3. Complaint is also made in motion for new trial that the court erred in admitting the testimony of Bradford that appellant was generally a fussy and quarrelsome man, and that he and Lee Welch were engaged in a fight in which appellant was the aggressor. This matter is not evidenced by bill of exceptions and cannot, of course, be considered.

4. A more substantial and difficult question arises on the motion, which strongly urges that appellant should have been granted a new trial on account of certain newly discovered testimony. This motion was prepared with great skill, and presents the most difficult question arising in the case. The testimony claimed to be newly discovered consisted of evidence of A. F. Jones, Joe Berkey, D. H. Smith, Barney Gulley, Mike Supina, E. Stanford, H. D. Sheppard, and Geo. H. Cook. By Sheppard and Cook it was proposed to be proven that on the 20th day of March they had a conversation with one Gentry James at the Link saloon in the town of Stawn, in which the said James stated that he got the money, referring to Richardson, and that he had planted it until after this thing was over, and then he would dig it up. By the witnesses Jones, Berkey, Smith, and Gulley it was proposed to be proven that a person could not be identified by and from the electric light at the place of the robbery. This same matter is presented in the affidavit of Supina and Stanford, who say: That, by an actual test on another night corresponding very closely in conditions to the night of the robbery, they were unable to recognize any one by the electric light or without the electric light; that on the night of the robbery, and almost immediately after Richardson was robbed, and before his return to town, they went to the place where he was, and that he stated to them that he did not know who robbed him, but thought it was the man who fought Lee Welch, but was not certain, and so expressed himself at the time; that at this time Richardson was very drunk. The rule is well-nigh universal that, in order to entitle a defendant to a new trial on account of newly discovered evidence, the motion must possess the following qualities: The evidence must be such as might change the result; it must go to the merits and constitute not merely a technical defense; it must be material and not merely cumulative, corroborative, or collateral; it must have been discovered since the trial; and it must be such as with reasonable diligence upon the part of the defendant he could not have discovered at the former trial. *Terry v. State*, 3 Tex. App. 236; *Duval v. State*, 8 Tex. App. 370; *White v. State*, 10 Tex. App. 167; *Fisher v. State*, 30 Tex. App. 502, 18 S. W. 90. It is one of the basic principles of our law, as it was in the time of St. Paul, that no citizen of a free state shall be scourged or condemned unheard. The law gives to every man his day

in court. It does not, however, give him two days, or the day that may belong to some one else. Every consideration of public convenience and economy and every suggestion of self-preservation would suggest to every litigant, when charged in a court of justice, due diligence in the preparation for trial, and in preparing for his defense. The possibility or probability, under the circumstances, of Richardson identifying his assailant, must and would inevitably have suggested itself to one of even the slightest intelligence. In fact, that was made an issue in this case. On this question, on the trial, Richardson testified as has been stated above. Lindsey, a witness for appellant, testified: "The night was rather dark; there being no moon. It was slightly cloudy." J. B. Cooper testified as follows: "The night was dark."

There can be no question that the scene of the robbery, the location of the lights, and the state of the weather were matters known to most of the witnesses, and information concerning this could have been obtained from a large number of persons on the slightest inquiry. The testimony sought in reference to the declaration of James was unimportant, for the reason that same was not at variance with the state's theory or in contradiction of anything testified to by Richardson. His testimony was to the effect, in substance, that two persons were present when he was robbed. The statement of James that he had the money, and when the thing had blown over he would dig it up, not only was not contradictory of the state's case, but tended rather to support it. Besides, no effort was made to secure the testimony of James. The record incidentally does show he had been indicted for the same offense, but that the prosecution, presumably for want of sufficient testimony, against him, had been dismissed before appellant was put on his trial. There would be some merit, perhaps, in the ground of the motion based on the affidavit of Supina and Stanford, except for the fact that in contesting the motion the state shows that all the facts which these witnesses would have testified to were known to B. Stanford, who testified as a witness on the trial in behalf of appellant. He states, in his affidavit, in substance, that he was present with Supina and his brother, E. Stanford, when they went to where Richardson was to help him look for his hat, and heard and saw everything that his brother and Supina heard and saw. The slightest diligence would have enabled appellant on inquiry from B. Stanford to have obtained information not only as to what he knew touching this matter, but who was present, so, if desired, their testimony could have been secured. It is no doubt true that much of this testimony claimed to be newly discovered was material, and some of it important; but it is largely cumula-

tive, and none of it, as we believe, newly discovered or such as could not have been discovered by the exercise of ordinary care. It is true appellant was put upon his trial a short time after the indictment, but he made no application for postponement or any suggestion of unreadiness or unpreparedness to meet the issue. We think, under all the facts, the court did not abuse the discretion that the law wisely commits to his good judgment.

5. Finally, it is urged that the judgment of conviction is contrary to and unsupported by the evidence, and that there is in the record such an overwhelming weight of testimony showing alibi that, in view of the testimony concerning Richardson's condition and the improbability of a complete and reliable identification of the robber, the court below should have, and that we ought now to, set aside the finding of the jury and reverse and remand the case on this ground. We cannot agree to this contention. Testimony in trials before courts is not weighed by mere *avoids*. It might often happen that the testimony of one man, affirming the truth of a given state of facts, might by reason of his intelligence, candor, and integrity outweigh the evidence of a score of men. Mere numbers do not always count. It is the office and duty of juries as triers of fact from conflicting statements to ascertain and declare the truth. When they have done so, and when such finding has received the approval of the trial court, we ought not to interfere, unless the theory of the state is so improbable or the weight of testimony so overwhelming as to evidence unfairness or a flagrant disregard of the testimony. Again, as we have often said, much deference should be paid to the action of the trial court in matters of this sort. The trial judge is more than a mere disinterested moderator, keeping the peace and naming the time of adjournment and convening of court. Among the offices of the position is the duty of passing on motions for new trials where controverted issues of fact are the bases of the motion. The law makes it his duty, where justice demands it, to grant new trials. He sees the witnesses. He is familiar with the environments, and has information and knowledge of the situation which, far removed as we are from the scene of the trial, we cannot have. It is only in cases where he has abused the discretion which the law confides to him that we can or ought to interfere. It may be in this case an injustice has been done appellant; but the issue raised was one of fact, and this fact both the jury and the trial court have held against him. We ought not to and cannot interfere.

Finding no error in the record, the judgment of conviction is hereby in all things affirmed.

## Ex parte MORGAN.

(Court of Criminal Appeals of Texas. Dec. 15, 1909. Rehearing Denied Jan. 12, 1910.)

## 1. HABEAS CORPUS (§ 30\*)—GROUNDS FOR RELIEF—IRREGULARITIES.

Though Rev. St. 1895, art. 3012, provides that the attachment in contempt for violation of an injunction shall be issued when complainant, or his agent or attorney, files his affidavit, and it is issued on the affidavit of another, this is a mere irregularity in process, so that one arrested under such circumstances, and after hearing committed on an order in the contempt proceeding, cannot, for such irregularity, obtain his release by habeas corpus, which is a proper remedy only where the court was without jurisdiction in the matter, or so exceeded its jurisdiction that its judgment was void.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.\*]

## 2. NUISANCE (§ 75\*)—DISORDERLY HOUSE—INJUNCTION—INTEREST OF COMPLAINANT—STATUTES.

Acts 30th Leg. p. 248, c. 132 (Pen. Code, art. 362b), in authorizing suit to restrain the keeping of a disorderly house to be brought by any citizen without showing that he is personally injured by the acts complained of, is not invalid.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 176, 177; Dec. Dig. § 75.\*]

## 3. NUISANCE (§ 75\*)—INJUNCTION—INTEREST OF COMPLAINANT—STATUTES—REPEAL.

Acts 30th Leg. p. 248, c. 132, § 1 (Pen. Code, art. 362b), authorizing suit to restrain the keeping of a disorderly house to be brought by any citizen, without showing that he is personally injured by the acts complained of, is not repealed by Rev. St. 1895, art. 2889, § 1, subd. 3, as amended by Acts 31st Leg. p. 354, c. 34, which has reference largely to the practice with reference to granting writs, hearing thereof, and appeals and orders granted therein, but does not by its terms or necessary implication repeal the former provision.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 75.\*]

Original application by Marie Morgan for writ of habeas corpus. Relator remanded to custody of sheriff.

Stuart & Bell, for appellant. F. J. McCord, Asst. Atty. Gen., and Davis & Thomason, for the State.

RAMSEY, J. This is an original application for writ of habeas corpus, filed in this court on the 16th day of October, 1909, and was made returnable on the 27th day of the same month, when the application was presented on oral argument both by counsel for the state and for relator.

An agreed statement of facts was filed in the case, from which it appears that on the 15th day of April, 1908, R. V. Bell instituted suit in the district court of Cooke county, seeking an injunction against relator, charging that she was engaged in keeping a bawdy house as defined in article 359 of the Penal Code of 1895. Temporary injunction was granted, after a hearing, by Hon. Clem B. Potter, judge of the Sixteenth judicial district of Texas, on June 15, 1908, restraining relator from permitting prostitutes to ply

their vocation upon said premises. From said order an appeal was prosecuted to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and on January 9th of this year judgment was in said court rendered affirming the judgment of the district court granting said temporary writ of injunction. *Lane v. Bell*, 115 S. W. 918. Thereafter, and within the time provided by law, relator in the case last named applied to our Supreme Court for writ of error, which was denied. The mandate of the Court of Civil Appeals in said cause was filed in the district court of Cooke county on August 3d of this year. On the 9th day of October, 1909, application was made by counsel for R. V. Bell, plaintiff in the cause above named, for attachment against relator, setting up a violation and disregard of the injunction theretofore granted. This application was signed by counsel for R. V. Bell, and was made in his behalf. It was sworn to, however, by J. A. Atchison, a citizen of Gainesville, who averred that the allegations contained in the application were true. It is admitted that Atchison was neither the agent nor attorney of said Bell; that he made the affidavit at the request of Bell's counsel. On the same day Judge Clem B. Potter entered an order on said application to enforce his judgment; and on the same day the clerk of the district court of Cooke county issued a writ of attachment, directed to the sheriff or any constable of Cooke county, and same was placed in the hands of H. P. Ware, sheriff of Cooke county, who took relator under such process into his custody. Thereafter on the 15th day of October, 1909, R. V. Bell himself filed statutory oath in said case, affirming that the allegations contained in the application to enforce writ of injunction filed in the cause on the 9th day of October preceding were true. It is agreed, however, that the filing of this affidavit was unknown to the said Marie Morgan and her counsel until after the issuance of writ of habeas corpus by this court. In this state of the record relator relies for release upon several propositions.

1. It is contended that, inasmuch as the original affidavit for attachment was not filed either by the plaintiff, his agent or attorney, that all subsequent proceedings should be treated as void and without authority of law, for that article 3012 of the Revised Statutes of 1895 expressly provides that the attachment in contempt for the violation of an injunction shall be issued by the court or judge when the complainant, his agent or attorney, shall file in the court or with the judge his affidavit stating the person guilty of such disobedience, and that under the conceded facts Atchison was neither the agent nor the attorney of R. V. Bell, and that the whole proceedings must fall, and the arrest and detention of relator were without au-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thority of law. They further contend that, if the original detention and arrest were without warrant of law, the validity of this process could not be aided by filing thereafter proper affidavit. They also contend that the act of the Legislature under which the original suit was instituted, and on which the original judgment was founded, is in violation of section 35, art. 3, of the Constitution. This section of the Constitution is as follows: "No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." In this connection the contention is also made that the portion of article 362b of the act in question (Acts 30th Leg. p. 248, c. 132, § 1), which provides that the citizen suing out the injunction shall not be required to show that he is personally injured by the acts complained of, has been repealed by section 3 of article 2989, Rev. St. 1895, as amended by the 31st Legislature (chapter 34, p. 354, of the General Laws of same).

These matters were submitted to the court in a very able oral argument, and have been well briefed on both sides. We think the infirmity of relator's first contention rests in the fact that it ignores, what must on reflection be manifest, that the court, in this case, had jurisdiction of the subject-matter and of the person of relator, and was by law authorized, both by statute and had, doubtless, the inherent authority, to make its own decrees effective, and that the matters complained of are but irregularities in the processes under which relator was sought to be brought to the bar of the court for punishment. We think it the rule, supported by all the authorities, that a person in custody under a judgment or order of a court of competent jurisdiction, in either a criminal or a civil proceeding, cannot obtain his discharge on habeas corpus on account of irregularities or errors in the judgment, the proceedings on which it was founded, or in the process under which he was held. Habeas corpus is a proper remedy where the court was without jurisdiction in the matter, or where it has so far exceeded its jurisdiction that the judgment is not merely erroneous, but void. Am. & Eng. Ency. of Law, vol. 15, p. 172. A writ of habeas corpus cannot be used to review the regularity of proceedings in inferior courts, nor to fill the office of a writ of error or appeal. Ex parte Cox, 53 Tex. Cr. R. 240, 109 S. W. 369; Perry v. State, 41 Tex. 488; Darrah v. Westerlage, 44 Tex. 388; Ex parte Schwartz, 2 Tex. App. 74; Ex parte Oliver, 3 Tex. App. 345; Ex parte Slaren, 3 Tex. App. 602; Ex parte Mabry, 5 Tex. App. 93; Griffin v. State, 5 Tex. App. 457; Ex parte Mc-

Gill, 6 Tex. App. 498; Ex parte Boland, 11 Tex. App. 159; Ex parte Dickerson, 30 Tex. App. 448, 17 S. W. 1076; Milliken v. City Council, 54 Tex. 388, 38 Am. Rep. 629. The doctrine, too, is well settled that, the district court being a court of general jurisdiction, its judgments cannot be collaterally attacked, and the writ of habeas corpus is not available for that purpose. Ex parte Call, 2 Tex. App. 498; Ex parte Branch, 36 Tex. Cr. R. 384, 37 S. W. 421.

2. In the case of Lane v. Bell, supra, it was distinctly held that the act was not invalid as being in contravention of article 3, § 35, of the Constitution quoted above. The opinion in that case contains a quite satisfactory treatment of the question, and it is to be noted, as agreed, this judgment was on application for writ of error affirmed, and received the approval of our Supreme Court. It is our own judgment that the decision in the case of Lane v. Bell, supra, is correct, and we should, in any event, be very reluctant to hold otherwise in view of the action of our Supreme Court holding to the same effect.

3. Nor is there any merit in the other question raised by relator, that the act of the 30th Legislature was invalid, which provides that the citizen suing out the injunction shall not be required to show that he is personally injured by the acts complained of, or that same is repealed by section 3 of article 2989 as amended by Acts 31st Leg. p. 354, c. 34. It is well settled that repeals by implication are not favored. This act does not by its terms or by necessary implication repeal the authority granted under the law by virtue of which the process issued. The act of the Thirty-First Legislature had reference largely to the practice with reference to granting writs, hearing thereof, and appeals, and orders granted therein, but was not, we think, intended or designed, nor would it have the effect of repealing a substantive grant of authority to issue the writ as was granted in the act under which these proceedings were had.

On full consideration of the entire subject, we are clear that relator is not entitled to the relief here sought, and it is therefore ordered that she be remanded to the custody of the sheriff of Cooke county.

#### Ex parte LANE.

(Court of Criminal Appeals of Texas. Dec. 15, 1909. Rehearing Denied Jan. 12, 1910.)

Original application by Gracie Lane for writ of habeas corpus. Relator remanded to custody of sheriff.

Stuart & Bell, for appellant. F. J. McCord, Asst. Atty. Gen., and Davis & Thomason, for the State.

RAMSEY, J. This case is in all respects identical with the case of Ex parte Marie Morgan (this day decided) 124 S. W. 99. On the authority of the case last named, relator is remanded to the custody of the sheriff of Cooke county.

**Ex parte PATTERSON.**

(Court of Criminal Appeals of Texas. Dec. 15, 1900. Rehearing Denied Jan. 12, 1910.)

Original application by Susie Patterson for writ of habeas corpus. Relator remanded to custody of sheriff.

Stuart & Bell, for appellant. F. J. McCord, Asst. Atty. Gen., and Davis & Thomason, for the State.

**BROOKS, J.** This case is in all respects identical with the case of *Ex parte Marie Morgan* (this day decided) 124 S. W. 99. On the authority of the *Morgan Case*, relator in this case is remanded to the custody of the sheriff of Cooke county.

**BROWN v. STATE.**

(Court of Criminal Appeals of Texas. Dec. 8, 1900. Rehearing Denied Jan. 12, 1910.)

**1. CRIMINAL LAW (§ 159\*)—SUBSTITUTION OF LOST INDICTMENT—LIMITATIONS.**

Code Cr. Proc. 1895, § 470, providing that where an indictment is lost the district attorney may suggest that fact when another indictment may be substituted upon his written statement that it is substantially the same as that lost, or that another indictment may be presented as in the first instance, when the period for the commencement of the prosecution shall be dated from the time of the making of such entry, applies as a statute of limitation only where a new indictment is found, and not where another indictment is substituted for the one lost, so that, if the prosecution was not barred when the original indictment was returned, a prosecution under an indictment substituted for the one lost will not be barred though substituted at a time when prosecution would be barred on a new indictment.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 159.\*]

**2. LARCENY (§ 88\*)—PUNISHMENT—REPEAL OF STATUTE.**

Pen. Code 1895, art. 881, makes any person stealing any horse, mule, etc., punishable by confinement in the penitentiary for not less than 5 or more than 15 years. Article 877, enacted March 8, 1887 (Laws 1887, p. 14, c. 21), makes a bailee of personalty, who, without the owner's consent, fraudulently converts it to his own use with intent to deprive the owner of its value, punishable as prescribed in the Penal Code for theft of like property, and Acts 25th Leg. 1897, p. 83, c. 67, punishes the offense defined by article 881 by imprisonment for not less than 2 or more than 10 years. *Held*, that Act 1897 did not abrogate the punishment for theft as a bailee by changing the punishment for theft under article 881 after the enactment of article 887, as the latter article merely provided that whatever punishment was prescribed at any time by the Penal Code should be applicable to theft by a bailee.

[Ed. Note.—For other cases, see *Larceny*, Dec. Dig. § 88.\*]

**3. CRIMINAL LAW (§§ 351, 361\*)—ADMISSION OF EVIDENCE—FLIGHT—EXPLANATION.**

In a prosecution for theft, accused's forfeiture of his bail bond and subsequent flight were admissible in evidence against him, and his explanation that his flight was upon the advice of his counsel for certain reasons was admissible in his favor.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 779, 802, 802½; Dec. Dig. §§ 351, 361.\*]

**4. CRIMINAL LAW (§ 811\*)—TRIAL—INSTRUCTIONS—UNDUE PROMINENCE OF PARTICULAR MATTERS.**

While, in a theft prosecution, the fact that accused forfeited his bail bond and his flight, as well as his explanation of such facts, were admissible in evidence, the court should not refer to either the incriminating or explanatory evidence in its charge.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. § 811.\*]

**5. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REQUESTS.**

In a prosecution for theft of a horse, the court refused accused's requested charge that if he did not intend to convert the horse and another hired it, but afterwards, in another county than that of the venue, accused assented to fraudulently converting it, the jury should acquit, but instructed that the jury must find the theft to have occurred in the county of the venue (K. county); and further instructed that if the horse was hired by another alone the jury should acquit, though it was converted in K. county, and accused assisted in converting it, and if it was hired by accused in K. county and he afterwards, in another county, conceived the idea of converting it, the jury should acquit, as K. county would have no jurisdiction, as the conversion did not occur therein. *Held*, that the charges given fully covered the requested charge, and further charges thereon were improper.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**6. CRIMINAL LAW (§§ 763, 764, 782\*)—TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.**

In a prosecution for larceny, the court charged that another was an accomplice if any offense was committed, and the jury could not find accused guilty upon the accomplice's testimony unless they believed it to be true and that it showed accused guilty as charged, and could not convict even then unless they believed that there was evidence outside of the accomplice's, tending to connect accused with the offense charged, and believed beyond a reasonable doubt from all the evidence that accused was guilty. *Held*, that the charge was not upon the weight of the evidence or misleading or confusing as requiring a less amount of proof to convict than is required by statute.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. §§ 763, 764, 782.\*]

Appeal from District Court, Kaufman County; F. L. Hawkins, Judge.

R. M. Brown was convicted of theft, and he appeals. *Affirmed*.

Woods & Morrow, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**RAMSEY, J.** The appellant, R. M. Brown, was convicted in the district court of Kaufman county on June 8th of this year on a charge of theft, and his punishment assessed at confinement in the penitentiary for two years. He has prosecuted his appeal to this court, and has raised a number of questions which are both interesting and difficult, and has supported his contentions by a well-considered brief, as well as an able argument on oral submission. We have, however, on a careful examination and reflection arrived at the conviction that none of the errors as-

signed are well taken, and that the case should be affirmed.

1. It appears from the record that the indictment originally presented in the case was returned on the 14th day of February, 1902. This indictment, at some period—left somewhat in doubt in the evidence—was lost. It seems, however, to have disappeared several years ago, and we think the assumption is safe that it has not been seen for more than four years, and probably for more than five years before the state sought to substitute same. However, the state did file its motion on the 11th day of January of this year in which it was sought to substitute the said lost indictment, with the averment that the original had been lost and that the copy attached to the motion was a substantially true copy of the original indictment. To the action of the state in seeking to substitute the indictment, appellant excepted for the reason that the motion did not set out or allege any date about which such indictment was lost so as to show that the right to substitute was not barred by the statute of limitations. Counsel for appellant further answered by a general denial, and especially denied the right of the county attorney to substitute the indictment, for that, if any indictment ever existed, same had been lost without appellant's fault for a period of more than five years next before the filing of said motion to substitute the same, and that the right to substitute is barred by the statute of limitations of five years. Appellant further pleaded the statute of limitation of four years. The court, on the 23d day of January, 1909, on proof, substituted the indictment, and the trial proceeded on such substituted indictment. The action of the court touching this matter is preserved in a proper bill of exceptions. The bill tendered recites that the evidence showed that the indictment had been lost in January, 1903, and that this fact was known to the district clerk, sheriff, and county attorney of Kaufman county as early as that date, and appellant excepted to the pleading and proof as well as the action of the court in substituting the indictment, for the reason that same is barred by the statute of limitation of four years. This bill is approved with this explanation: "The defendant was never arrested under the indictment, but, before same was returned, forfeited his appearance bond and was never rearrested until in December, 1908, at which time the present county attorney first discovered the loss of said indictment." Article 470 of the Code of Criminal Procedure is as follows: "When an indictment or information has been lost, mislaid, mutilated or obliterated, the district or county attorney may suggest the fact to the court, and in such case another indictment or information may be substituted upon the written statement of the district or county attorney, that it is substantially the same as that which has

been lost, mislaid, mutilated or obliterated. Or another indictment may be presented, as in the first instance, and in such case the period for the commencement of the prosecution shall be dated from the time of making such entry." It will be observed that by the language of the statute that limitation will only run in the case of the presentment of a new indictment. We think the language of the statute itself clearly indicates that this provision of the statute, in regard to limitation, was intended to apply only in cases where a new indictment was sought to be found. We think, indeed, on general principles, in the absence of such a provision this would be the rule. The substitution of an indictment or other paper in a pending case is not the institution of a new suit, or a new prosecution. It is merely an ancillary proceeding in the action then pending. The presentment of a new indictment, of course, requires the action of a grand jury, and presumably it would require the introduction before them of the evidence, an ascertainment that a crime had been committed and their presentment of the person committing same before the court in due order. It was not intended, we think, by our Code that this rule should apply where it was merely sought to substitute an indictment already found. We think, by analogy, the rule in civil cases would apply. If, let us say, an action had been brought on a note a short time before it would be barred by limitation, and thereupon the petition was lost, could it be successfully contended that the action and ground of recovery would be lost, because the motion to substitute had been filed at a time when, if it were to be treated as a new suit, the cause of action would be barred by limitation? We cannot think so. On the other hand, it is clear that if in such a case, instead of attempting to substitute, a new suit were instituted that limitation would apply. This rule, we think, the Legislature intended in respect to criminal cases. In other words, if the original indictment were returned at a time when the offense was not barred, it cannot avail a defendant if the indictment becomes lost that a motion to substitute was entertained at a time when, if treated as a new prosecution, the offense would be barred.

2. The next question raised on the appeal is that under the law no penalty is attached to the offense with which appellant is here charged. By article 881, Pen. Code 1895, it is provided that, "If any person shall steal any horse, ass or mule, he shall be punished by confinement in the penitentiary not less than five nor more than fifteen years." By Acts 25th Leg. March 26, 1897, p. 83, c. 67, it was provided that the punishment for this offense should not be less than 2 nor more than 10 years. Article 377 of the Penal Code of 1895, passed March 8, 1887 (Laws 1887, p. 14, c. 21), is as follows: "Any person having

possession of personal property of another by virtue of a contract of hiring or borrowing, or other bailment, who shall, without the consent of the owner, fraudulently convert such property to his own use with intent to deprive the owner of the value of the same, shall be guilty of theft, and shall be punished as prescribed in the Penal Code for theft of like property." The argument is made that, inasmuch as the provision of the Code under which this prosecution is being urged was passed at a time when the punishment for theft of a horse was not less than 5 nor more than 15 years, then when this article was amended and a different punishment prescribed, after the passage of article 877, this had the effect to repeal and abrogate the punishment for theft as bailee, and that there being no punishment for the offense, and no legal penalty prescribed, no prosecution under this article could be sustained. We think this argument is unsound and the position untenable, for the reason that the effect of article 877 was merely to declare that conversion by bailee is theft and should receive the same punishment as the law fixed for the theft of the same property by a fraudulent taking without consent, and that the clear meaning of the language "and such punishment as prescribed by the Penal Code for theft of like property" was to attach a like punishment whatever that punishment might be at any given time.

3. In this case it seems that soon after appellant was first indicted he left the state and remained away for several years, forfeiting his bail bond, and that proof of such flight and the forfeiture of his bail bond were made as circumstances against him. He became a witness in his own behalf, and in the course of his testimony stated that the occasion of his departure from the state was due to the fact that he had been advised by his counsel that one Adams, a codefendant and coactor in the offense, would plead guilty, and the prosecution against him would be dismissed. In this state of the evidence, counsel for appellant requested the court to instruct the jury that if they believed the appellant was informed by his counsel that his case was to be dismissed and that his codefendant would plead guilty, and defendant believed same to be true, then the forfeiture of his bail bond afterwards would not be considered as a fact against him. That appellant's flight and forfeiture of his bail bond were admissible as a circumstance against him is not to be denied; that his explanation of this fact was admissible as a circumstance in his favor is also well settled. It was not, however, proper that the court should have referred, in his charge, to the fact of such forfeiture, or to his explanation and justification thereof. These were facts to be considered by the jury, and the court was not called upon, nor would it indeed have been proper for him, to have singled out

either the incriminating fact against him or his explanation justifying his conduct.

4. Again, counsel complain that the court erred in refusing his special charge to the effect that if he did not have the intent to convert the horse, and that R. E. Adams hired same, but afterwards, while in Van Zandt county, appellant assented to the fraudulent conversion thereof, the jury should acquit the defendant; and if the jury have a reasonable doubt on this point they should acquit him. In support of this proposition we are referred to the case of *Abbey v. State*, 35 Tex. Cr. R. 590, 34 S. W. 930. We think, under the testimony in this case, it would inevitably result that if this charge had not in substance been given that a reversal should be ordered. However, an inspection of the court's charge, as we believe, covered this question, and was probably more favorable to appellant than the charge requested by him. In the first place, in submitting the issue as a basis of conviction, the jury are required to find a conversion to have occurred in Kaufman county. Then the court thus instructs the jury: "If you believe the horse in question was hired by R. E. Adams alone, and that defendant did not participate in the hiring thereof, then you will acquit the defendant, even though you may also believe from the evidence beyond a reasonable doubt that the horse was converted in Kaufman county, and that defendant was a party to the conversion." Again, the court gave this charge: "If the horse in question was hired by defendant from Luther Kines in Kaufman county, Texas, and defendant afterwards, in Van Zandt county, conceived the idea and intent to fraudulently convert said horse, and did so convert him in said Van Zandt county to his own use, then you must acquit the defendant, because this county would have no jurisdiction if the conversion, if any there was, did not occur in Kaufman county." Thus, all together, we think this was a fair and clear submission of appellant's contention, and that no further instruction touching the matter was required, or, indeed, would have been proper.

5. The next ground of complaint is in respect to the charge of the court on the subject of accomplice. Touching this matter the court gave this instruction: "A conviction cannot be had upon the testimony of an accomplice unless the jury first believe that the accomplice's evidence is true and that it shows the defendant is guilty of the offense charged against him, and even then you cannot convict unless the accomplice's testimony is corroborated by other evidence tending to connect the defendant with the offense charged, and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the defendant with its commission. You are charged that R. E. Adams was an accomplice, if any offense was committed, and you are

instructed that you cannot find the defendant guilty upon his testimony unless you first believe that the testimony of said Adams is true and that it shows the defendant is guilty as charged in the indictment; and even then you cannot convict the defendant unless you further believe that there is other evidence in the case, outside of the evidence of said Adams, tending to connect the defendant with the commission of the offense charged in the indictment, and then from all the evidence you must believe beyond a reasonable doubt that the defendant is guilty." It is complained that this charge, as framed, is upon the weight of the evidence, and goes beyond the plain words of the statute, and is confusing to the jury, misleading, and erroneous, in that it impresses the jury that by reason of its construction that a less quantum of proof is required to convict than is required by statute. We cannot agree with counsel in these criticisms. The charge of the court contains every essential necessary to be charged, and is, indeed, rather a more favorable presentation of the issue than appellant was entitled to receive. The jury could not have been misled by the charge. In the first place, it instructs the jury that Adams is an accomplice in the offense, if one was committed; that they cannot convict unless they believe his testimony is true and that same shows that appellant is guilty, and cannot, even then, convict unless there is other evidence tending to connect appellant with the commission of the offense charged, and finally, that no conviction can, in any event, be had unless they believe him guilty beyond a reasonable doubt. The charge, we think, leaves appellant without possible ground of complaint.

The evidence is sufficient, if believed, to sustain the verdict of the jury. After a careful examination of all the questions raised, we find no error in the record, and the judgment of conviction is therefore affirmed.

#### DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 15, 1909. Rehearing Denied Jan. 12, 1910.)

#### 1. CRIMINAL LAW (§ 823\*)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS.

Where a previous portion of the instructions correctly defined malice as applicable to both degrees of murder, an instruction that if defendant with a deadly weapon shot and killed deceased, and such shooting was not under the immediate influence of sudden passion produced by an adequate cause, and was not in self-defense of an unlawful attack, he is guilty of murder in the second degree, is not objectionable as failing to require the existence of malice.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 823.\*]

#### 2. CRIMINAL LAW (§ 810\*)—TRIAL—CONTRADICTORY INSTRUCTIONS.

An instruction on manslaughter that "insulting words or gestures or an ordinary as-

sault and battery so slight as to show no intention to inflict pain or injury are not deemed adequate cause" is proper, and not contradictory of a further instruction that "any condition or circumstance which is capable of creating and does create sudden passion, such as anger, rage, sudden resentment, or terror rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not, is deemed adequate cause," etc.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 810.\*]

#### 3. CRIMINAL LAW (§ 1171\*)—APPEAL—CONDUCT OF COUNSEL—HARMLESS ERROR.

Remarks of counsel for the prosecution that he did not believe that the jury would find defendant not guilty because the people in that county were law-abiding people, and believed in enforcing the law, that the killing was deliberate, preconceived and a cold-blooded murder, and that in passing on the matter the jury had before them a deliberate, cold-blooded murder with which to deal, while objectionable, do not require a reversal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1171.\*]

#### 4. CRIMINAL LAW (§ 649\*)—CONDUCT OF TRIAL—RECESS DURING TRIAL.

Refusing to allow defendant's counsel five minutes in which to consult with witnesses and each other at the close of the state's case is not ground for reversal where counsel for the state had just previously been given 10 minutes in which to consult on their statement that they had only one more witness whose testimony would be short, and defendant's first witness was not present, and 17 minutes were allowed to bring her in.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1512-1515; Dec. Dig. § 649.\*]

#### 5. HOMICIDE (§ 266\*)—TRIAL—NECESSITY FOR CALLING EYEWITNESSES.

The state is not required to call all eyewitnesses of the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 500; Dec. Dig. § 266.\*]

Appeal from District Court, Callahan County; Thomas L. Blanton, Judge.

C. Q. Davis was convicted of murder in the second degree, and appeals. Affirmed.

B. D. Shropshire, B. L. Russell, and Otis Bowyer, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for murder in the second degree. The punishment was assessed at 16 years' imprisonment in the penitentiary.

The deceased was named Arthur Clemer. A difficulty arose between the parties on Sunday morning in regard to rent due by Clemer, and for which appellant seems to have been responsible as surety. There was apparently ill feeling between the parties prior to this transaction. The deceased became abusive to appellant, using the vilest and most vulgar expressions in denunciation of him. The parties separated, each going to his home, within a hundred yards of where the meeting occurred. Their places of residence were about 100 feet apart. Appellant was keeping a hotel. Clemer had his little child with him at the time of the meeting above mentioned.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

After carrying the child home, he went from there north of where the above meeting occurred to the place of the homicide. The railroad runs practically east and west through the little town of Putnam, where this tragedy occurred. Appellant armed himself with a shotgun, and went in the same direction. His testimony shows that he was en route to the post office to mail several letters. He gave as a reason for carrying the gun that he had an understanding with a young man in the town that they would go hunting, and as a further reason that deceased had threatened him, and he was then fearful of the execution of such threats and a renewal of the difficulty, and took the gun for the purpose of protecting himself. As appellant approached the place where deceased was, the deceased went into a restaurant and sought to obtain a gun. Falling in this, he went out upon the gallery, which was spoken of as the sidewalk, and took his stand near one of the gallery posts, with one of his hands upon the post. Some of the witnesses say it was his left hand; others that it was his right hand. There is testimony from several of the witnesses to the effect that deceased's right hand was in or about his right hand hip pocket. Appellant was passing about 10 steps distant from the deceased when deceased began cursing and applying to him very vulgar and opprobrious epithets, calling him a damned son of a bitch and God damned son of a bitch, and using expressions, according to some of the witnesses, much more vulgar and obscene. He further remarked to appellant that he (appellant) was armed; that he (deceased) was unarmed, but that he (appellant) was a God damned coward, and did not have nerve to shoot him. These epithets, expressions, and statements were repeated as many as three or four times. Appellant testified in his own behalf to the language used by the deceased towards him, and movement of his hand to his right hip, at which juncture he fired. The first shot missed deceased, the second shot took effect in deceased's stomach a little to the right of the navel. Small shot were used, supposed to be No. 4's, or, as some of the witnesses call them, "duck shot." This is a sufficient statement of the evidence without going into the details.

1. The court charged upon both degrees of murder, manslaughter, and self-defense. Exception was reserved to the following subdivision of the court's charge, applying the law of murder in the second degree to the facts: "If you believe from the evidence beyond a reasonable doubt that defendant, C. Q. Davis, \* \* \* with a gun, and that the same was a deadly weapon, did shoot and thereby kill Arthur Clemer as charged in the indictment, and that such shooting, if any, was not done under the immediate influence of sudden passion produced by an adequate cause (as the same is hereinafter explained to you), and was not in defense of himself against an unlawful attack, or what to the defendant might have

reasonably appeared an unlawful attack, producing in his mind a reasonable expectation or fear of death or serious bodily injury, then you will find the defendant guilty of murder in the second degree, and assess his punishment," etc. The objection to this charge urged in the motion for new trial is "that the court nowhere tells the jury that the killing must be upon malice aforethought, or upon implied malice aforethought as theretofore defined." We are of opinion that there is no substantial merit in this contention. The question involved here was discussed in the case of *Puryear v. State*, 118 S. W. 1043. In a previous portion of the charge the court in this case gave a full and fair definition of malice as applicable to both degrees of murder. The following language was used in the *Puryear Case*, supra: "As to the other criticisms of this portion of the charge, it is not to be denied that the charge is not as full or as accurately expressed as is always desirable; but we believe, tested in the light of the entire charge, or considered in fairness and carefully analyzed within itself, the charge complained of is not so clearly erroneous as to constitute reversible error. We have frequently said, and it cannot be too often repeated, that in testing the sufficiency of a charge of the court, as, indeed, other instruments, the whole instrument and charge must and should be considered together." Then follows a quotation in the case, supra, of the definitions of malice and other portions of the charge given in that case bearing on this question. Then the court said: "There is no complaint in the motion that murder in the second degree was not properly defined. The jury were in terms told that, in order to constitute murder in the second degree, malice must exist, and, further, that implied malice was inferred, or such as the law imputes to the act and fact of an unlawful killing. Then follows the language complained of. It is certain, if one kills another intentionally, under circumstances not amounting to murder in the first degree, or such as would reduce the grade of offense to manslaughter, and same is not in self-defense, it is unlawful. It is equally certain that under such circumstances the law would impute malice to appellant, and that the killing would be murder in the second degree. It is always unlawful for one person to intentionally kill another, unless the act is in self-defense or under such circumstances as in case of legal execution that the act would be justified in law; and in a case like the one at bar, where murder in the second degree is well and fully defined, so well, indeed, that the definition escapes criticism or complaint, it is not believed that the mere omission in a particular paragraph to require the killing to be unlawful, or upon malice, would vitiate what would be otherwise a proper charge, where the facts required to be found, both as a matter of law and as a matter of fact, would make the killing unlawful, and stamp it in-

evitably as of the grade of murder in the second degree." Under the decision in the Puryear Case from which this quotation is made, we are of opinion that tested by the rules laid down there the charge was sufficient in this case. In fact, this case on the charge is very similar, almost exactly like that in the Puryear Case, and the quotation from that opinion may well apply to the question here suggested.

2. The court's charge upon the law of manslaughter is also criticised. At least that portion which reads as follows: "Insulting words or gestures, or an ordinary assault and battery, so slight as to show no intention to inflict pain or injury, are not deemed adequate cause." Exception was reserved to this charge because it was not applicable to the peculiar facts in evidence, and contradicts and destroys the effect of the clause of the court's charge which immediately follows it. That charge is in the following language: "Any condition or circumstance which is capable of creating and does create sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not, is deemed adequate cause. And where there are several causes to arouse passion, although no one of them alone might constitute adequate cause, it is for you to determine whether or not all such causes combined might be sufficient to do so." There is no complaint of the latter part of the charge quoted, but the contention is that the first portion of the charge quoted is contradictory of the second, and not applicable to the facts of the case. We are of opinion there is no substantial merit in this contention. The charge criticised is practically a copy of the statute, and is the law applicable to all insulting words or gestures, except where the insulting conduct, words, or gestures are towards or concerning a female relative. The insulting words used by the deceased, while of a most obscene character, were directed at appellant, and not at his female relatives. *Simmons v. State*, 23 Tex. App. 653, 5 S. W. 208; *Levy v. State*, 28 Tex. App. 203, 12 S. W. 596, 19 Am. St. Rep. 826. We are of opinion this charge did not mislead the jury. It was the law of the case so far as the insulting words were concerned as applied by deceased to appellant. Those words could not of themselves reduce an otherwise unlawful killing to the grade of manslaughter.

3. Two bills of exception were reserved to the language of prosecuting attorneys. The language is not of sufficient gravity, we think, to require a reversal of the judgment. The remarks were in substance the opinion of said attorneys as to their view of the case, or what ought to be done with appellant. One of the attorneys said he did not believe that the jury would find appellant not guilty because the people of that county were law-abiding people, and believed in enforcing the law. The other said that the killing was de-

liberate, preconceived, and a cold-blooded murder, and, in passing on the matter, the jury had before them a deliberate, cold-blooded murder with which to deal. Opinions of attorneys in matters of this sort should not be indulged, and such conduct has been reprobated by this court in various decisions, but usually such arguments or statements have not been regarded as of sufficient importance to reverse the judgment, and it will be noticed that a special charge was not asked in regard to the matter. As presented, we are of opinion there is not sufficient merit to require or authorize a reversal of the judgment in these contentions.

4. Another bill of exceptions recites that, when the state had rested its case, appellant's counsel stated to the court that they were taken by surprise at the action of the state in resting its case so suddenly, and requested the court to grant them five minutes' time within which to consult with their witnesses and with each other before offering testimony on behalf of defendant. The court signs this bill with the statement and explanation that shortly before the state rested the district attorney stated that the state was about ready to rest its case, and asked for about 10 minutes in which to consult stating that the state would put on only one more witness, whose evidence would be short, and then the state would rest. Time was granted as requested, and defendant was thus put on notice that the state would shortly rest its case, and the defendant's counsel had this time for consultation. The state did rest its case as indicated, and then defendant's counsel asked that they be given time to consult and arrange their testimony, and the court ruled that they had already had sufficient time and that they must proceed. Appellant then called for a female witness, who, it transpired, was at a boarding house, and the court sent for her, and waited for her appearance, and after sending for this witness 17 minutes elapsed before she arrived, during all of which time defendant's counsel had ample time to consult, if they had so desired; and with the above explanation the court approves the bill. As the matter is presented we are of opinion there is no special merit shown. The appellant had the time allowed by the court to the state in which to consult before "resting" the state's case, and, in addition, they had 17 minutes while waiting for the appearance of the female witness mentioned in the court's explanation. Inasmuch as the appellant had only asked for five minutes under the facts stated, he could have availed himself of the 27 minutes.

5. One of the grounds of the motion for new trial complained of the court's action in refusing to require the state to put on all the eyewitnesses to the actual killing. It is further stated that the prosecution had only produced two such eyewitnesses before the jury. It is also stated that there were many

other witnesses to the killing. This is not verified by bill of exceptions, and it might be answered that this is sufficient to meet this ground of the motion, but in any event there was no merit in this contention. *Mayes v. State*, 33 Tex. Cr. R. 33, 24 S. W. 421; *Reynolds v. State*, 33 Tex. Cr. R. 145, 25 S. W. 786, 47 Am. St. Rep. 25; *Martinez v. State*, 58 S. W. 1018; *Jackson v. State*, 24 S. W. 896; *Blair v. State*, 60 S. W. 880; *McCandless v. State*, 42 Tex. Cr. R. 655, 62 S. W. 745; *State v. David*, 131 Mo. 395, 33 S. W. 28; *Kidwell v. State*, 35 Tex. Cr. R. 264, 33 S. W. 342; *Darter v. State*, 39 Tex. Cr. R. 44, 44 S. W. 850; *Willford v. State*, 36 Tex. Cr. R. 424, 37 S. W. 761; *Trotter v. State*, 37 Tex. Cr. R. 474, 36 S. W. 278; *State v. Barrett*, 33 Or. 199, 54 Pac. 807; *Ross v. State*, 8 Wyo. 379, 57 Pac. 924; *McGrew v. State*, 49 S. W. 239. There are quite a number of other cases that might be cited, but we think these are sufficient to show that the rule is well established that the state is not bound to place on the stand all eyewitnesses.

There are some other questions stated in the motion for new trial, but they are not verified by bills of exceptions, and are such matters as can only be considered when presented by bills of exceptions, except some minor criticisms of the charge of the court. In these there is no merit, and we deem it unnecessary to discuss them.

The evidence, we think, is sufficient to justify the jury in arriving at their verdict. The judgment is affirmed.

### GOSS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1909. Rehearing Denied Jan. 12, 1910.)

#### 1. INTOXICATING LIQUORS (§ 233\*)—PROSECUTION FOR UNLAWFUL SALE—EVIDENCE.

In a prosecution for the sale of liquors in violation of the local option law, evidence that seven weeks before the alleged sale liquors were found in defendant's possession is inadmissible if objected to by defendant.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 295; Dec. Dig. § 233.\*]

#### 2. CRIMINAL LAW (§ 1134\*)—REVIEW—ADMISSION OF EVIDENCE—EXPLANATION IN BILL OF EXCEPTIONS.

In passing on exceptions to evidence, the reviewing court is guided by the explanation of the trial judge in the bill of exceptions which was accepted by defendant.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1134.\*]

#### 3. CRIMINAL LAW (§ 695\*)—TRIAL—OBJECTIONS TO EVIDENCE.

A general objection to evidence of the seizure of liquor in defendant's possession prior to an alleged sale in violation of the local option law is insufficient as an objection on the ground that such possession by defendant was not reasonably contemporaneous with the alleged sale.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 695.\*]

#### 4. WITNESSES (§ 321\*)—IMPEACHING ONE'S OWN WITNESS.

That the testimony of a witness called by the state contradicted the testimony of another state's witness is not sufficient to entitle the state to impeach its own witness.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 321.\*]

#### 5. CRIMINAL LAW (§ 673\*)—TRIAL—INSTRUCTIONS AS TO PURPOSE OF EVIDENCE.

Where a previously written statement contradictory of a witness' testimony in court is admissible for the purpose of impeachment, the court should, by an instruction, confine its consideration to that purpose.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1734, 1735, 1872-1876; Dec. Dig. § 673.\*]

#### 6. CRIMINAL LAW (§ 1056\*)—REVIEW—NECESSITY FOR EXCEPTION TO FAILURE TO INSTRUCT.

A conviction will not be reversed for the failure to limit the scope of impeaching evidence, in the absence of an exception to such failure and a request for such limitation.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.\*]

Appeal from Fannin County Court; H. A. Cunningham, Judge.

Lawrence Goss was convicted of selling liquors in violation of the local option law, and appeals. Reversed.

S. F. Leslie, for appellant. F. J. McCord, Asst. Atty. Gen., J. W. Donaldson, County Atty., and Rosser Thomas, Asst. County Atty., for the State.

RAMSEY, J. This appeal is prosecuted from a judgment had in the county court of Fannin county on April 8th of this year, in which appellant was found guilty of a violation of the local option law, and his punishment assessed at 40 days' confinement in jail and a fine of \$30.

1. The evidence in the case is not very satisfactory, but is, we think, sufficient on appeal to sustain the verdict of the jury and the action of the court in overruling the motion on this ground. As stated by counsel for appellant, most of the exceptions taken by him on the trial are rendered harmless by explanations and statements of the court. The only two questions which could in any event avail him are those presented in his brief, and which are well presented and which we have carefully considered. On the trial the state introduced one Bridge, sheriff of Fannin county, who testified that, under process he searched the house occupied and controlled by defendant, and found therein some whisky; that this was about the 1st day of September, 1908, and the sale was alleged to have been made on or about the 22d day of October, 1908. The evidence of the witness Carter, to whom the sale was alleged to have been made, fixes the transaction as having occurred about the 17th of October, 1908. The exception of appellant to this testimony is quite full, and, in the

absence of explanation, we should not hesitate, under the authority of *Myers v. State*, 52 Tex. Cr. R. 558, 108 S. W. 392, to reverse the case. It is there held that, where evidence of the possession of liquor is admitted at all, such admission can only be justified where the possession of same is reasonably contemporaneous with the time of the alleged sale. In this case some seven weeks had intervened. However, in his explanation to the bill the court makes this statement: "The only objection made was a general objection to sheriff testifying as to seizure at all, which was overruled. Afterwards sheriff stated time of seizure, but at that time no objection was made or exception taken. I do not certify that evidence failed to show defendant operated place at time of sale, etc., or that grounds of objection to that effect were offered." Now, in passing on exceptions, it is evident that this court must, in the nature of things, be guided by the explanations of the trial judge. Certainly this is true where the bill, as explained, is accepted, and no effort is made to prove up the exception by bystanders. Testing the bill by this rule, it is obvious that the objection cannot be sustained. If, when this testimony was offered, the time of seizure and finding of liquor in appellant's possession was not stated, it was within the power of appellant to have developed this fact preliminary to making objections, or to have made the objection that, in the absence of a showing that such possession was contemporaneous, the testimony was not admissible, but, as the explanation of the court discloses, the objection was that the testimony was not admissible at all. The reason of the rule requiring counsel to point out the objection to testimony is that in fairness to the court below such court may have an opportunity of passing intelligently upon the admissibility of the evidence. Testing the bill by the court's explanation, this was not done in this case. Under certain circumstances, the testimony was admissible. The objection is in substance to the effect that under no circumstances was it admissible.

2. The other matter presented is the action of the court in permitting the county attorney to prove by the witness Will Slagle the making of a certain affidavit by him, and permitting same to be offered in evidence. This affidavit was to this effect: "I sold some cotton in Honey Grove. My family do most of their trading at Price's in Honey Grove. I have not bought any whisky in Honey Grove any time this fall. I have not gotten any whisky for myself or for any one else in Honey Grove this fall. I do not know of any one who has gotten any whisky in Honey Grove this fall. I have not seen any whisky delivered to any one in Honey Grove this fall. I stayed at the Lahue Hotel in November one night and one night last week I stayed at P. M. Price's." This affidavit was made on the 8th of December,

1908. It is objected to because irrelevant and immaterial, and as having no bearing on any issue in the case; that said statement was not made in the presence or hearing of the defendant; that the same was offered for the purpose of impeaching the testimony of the witness Will Slagle, who was a state's witness, and who did not testify to any facts injurious to the state's case. This matter is evidenced by three separate bills. In one of the bills the court makes the explanation that the witness Slagle had contradicted the state's witness Carter on several material points, and was generally hostile to the state, and the state claimed to be surprised at his statements. An inspection of the record discloses the fact that the testimony of the witness Slagle does contradict the testimony of Carter in several particulars. The court's explanation is further to the effect that the witness was generally hostile to the state, and that the state claimed to be surprised at his testimony. We do not ourselves see that the affidavit or statement of the witness Slagle was important to the state, but same was prejudicial to appellant. Slagle in his testimony did admit getting a half pint of whisky from a negro, but his evidence tended strongly to exculpate appellant. The testimony of Slagle was favorable to appellant. The introduction of this general affidavit in which he denies having obtained any whisky at all, either for himself or any one else, was calculated to break down the confidence of the jury in his testimony, and to put him in a bad light before them. In view of the possession by the state of this affidavit, it is not very well seen how the state could have claimed any surprise at the testimony of this witness. The testimony at best is fragmentary and uncertain. This witness was a relative of the appellant. His testimony tended to exculpate appellant, and, as stated, was distinctly at variance with and contradictory to the testimony of Carter. In this state of the proceedings to permit the introduction of this ex parte statement was well calculated to deny to appellant the benefit of the evidence of this witness. It seems to be a universal rule, thoroughly well settled in this state, that, before any party will be permitted to impeach its own witness, such witness must have testified to facts injurious to their case, and the simple failure to prove a fact by one's own witness will not entitle him to impeach the witness. *Dunagain v. State*, 38 Tex. Cr. R. 614, 44 S. W. 148, and *Finley v. State*, 47 S. W. 1015. Again, if the testimony was admissible for any purpose, it was the duty of the court to instruct the jury that same would be considered for the purpose of impeachment, and for no other purpose. We would not reverse the case for the failure of the court to so charge, since no exception was taken on this ground and a proper charge presenting the matter requested.

In view of the entire record, we think the error of the court in permitting this testimony was prejudicial to the rights of appellant, and on this ground the judgment of conviction should be set aside, and it is so ordered.

BROOKS, J., absent.

# INTERNATIONAL & G. N. R. CO. v. MILLER.

(Court of Civil Appeals of Texas. Dec. 8, 1900.  
Rehearing Denied Jan. 12, 1910.)

## 1. APPEAL AND ERROR (§ 294\*)—SUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT—MOTION FOR NEW TRIAL.

The sufficiency of the evidence to sustain a verdict cannot be considered in absence of a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1727; Dec. Dig. § 294.\*]

## 2. APPEAL AND ERROR (§ 731\*)—ASSIGNMENTS OF ERROR.

An assignment of error that "the verdict of the jury is greatly excessive" is obnoxious to the rules of the Courts of Civil Appeals, and will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3017; Dec. Dig. § 731.\*]

## 3. DAMAGES (§ 132\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where a minor, 17 years old, suffered permanent injuries, accompanied by kidney trouble, fever, insomnia, a pulse much faster than normal, and temperature going at times as high as 103 degrees, a verdict for \$15,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372, 375; Dec. Dig. § 132.\*]

Appeal from District Court, Bexar County; Arthur W. Seeligson, Judge.

Action by Vicente Miller, by his next friend, Mrs. T. F. Adams, against the International & Great Northern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

King & Morris and Hicks & Hicks, for appellant. Anderson & Belden and Carter & Lewis, for appellee.

FLY, J. This suit was instituted by Vicente Miller, a minor, through his mother and next friend, Mrs. T. F. Adams, for damages arising from personal injuries alleged to have been suffered through the negligence of appellant. Appellant answered by general and special exceptions and general denial. A trial by jury resulted in a verdict and judgment in favor of appellee for \$15,000.

Deferring to the verdict of the jury, we find from the statement of facts that appellee, a minor, 17 years of age at the time, was on November 17, 1907, while a passenger on the train of appellant, injured seriously and permanently in the sum found by the jury. He has kidney trouble, and has had fever ever since, suffers from insomnia,

and has a pulse much faster than normal. His temperature at times goes as high as 103 degrees; normal temperature being about 98½. The injuries were inflicted by the negligent derailment of the train on which appellee was riding.

The first assignment of error questions the sufficiency of the evidence to sustain the verdict, but it is not followed by such statement as is required by rule 31 (67 S. W. xvi) for the Courts of Civil Appeals. In rule 30 for the same court it is provided that each point under an assignment of error shall be stated as a proposition, and in rule 31 it is provided: "To each of said propositions there shall be subjoined a brief statement, in substance, of such proceedings, or part thereof, contained in the record, as will be necessary and sufficient to explain and support the proposition, with a reference to the pages of the record." The rule goes further, and requires that the "statement must be made faithfully, in reference to the whole of that which is in the record having a bearing upon said proposition," etc. In this case the proposition is "that, where the jury have found manifestly against the whole weight of the evidence, it is not only the right, but the duty, of the appellate court to set the verdict aside." The only statement under the proposition is a copy of practically the whole of the statement of facts. This court is not informed whether the sufficiency of the evidence was questioned in the motion for new trial, nor in what particulars the evidence was lacking. In other words, the statement is equivalent to a reference to the record for facts, because it entailed the same search through the statement of facts as though nothing had been copied in the brief, for the reason that it was practically a copy of the statement of facts. A reference to the record to ascertain what was contained in the motion for new trial shows that it was very general, and does not sustain the only proposition under the first assignment of error. The only clause in the motion for new trial upon which the assignment of error can be based amounted to a contention that appellee was only slightly hurt. The assignment itself is to the effect that the evidence showed that appellee received no injuries, while the proposition is broad enough to bring in review every phase of the case; or, in other words, the motion for new trial and assignment of error would only justify an inquiry into the sufficiency of the evidence to prove injury to appellee, while the proposition is broad enough to support an inquiry into the question of negligence as well as other phases of the case. When the sufficiency of the evidence to sustain a verdict is questioned, the only basis for the assignment is the motion for a new trial. We have, however, considered the facts, and our conclusions do not support

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the assignment of error or proposition thereunder.

The second assignment assails the verdict on the ground that it is excessive, and the third presents as error that the court refused to set aside the verdict or compel appellee to enter a remittitur. There is nothing in the statement to indicate that excess in the verdict was presented in the motion for new trial, as the rules would require, and an inspection of the motion for new trial discloses that it is as general as the assignment, merely stating that "the verdict of the jury is greatly excessive." Such an assignment based on a similar motion for new trial has been held to be obnoxious to the rules of Courts of Civil Appeals. *Railway v. McVey*, 81 S. W. 991; *Railway v. Hinzle*, 82 Tex. 623, 18 S. W. 681. However, we have considered the facts, and, if the evidence of appellee, of Dr. Withers, and even of one or two physicians introduced by appellant is worthy of belief, it would indicate that appellee was seriously injured, and that it was probably permanent in its character.

Dr. Withers testified that his nervous system was wrecked, that he was very weak and losing in flesh and strength, that his temperature had been for over a year about 100 degrees or over, that his appetite was poor, that his heart beat was rapid all the time, that his ankle was weak and crutches necessary, and that his kidneys were affected. Dr. Berry swore that he had examined appellee several times and every time he had fever; that on his last examination, on the day before he testified, his temperature was 100 and his pulse beat 120. The normal pulse beat for one of his age is about 70. Dr. Bilem, for the defense, was uncertain as to whether appellee would recover; he might and he might not. He swore that appellee's heart action was weak, "his pulse rate would be down to 107, and then sometimes up to 118," and his temperature was 100. The evidence was ample to show that the weak and feverish condition and other troubles were the direct result of his injuries. Under all the facts, we do not find that we are authorized to disturb the verdict of the jury.

The judgment is affirmed.

### BUSH v. YOUNG.

(Court of Civil Appeals of Texas. Dec. 10, 1909.)

#### 1. ACTION (§ 6\*)—JURISDICTION—MOOT QUESTIONS.

Where, in an action for defamation, defendant denied the petition and charged that the allegations therein derogatory to his character were maliciously made to injure him, to his damage, for which he prayed judgment, and prayed for affirmative findings that the charges

against him were untrue, and plaintiff took a nonsuit, and the court sustained an exception to the part of the answer praying for damages, the court was without jurisdiction to try the issue as to the truth of the charges against defendant.

[Ed. Note.—For other cases, see *Action*, Dec. Dig. § 6.\*]

#### 2. APPEAL AND ERROR (§ 20\*)—JURISDICTION OF TRIAL COURT.

Where the district court was without jurisdiction, the court, on appeal from the judgment rendered, acquired none.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 81-87; Dec. Dig. § 20.\*]

Appeal from District Court, Galveston County; Lewis Fisher, Judge.

Action by A. E. Bush against E. H. Young. From a judgment for defendant, plaintiff appeals. Dismissed.

W. F. Kelly, for appellant. Stewarts, M. H. Royston, and Geo. T. Burgess, for appellee.

**PER CURIAM.** Appellant instituted suit against appellee to recover damages alleged to have been sustained by him in his reputation and business by reason of certain charges made against him by appellee. The petition contained certain charges derogatory to the character and reputation of appellee. Appellee answered denying the allegations of the petition, and charging that the same were maliciously made for the purpose of injuring him in his business and reputation, to his damage in a large amount, for which he prayed judgment. Appellee also prayed the court for affirmative findings, to be spread upon the record, that the charges against him were untrue and without foundation. The court sustained an exception to that part of the answer praying for damages, but overruled exception to that portion praying that a finding be had, and made a part of record, that the charges against appellee were without foundation. Appellant took a nonsuit, and over his objection the court retained jurisdiction for the purpose of establishing and making matter of record the falsity of the charges against appellee.

Appellant appeals from the judgment, and appellee moves to dismiss the appeal on the ground that the district court had no jurisdiction to try the issues as to the truth of the allegations of appellee's petition after exceptions sustained to appellant's claim for money damages, and appellant's nonsuit. The motion must be sustained. The jurisdiction of the court could not be invoked for such purpose, which was purely sentimental. The district court having no jurisdiction, this court has none on appeal.

The appeal is dismissed. As we understand the case, there is no appeal from the judgment for costs, which resulted from the nonsuit.

**GILMORE v. LOCKWOOD.**

(Court of Civil Appeals of Texas. Nov. 20, 1909.)

**PUBLIC LANDS (§ 173\*) — SCHOOL LANDS — SALES — CERTIFICATE OF OCCUPANCY — CONCLUSIVENESS.**

A certificate of three years' occupancy of school lands is not conclusive as against a claimant whose rights had their incipency prior to the issuance of the certificate.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.\*]

Appeal from District Court, Lynn County; L. S. Kinder, Judge.

Trespass to try title by M. E. Gilmore against A. L. Lockwood. There was a directed verdict for defendant, and plaintiff appeals. Reversed and remanded.

Jno. P. Marrs and Beall Bros. & McDugald, for appellant. L. W. Dalton, for appellee.

**SPEER, J.** Appellant, Gilmore, brought this suit in the form of an action of trespass to try title to recover from appellee, Lockwood, a section of school land in Lynn county. The application of appellant was rejected because of a prior sale to appellee, and appellant sought to impeach this sale by showing that appellee was not, at the time of the award to him, an actual settler upon his base or mother section. Upon appellee's proving that the Commissioner of the General Land Office had issued a certificate of three years' occupancy, the trial court instructed the jury to return a verdict in his favor, holding upon the authority of *Williams v. Barnes*, 111 S. W. 432, that such certificate was conclusive upon the rights of appellant, notwithstanding those rights had their incipency at a date prior to the issuance of the certificate.

The ruling of the court in declining to hear certain testimony from appellant, and in thus instructing a verdict, constituted error, for which the judgment will be reversed. The authority cited undoubtedly sustains the court's ruling, but has itself been reversed on writ of error to the Supreme Court. *Barnes v. Williams* (Sup.) 119 S. W. 89. See, also, *Lamkin v. Matsler*, 32 Tex. Civ. App. 218, 73 S. W. 970; *Bumpass v. McLendon*, 45 Tex. Civ. App. 519, 101 S. W. 491, a writ of error having been refused in the latter case on a subsequent appeal.

Reversed and remanded.

**PECOS & N. T. RY. CO. v. WOMBLE.**

(Court of Civil Appeals of Texas. Nov. 27, 1909.)

**COURTS (§ 169\*) — JURISDICTION — COUNTY COURTS—AMOUNT IN CONTROVERSY.**

The county court has no jurisdiction of an action for damages for delay in furnishing cars

to the amount of \$987.43, since the damages with legal interest would exceed \$1,000.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-436; Dec. Dig. § 169.\*]

Appeal from Deaf Smith County Court; W. H. Russell, Judge.

Action by J. O. Womble against the Pecos & Northern Texas Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

Madden, Truelove & Kimbrough, for appellant. Carl Gilliland, for appellee.

**CONNER, C. J.** This suit was instituted in the county court of Deaf Smith county by appellee on December 24, 1907, to recover alleged damages to 120 head of cattle, shipped by him to Kansas City, Mo. It was alleged that on the 16th day of October, 1906, the cars were ordered for the shipment, and that appellant promised to furnish them on the 10th of November following; that on the evening of the 9th of November, 1906, the plaintiff placed his cattle in the pens for shipment, but that the defendant company did not furnish the necessary cars until on the 28th day of that month; that said delay was unreasonable and resulted in damage to the plaintiff, which he thus states: "On account of expenses incurred in caring for and keeping said cattle in sum of \$100, which said expenses were pasturage and feed to the amount of \$85, and \$15 for time in looking after and herding said cattle, all of which plaintiff alleges to have been necessary on account of having to hold said cattle for shipment. Plaintiff further alleges that on account of said delay in furnishing cars, his cattle lost in weight and depreciated in value, all of which damages amounted to the aggregate sum of \$987.43, and plaintiff prays for judgment in the said sum of \$987.43, with interest thereon at the legal rate, and all costs of suit." The trial, which was on October 13, 1908, resulted in a verdict and judgment in appellee's favor for \$550, and appellant has duly prosecuted an appeal.

Without reference to the assignments of error presented, we find that the judgment must be reversed and the cause dismissed for want of jurisdiction in the county court. From appellee's petition it is manifest that the damages to the cattle claimed \$987.43, plus the interest thereon at the legal rate, which was recoverable in the way of damages only, exceeds the sum of \$1,000, the limit of the county court's jurisdiction. The case in all material respects is controlled by the cases of *Gulf, W. T. & P. Ry. Co. v. Fromme*, 98 Tex. 459, 84 S. W. 1054; *Schulz v. Tessman & Bro.*, 92 Tex. 488, 49 S. W. 1031; *Baker v. Smelser*, 88 Tex. 26, 29 S. W. 377, 33 L. R. A. 163; *T. & P. Ry. Co. v. Smitten*, 31 Tex. Civ. App. 594, 73 S. W. 42; *Pecos & N. T. Ry. Co. v. Faulkner*, 118 S. W. 747; and the case of *F. W. & D. C. Ry.*

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Co. v. Everett, 95 S. W. 1085. The case last named is directly in point, and we do not feel that we can add to what has been so clearly stated in the cases cited.

For the reason stated, it is ordered that the judgment be reversed and the cause dismissed.

### HAMM et al. v. BRIANT.

(Court of Civil Appeals of Texas. Nov. 20, 1909.)

#### 1. NUISANCE (§ 54\*)—ACTION FOR DAMAGES—INSTRUCTIONS.

In an action for damages for maintaining a nuisance, where the court properly submitted the issue whether the operation of defendant's plant constituted a nuisance warranting a recovery by plaintiff, it was error to continue and instruct further that, no matter how lawful a business may be, it cannot be conducted in such manner as to substantially injure the comfort and convenience of another, and that, where dust, dirt, and lint are emitted from defendant's and carried upon plaintiff's premises to his discomfort and annoyance, it is not necessary for him to show defendant's business was carried on recklessly or was not properly managed, and, where one permits dust, dirt, and lint to be emitted from his premises and carried upon adjoining property in such manner as to seriously annoy and discomfort the occupants, any such action is subject to liability, and that dirt, dust, and lint are not nuisances per se, but, when produced in such quantities and distributed in such manner as to render them specially uncomfortable and inconvenient and to interfere with the comfort of human existence, then they may become nuisances, since the court by so instructing unduly emphasized plaintiff's contention.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 54.\*]

#### 2. NUISANCE (§ 54\*)—ACTION FOR DAMAGES—INSTRUCTIONS—INCORRECT PROPOSITION OF LAW.

In an action for damages from maintaining a nuisance a requested instruction that defendants had a right in law to use their property for all purposes proper to the prudent maintenance and operation of said gin and light plant, and defendants will not be liable herein if the use to which they have put their property is a reasonable use for proper purposes, was an improper statement of law and was properly refused.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 54.\*]

Appeal from Taylor County Court; T. A. Bledsoe, Judge.

Action by William O. Briant against John C. Hamm and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Hardwicke & Hardwicke and Theodore Mack, for appellants. Wagstaff & Davidson and W. H. Sewell, for appellee.

DUNKLIN, J. William O. Briant recovered judgment for \$300 against John C. Hamm and the Merkel Light & Power Company for alleged damages for annoyance, inconvenience, and discomfort to the plaintiff and his family, resulting from the operation

of a gin and light plant by defendants, and from that judgment defendants have appealed.

In the charge of the court, the issue was submitted as to whether or not the operation of the plant constituted a nuisance warranting a recovery by the plaintiff, and neither party has challenged the correctness of that instruction. After thus instructing the jury, the charge contained the following additional instruction, to wit:

"You are further charged that, no matter how lawful a business may be, it cannot be conducted in such a manner as to directly, palpably, and substantially injure the comfort and convenience of the premises of another.

"And that where dust, dirt, and lint are emitted from the premises of the defendants, and carried on the plaintiff's premises to the discomfort and annoyance of plaintiff, it is not necessary for plaintiff to show that defendants' business was carried on recklessly or was not properly managed.

"And where one permits dust, dirt, and lint to be emitted from his premises and carried onto the premises of adjoining property of another in such a manner as to seriously annoy and discomfort the occupants of said adjoining property, such action is subject to liability.

"Dirt, dust, and lint are not nuisances per se; but, when produced in such quantities and distributed in such a manner as to render them specially uncomfortable and inconvenient and to interfere with the comfort of human existence, then they may become nuisances."

By different assignments, each paragraph of the charge quoted above is assailed as being argumentative, and as giving undue emphasis to plaintiff's contention that dirt, dust, and lint escaping from defendants' plant did cause himself and family annoyance and discomfort, and those assignments are sustained. As above noted, the issues to be decided by the jury had already been submitted to the jury in previous paragraphs of the charge, and, when that is done in a proper manner, we fail to understand the necessity in any case of following such instructions with statements of abstract propositions of law. It may become necessary in some instances to define a legal term, such as "negligence" used in presenting the issues to be decided by a jury; but, when the court proceeds further and indulges in a discussion of abstract questions of law, there is always danger of unduly emphasizing the contention made by some party to the suit, as we think was clearly done by the instructions above quoted.

By their tenth assignment, complaint is made of the refusal of the court to give to the jury the following special instruction, requested by defendants: "Gentlemen of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

jury, you are instructed that defendants had a right in law to use their property for all purposes proper to the prudent maintenance and operation of said gin and light plant, and defendants will not be liable herein if the use to which they have put their property is a reasonable use for proper purposes."

This requested instruction embodied an incorrect proposition of law, and the court did not err in refusing it. In *Burditt v. Swenson*, 17 Tex. 502, 67 Am. Dec. 685, the court said: "What constitutes a 'nuisance' is well defined. The word means literally annoyance; in law, it signifies, according to Blackstone, 'anything that worketh hurt, inconvenience, or damage.'" In that case the court further quoted, with approval, from Blackstone, the following: "And by consequence it follows that if one does any other act in itself lawful, which being done in that place necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act where it will be less offensive." See, also, *Railway v. Hall*, 78 Tex. 174, 14 S. W. 259, 9 L. R. A. 298, 22 Am. St. Rep. 42. The facts in cause No. 5,745, *Western Texas Compress Company v. Alex Williams* (decided by this court, but not officially reported) 124 S. W. 493, were very similar to the facts in this case, and in the opinion there rendered we used the following language: "The third and sixth assignments raise the point that to entitle appellee to a recovery he must have alleged and proved negligence on the part of appellant in maintaining or operating its plant. But the reverse of the proposition appears to be the law. In other words, if the operation of appellant's plant amounted to a nuisance as to appellee, then no amount of care on the part of appellant in conducting its business would excuse it from liability for the damages. The principle is thoroughly settled in railroad cases in: *Daniel v. Ft. W. & Rio G. Ry. Co.*, 96 Tex. 327, 72 S. W. 578; *Rainey v. Red River, T. & S. Ry. Co.*, 80 S. W. 95; *M., K. & T. Ry. Co. v. Perry*, 46 Tex. Civ. App. 374, 102 S. W. 1169. And the rule commends itself to us as being applicable to other than railroad cases, and indeed has frequently been so held. For a case very much in point see *Berger v. Minneapolis Gaslight Co.*, 60 Minn. 296, 62 N. W. 336, where a defendant, who for his own use stored on his own land petroleum, which escaped on the premises of the plaintiff, was held to be liable for the damages without proof of negligence on his part." See, also, *Rainey v. Railway*, 99 Tex. 276, 89 S. W. 768, 90 S. W. 1096, 3 L. R. A. (N. S.) 590, 122 Am. St. Rep. 622.

Appellants have presented other assignments of error; but, as the circumstances made the basis thereof will not likely occur upon another trial, it is not necessary to discuss them.

For the errors indicated above, the judgment of the trial court is reversed, and the cause remanded for another trial.

### HAMM et al. v. GUNN.

(Court of Civil Appeals of Texas. Nov. 20, 1909.)

Appeal from Taylor County Court; T. A. Bledsoe, Judge.

"Not to be officially reported."

Action by Nannie Gunn against John C. Hamm and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded. See, also, 113 S. W. 304.

Hardwicke & Hardwicke and Theodore Mack, for appellants. Wagstaff & Davidson and W. H. Sewell, for appellee.

CONNER, C. J. This is a companion case to that of *John C. Hamm et al. v. William O. Briant* (No. 6,195, this day decided by us) 124 S. W. 112, the facts and the questions raised by the assignments of error being substantially the same in both cases, and the judgment herein is, accordingly, reversed, and the cause remanded for the reasons given in the case referred to.

### CONNESSE v. BAIRD.

(Court of Civil Appeals of Texas. Nov. 24, 1909. Rehearing Denied Jan. 12, 1910.)

1. VENDOR AND PURCHASER (§ 75\*)—CONSTRUCTION OF CONTRACT—TIME OF PAYMENT OF INTEREST.

A contract for sale of a house and lot at the total price of \$3,000, terms of payment \$300 in 60 days and assumption of \$2,500 "due in monthly installments of \$25 a month including 8 per cent. interest," will be construed to mean that the \$25 payment a month included interest and the balance of the payment was to be paid on the principal.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 116; Dec. Dig. § 75.\*]

2. PRINCIPAL AND AGENT (§ 157\*)—WRONGFUL PAYMENT OF MONEY BY AGENT.

If an agent standing in the position of a stakeholder receives money to be paid over on the happening of a contingency or the performance of a condition and makes a payment to the principal before the time limited, he will be liable to the party found to be entitled to receive the money.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 588; Dec. Dig. § 157.\*]

3. BROKERS (§ 106\*)—EARNEST MONEY—PAYMENT TO PRINCIPAL—LIABILITY OF AGENT—EVIDENCE.

In an action by a purchaser of land to recover earnest money of an agent who paid the money over to his principal, evidence held to show that the purchaser intended to breach his contract without regard to any alleged breaches of the seller as to abstract of title, payment of tax, etc., and hence the agent was not in fault in paying over the earnest money to the principal.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 150; Dec. Dig. § 106.\*]

Appeal from Bexar County Court; P. H. Shook, Judge.

Action by Cornelius A. Baird against W. S. Connese. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Henry E. Vernor, for appellant. W. W. King, for appellee.

FLY, J. Appellee sued in the justice's court to recover of appellant the sum of \$150, paid by him to appellant as earnest money on a purchase of certain land in San Antonio. Appellee recovered judgment in the justice's court and on appeal in the county court for the amount sued for.

The following contract had been entered into between appellee and appellant as the agent of F. Frow and Eliza D. Frow: "San Antonio, Texas, August 7, 1906. Received from Cornelius A. Baird, one hundred and fifty dollars, earnest money, to close sale to house and lot at 407 Locust street, San Antonio, Tex., at total price of three thousand dollars; terms of payment three hundred dollars in sixty days, and assumption of \$2,500 due in monthly installments of \$25 a month including 8 per cent. interest, title to be perfect, or to be made perfect, or this earnest money to be refunded. Deed at expense of seller. City taxes to be paid to June 1, 1906. State and county taxes to be prorated to August 1, 1906. Deal to be closed on or before 15 days after delivery of abstract. W. S. Conness, Agent for F. Frow, Eliza D. Frow. We accept the foregoing contract. Cornelius A. Baird. Signed in Duplicate."

The contract was to buy the property for \$3,000, as was admitted by both parties, \$300 in cash, \$200 in 60 days, and the assumption of an indebtedness of \$2,500, which was to become due in monthly installments of \$25 and was to bear 8 per cent. interest. The contract failed to designate and describe the indebtedness assumed by appellee, but the evidence showed that it was one due by Frow and wife to Mrs. Mabel Luter on the land that was the subject of the contract. That debt bore interest at the rate of 8 per cent. per annum from March 3, 1906. There can be but one construction put upon the language of the contract, and that is that interest was to be paid on the \$2,500 indebtedness assumed by appellee, and that the amount of interest due each month was included in the monthly payment of \$25. There was no occasion to mention interest in the contract if it was not to be paid and appellee was charged with knowledge of the terms of the note given by the Frows to Mrs. Luter. He saw and talked with Mrs. Luter about the purchase of the property on the day of the execution of the contract and before its execution. It was not pleaded nor proved that appellant had deceived him about the Luter debt, and the plain terms of the contract placed him upon notice of the nature of the debt.

By the terms of the contract, appellant, as agent for Frow and wife, bound them to furnish appellee an abstract of title. The abstract was furnished and showed a perfect title to the land; the only incumbrance

upon it being the \$2,500 which appellee had agreed to assume. No refusal to pay the taxes or insurance premiums upon the part of the Frows was shown. Fraud, misrepresentation, or mistake was not alleged or proved. If appellee did not know all about the note held by Mrs. Luter, it was his fault. He accepted the abstract of title and took it to his attorney after he had been shown a copy of the note by Mrs. Luter. Appellee did not contradict the statement made by Frow that twice on the day before the contract was made he had fully explained to appellee that "the price was \$3,000, \$300 cash, \$200 in 60 days, and \$2,500 in monthly installments of \$25 per month with interest at 8 per cent." Appellee declared the trade off before he saw the abstract, before he knew the state of the title, and before he knew whether or not the owners of the land would pay the taxes and insurance. These matters could not have influenced his action in breaching the contract.

There is, we think, but one reasonable construction that could be placed upon the language of the contract, and that is that \$25 a month was to be paid on the debt, and that in the \$25 was included the interest due each month; the balance of the payment of course going as a payment on the principal.

The court stated to the jury that appellee based his suit on the facts that the original abstract of title was not, but only a copy of it, furnished appellee, and that the debt was in excess of \$2,500, and instructed them that if a copy of the abstract of title was furnished appellee, and he refused to accept it, or if the debt was in excess of \$2,500, then the jury was to find for appellee. There was no controversy about the abstract being a true copy of the original which was furnished by an abstract company, and a supplemental abstract by that company was furnished. The title was pronounced good by appellee's counsel, who reported on his examination of the abstract on August 18, 1909. Before that time appellee had informed appellant that he would not comply with the terms of the contract. No demand was ever made on Frow and wife, or on appellant, for another abstract. Appellee testified that he mailed the opinion of his attorney to appellant, but when it was mailed does not appear in the record. He swore that he did not inform appellant, after his attorney had pronounced the title good, that he was ready to perfect the purchase of the land. The earnest money was not paid to Frow until several days after the 15 days had expired. The court refused to allow appellant to show that his attorney had notified appellee in writing that the Frows were ready to fully comply with the contract of sale in every respect.

The evidence indicates a desire on the part of appellee to avoid the contract before he had learned anything about the abstract, the

insurance, and the taxes. Those matters, it seems, were raked up afterwards to sustain and justify his breach of the contract.

It is the law that if an agent, standing in the position of a stakeholder, receives money to be paid over upon the happening of a certain contingency or the performance of certain conditions, and makes a payment to the principal before the happening of the contingency or the performance of the conditions, he would be liable to the party found to be entitled to receive the money. Mech. Agency, § 566. Appellee has not proved a case bringing appellant within the purview and effect of that rule. The contract having been made in the name of the principal, the agent could be held liable only in case of fraud, deceit, or misrepresentation on his part. In this case, if appellant knew that his principal had breached the contract before he paid the forfeit money over to him, the agent would be liable; but the evidence failed to disclose such a state of facts. The facts showed that appellee had fully made up his mind to breach the contract before any opportunity was given to appellant or his principal to perform it.

The judgment is reversed, and judgment here rendered that appellee take nothing by his suit, and that appellant recover all costs in this behalf expended.

#### GRIFFIN et al. v. TERRY et al.†

(Court of Civil Appeals of Texas. Oct. 23, 1909. On Rehearing, Dec. 11, 1909.)

#### 1. SHERIFFS AND CONSTABLES (§ 139\*)—LIABILITIES OF SURETIES.

One claiming title to property attached as the property of a debtor and obtaining on appeal a judgment directing the clerk of the trial court to turn over to him the proceeds of a sale of the property may recover from the sheriff and the sureties on his indemnity bond the full value of the property, where the clerk did not turn over any of the proceeds because they had been paid out on the judgment in the attachment case before the return to the trial court of the mandate.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 139.\*]

On Rehearing.

#### 2. APPEAL AND ERROR (§ 79\*)—"FINAL JUDGMENT."

A judgment which in no way disposes of a party made a defendant is not a "final judgment" and is not appealable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 484; Dec. Dig. § 79.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2774-2798; vol. 8, p. 7663.]

#### 3. APPEAL AND ERROR (§ 79\*)—FINAL JUDGMENT.

Where the petition complained of a corporation as a defendant and alleged that the individual defendants were the sole stockholders of the corporation, which had become defunct, and the judgment disposed of the individuals, the judgment was final as against the objection

that it did not dispose of the corporation, and was appealable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 484-493; Dec. Dig. § 79.\*]

Appeal from District Court, Dallam County; J. N. Browning, Judge.

Action by Eugene Terry and others against J. E. Griffin and others. From a judgment for plaintiffs and in favor of a defendant against codefendants, the latter appeal. Affirmed.

H. H. Cooper and C. B. Reeder, for appellants. R. E. Stalcup, John W. Viale, and Wallace & Lumpkin, for appellees.

SPEER, J. A statement of this case will be found by reference to the report of a former appeal, wherein the present appellee was the appellant, reported in 96 S. W. 70. The appellee on the last trial recovered judgment for \$1,200, representing the value of the goods taken under the circumstances shown in the report of the case referred to, and J. E. Griffin and Lenora White, executrix of the estate of E. W. White, deceased, the sureties on Sheriff Webb's indemnity bond, against whom judgment was rendered over in the sheriff's favor, have appealed.

On the measure of appellee's damage, the court instructed the jury as follows: "If you find for the plaintiff under the foregoing instructions, then you will assess his damages at such sum as you may find and believe from the evidence to be the reasonable market value in Dalhart, Tex., of the goods taken at the date of their seizure and conversion." Appellants attack the correctness of this charge and insist that special charges submitted by them should have been given, to the effect that the recovery by appellee should be diminished by the amount of the sum of money for which the goods were originally sold, and which the clerk had been ordered by the prior judgment of this court to turn over to appellee. We held on the former appeal that there was no inconsistency in appellee's exercising the right to sue the sheriff for the illegal seizure after he had claimed the goods in the original attachment suit. Appellants' insistence now is that appellee, having finally secured a judgment in the attachment suit directing the clerk to turn over the proceeds of the sale to him, should not be permitted to recover the full value of the goods from the sheriff and his bondsmen, notwithstanding the clerk never in fact turned over such proceeds to him, because they had been paid out on the judgment of the county court in the attachment case; no supersedeas bond having been filed by the appellee. But we cannot assent to such a proposition. It is in the nature of a plea of accord without satisfaction. The former judgment did not run against the sheriff or any of the present appellants, but was no more than an order

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court January 19, 1910.

to the clerk to turn over funds presumably in his hands, but which in fact had been paid out under the judgment of the court. Under such circumstances the appellee was entitled to recover against the sheriff and his bondsmen the full value of the goods unlawfully taken by him.

The court's failure to submit to the jury the issue of the liability of the Kemp-Amarillo Grocery Company and others is accounted for by the recitation in the judgment that counsel for all the defendants requested the omission, agreeing that, if judgment should be rendered in favor of the plaintiff against the defendant Webb, a similar judgment should be rendered over against the other defendants, which was accordingly done. Having thus consented to such course, appellants cannot now complain of it. Besides, it is difficult to see how such failure could in any event affect the recovery against these appellants.

No other errors are assigned, and the judgment is therefore affirmed.

#### On Rehearing.

Appellants J. E. Griffin and Lenora White and appellees Webb, Cain, Gober, Jenkins, and Woods have filed their motions asking for a rehearing. Nothing new is presented in these motions, and we see no reason to change our views heretofore expressed in the opinion affirming the case. We think it proper, however, in overruling the motions and refusing to dismiss the appeal on the ground urged by the above-named appellees, to wit, that the judgment below did not dispose of all of the parties, to state the ground of our holding, since we did not give such reasons in the former opinion. The specific complaint is that the Kemp-Amarillo Grocery Company, a corporation, was made a party defendant in the district court, and that the judgment of the district court in no way disposes of such defendant. Of course, if this were true, the motion is well taken and should have been sustained in the first place. It is true the plaintiffs' petition complains of the Kemp-Amarillo Grocery Company, a corporation, as one of the defendants in the action; but the plaintiffs further allege: "That the defendants M. Lasker, J. T. Groce, J. A. Kemp, C. W. Wilson, and Bruno Richter were, at and before the issuance and levy of said writ of attachment, the sole and only stockholders of the defendant corporation, Kemp-Amarillo Grocery Company; that since the filing of said suit out of which said attachment issued, and at this time, plaintiff is informed and charges that said corporation has become defunct and no longer exists, and said corporation has not within the knowledge of plaintiff any property or assets out of which a money judgment could be made, and has not, so far as plaintiff is informed and be-

lieves, sufficient money, property, or effects out of which to make the money claimed by plaintiff in this suit." The judgment does dispose of the defendants who are alleged to be the only stockholders of the defunct corporation. We hold the judgment to be final, and that its effect is to dispose of all the parties to the suit. It implies a finding, in accordance with the allegations of the petition, that the Kemp-Amarillo Grocery Company is no longer in existence, and in disposing of all of its stockholders the company itself, under the allegations of the petition, is effectually disposed of.

The motions for rehearing are therefore overruled.

#### WEIL v. MARTINEZ et al.†

(Court of Civil Appeals of Texas. Nov. 10, 1909. Rehearing Denied Jan. 6, 1910.)

#### 1. VENDOR AND PURCHASER (§ 296\*)—PERFORMANCE OF CONTRACT—REMEDIES OF VENDOR.

Plaintiff contracted to sell a specified number of acres out of each of several tracts of land, and the contract provided that all the acres should be situated in one solid body, and that in case they were not so situated the vendee might at his option refuse to take any of the lands, or might take all of them, or any part thereof, as he might elect, and that any of the tracts not partitioned might be considered by the vendee as imperfect title, and that the vendor should have them partitioned and have the entire acreage surveyed in one solid body. Some of the tracts were unpartitioned, and thereafter the lands were surveyed in a solid body and a deed thereof given, and the same day the vendee executed an agreement to pay the purchase price for the lands in two of the tracts upon the execution or securing of deeds or decrees of partition, the vendor to secure such deeds or decrees, and a vendor's lien was given, the vendee in the meantime to remain in possession without rent or charge. The vendee after certain partition proceedings refused to pay for the land in one of the tracts on the ground that it was not in a solid body with the remainder. Held, that the contract of sale containing the option provision was not abrogated after the execution of the deed and vendor's lien contract, so that the vendor was bound without condition to have such partition made as should be satisfactory to the vendee; but the refusal of the vendee to pay for the lands on the ground stated by him amounted to an election, governed by the original contract, and the vendor was entitled to recover the tract in question.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 296.\*]

#### 2. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR.

An assignment of error assailed the findings of fact on the ground that there was no evidence to sustain them, and the proposition under the assignment was: "A finding of fact by the court should reflect the spirit and substance of the matters from which he finds, otherwise the finding is insufficient and should not be sustained." The statement did not pretend to show from the evidence that the facts so found were not supported by evidence. Held, that the assignment would not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 742.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

**3. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR.**

An assignment of error was directed to conclusions of fact by the trial court, and in the statement was set out certain evidence contrary to the findings; but it was not stated directly or by inference that it was all the evidence on the question. *Held*, that it could not be held that the conclusions were not supported by evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 742.\*]

**4. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR.**

Where an assignment of error assailed a conclusion of fact of the trial court that the rental value of land from a certain date was not less than a certain amount, and the statement was to the effect that the finding was objected to because it fixed the date of rent from a certain date, the assignment would be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 742.\*]

**5. VENDOR AND PURCHASER (§ 196\*) — CONSTRUCTION OF CONTRACT.**

The owner of a tract of land conveyed a certain number of acres under a contract, whereby they were to be situated in a solid body, it being agreed that the vendor should bring about partitions to accomplish such result, and that in case they were not so situated the vendee might refuse to take any of the lands or all or any part as he might elect; the vendee to remain in possession without rent or charge. He refused to take some of the lands on the ground that they were not in a solid body with the remainder. *Held*, in a suit by the vendor to recover the lands the vendee had elected not to take, that the vendee should pay rent for them from the date the vendor acquiesced in the election; it appearing that up to that time negotiations between the parties had continued.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 196.\*]

**6. VENDOR AND PURCHASER (§ 201\*)—REMEDIES OF VENDOR.**

The vendee was entitled to payment for permanent and valuable improvements placed by him on the lands in controversy.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 414-417; Dec. Dig. § 201.\*]

**7. VENDOR AND PURCHASER (§ 296\*)—REMEDIES OF VENDOR.**

The vendee having denied the vendor's right to demand payment for the lands in controversy or to recover the land and having resisted such claims by litigation extending through six years, and the lands having largely increased in value, it was proper not to allow the vendee's offer to take the lands and pay what the court might find to be due the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 296.\*]

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Action by Rosendo Martinez and others against Charles Weil. From a judgment in favor of plaintiffs, defendant appeals. Reformed and affirmed.

G. R. Scott & Pope and W. L. Dawson, for appellant. James B. Wells and F. W. Seabury, for appellees.

REESE, J. Rosendo Martinez and others instituted this suit against Charles Weil for the recovery of certain lands embraced in a

deed from plaintiffs to defendant and a contract contemporaneous therewith expressly retaining a lien on said lands until the purchase money was paid, and cancellation of said deed as to the land embraced in the petition, for rents, damages, etc. There was an alternative prayer for judgment for the purchase money in the event plaintiffs were held not entitled to recover the land. The suit was instituted in 1902.

The material averments of the petition are: That on August 1, 1899, plaintiffs, together with their ancestor, Gertrudis Martinez, since dead, whose rights they hold, entered into a written contract, by the terms of which they contracted to sell to defendant a large body of land, consisting of several different tracts, for the price of \$1 per acre. Among the tracts embraced in the contract, all of which are set out in the petition, to which the contract is attached as an exhibit, are 4,715 acres out of the "Palitos Blancos" grant, 5,412 acres out of the "Agua Nueva de Arriba" grant, and 4,087 acres out of "La Noria de Santo Domingo" grant. We will hereafter speak of these grants as "Palitos," "Domingo," and "Arriba." There were the usual provisions about furnishing deeds and proof of title on the part of plaintiffs and examination and approval of same by defendant before payment of purchase money. This contract has the following: "The parties further declaring their understanding that all of said lands were situated in one solid body, and if it should be discovered that they are not so situated, then defendant might at his option refuse to take any of said lands, or might take them all, or any portion of them, as he might elect, if the parties to said contract should be satisfied; and that any of said tracts of land that were not partitioned might be considered by defendant as imperfect title, and that the other parties thereto should proceed to have them duly partitioned, and that they should also have said 30,370 acres of land surveyed in one solid body and incorporate the field notes of the survey in their deed."

That in pursuance of this contract plaintiffs presented to defendant abstracts and proofs of title which were examined by him, and certain defects suggested, which were corrected by plaintiffs, and on or about October 1, 1899, defendant approved said titles in all respects, except only that the lands in the "Palitos," "Arriba," and "Domingo" grants were unpartitioned, and defendant declined to take or pay for said unpartitioned lands, until they should be partitioned, but defendant agreed to accept from said vendors their deed to all of the land embraced in a survey thereof to be made by a surveyor of his selection, including portions equal to their undivided interests in said unpartitioned lands, and to pay for the same except the unpartitioned tract, at once, upon delivery

of the deed, and to pay for the remainder when partitioned; the deferred payments to be secured in some manner to be later agreed upon. That thereupon said lands were surveyed by a surveyor selected by defendant, and a map thereof submitted to, and approved by, defendant, and on December 4, 1890, plaintiffs delivered to defendant a deed embracing, by field notes, all of said lands, including 4,256.64 acres of the Palitos, 5,904 acres of the Arriba, and 3,523.1 acres out of the Domingo grants, total of 31,593.14 acres varying in some respects from the quantity mentioned in the original contract, but accepted by defendant as a compliance therewith. The purchase price of all said lands, except those in the three surveys mentioned, was paid in cash, and, with regard to the latter, on the same day the parties executed a contract, reciting the conveyance aforesaid, and also that the land in the Palitos grant had been arranged and paid for, defendant acknowledged a vendor's lien upon the land, in the Arriba and Domingo grants, to secure the payment of the purchase money thereof, to wit, \$1 per acre.

The contract is made a part of the petition as "Exhibit C," from which it appears that the defendant agreed to pay for the land conveyed to him in the Arriba and Domingo grants, respectively, "whenever proper deeds or decrees of partition may be procured by and between said grantors and the other owners of the whole of said two tracts of land, whereby the parts and portions conveyed to me, in said deed of conveyance, are deeded or decreed to said grantors or to defendant, said deed of conveyance being referred to for a more particular description of all lands above mentioned." This contract has the following further provision: "It being understood by and between all the parties to said deed that the grantors therein, will, as soon as practicable, have said two last-named tracts partitioned between all of the parties who may be interested therein, whether by equitable or legal title, and will secure such partition deeds, or decrees of partition, or both, between all of said parties who may be interested in said two tracts, or either of them, as will meet with the approval of myself; and until said deeds or decrees of partition are had, I am to remain in full, complete and independent and sole possession of all of said lands described in said deed, without rent or toll of any kind for the use thereof, or the use of any portion thereof, and that as soon as said deed or decrees of partition are had by the said grantors, I will, on their demand, pay in the city of Corpus Christi, the balance of said purchase money, provided, they, at the same time, present, offer and deliver to me, in the said city of Corpus Christi, a full, complete release from this instrument and its effects."

It is further alleged that, in pursuance of said contract, plaintiffs, joining with other

co-tenants of said lands, defendant being also a party plaintiff, in 1900 instituted a suit for partition of the lands in Arriba grant, and on March 20, 1902, secured a final decree of partition, in which there was set apart to defendant, as holding the possessory title, and to these plaintiffs, as holding the legal title, 5,904 acres out of the Arriba grant, denominated "share 41," the metes and bounds of which are fully set out, and thereupon, on or about April 5, 1902, plaintiffs informed defendant of said decree and demanded payment of the purchase price of said 5,904 acres, offering to execute proper release of the vendor's lien. Defendant declined to make payment unless plaintiffs would have the decree of partition recorded, present evidence of the payment of all back taxes, and deliver to him a full release of the vendor's lien, all of which conditions were complied with by plaintiffs on or about April 20, 1902, as to the Arriba land, when defendant declined to pay until he could examine the original map of partition and satisfy himself that the field notes of share 41 corresponded therewith. Plaintiffs then secured such original map and sent the same to defendant, whereupon, on or about May 10, 1902, defendant demanded that share 41 be surveyed by a surveyor of his selection, which was thereupon done at plaintiffs' expense, and about June 10, 1902, again demanded of defendant payment for said land, and frequently during the months of June, July, and August, 1902, repeated said demand, but defendant continuously evaded and put such payment off until finally, on or about September 8, 1902, plaintiffs tendered to defendant in Corpus Christi their certain deed and release in due form conveying said share 41 and releasing the vendor's lien, demanding payment by defendant of the purchase price of \$5,904, but that defendant thereafter, on October 31, 1902, refused to accept such release and deed or pay said money, giving as his sole reason for such refusal that all of the lands sold should be in a solid body, and that this release and conveyance failed to comply with such requirement, and that thereafter on various occasions has repeated such refusal on the ground that there exists between share 41 and the lands in the Santo Domingo de Abajo grant (embraced in the original deed) a strip of land that is not included in any conveyance made or tendered to defendant and not in fact the property of plaintiffs. It is averred that such refusal on the part of defendant constituted an election by him, under the terms of the original contract of sale, relating to such option and hereinabove set out in full, not to take the lands embraced in the Arriba grant as share 41, which election plaintiffs declared at the time of such refusal, and now declare they are satisfied, and that by virtue of such election said land is excluded from said contract, and plaintiffs are entitled to a reconveyance

thereof, which has been demanded by them, which has been refused, which is a cloud upon their title. But in the event that facts set out should be held not to show such election, plaintiffs aver that they have had partitioned and set apart to defendant, in severalty, said 5,904 acres in the Arriba grant, as share 41, that said decree is final and binding upon all the parties, that they had tendered to defendant a deed and release, and are entitled to recover the sum of \$5,904, with legal interest from April 20, 1902, with foreclosure of their lien.

There are certain allegations with regard to the land in the Domingo grant, which need not be shown. It is sufficient to say, with regard to this land, 3,545 acres, that by amended answer filed in 1908 defendant expressed himself as satisfied with the partition of this tract, and tendered and deposited in court the purchase price thereof, and that matter was settled by decree of court to the satisfaction of the parties by paying over to plaintiffs the money so deposited, less the amount advanced by defendant to plaintiffs to pay costs of the partition proceedings and interest, according to the terms of a contract entered into by the parties with regard thereto.

The petition concludes with a prayer for recovery of the possession of the land, cancellation of the deed, removal of cloud, and for rents and damages, and in the event that plaintiffs are not entitled to recover the land, for judgment for the purchase money and foreclosure of lien, and for equitable and general relief. All of the written documents referred to are attached to the petition as exhibits.

To this petition defendant interposed a general demurrer, numerous special exceptions, general denial, and not guilty, and a lengthy special answer on the facts. Such of said special exceptions as are material will be shown in the discussion of the various assignments of error based upon the action of the court in overruling the same.

Defendant states the facts stated by plaintiffs with regard to the execution of the original contract of sale, the deed of conveyance, and the contract with regard to the unpartitioned lands and reservation of the vendor's lien as pleaded by plaintiffs, and with regard to these lands it is alleged that it was understood between the parties that, in keeping with the terms of said contract, plaintiffs were to have said unpartitioned lands partitioned and set apart to defendant or themselves in a solid body, in compliance with the description in their deed, and such partition should be had with vigor and had to the satisfaction of defendant at the earliest date, that it was further agreed that all of the premises conveyed were under a good and substantial fence, especially on the outer lines, and that if not on such outer lines plaintiffs would place it there.

As showing defendant's contention, arising

upon construction of the contract aforesaid, it was alleged that the purchase money of the unpartitioned land was not to be paid until the lands were partitioned and set apart to defendant according to the description in the deed, and with the approval of defendant, and until this was done defendant was to have exclusive possession of the land described in the deed without rent or toll of any kind. It was averred that the land in the Arriba grant had not been partitioned in accordance with the terms of the agreement so as to form a solid body with the other lands conveyed, nor so as to give to defendant the lands out of that grant included in the field notes of land conveyed by the deed, but that according to said partition the land described in the deed is not set apart to defendant, but a different tract of different shape, and leaving a strip of land separating said tract from the other lands conveyed to defendant, so that the entire tract would not be in a solid body.

It is alleged that plaintiffs have wholly failed to comply with the provisions of their said contracts as aforesaid, and to have set aside to defendant the lands out of the Arriba grant as agreed, so that he might pay the balance of the purchase money which it is alleged he has been at all times ready, able, and willing to do, as soon as plaintiffs have complied with their contracts; but, in the event the court should find that plaintiffs have complied with their part of said agreements by doing the things undertaken to be done by them, then the defendant tenders in court such amount as the court may find due plaintiffs under the terms and provisions of said contracts and agreements. It was alleged that the vendor's lien agreement executed in connection with the deed constituted a new, separate, and binding contract upon the parties; that if defendant was a party to the partition suit of the Arriba lands the same was done by plaintiffs without his knowledge or consent, and for the convenience of plaintiffs; and that defendant knew absolutely nothing about said suit or any action taken therein until long after its final disposition, but left the entire control and management thereof to plaintiffs, and defendant is in no way bound by said decree in this proceeding.

Defendant alleged that, after the execution of the deed, relying upon the agreement of plaintiffs with regard to the partition, he entered upon that part of the Arriba grant conveyed to him, and in good faith has made valuable and permanent improvements, specifying the same, of the value of \$1,000. This answer, being the first amended answer, was filed July 15, 1908.

The court overruled defendant's general demurrer and special exceptions, and, trying the case without a jury, rendered judgment for plaintiffs for the 5,904 acres of land of the Arriba grant and for rent thereof from April 1, 1902, to April, 1908, at 10 cents per acre per annum, amounting to \$3,789.20, and

canceled the deed as to this tract, and also canceling the vendor's lien as to the land in the Santo Domingo tract. The decree directed the payment to plaintiffs, out of the sum of \$3,545.20 paid into the court by defendant as the price of the land out of the Domingo tract, the sum of \$1,822.70; the balance of said sum, \$1,722.50, to be paid to defendant, being the amount found to be due him for the \$1,000 advanced by him to plaintiffs to pay costs of the partition proceedings, with interest thereon according to the terms of the written contract concerning that matter. All of the costs were adjudged against defendant except that portion thereof arising out of plaintiffs' demand for the balance of the purchase price of the Santo Domingo land, which are adjudged against plaintiffs. From the judgment defendant presents this appeal.

The following findings of fact of the trial court are approved and adopted by us, embracing all of the court's findings; none of the objections thereto in the appellant's brief being sustained:

"(1) That the plaintiffs in this case now own, and are entitled to, all the rights and cause of action of one Gertrudis G. Martinez (also known as Gertrudis Garcia de Martinez) hereinafter mentioned, who was their ancestress, and who is now dead, and of whom they are the sole heirs at law.

"(2) That on August 1, 1899, these plaintiffs and said Gertrudis G. Martinez entered into a written contract with the defendant, Charles Well, bearing that date, whereby they contracted to sell to the said Charles Well 30,270 acres of land, more or less, situated in Starr county, Tex., embracing, among other tracts and parcels of land, as recited in said contract, 5,412 acres of land out of an eight-league tract of land in said county, called 'Agua Nueva de Arriba,' and 4,087 acres out of a five-league tract of land in the same county, called 'La Noria de Santo Domingo,' for a consideration of \$1 per acre, to be paid on the delivery of possession of, and a good and sufficient deed to, said premises, and a title thereto satisfactory in all respects to defendant. The parties therein further declaring their understanding that 'all of said 30,370 acres, intended to be conveyed by this contract, are situated in one solid body, and if it is discovered that they are not so situated, then the party of the second part may, at his option, refuse to take any of the lands, or may take all of them, or any portion thereof, as he may elect, if the parties thereto are satisfied,' and that any of said tracts that are not partitioned may be considered by said Well, defendant herein, as imperfect title, and that the other parties thereto shall proceed to have them duly partitioned, and that they shall also have said 30,370 acres surveyed in one solid body, and incorporate the field notes of the survey in their deed; said contract being the same as attached in full to and made 'Exhibit A,' to plaintiffs'

first and second original petition, and also by defendant made a part of, and an exhibit to, defendant's first amended original answer.

"(3) That at the time of making said contract on August 1, 1899, the said Agua Nueva de Arriba and La Noria de Santo Domingo tracts were unpartitioned, as also was another grant called 'Palitos Blancos,' containing 13,471 acres, out of which 4,715 acres were to be conveyed under said contract.

"(4) That thereafter, on or about October 1, 1899, plaintiffs' titles to all of said lands were approved by the defendant, and that plaintiffs thereupon had said lands surveyed in one solid body, and that said survey was also approved by the defendant, and that thereafter, to wit, on December 4, 1899, the plaintiffs and said Gertrudis de Martinez executed and delivered to the defendant a general warranty deed conveying, or purporting to convey, all of the lands included within the field notes of said survey, being 31,596.14 acres, and embracing 5,904 acres out of the said Agua Nueva de Arriba tract, 3,523.1 acres out of the said La Noria de Santo Domingo tract, and 4,246.64 acres out of said Palitos Blancos grant, which deed, notwithstanding a number of variations in the quantity of land conveyed in the various tracts and parcels, was accepted by the defendant as a sufficient compliance with their said contract as to such quantity; said deed being the same as attached in full and made 'Exhibit B' to both plaintiffs' first and second amended original petitions, and also by defendant made part of, and an exhibit to, defendant's first amended original answer.

"(5) That at the time of the execution of said deed, dated December 4, 1899, and of its acceptance by defendant, Well, the said La Noria de Santo Domingo, Agua Nueva de Arriba, and Palitos Blancos grants were each and all unpartitioned, and this fact was then known to said defendant, Well.

"(6) That the agreed purchase price, provided for in said contract of August 1, 1899, at the rate of \$1 per acre, for the said land in the said Agua Nueva de Arriba, La Noria de Santo Domingo, and Palitos Blancos, aggregating 13,683.74 acres, was not paid at the time aforesaid deed was delivered, said three tracts or grants being then still unpartitioned, but that the defendant on said December 4, 1899, executed and delivered to these plaintiffs and to said Gertrudis Garcia de Martinez a certain instrument in writing, bearing that date, wherein and whereby, after reciting said conveyance of even date to him, and his payment for the remainder of said lands, and further reciting that the payment for said lands in said Palitos Blancos grant had also been arranged and receipted for, the said defendant, Charles Well, acknowledged, expressly agreed to, and created, and gave plaintiffs a vendor's lien upon, the said lands in said Agua Nueva de Arriba and La Noria de Santo Domingo tracts, to secure the payment of the purchase

price thereof as provided for in the aforesaid contract of sale of August 1, 1899, and undertook and obligated himself to pay the amounts of the said purchase price of said lands respectively, in the city of Corpus Christi, Tex., upon the execution or securing deeds or decrees of partition, or both, of said lands, between all the parties interested in said Agua Nueva de Arriba and La Noria de Santo Domingo tracts, or either of them, and upon the execution and delivery of a complete release from this instrument, and the said vendors to secure such deeds or decrees of partition, and to have set apart to him or them therein those portions of said two tracts respectively that were included in the aforesaid deed of conveyance to him, and he to remain, meanwhile, in the possession of said premises, without rent or charge; said contract creating and giving said vendor's lien being the same as attached in full to, and made 'Exhibit C' to both plaintiffs' first and second amended original petitions, and also by defendant made part of, and an exhibit to, defendant's first amended original answer.

"(7) That thereafter, to wit, in the year of 1900, the said Palitos Blancos grant was partitioned, and said 4,256.64 acres therein fully paid for by defendant to plaintiffs at the price fixed in, and according to, said contract of August 1, 1899, save a part thereof held out by agreement of the parties.

"(8) That on May 1, 1901, defendant paid, or advanced to plaintiff, the sum of \$1,000 to be used in procuring the partition of said tracts of Agua Nueva de Arriba and La Noria de Santo Domingo; said sum (by written agreement of that date between the parties hereto) to bear interest from said date at the rate of 10 per cent. per annum until a settlement should be had with the plaintiffs for the balance of the purchase price on said lands under the terms of said vendor's lien obligation of December 4, 1899, and together with such interest to be credited on said vendor's lien obligation, and the said sum with interest being further secured by the written obligation of J. R. Monroe and F. W. Seabury, dated said May 1, 1901, whereby they bound themselves to the said Charles Weil that he should have the aforesaid credit on said vendor's lien obligation, and in default of said credit, or the payment to him of the sum and interest, they promised to pay to said Charles Weil the aforesaid sum with interest, and 10 per cent. attorney's fees, and said written agreement and written obligation being the same instruments attached in full to and made 'Exhibit A' to defendant's first and second original answer.

"(9) That in the year 1900 a suit was instituted in the district court of Starr county, Tex., for the partition of said La Noria de Santo Domingo five-league tract of land, but was subsequently dismissed, and that therefore, in the year 1907, these plaintiffs, with the many co-tenants and owners of said

tract, filed another suit in the district court of Nueces county, Tex., for the partition of said tract, said suit being numbered 4,308, and entitled John H. Houghton et al. v. Charles Weil (the defendant herein), and on July 6, 1908, secured a final decree of partition by this court of the said tract of land, whereby there was allotted and set part of said Charles Weil, as holding the equitable and possessory title thereto under conveyance reserving a vendor's lien, and to these plaintiffs, in common among themselves, as the holders of the legal title thereto, reserved in the aforesaid conveyance to said Charles Weil, to 3,545.2 acres of land out of said tract as and being share No. 9 of said partition. That said decree of partition is the same as introduced in evidence by plaintiffs upon the trial of the present suit. That no demand was made by plaintiffs of defendant for the purchase price of said land in said La Noria de Santo Domingo tract, nor was there any release of the said vendor's lien on said land offered or tendered to him by plaintiffs prior to the judgment herein, nor did defendant at any time before or after said partition offer to pay or tender the purchase money thereof until the tender in court hereinafter mentioned.

"(10) That the defendant in his first amended original answer filed herein on July 15, 1908, alleged that he tendered into court the amount of the purchase price of the said 3,545.2 acres of land in said share No. 9, in the said La Noria de Santo Domingo tract, and thereafter, to wit, on July 21, 1908, did in fact tender into court and pay over to the clerk of this court the sum of \$1,822.98 for and as the full amount of the purchase price as provided in said contract of sale between himself and plaintiffs of August 1, 1899, of said 3,545.2 acres of land, at the rate of \$1 per acre, after deducting therefrom the aforesaid sum of \$1,000, with interest thereon from May 1, 1901, to said July 21, 1908, at the said rate of 10 per cent. per annum; and the court now here finds the amount of said purchase price, after making such deduction, to be \$1,822.70.

"(11) That in the year 1900 these plaintiffs, together with said Gertrudis G. Martinez, and said Charles Weil, and more than 100 other co-tenants and owners in the same tract, instituted in the district court of Starr county, Tex., a suit for the partition of the Agua Nueva de Arriba tract, said suit being numbered 575 on the docket of said court, entitled Lazaro Ramirez et al. v. Manuel Guerra et al., and thereafter, to wit, on March 20, 1902, a final decree of partition of the said tract was rendered by said court in the aforesaid cause, and in said decree there was allotted and set apart to said Charles Weil, as holding the equitable possessory title, and to these plaintiffs (the said Gertrudis G. Martinez having died pending said suit) as holding the legal title thereto, to 5,904 acres of land out of said tract, being share

41, of said partition, as described in plaintiffs' first and second amended original partitions, and with the following metes and bounds, as set out in said decree and in said petitions, to wit: 'Beginning at a stake 7,555 varas N.  $89\frac{1}{2}^{\circ}$  W. from a rock and cement mound, the northeast corner of this said 8 league tract of land. Thence N.  $89\frac{1}{2}^{\circ}$  W., 2,500 varas, to the northwest corner of this tract. Thence S.  $2\frac{1}{4}^{\circ}$  W., 13,343 varas, to a stake, the northwest corner of share No. 17 for the southwest corner. Thence S.  $89\frac{1}{2}^{\circ}$  E., 2,500 varas, to the northeast corner of share No. 17. Thence N.  $2\frac{1}{4}^{\circ}$  E., 13,343 varas, to the place of beginning.' That said Agua Nueva de Arriba tract was described in said decree, of partition as a tract of 35,678 acres of land in Starr county, Tex., commonly known as the 'Agua Nueva de Arriba' tract, and being abstract No. 147 for Starr county, containing eight square leagues of land, more or less, confirmed to Jose Miguel Ramirez, as confirmation No. 39 for Starr county by an act of the Legislature of Texas, approved February 10, 1852 [Laws 1852, p. 63, c. 71], entitled 'An act to relinquish the right of the state to certain lands therein named,' and as patented by patent No. 2, volume 11, issued March 23, 1854, said tract being bounded on the north by the 'Palitos Blancos' tract, originally granted to Rafael Garza Sals and by various 640-acre surveys; on the east by the 'Las Animas' tract, originally granted to Bruno, Nicholas, and Matias Garsia y Garza; on the south by the 'Agua Nueva de Abajo' tract, originally granted to Juan Manuel Ramirez, and on the west by a tract called 'Santo Domingo de Abajo,' originally granted to Dionicio de la Garza. And that said decree of partition is the same as introduced in evidence by plaintiffs on the trial of this cause, and that said defendant, Charles Well, was at all times fully informed of the institution, progress, and result of the said suit for partition, and that he, the said Charles Well, was a party thereto, and by the express terms of said decree the title to all of said partition share No. 41 was vested in said defendant, Well, as holding the equitable, possessory title, and to these plaintiffs as holding the legal title thereto.

"(12) That shortly thereafter, to wit, on or about April 5, 1902, plaintiffs presented defendant with a copy of the said decree and demanded the payment of the purchase price of said 5,904 acres of land out of said 'Agua Nueva de Arriba' tract, so set apart to him and them, in said partition, to wit, the sum of \$5,904, and thereafter at various times repeated said demand, and offered to execute and deliver to him, the defendant, a proper release of said vendor's lien thereon, upon the receipt of the purchase money upon it, provided in said contract of sale of August 1, 1899. That, in response of said several demands, defendant refused to pay said purchase money, and that the defendant on April 14, 1902, required of plaintiffs that they

should have said decree recorded in the deed records of Starr county, present evidence of payment of all back taxes on said land, and deliver to him, at Corpus Christi, Tex., a full release of said lien. That plaintiffs thereupon had said decree recorded, presented such evidence of payment of said back taxes, and on or about April 20, 1902, presented defendant, in said town of Corpus Christi, Tex., a full release of the said lien (being the same introduced in evidence by plaintiffs on the trial of this cause), and demanded the payment of the purchase price of said land, and that defendant then and there absolutely refused to accept such release, or to make said payment. That defendant thereafter in said month of April, 1902, demanded and required of plaintiffs the production and delivery to him for examination of the original map of said Agua Nueva de Arriba partition, and that the plaintiffs so secured and delivered to him the said map, being the same map introduced in evidence by plaintiffs on the trial of this cause. That defendant, then, on or about May 10, 1902, required of plaintiffs that they should have said partition share No. 41 resurveyed by a surveyor of defendant's selection, and that plaintiffs then had the said share so resurveyed on the ground by one C. F. H. von Blucher, selected by defendant, and that the survey was made by said Blucher, and, as reported by him, showed that the said share No. 41, as staked out on the ground, included about 5,400 acres of the said 5,904 acres of land described and included in plaintiffs' said deed of December 4, 1899, together with a strip of additional land on the east, but failed to include a strip of between 100 and 200 acres on the south, out of said 5,904 acres so described in said deed, and also left to the west of said share No. 41, and between it and the said 'Santo Domingo' grant, originally granted to Dionicio de la Garza (an adjoining part of which grant was conveyed to defendant in said deed of December 5, 1899), a strip of about 360 acres, running its whole length, and dividing said share from the other lands included and described in said deed, and said strip, if it really exists, preventing said share from being in a solid body with said 'Santo Domingo de Abajo' lands; said strips being as shown on Blucher's map as 'A' and 'B,' offered in evidence by plaintiffs on the trial of this cause.

"That thereafter, during the months of June, July, and August, 1902, plaintiffs frequently demanded of defendant the payment of said \$5,904, which payment defendant then and there refused to make, and assigned to plaintiffs, as his sole reason for such refusal, the same matters and reasons as later assigned by him on October 3, 1902, and as hereinafter fully set out. That on or shortly before the 3d day of October, 1902, the said plaintiffs tendered to defendant, in the city of Corpus Christi, Tex., their deed and release in due form, dated December 8, 1902,

being the same as attached to, and made 'Exhibit D,' both to plaintiffs' first and second amended original petitions, wherein they conveyed to defendant all of said share No. 41, as described in said decree of partition, and released the aforesaid vendor's lien on the said 5,904 acres, as described and created in the aforesaid deed and vendor's lien obligation of date December 4, 1899, and that on said October 3, 1902, the defendant absolutely refused to accept said deed and release, or to pay the said purchase money for said Agua Nueva de Arriba land, and assigned to plaintiffs, as his sole reason for such refusal, the fact that said original contract provided that all of the land should be in a solid body, and that the instrument tendered failed to comply with that requirement, and that the aforesaid strip found by said O. H. F. von Blucher, between said share No. 41 and the remainder of said land, did, in fact, exist, and did, in fact, prevent share No. 41, from being in a solid body with said other lands, as required by the aforesaid contract of sale. And that at various other times, before the institution of this suit and thereafter, the defendant has, continuously and absolutely, failed and refused to pay said sum of money, or to take said share No. 41, at all times basing his refusal solely on the grounds so alleged by him on October 3, 1902, that said share No. 41, was, as aforesaid, not in a solid body with the other lands aforesaid, as required by said contract of sale.

"That plaintiffs, at the time of such refusal, declared, and have ever since declared, that they were satisfied with the aforesaid action of the defendant in exercising his option, under said contract of sale, of refusing to take the said share No. 41, and they, said plaintiffs, at said times of refusal, demanded of defendant that he return and reconvey to them their said land, together with any interest he might have therein, or that he release them from any incumbrance or cloud existing thereon by reason of the contracts and conveyance aforesaid, but that defendant, on said October 3, 1902, and on the other occasions aforesaid of his refusal to take said lands and pay said sum of money, refused, and has ever since refused, to execute such reconveyance or release, or to deliver up said land.

"(13) That the defendant, Charles Weil, entered into possession of all the lands described in the aforesaid deed of December 4, 1899, on or about February 1, 1900, and that he has had continuous and exclusive possession of all of said lands from that date to date of judgment herein, using the same as a pasture and grazing cattle, etc., thereon, and having, holding, and using, within the fences of his said pasture, not less than 5,760 acres of land out of said Agua Nueva de Arriba tract, and out of said partition share No. 41 thereof. That the said defendant, Charles Weil, has had and held such continuous and exclusive

possession of all the land embraced within the share No. 41, of the Agua Nueva de Arriba tract, from April 1, 1902, down to the date of judgment herein, and has, during said period, had the sole and exclusive use, benefit, and profit of the said lands, and has continuously used the same as a part of his pasture, and for grazing cattle thereon. That the said share No. 41 is at present of the fair market value of at least \$3 per acre, and that the fair and reasonable rental value of the said land in said share No. 41, from April 5, 1902, to the date of judgment herein, is not less than 10 cents per acre per annum average through said period, and that the value of the rentals of said share No. 41 during said period, as aforesaid, amount to the sum of \$3,739.20 at said rate of 10 cents per acre per annum.

"(14) That at various times before, during, and subsequent to, the making of the aforesaid contract of sale, deed, and vendor's lien obligation, and the delivery of possession of the said premises, the plaintiffs and the defendant made and had various verbal agreements and understandings in regard to building and rebuilding of fences on the outer line of the lands sold by plaintiffs to defendant. That there is an irreconcilable conflict between the parties thereto as to the terms of such agreements and understandings. But the court finds that none of said understandings and agreements were reduced to writing, or incorporated in any of the former contracts in writing made by and between the parties, but that all of the same were collateral and additional agreements and understandings, and not at all intended by the parties to be ingrafted as conditions on the aforesaid contract for the sale of said lands, or for the aforesaid deed, or vendor's lien obligation.

"(15) That the said defendant, Charles Weil, after taking possession of said lands, including said share No. 41, in the partition of the Agua Nueva de Arriba tract, and before the filing of this suit constructed a well and watering place on said share No. 41 at a cost to him of \$750, and also ran two cross-fences across the whole of said ranch, from the west line of the said land in said La Noria de Santo Domingo grant to the east line of said land in said Agua Nueva de Arriba tract, at a cost to him of \$525, for the part thereof on said share No. 41."

The first assignment of error is addressed to the action of the court in overruling the general demurrer, and cannot be sustained. Appellees' right to recover, and the judgment of the court, are not based upon their having had the land out of the Arriba grant so partitioned as to embrace exactly the land conveyed by the deed, but upon appellant's refusal to take and pay for the land so partitioned, in the exercise of his option to do so, acquiesced in by appellees as set out in the contract of sale, which clearly appears

to have been in the minds of the parties through the entire transaction. Having elected not to take and pay for this tract, and appellees having acquiesced therein in equity and good conscience, appellant could not keep the land. Appellant's contention, which goes to the root of his defense, is that the contract of sale containing this option provision, as shown in our findings of fact, was entirely abrogated by, and of no obligatory force after, the execution of the deed vendor's lien contract, and that appellees were bound, without reservation or condition, to have such partition made as was approved by, and satisfactory to, appellant, and that until this was done appellant, while holding the land, as conveyed by his deed, was not required to pay for it. To this we cannot agree. The third special exception to the petition clearly shows that it was not so understood, but that the terms and obligations of the original contract of sale, with regard to these unpartitioned lands, remained a part of the contract and agreement of the parties. This contract contains the only obligation to have these lands so partitioned as to lie in one solid body, the failure to do which is shown to have been the sole objection on the part of appellant to take the Arriba tract, partitioned as share 41; it being claimed that this tract was separated from the other land by a narrow strip. Throughout his pleadings appellant refers to the failure of appellees to comply with the provisions of his said "contract" and "agreements," referring to both the original contract of sale and the agreement contained in the vendor's lien contract. It was shown that the Arriba lands were unpartitioned, and that appellees, as owners of undivided interests, could not absolutely control such partition, and take their shares where they chose. It was to cover the contingency of their failure to have the land so partitioned as to include exactly the land embraced in the deed out of this tract, and forming a solid body with the other land conveyed, that the option agreement was made, and, as to this land, this contingency still remained after the execution of the deed. The partition had been made and was binding upon all of the parties to it. The evidence tends strongly to show that plaintiffs intended to have the Arriba land so partitioned as to include in share 41, awarded to appellant, the land embraced in their deed, and thought they had done so. The petition presented a good cause of action, and the court did not err in overruling the general demurrer.

This practically disposes of this appeal, except as to certain minor details, as every material fact alleged in the petition was found in the trial court, upon sufficient evidence, in favor of appellees.

Without expressly so deciding, it suggests itself to us that, even if the original contract is not to be considered as of any obligatory

force after the execution of the deed and vendor's lien contract, the land having been partitioned by the decree, and the interest of appellees absolutely settled beyond the possibility of recall, if thereby it is placed beyond the power of appellees to comply strictly with their contract, absolute as claimed by appellant, he could not in such case retain his right under the deed to that part of the Arriba land embraced therein and refuse to pay for the same, but would either have to consent to a rescission of this contract, or pay for the land, and rely upon an action of damages for failure on the part of appellees to comply with their said contract. This appellant did not seek to do, but sought to keep the land and the money also, until appellees complied with what is manifestly a practically impossible condition.

We have discussed these questions, as they arise upon the general demurrer, at greater length than would have otherwise been necessary, for the reason that here is the pith of appellant's case as presented by the pleadings and evidence.

The court did not err in overruling the first special exception, that the petition did not sufficiently describe the land and was too vague, uncertain, and indefinite. The second assignment of error, presenting the point, is without merit.

What we have said in discussing the first assignment renders any discussion of the third assignment unnecessary, and it is overruled.

The third special exception to the petition is, in substance, that the petition shows that the title to the land had been accepted by appellant, and had been followed by an obligation in writing whereby the conditions of the original contract of sale, in so far as they had not been complied with by appellees, were renewed, and the appellees bound themselves to comply with said conditions, and the petition fails to allege a compliance with such conditions. The exception was not well taken. The right of recovery was rested upon an entirely different ground, to wit, the refusal of appellant to take and pay for the land, thereby exercising the option reserved by him in the contract.

There is no merit in the fourth assignment, nor in the fifth assignment, that by the allegations of the petition it appeared that appellees had not complied with the general warranty of title in the deed.

The sixth, seventh, eighth, ninth, and tenth, assignments of error and propositions thereunder do not require any further discussion, after what has been said in disposing of other assignments, and are severally overruled.

By the eleventh assignment of error appellant assails the findings of fact of the trial court, as set out in the second paragraph thereof, on the ground that there is no evidence to sustain the same. The proposition

under this assignment is that: "A finding of fact by the court should reflect the spirit and substance of the matters from which he finds, otherwise the finding is insufficient and should not be sustained." The proposition presents a question entirely different from that presented by the assignment. The statement does not pretend to show from the evidence that the facts so found by the trial court, being really the substance of certain contracts introduced in evidence and referred to as part of the findings, are not supported by the evidence. The assignment will not be considered. Our approval and adoption of the court's findings of fact operate to overrule this and other assignments addressed to certain portions of such fact findings as not supported by the evidence.

What is said with regard to the eleventh assignment applies also to the twelfth and thirteenth assignments.

Objection is made by the sixteenth assignment of error to the conclusions of fact set out in the eleventh paragraph of such conclusions. The statement under the proposition refers alone to the finding that "at all times the defendant, Charles Weil, was fully informed of the institution, progress, and result of the said suit for partition, and in all things fully acquiesced in the same." In the statement is set out only the testimony of Charles Weil, which tends to show that he left the whole matter of the partition of the Arriba tract to appellees, and relied upon them wholly. It is not stated either directly or by inference that this is all the evidence on this point. From all that appears in the statement there may be abundance of evidence in the record to contradict Weil and support the conclusion of the trial court. Taking the entire statement from the record accompanying the assignment as absolutely true and sustained by the record, we cannot say that the conclusion of fact referred to is not supported by other testimony, the existence of which is not, either directly or inferentially, negatived. If appellant had stated that this was all the evidence on this point, it would have been taken as true unless denied by appellees, under rule 41. But here there is nothing appellees are called upon to deny.

The evidence was sufficient to support the finding of the trial court set out in the seventeenth assignment, that appellant gave as his sole reason for refusing to accept and pay for the Arriba land, partitioned to him as share 41, that the original contract of sale provided that the lands should be in a solid body with the other lands, and that there was a strip between this tract and the other lands. Here, as in the assignment above referred to, the statement under the assignment does not purport to give all of the testimony upon the point, but only the letter of Scott tending to show that there were other reasons, not stating them, however. The testi-

mony of Seabury, not referred to in appellant's statement, certainly sustains the court's finding in the matter indicated. The assignment is overruled.

The eighteenth assignment assails the conclusion of fact of the trial court set out in the thirteenth paragraph thereof relating to appellant's possession of the land, the value of the land, and that the rental value from April 5, 1902, to the date of judgment is not less than 10 cents per acre per annum, and that the value of the rental of share 41 during that period amounted to \$3,739. The ground of the objection is that the finding is not supported by the evidence. This objection cannot be sustained. In the statement it is said that the finding is objected to because it fixes the date of rent from April 5, 1902. The assignment does not present the question of error in allowing rent from April 5, 1902, but the only question of the sufficiency of the evidence to authorize the finding as to the value of rents from that date, and must be overruled. The question probably intended to be presented here is presented in the twenty-ninth assignment of error.

The nineteenth assignment of error relating to the finding of fact set out in the fourteenth paragraph thereof is overruled without discussion.

What we have said in disposing of the first assignment of error also disposes of the twenty-second assignment, complaining of the court's conclusion of law that under the second, third, fourth, fifth, sixth, and fourteenth findings of fact the rights of the parties are fixed and determined by the original contract of sale, the deed, and the vendor's lien obligation, and are not affected by the verbal agreements or understandings between them. The latter portion of this finding refers to certain verbal agreements, as to which there was some evidence, with regard to placing the fence on the outside line. The primary objection to this conclusion of law, however, is that, upon the execution of the deed and vendor's agreement, the original contract of sale was entirely abrogated and could no longer be looked to in determining the rights of the parties, having reference entirely to that part of the original contract with regard to the option of appellant to refuse to take any one of the unpartitioned tracts without losing his right to take the balance of the land if upon partition it was found to be not in a solid body with the others, if agreeable to appellees. In this contention, as we have shown, we think appellant is in error. The assignment is overruled.

The objections to certain of the conclusions of law set out in the twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, and twenty-eighth assignments of error do not require any further discussion and are overruled.

The twenty-ninth assignment may be considered, in connection with the eighteenth as-

signment, as presenting, though not at all clearly, the question that, in estimating the amount of rent adjudged to appellees, it was error to allow such rents from April 5, 1902. The amount awarded was \$3,739.20. In the decree the court adjudged to appellees rent on the 5,904 acres at 10 per cent. per annum from April 1, 1902, to April, 1908, which he finds to be \$3,739.20. The correct amount of rent for that time would be \$3,542.40. The amount really adjudged is the amount which would be due from April 1, 1902, to date of the judgment, August 1, 1908. This error, however, is not pointed out in the brief. We think that appellant should be required to pay rent only from the date that appellees acquiesced in his refusal to take the land, which appears to have been October 3, 1902. Up to this date, it seems that appellant continued to make objections to the partition, and appellees continued to press him to take the land and pay for it. The judgment in this particular will be reformed so as to allow appellees rent from October 3, 1902, to August 1, 1908, the date of the judgment, amounting to \$3,437.40.

We think that the judgment was erroneous in refusing to allow appellant pay for the improvements placed by him on the lands, and that the tenth conclusion of law of the trial court, as set out in the thirtieth assignment of error, is erroneous. The findings of fact show that appellant entered into possession of this land, as he had a right to do under the contracts between the parties, relying upon the agreement with regard to the partition, and in good faith assuming that the land would be so partitioned as that there would be no reason for his refusal to take it. We think in equity he should have pay for permanent and valuable improvements placed by him on the land in such circumstances. *Patrick v. Roach*, 21 Tex. 256; *Eberling v. Deutscher Verein*, 72 Tex. 339, 12 S. W. 205. The judgment will be so reformed as to adjudge to appellant the value of such improvements, which, as found by the court, is \$1,225; but in his answer he only claimed as the value of improvements placed on the Arriba tract, \$1,000, and his recovery must be limited to that amount.

In appellant's amended answer, filed July 15, 1908, appellant offered to pay whatever the court might find to be due appellees for the land in event the court should find that appellees had complied with their part of said agreements by doing the things undertaken to be done by them, and complaint is made of the action of the court in not allowing appellant to do this and keep the land, by the decree. No money was actually tendered in court. This conditional offer came for the first time six years after the suit had been filed, and after the land had very largely increased in value. After absolute denial of

appellees' right to demand payment, and resistance of his claim for either money or land, requiring the bringing of this suit, and persisted in through the six years that the suit has been pending, and after the large increase in value of the land, there was no equity in appellant's belated claim thus set up, and the court did not err in refusing to entertain it. Appellant had made his election and must stand by it. *Pom. Sp. Perf.* §§ 407, 408; *Fullerton v. Doyle*, 18 Tex. 3.

The remaining two assignments of error present no ground for reversing the judgment and do not require further discussion. They are severally overruled.

We find no grounds for reversing the judgment and remanding the cause. The judgment should be reformed in the matter of rents and improvements as herein indicated, and, as so reformed, should be affirmed at the costs of appellees, and it is so ordered.

Reformed and affirmed.

#### SCANLAN & BARTELL v. DAVIS.

(Court of Civil Appeals of Texas. Dec. 3, 1909.  
Appellee's Motion for Rehearing Denied  
Dec. 22, 1909.)

#### 1. LANDLORD AND TENANT (§ 129\*)—FAILURE TO DELIVER POSSESSION—ACTIONS—INSTRUCTIONS.

In an action for damages for refusing to allow plaintiff to occupy a house rented of defendants, there was evidence that, because of defendants' action, plaintiff was obliged to go in search of another house, and did not succeed in finding a place for herself and family until after dark of the day she was refused admission to the house rented of defendants; but there was no evidence to show how she went from one place to the other, nor the distance between the places, nor that she suffered from fatigue, or sustained any physical pain or injury. *Held*, that it was error to instruct that, if the jury found for plaintiff, they should find in her favor for such an amount as to compensate her for her mental and physical suffering, and inconvenience, if any, caused by defendants' breach of contract.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 129.\*]

#### 2. APPEAL AND ERROR (§ 1064\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where the verdict for plaintiff appears to the appellate court to be excessive, the court cannot say that an erroneous instruction to find in plaintiff's favor, if they find any damages for plaintiff, for such an amount as will compensate her for her mental and physical suffering and inconvenience, if any, caused by defendants' breach of contract, did not induce the jury to return a larger verdict than they otherwise would have found.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1064.\*]

Appeal from Harris County Court; A. E. Amerman, Judge.

Action by Mrs. Mary V. Davis against Scanlan & Bartell. Judgment for plaintiff, and defendants appeal. Reversed on rehearing, and remanded.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Love & Channell, for appellants. Mark G. Fakes, for appellee.

**PLEASANTS, C. J.** At a former day of this term we affirmed the judgment of the court below in this case, without a written opinion.

Upon a re-examination of the record, in considering appellants' motion for rehearing, we think we erred in overruling the third assignment of error, which complains of the charge of the court on the ground that it submitted as an element of damage the alleged physical suffering of plaintiff, when there is no evidence that plaintiff sustained any physical injury of any kind, or was caused any physical suffering by the alleged wrongful acts of the defendants. It was shown that, by reason of defendants' refusal to permit plaintiff to occupy the house she claims to have rented from them, she was obliged to go in search of another house, and did not succeed in finding a resting place for herself and family until after dark of the day she was refused admission to the house she claims to have rented from defendants. There is nothing in the evidence to show how she went from one place to the other, nor the distance between the places, and we cannot say that the evidence is sufficient even to show that she suffered from physical fatigue, and there is not an intimation in the record that she sustained any physical injury or suffered any physical pain of any kind. Under this state of the record, it was error for the trial court to give the jury the following instruction: "If you find any damages to plaintiff, you will find in her favor for such an amount as will compensate her for her mental and physical suffering and inconvenience, if any, caused by defendants' breach of contract, together with such expenses as plaintiff may have caused to incur, if any, by virtue of said breach of contract, if any."

The verdict returned by the jury appears to us to be excessive in amount, and we cannot say that this error in the charge did not induce the jury to return a larger verdict than they would have found but for such improper charge. *Railway Co. v. Rosing*, 26 S. W. 243.

The motion for rehearing will be granted, and for the error indicated the judgment of the court below will be reversed, and the cause remanded.

**PACIFIC EXPRESS CO. et al. v. WATSON.**†  
(Court of Civil Appeals of Texas. Oct. 16, 1909. Rehearing Denied Dec. 4, 1909.)

**1. DAMAGES (§ 37\*)—INJURY TO CHILD—ACTION BY PARENT.**

A parent suing for a personal injury to a minor child, not resulting in his death, may only recover for the diminution in the value of

the child's services during minority and the expenses rendered necessary by the injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 240; Dec. Dig. § 37.\*]

**2. MASTER AND SERVANT (§ 100\*) — NEGLIGENCE—RELEASE OF LIABILITY—VALIDITY.**

An agreement by a parent, as an inducement to the employment of a minor child, to hold the employer harmless for any injury to the child occasioned by the employer's negligence, is contrary to public policy and void, whether applied to active or passive negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 166; Dec. Dig. § 100.\*]

Appeal from District Court, Taylor County; J. H. Calhoun, Judge.

Action by Mrs. Mollie E. Watson against the Pacific Express Company and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Wagstaff & Davidson and Ethridge & McCormick, for appellants. Hardwicke & Hardwicke and Theodore Mack, for appellee.

**DUNKLIN, J.** While Will W. Watson, a minor, was engaged in the service of the Pacific Express Company, he stepped from an express car upon a baggage truck having a defective floor, which defect caused him to fall and sustain injuries. The truck had been left near the car by employes of the Texas & Pacific Railway Company and was the property of the latter company. The accident happened July 30, 1905, at the Texas & Pacific Railway depot in Abilene. Will Watson attained the age of 21 years September 7, 1905, and was living at the date of trial, September 7, 1908, and in another suit had already recovered judgment in his own right for \$10,000 as damages for the injuries sustained by him. The verdict in this case was in plaintiff's favor for \$1,000.

Upon the measure of damages the court charged the jury that, in case of a verdict in favor of Mrs. Watson, then, in addition to the loss of earnings of her son during minority and the value of her services in nursing him during that period, she should be allowed as damages the reasonable value of such pecuniary aid as the mother had a reasonable expectation of receiving from her son after he reached the age of 21 years. This charge is assigned as error by both defendants in the case, and those assignments are sustained. Doubtless the trial court was induced to give this instruction by the decision of Justice Fisher, of the Court of Civil Appeals, in the case of *Railway v. Hall*, reported in 34 Tex. Civ. App. 535, 80 S. W. 133, which seems to sustain such an instruction. However, such a holding was not necessary to a disposition of the appeal in that case, as it appears from the opinion of the court that in the plaintiff's pleadings no claim was made that the father, who was plaintiff in the case, had a reasonable expectation of receiving pecuniary benefits from his injured son, Charles Hall, after

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court January 12, 1910.

the son had reached the age of 21 years, and the court further held that the evidence was not of such a character as to warrant a verdict in plaintiff's favor as to that item of damages.

The case of *Railway v. Johnson*, 99 Tex. 337, 90 S. W. 164, was one in which the mother sued for damages for personal injuries to her minor son, and our Supreme Court used the following language: "Over the objection of the defendant, the court admitted evidence to show that Mrs. Alice Johnson depended upon her work for a living. The decisions relied on to sustain this ruling were made in cases in which the plaintiffs sued for damages resulting from the death of relatives in which their rights of action and measure of damages consisted of the value of pecuniary benefits or contributions which they would have received from the deceased had they lived; and evidence of the necessity for such help arising from the poverty of the plaintiffs tended to show the probability that it would have been extended. *International & G. N. R. R. Co. v. Kindred*, 57 Tex. 491; *Houston & T. C. Ry. Co. v. White* [23 Tex. Civ. App. 280] 56 S. W. 207; *International & G. N. R. R. Co. v. Knight*, 52 S. W. 641. But the rule is not the same in cases like this, where the right of action and measure of damages are different. The mother's right was only to recover for the diminution in the value of the minor son's services during minority, with such expenses as may have been rendered necessary by the injury, and her poverty did not tend to show these things. *Houston & G. N. R. R. Co. v. Miller*, 49 Tex. 332; *Missouri Pac. Ry. Co. v. Lyde*, 57 Tex. 505; *Missouri, K. & T. R. R. Co. v. Hannig*, 91 Tex. 349 [43 S. W. 508]; and cases cited. More than that, she could not recover, whether rich or poor, for the right of action for all other damages resulting from the son's injury belongs to him."

While it does not appear from the report of that case that the mother of the son sought to recover for pecuniary benefits from her son's services after he had attained the age of majority, we think the language quoted above clearly indicates that our Supreme Court would not hold that such benefits could be recovered by a parent where the injury to a minor did not result in death. Unquestionably, Will W. Watson has the legal right to recover the full amount of his loss of earnings sustained after he attained the age of 21 years and occasioned by the negligence of defendants, and to allow his mother to recover also for a portion of such loss, it seems, would, in one sense, at least, be to allow a double recovery for the same injury. If the mother had a legal interest in such services, of course she could recover for the loss thereof occasioned by the negligence of defendants; but we know of no rule of common law nor any statute of our state vesting in her such an

interest where the injury which occasioned the loss of earnings by the son did not result in his death. Without such an interest we fail to understand how in such a case she could have a cause of action for expected benefits from such services. Except the case of *Railway v. Hall*, supra, no authorities are cited by appellee, and we have been unable to find any, to sustain the charge given by the trial court. The case of *Mercker v. Jackson*, 54 Ill. 397, seems directly in accord with our views expressed above. See, also: *Railway v. Cowser*, 57 Tex. 300; *Railway v. Nixon*, 52 Tex. 25; *Railway v. Miller*, 49 Tex. 322.

As an inducement to the express company to employ her son, Mrs. Watson agreed in writing with the company to hold it harmless for any injury to her son occasioned by the negligence of that company. The express company insists that the uncontroverted evidence shows that the negligence, if any, which occasioned the injury to Will Watson, was the active negligence of the Texas & Pacific Railway Company in leaving the defective baggage truck at the place where Will Watson stepped upon it, that, if the express company was negligent in permitting such a truck to be so placed, such negligence was passive only, and therefore its contract with plaintiff for immunity against liability for negligence on its part should be enforced. To sustain this contention appellant has cited several authorities holding that in certain cases a passive wrongdoer may have judgment over against an active wrongdoer when both are held liable to the plaintiff, in one of which cases (*Pullman Co. v. Norton*, 91 S. W. 841) this right of recovery was based upon a contract of indemnity in favor of one defendant with its codefendant. But no decisions are cited, and we know of none, which hold that, if negligence which causes an injury is passive only, then by reason of the fact that it is of that character a contract for immunity from damages occasioned thereby will bar a recovery by the injured party. In *Railway v. Carter*, 95 Tex. 461, 68 S. W. 159, our Supreme Court held that there is no general rule that one cannot contract for immunity from the consequences of his negligence, and in that case a contract by a sawmill owner with a railroad company to hold it harmless against loss of property by fire from its engines if the railroad company would build a spur track to the mill was upheld, even though the fire occurred through the negligence of the railway company. To the same effect, see: *Woodward v. Railway*, 35 Tex. Civ. App. 14, 79 S. W. 896; *Wooldridge v. Railway*, 38 Tex. Civ. App. 551, 86 S. W. 942. But we think a different rule would prevail if the contract is for immunity from the consequences of the master's negligence, resulting in personal injury to his employé. Indeed, in cases of this character, upon the question of plaintiff's right to recover, such

contracts have been held to be void as in contravention of a sound public policy, and we know of no reason for making a distinction if such negligence be active or passive only. *Penner v. Bean*, 80 Tex. 155, 15 S. W. 798; *T. & P. Ry. v. Putman*, 63 S. W. 910; *G. C. & S. F. Ry. v. Darby*, 28 Tex. Civ. App. 413, 67 S. W. 446, and authorities there cited.

The express company further complains that the charge of the court presenting the issue of negligence vel non of that company was upon the weight of the evidence; but, after a careful examination of the instruction, we hold that there is no merit in the assignment, and it is, accordingly, overruled.

For the error above indicated, the judgment of the trial court is reversed, and the cause remanded.

### GALVESTON, H. & S. A. RY. CO. v. CALLAHAN.†

(Court of Civil Appeals of Texas. Dec. 8, 1909.  
Rehearing Denied Jan. 12, 1910.)

#### 1. NEGLIGENCE (§ 119\*)—ACTIONS—PLEADING—ISSUES, PROOF, AND VARIANCE.

A petition alleging several acts of negligence does not require proof of all the acts, but it is sufficient if it be shown that the injury resulted from one of the acts alleged, and it is only when a series of acts alleged as negligence, none of which if severed from the combination would constitute negligence, that it is essential to submit all the facts alleged to the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 208, 216; Dec. Dig. § 119.\*]

#### 2. MASTER AND SERVANT (§ 291\*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action against a railway company for injuries to a switchman, in which it was alleged that the negligence consisted in running the train on which plaintiff was working without a proper lookout, and in failing to provide a flagman on another train, and also in backing such other train upon the track on which plaintiff's train was running, an instruction is not erroneous which directs a verdict for plaintiff if the jury find that the collision between plaintiff's train and the other train was caused by the negligence of defendant in failing to provide a flagman on the other train, and that such negligence was the proximate cause of the collision, as, under the complaint, it was not necessary to submit all the grounds of negligence in the charge.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 291.\*]

#### 3. JUDGMENT (§ 256\*)—FINDING TO SUPPORT.

Where a petition in an action by a servant for injuries avers several grounds of negligence which are independent, and the court instructs the jury to find for plaintiff if one of the grounds of negligence is established, an affirmative finding on such issue will support a judgment for plaintiff.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 256.\*]

Appeal from District Court, Bexar County; Arthur W. Seeligson, Judge.

Action by John Callahan against the Galveston, Houston & San Antonio Railway Com-

pany. Judgment for plaintiff, and defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, D. C. Bolinger, and W. F. Ezell, for appellant. Perry J. Lewis and H. O. Carter, for appellee.

NEILL, J. This is an action to recover damages alleged to have been inflicted by the negligence of appellant upon the appellee. That part of plaintiff's petition which charges the negligence is as follows: "That heretofore, to wit, on or about the 24th day of September, 1907, the plaintiff was in the employ of the defendant in the capacity of a switchman in its yards in San Antonio, and while in the yard limits of said company he was in the discharge of his duty upon a train of cars which was being drawn by a locomotive eastward and the defendant had in its yard limits another train of cars, which was being backed by a locomotive westward; that by reason of the negligence of the crews of both of said trains, who had charge of the operation of said trains, said trains were brought together in a violent collision, and the plaintiff, who was in the performance of his duty upon said train, upon a box car, was thrown with great violence to the ground and seriously and permanently injured as hereinafter stated. Plaintiff charges that the defendant's employes, who were in charge of the train upon which he was working, were negligent in failing to keep a proper lookout for the train which was backing westward, and were negligent in failing to stop the train upon which plaintiff was in the discharge of his duty, ere it came into collision with said train which was being backed westward, and that had those in charge of the operation and movements of said train upon which plaintiff was in the discharge of his duty, used proper diligence to discover the approach of said train, which was backing westward, said train, upon which plaintiff was in the discharge of his duty, might have been stopped in time to have averted the collision; that defendant's servants in charge of the operation of said train, which was being backed westward, had no right to be upon the track where the train was being backed at all, save under the protection of a flagman, whose duty it was to go ahead of said train and give warning of its approach, and to prevent said train from coming into collision with other trains, which flagman was absolutely essential to prevent the two trains from coming into collision, but, notwithstanding said train had no right upon said track, save under the protection of a flagman, defendant's servants in charge of the operation and movements of said train, which was being backed westward, negligently propelled the same backwards, without sending out a flagman and without keeping a reasonable lookout, and without taking any precautions whatever to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

prevent coming into collision with other trains; that, by reason of the negligence aforesaid, said two trains were directly brought into collision with other trains; that, by reason of the negligence aforesaid, said two trains directly and proximately caused plaintiff's injuries. Plaintiff says that he had nothing whatever to do with the movements and operation of either one of said trains, and at the time of said collision he was in the discharge of his duty and in the exercise of due care to prevent injury to himself."

Upon the issue of negligence this is the charge of the court: "If you believe from the evidence that on or about the 24th day of September, 1907, the plaintiff was in the employ of the defendant in the capacity of a switchman in its yards in San Antonio and that on said date he was engaged in the discharge of his duty upon a train of cars, which was being drawn by a locomotive eastward, and that while so moving eastward the said locomotive and train of cars came into collision with another locomotive and train of cars in defendant's yard, which was being moved westward on the same track, and if you further believe from the evidence that by reason of said collision, if you find there was a collision, the plaintiff was thrown from one of the cars in the train which was moving eastward, and that by reason thereof he sustained any of the injuries alleged in plaintiff's petition, and if you further believe from the evidence that it was the duty of the defendant's servants and employes in charge of said train, which was moving westward, to protect the train by having out a flagman, and if you further believe from the evidence that they did not have out a flagman, and if you further believe from the evidence that it was negligence on the part of defendant's servants and employes in charge of said westbound train not to have out a flagman, if you find there was no flagman, and that such negligence, if any, was the direct and proximate cause of the said collision, if any, and if you further find from the evidence that by reason of said collision, if any, the plaintiff received any of the injuries alleged in his petition, then your verdict must be for the plaintiff."

This portion of the charge is complained of by the first and second assignments upon the ground that it does not conform to the pleadings, and it is complained by the third and fourth that the verdict is not supported by the pleadings and evidence. The substance of the propositions advanced under these assignments is that "The acts of negligence alleged in plaintiff's petition were so connected with each other as to require proof of all to establish a cause of action." If the acts of negligence were so connected, as is urged by the defendant, then it would logically follow that the charge was erroneous, and that

a verdict predicated upon the single issue submitted could not form the basis of a good judgment. Hence, an answer to the question, "Are the allegations so connected as to require proof of all facts averred?" will determine the matter.

It may be stated as a postulate that a petition alleging several acts of negligence does not require proof of all the acts; but that it is sufficient if it be shown that the injury resulted from one of the acts alleged. *San Antonio St. Ry. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 753; *T. & P. Ry. v. Hill*, 71 Tex. 451, 9 S. W. 351; *G., H. & S. A. Ry. v. Patillo*, 45 Tex. Civ. App. 572, 101 S. W. 493; *Garber v. St. L. S. W. Ry.*, 118 S. W. 858; 14 Ency. Pl. & Prac. 345. It is only when a series of facts are alleged as negligence, none of which, if severed from the combination, constitutes negligence, but the combination of the entire series is required to make out a case of negligence, that it is essential for the court to submit all the facts alleged to the finding of the jury. *Williams v. G., H. & S. A. Ry. Co.*, 34 Tex. Civ. App. 145, 78 S. W. 45; *De Castillo v. G., H. & S. A. Ry. Co.*, 42 Tex. Civ. App. 108, 95 S. W. 547; *G., H. & S. A. Ry. v. Patillo*, supra. This is not an exception to the general rule stated, but is in accord with it. For when it takes a combination of a number of facts to make out a case of negligence, and they are averred, the petition does not allege several grounds of negligence, but only one. That the petition in the case under consideration avers several grounds of negligence, and not one dependent upon a series of facts pleaded, is apparent from its face. Hence, in view of the general rule stated, it was not an error of which defendant can complain in the court's submitting only the ground of negligence embodied in its charge; nor, when the jury found in the affirmative on such issue, can it be said the verdict on such issue does not support the judgment.

The remaining assignment complains that the verdict is excessive. It was for \$16,000, but a remittitur was required by the court reducing it to \$12,000. We believe the evidence is sufficient, upon plaintiff's theory as to the character and extent of his injuries, to sustain the judgment for the latter amount.

The evidence sustains the verdict on the issue of negligence, there is no error in the judgment, and it is affirmed.

#### GULF, C. & S. F. RY. CO. v. WARD.

(Court of Civil Appeals of Texas. Dec. 10, 1909.)

#### 1. CARRIERS (§ 274½\*)—CARRIAGE OF PASSENGERS—ACTIONS—VENUE.

Under the venue statute (Gen. Laws 1901, p. 31, c. 27, § 1), suits for carrying a passenger past his destination may be brought either in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the county where the injury occurred or where plaintiff resided at the time of the injury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 274½.\*]

**2. APPEAL AND ERROR (§ 1066\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

In an action for carrying a passenger past his destination, an erroneous instruction relating to the plea of privilege, stating that if at the time of suit plaintiff was temporarily residing in that county, with the intention of returning to another county, the defendant's plea to the jurisdiction was conclusive, was harmless, where there was no issue as to plaintiff's residence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

**3. CARRIERS (§ 276\*)—CARRIAGE OF PASSENGERS—VENUE—EVIDENCE.**

In an action for carrying a passenger past his destination, evidence held to show that he was a resident of another county from that in which the suit was brought.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 276.\*]

**4. TRIAL (§ 296\*)—ERRONEOUS INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.**

In an action for carrying a passenger beyond his destination, an erroneous instruction that it was the duty of the railroad company to safely carry him from the starting point and deliver him at his destination, and that a failure to do so would be negligence on their part, was not cured by an instruction properly defining the words "negligence" and "ordinary care," and charging that if the passenger was properly on the train and that the employees of defendant negligently, as the term is above defined, carried him past his destination, etc., they should find for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. § 296.\*]

**5. APPEARANCE (§ 8\*)—ACTS CONSTITUTING—AGREEMENT TO CONTINUANCE.**

In an action for carrying a passenger beyond his destination, where defendant's attorney was informed of the filing of suit and agreed to a continuance, this amounted to an appearance, and his plea of limitations based on plaintiff's failure to issue a citation cannot be sustained.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 23; Dec. Dig. § 8.\*]

Appeal from Burleson County Court; R. J. Alexander, Judge.

Action by W. L. Ward against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Terry, Cavin & Mills, for appellant. Mathis, Buchanan & Stone, for appellee.

**PLEASANTS, O. J.** This suit was brought by appellee against appellant to recover damages alleged to have been caused him by the negligence of appellant's servants in failing to announce the arrival of a train upon which appellee was a passenger at the station of Duke on appellant's road in Ft. Bend county, and in failing to stop the train at said station, and thereby conveying appellee beyond his destination and requiring him to alight from the train in the dark and to walk back through rain to said station, a distance of more than a mile, by reason of which it is

alleged appellee was made sick, and suffered physical and mental pain. Appellant filed a plea of privilege to be sued in Ft. Bend county, where the injury occurred, and where it is alleged in said plea the appellee resided at the time of the injury. Subject to this plea appellant answered by general denial and plea of limitation. The trial in the court below by a jury resulted in a verdict and judgment in favor of appellee for the sum of \$250. The plea of privilege was submitted to the jury with the case. In submitting this plea the court instructed the jury as follows: "If, however, you should find from the evidence that if, at the time the petition herein was filed with the clerk, or was deposited with the clerk of the court for the purpose of being filed, the plaintiff herein was residing in Fort Bend county, Texas, with the intention of living there temporarily, and then returning to Burleson county, then you should find the defendant's plea to the jurisdiction to be true, and go no further in the consideration of the case." This instruction is manifestly erroneous. The venue statute under which the plea was made requires suits of this character to be brought "either in the county in which the injury occurred or in the county in which plaintiff resided at the time of the injury." Gen. Laws 1901, p. 31, c. 27, § 1. This error in the charge cannot, as claimed by appellee, be regarded as a mere clerical, immaterial error which could not have resulted in injury to appellant. It is an affirmative misstatement of the law, and would be presumed to have injured appellant if the evidence raised the issue of whether appellee resided in Ft. Bend county at the time of the alleged injury. We are inclined to the opinion, however, that the evidence fails to raise this issue, and therefore the error in the charge was harmless.

It is true that appellee, who is unmarried, had been working in Ft. Bend county for several months before his injury, and remained at work there for several months thereafter, and he has been away from Burleson county most of the time for the past four years, but the undisputed evidence further shows that he was born and reared in Burleson county, that his mother lives in said county, and appellee has always claimed that county as his home. He has always voted there, pays his poll tax there, and returns there and stays with his mother when he is not engaged in work in some other county. We do not think in the face of this testimony that the mere fact that appellee worked in Ft. Bend county for several months before and after the alleged injury would authorize a finding that he resided in that county as that word is used in the statute above quoted. The record shows that when appellee was testifying on the trial of the case he was asked about a written statement of his claim made by him in which he stated that

he resided in Ft. Bend county. He testified that he did not remember to have made such statement, and the written statement referred to was not introduced in evidence, nor was it otherwise shown that appellee had made such statement. There being no evidence tending to contradict his testimony that Burleson county was the county of his residence, and the facts before set out which tend to establish the truth of this claim having been shown by other witnesses than appellee, we think the trial court might have instructed the jury to find for appellee on the plea of privilege, and therefore the error in the charge above pointed out was harmless.

Upon the issue of whether the employés of appellant announced the arrival of the train at Duke and stopped it there a sufficient time to enable appellee to alight, the evidence was conflicting. Upon this state of the evidence the court charged the jury as follows: "You are instructed that the duty devolves upon a railroad company, acting through its duly constituted agents and employés, to safely carry a passenger, holding a ticket from the starting point, and deliver him to his point of destination; a failure to do so would be negligence on the part of said railway company." It is not claimed by appellee that this charge is correct, but it is contended that other portions of the charge properly submit the issue of negligence on the part of appellants as alleged in the petition, and that the charge taken as a whole could not have misled the jury and properly submits the issue of negligence *vel non*. We cannot agree with appellee in this contention. In succeeding paragraphs of the charge the words "negligence" and "ordinary care" were properly defined, and the jury were then told that if they found from a preponderance of the evidence that appellee was a passenger on appellant's train as alleged, and that the agents and employés of appellant negligently, "as the term is above defined, carried appellee past said station," etc., they should find for plaintiff. It cannot be held that these instructions cured the error in the charge above quoted. By the express language of the charge complained of the jury were told it would be negligence, as a matter of law, for the appellant to carry appellee beyond the station of his destination, and this affirmative misstatement of law was not rendered harmless by the subsequent portions of the charge which correctly defined negligence, and told the jury that if they found such negligence on the part of appellant's employés they should find for plaintiff. The instructions are wholly inconsistent, and it cannot be determined whether the jury followed the one or the other. In such case the judgment should be reversed. *Baker v. Ashe*, 80 Tex. 358, 16 S. W. 36.

None of the other assignments present any

error requiring or authorizing a reversal of the judgment of the trial court.

Defendant's plea of limitation was not sustained by the evidence. The continuance of the case by agreement from time to time was an appearance by the defendant, and no citation was thereafter necessary. In addition to this the failure to issue the citation when the petition was filed was not due to any negligence on the part of appellee or his attorneys, and said attorneys were not negligent in failing to discover the fact that no citation had been issued until shortly before the term of the court at which the case was tried. The attorney for appellant having been informed of the filing of the suit a short time thereafter, and having agreed to a continuance of the case, it cannot be said that proper diligence required appellee's attorney to thereafter make any inquiry as to the issuance of a citation.

For the error in the charge above indicated, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

#### CHICAGO, R. I. & G. RY. CO. v. WILSON.

(Court of Civil Appeals of Texas. June 19, 1909. On Rehearing, Oct. 23, 1909. On Appellee's Motion for Rehearing, Dec. 4, 1909. Further Rehearing Denied Jan. 8, 1910.)

On Appellee's Motion for Rehearing.

#### RAILROADS (§ 413\*) — CROSSING PRIVATE LANDS—FENCES.

Under Sayles' Ann. Civ. St. 1897, art. 4427, requiring railway companies to make crossings with gates in their fences, when their track divides an inclosure, where a railway company constructed a crossing outside an inclosure divided by their track and erected gates when they were not then required to do so, it was their duty to keep them closed; and they are liable for injuries to animals escaping onto the track through these gates, although the owner of the land and the animals had, after the placing of the gates, erected a lane leading up to the gates, so that the railway company, at the time of the injury, was required under the statute to put in the crossing and gates, since the track then divided an inclosure.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 413.\*]

Appeal from Wise County Court; C. V. Terrell, Judge.

Action by Laura Wilson against the Chicago, Rock Island & Gulf Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

T. J. McMurray, N. H. Lassiter, and Robert Harrison, for appellant. R. E. Carswell, for appellee.

SPEER, J. The rule announced by our Supreme Court in *Tex. Cent. R. Co. v. Pruitt*, 109 S. W. 925, that "it is the duty of a railroad company, after it has fenced in its right of way, to maintain the fence in such

condition as under ordinary circumstances to effectually turn live stock of ordinary disposition and docility," calls for an affirmation of this case. The injury occurred at a point where gates had been placed by the railway company across a lane, the other end of which was open, and there is nothing in the record to show that the company could not fence its road at this point, or even that it was required to place a gate at such place. Under such circumstances, the animals having entered through the open gate, the company is liable even without proof of negligence. See, also: *Tex. & Pac. Ry. Co. v. Webb*, 114 S. W. 1174; *Tex. & Pac. Ry. Co. v. Corn* (Sup.) 114 S. W. 103; *Tex. Cent. R. Co. v. Wills*, 116 S. W. 145.

The judgment of the county court is therefore affirmed, but without the damages prayed for by appellee.

#### On Rehearing.

On the original hearing we affirmed this case on the authority of *Texas Central Railroad Company v. Pruitt*, 109 S. W. 925, stating in our conclusions that: "The injury (killing of live stock) occurred at a point where gates had been placed by the railway company across a land, the other end of which was open, and there is nothing in the record to show that the company could not fence its road at this point, or even that it was required to place a gate at such place. Under such circumstances, the animals having entered through the open gate, the company is liable even without proof of negligence." A re-examination of the record convinces us that this conclusion was erroneous. The evidence indicates that at the time the railroad was built it divided an inclosure, and the gate in question was placed there for the benefit of the owner of such inclosure. The lane referred to appears to have been built long afterward by the present owner of the farm. There is, then, in the record, that which shows it to have been the duty of the railroad company to leave an opening in its right of way through this inclosure, and under numerous decisions it became the duty of the person for whose benefit such gate was erected to keep it closed. *Railway v. Hanack*, 23 Tex. Civ. App. 894, 56 S. W. 938; *Id.*, 93 Tex. 446, 55 S. W. 1117; *T. & P. Ry. Co. v. Corn* (Sup.) 114 S. W. 103; *T. & P. Ry. Co. v. Webb*, 114 S. W. 1174; *M., K. & T. Ry. Co. of Tex. v. Davis*, 118 S. W. 234; *M., K. & T. Ry. Co. of Tex. v. Butler*, 121 S. W. 176. Appellee's animals strayed from her inclosure through this gate onto appellant's right of way and were killed. Appellant requested the following charge: "The defendant requests the court to charge the jury that if they find from the evidence that the stock of the plaintiff were killed on defendant's railroad by being struck by any of its trains, but also find that the defendant had fenced its right of way on each side of the track,

and that for the benefit of the landowner a gate was placed in the right of way and the company had no use for the gate, but it was used exclusively for the use of the landowner, and find that the stock of plaintiff were put in her pasture on the night they were killed, and that they escaped and wandered onto the right of way of defendant company and were killed by one of its trains, you will find for the defendant company, unless you find defendant's servants in charge of the train did not use ordinary care to prevent striking stock on its track." This was a fair presentation of an issue not otherwise submitted, and the charge ought to have been given.

For the error of the court in refusing it, the judgment of the court is reversed, and the cause remanded.

#### On Appellee's Motion for Rehearing.

Upon further consideration of this appeal, we have concluded that the trial court did not err in refusing the requested instruction, for which we formerly reversed and remanded the case. Article 4427, *Sayles' Ann. Civ. St. Tex.* 1897, is as follows: "All railway corporations in this state which have (fenced), or which may hereafter fence their right of way, may be required to make openings or crossings through their fence and over their roadbed along their right of way every one and one-half miles thereof; provided, that if such fence shall divide any inclosure that at least one opening shall be made in said fence within such inclosure." The obvious purpose of this statute is to afford the owner of such divided inclosure easy access to and from the segregated portions of his inclosure, and, where such openings are made for the owner's exclusive benefit, it is but just that he should bear the burden of keeping the gates shut. But in the present case, as will be seen from our statement in the former opinion, the gate constructed by appellant is not "within" an inclosure at all, but is at a point at the end of an open lane which is literally and to all intents and purposes in the outside fence of such inclosure. In that case the right of way at such a point is exposed to all the hazards of trespassing stock, and the public is as much entitled to demand the protection of a fence as at any other point not actually within an inclosure. The statute quoted does not seem to contemplate that an owner, whose inclosure was divided by a line of railway, would be entitled to demand an opening in the right of way fence except at some point within his inclosure. If the owner then is not entitled to demand such opening, clearly the railway company is not required to make it, and its doing so would not relieve it of the duty imposed by law to fence its track. We are not forgetful of the fact that the open lane was constructed by appellee after the gate in question had been put in by appellant, and

that therefore appellant at the time was under the legal obligation of putting in such gate because its line actually divided, and the opening was placed within, an inclosure. But upon appellee's exposing this opening to the crossing, and thus jeopardizing the interests of the public, the appellant could no longer defend an injury by pleading that such opening was maintained in obedience to the statute quoted. It was not error therefore to refuse the requested charge heretofore set out, which in effect assumed that the gate in controversy was within an inclosure.

Appellee's rehearing is therefore granted, and the judgment of the county court is affirmed.

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**ADOUÉ & LOBIT v. TOWN OF LA PORTE.**†  
(Court of Civil Appeals of Texas. Dec. 10, 1909. Rehearing Denied Jan. 6, 1910.)

**1. VENDOR AND PURCHASER (§ 261\*)—REMEDIES OF VENDOR—ASSIGNMENT OF LIEN—BONA FIDE PURCHASER.**

The purchaser of vendor's lien notes in due course of trade before maturity and for a valuable consideration, without notice of a parol dedication of a part of the land by the maker, will be protected as an innocent purchaser as against such dedication.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 261.\*]

**2. VENDOR AND PURCHASER (§ 295\*) — ENFORCEMENT OF VENDOR'S LIEN—OPERATION AND EFFECT.**

The foreclosure of a vendor's lien by the assignee thereof, who used due diligence to ascertain all existing claims to the land and to make all known claimants parties to the action, extinguishes the rights of a town under a prior parol dedication of which such assignee had no notice, though the town was not a party.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 295.\*]

**3. DEDICATION (§ 19\*)—ACTS AMOUNTING TO DEDICATION—MAPS.**

The conveyance of land with reference to a recorded map on which a plot of ground is marked "park" does not amount to a dedication of such plot to the public or ratify a parol dedication by a former owner of which the grantor had no notice.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35-47; Dec. Dig. § 19.\*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by the Town of La Porte against Adoué & Lobit. Plaintiff had judgment, and defendants appeal. Reversed and rendered.

Ewing & Ring, for appellants. P. H. Briant, A. R. Masterson, H. N. Atkinson, and H. Masterson, for appellee.

**PLEASANTS, C. J.** This is an action of trespass to try title brought by the appellee, a municipal corporation within the county of Harris, against B. Adoué and Joseph Lobit, composing the firm of Adoué & Lobit, to recover the title and possession of a tract

of about 13 acres of land situated within the corporate limits of appellee town. The land in controversy is a part of a tract of 1,600 acres in the Johnson Hunter survey in Harris county. This 1,600-acre tract was owned by John A. and Nancy J. Caplen on March 10, 1892. On that date the Caplens conveyed all of said tract to A. M. York for a consideration of \$21,775. Of this consideration \$2,518 was paid in cash, and for the remainder York executed his several notes in varying amounts and payable in from one to six years respectively. To secure the payment of these notes a vendor's lien was expressly reserved in the deed executed by the Caplens to said York. All of these notes were assigned and transferred by the Caplens to appellants before their maturity to secure loans made Caplen by appellants. Upon the maturity of these loans the transfer of the vendor's lien notes above mentioned was made absolute by the Caplens, and they executed and delivered to appellants a conveyance of the title in the land held by them under the vendor's lien reservation in their deed to York. This conveyance was made in 1897. Thereafter appellants brought suit to foreclose their vendor's lien against York and all of his record vendees and all persons in possession of any part of the 1,600 acres of land, except those who had made settlement with appellants and obtained releases for the land held by them. Appellee was not a party to this suit. Judgment was rendered for plaintiffs in said suit at a foreclosure sale regularly held under said judgment. Appellants became the purchasers of all of the land sold, including the tract in controversy in this suit. Appellee claims the land under an alleged dedication thereof for the purpose of a public park by Caplen and his immediate and remote vendees, which dedication was accepted by appellee town. It is also claimed by appellee that this dedication was ratified by appellants, and that appellants by their acts, after they acquired the superior title to the land, rededicated the property in controversy to the public use before stated. The cause was tried in the court below without a jury, and judgment was rendered in favor of appellee for the title and possession of the property, with allowance to appellants of the value of their improvements as provided by articles 4814 and 4815 of the Revised Statutes of 1879.

The trial judge filed conclusions of fact and law. After finding that Caplen and his vendee, York, and the vendee of York, after the sale to York by Caplen and prior to the foreclosure by appellants, "by their respective acts and declarations and their courses of conduct, made parol dedication to the public as far as they could of the land in controversy for the purpose of a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

park, and that the public prior to said foreclosure recognized and accepted such dedication." he further finds that appellants "knew nothing of the dedication, as a matter of fact, until at or about the commencement of this suit, and I further find, from examination of the decree in the foreclosure suit, that a very large number of parties were made defendants, and from all the proceedings had in that case, as revealed by the abstract of title, copies of the decree, and other evidence, I conclude that counsel for Adoue & Lobit used all reasonable diligence to obtain an effectual foreclosure so far as an examination of the records in order to ascertain what parties were proper and necessary to that end. Having found that neither Adoue & Lobit nor their counsel had any knowledge, as a matter of fact, of any dedication of the property, I conclude that the fact that their counsel made no inquiry as to whether there had been such dedication does not, under the facts and evidence, militate against or weaken the conclusion above found as to the exercise of reasonable diligence. I find that neither Adoue nor Lobit personally ever made any examination of the records of Harris county to see anything about the property, or what parties were necessary, and that everything was intrusted to their counsel. The defendants, Adoue & Lobit, shortly after said foreclosure, and their purchase thereunder, through their tenants and agents, went into the exclusive possession of the land in controversy, and ever since then, down to the commencement of this suit, have been in the peaceable and adverse possession of the same, using and enjoying it, holding the same under a duly registered deed, to wit, said sheriff's deed, paying all taxes accruing thereon, including taxes to the town of La Porte, which it has accepted and appropriated through its officers, without objection. After said foreclosure and the purchase thereunder by defendants, until about the time of this suit, the adverse use and possession of the premises by defendants as absolutely theirs was acquiesced in without objection or complaint by the public or its organized representative, the town of La Porte; said municipality meantime, as before stated, receiving and appropriating from defendants taxes on such land."

None of these conclusions of fact are attacked by appellee, and it is not contended that upon these facts appellee would be entitled to recover the land from appellants. Having purchased the notes or taken them as collateral security in due course of trade and for a valuable consideration before maturity and without actual or constructive notice of the dedication by Caplen and York, appellants would be protected as innocent purchasers in the right to subject all of the property covered by the vendor's lien retained to secure said notes to the payment of

said notes, and, having in the foreclosure proceedings instituted by them used proper diligence to ascertain the claims of all persons asserting rights in the property and to make all such persons parties to the foreclosure suit, appellee's right of redemption was foreclosed by the judgment in said suit. *Liddell v. Crain*, 53 Tex. 555; *Kauffman & Runge v. Robey*, 60 Tex. 308, 48 Am. Rep. 264; *Marx v. Dreyfus*, 26 S. W. 232; *Baldwin v. Root*, 90 Tex. 552, 40 S. W. 3; *Rogers v. Houston*, 94 Tex. 403, 60 S. W. 869.

As before stated, appellee does not contend that appellants would be bound by the parcel dedication found by the court to have been made by Caplen and York, of which appellants had no notice at the time they purchased the notes, or at the time of the foreclosure and their purchase of the land under judgment of foreclosure; but it is insisted that the judgment should be sustained upon the conclusion of law of the trial court that appellants, "by their deeds and releases and reference to the maps and plots of the property, ratified the dedication, that under all the circumstances they are estopped to deny it, and that the title to the property for the purpose of a park is vested in the corporation of the town of La Porte, subject to allowance for improvements as prescribed by the statutes." This conclusion is assailed by appellants upon the ground that it is not supported by the facts found by the trial court and established by the evidence. The fact conclusion upon which this conclusion of law is based is as follows: "I further find that Adoue & Lobit executed certain deeds and releases describing the property so released and conveyed according to the maps and plots of the town of La Porte, which disclose and evidence the existence of Beach Park and its recognition by Adoue & Lobit. The maps and plots in evidence show Beach Park to be an annex or addition to the town of La Porte, and to comprise the land in controversy, besides other land, which annex or addition is platted and laid out and marked as shown by copy of map hereto attached, marked 'Exhibit A,' being the aforesaid map recorded in volume 83, pp. 596, 597, of the Deed Records of Harris County."

The map referred to in this finding purports to be a map of an annex or addition to the town of La Porte called or designated "Beach Park," and, while the land in controversy is shown thereon, there is nothing on any of the maps introduced in evidence to indicate that said land had been set aside for a public park or for any public use. As found by the court, the map shows the subdivision of Beach Park annex into numerous blocks and lots. Near the center of said annex, and some distance from the land in controversy, there is a circular plot of ground marked "Park." The land in suit is an irregular shaped plot and lies along the beach

front. As it appears upon said map it is unnumbered and unmarked, except that it shows that a bathing pier with bathhouses at the end extends into the bay from this property, and at the shore end of this pier a dancing pavilion is shown.

We think it clear that the record of this map would not in itself amount to a dedication of the property in question to public use, and it necessarily follows that a mere reference to said map in deeds and releases executed by appellants would not be a dedication by them of the property in question. The court having expressly found, and this finding not being questioned, that appellants had no notice of the parol dedication of the property by Caplen and his vendees, they cannot be held to have ratified such dedication, for one cannot ratify an act of which he has neither actual nor constructive notice, and, unless the record of the map in question is sufficient in itself to effect the dedication, appellants have neither dedicated nor ratified the dedication of said property.

We think the facts of this case easily distinguish it from the case of *City of Corsicana v. Anderson*, 33 Tex. Civ. App. 596, 78 S. W. 284, and the case of *Oswald v. Grenet*, 22 Tex. 94, cited and relied on by appellee. Before the property of a citizen can be taken for public use without compensation upon the claim of a gift or dedication, the facts and circumstances relied upon to prove such dedication must be of an unequivocal character, or at least must prima facie be of such character as would reasonably induce the public or some member thereof to believe that such dedication had been made; and, before any estoppel could arise by reason of such prima facie dedication, it must be shown that the public or some member thereof acted upon such prima facie dedication in such way as to render it inequitable and unjust for the owner to deny the dedication. No such facts are shown in this case.

As before said, we think the map is clearly insufficient to show the dedication. The acts of appellants conclusively show that it was never their intention to dedicate this land to the public, but they have at all times since they acquired the title thereto asserted ownership of the property in the most unmistakable manner by improving it, renting it, and paying the taxes thereon to the town of La Porte. Having, as found by the trial court, and as shown by the undisputed evidence, acquired the title to this property without any notice of the previous dedication, appellants should not be divested of their property upon evidence which is clearly insufficient to show any intention on their part to dedicate it to public use.

We are of opinion that the judgment of the court below should be reversed, and judgment

here rendered for appellants, and it has been so ordered.

Reversed and rendered.

## HOUSTON & T. O. R. CO. v. HANKS†

(Court of Civil Appeals of Texas. Dec. 22, 1909. Rehearing Denied Jan. 6, 1910.)

### 1. DAMAGES (§ 158\*)—PERSONAL INJURIES—EVIDENCE—ADMISSIBILITY.

In an action for injury to plaintiff's foot resulting first in the amputation of a toe, followed by a development of a diseased condition of the covering of the bones of the foot, rendering a subsequent amputation of the foot and part of the leg necessary, evidence that the kidneys were involved offered only as symptomatic of the diseased condition of the covering of the bones of the foot was admissible as against the objection that there was no pleading to sustain any injury to the kidneys.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 441, 442; Dec. Dig. § 158.\*]

### 2. EVIDENCE (§ 472\*)—OPINION EVIDENCE—MATTERS FOR JURY.

Where, in an action for injuries to an employé of a car wheel company while repairing an engine on its track, separated by a barrier from the part of the track on which a railroad operated cars, caused by a car running against the barrier and striking it so as to move the engine, the distance of the engine from the barrier and the other facts proved enabled the jury to determine whether the engine was far enough back not to have been reached by the drawhead of the car, a question whether the movement of the car would have caused the injury if the engine had been far enough back not to have been reached by the drawhead of the car called for an opinion, concerning which a witness could not testify.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2195; Dec. Dig. § 472.\*]

### 3. RAILROADS (§ 281\*)—LIABILITY FOR INJURIES—RESPONDEAT SUPERIOR.

The switching crew of a railroad did switching on a track of a car wheel company connected with the railroad track for the purpose of placing cars at a platform to be loaded or unloaded by the company. The manager of the company called on the foreman of the crew to move cars on the track, but the company exercised no control over the crew, or the manner in which they did their work. The crew were paid and controlled by the railroad, and operated its engines. *Held*, that the members of the crew were the servants of the railroad, and it was responsible for their negligence.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 281.\*]

### 4. RAILROADS (§ 275\*)—INJURIES TO PERSONS ON TRACK—LICENSEES—CARE REQUIRED.

A car wheel company, maintaining a switch track connected with a railroad, and placing a barrier on the track to separate the part of it on which repair work should be done from that on which cars should be switched by the switching crew of the railroad, need not provide a barrier sufficient to withstand an unusual and unnecessary impact of a car against the barrier, resulting in the forcible moving of the barrier, and causing an accident to one engaged in repair work, and the members of the crew could not presume that the company had done so, and they must exercise ordinary care in switching cars, though they could rely on the presumption that the company had performed its duty in main-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

taining a proper barrier for the protection of the men engaged in repair work.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 275.\*]

**5. RAILROADS (§ 279\*)—IMPUTED NEGLIGENCE—AS BETWEEN EMPLOYER AND EMPLOYEE.**

The liability of a railroad for the negligence of its switching crew while engaged in switching cars on the track of a manufacturer, and moving a car against a barrier, and thereby moving an engine of the manufacturer and injuring an employé repairing it, depended on the negligence of its switching crew as a contributing cause of the accident and of the employé's guilt or innocence of contributory negligence, but the fact of the concurring negligence of the manufacturer was no defense.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 901; Dec. Dig. § 279.\*]

**6. DAMAGES (§ 34\*)—PERSONAL INJURIES—AGGRAVATION OF INJURY.**

Where the person injured used ordinary care in selecting the surgeon who treated him and who amputated his foot and leg, he could recover for the loss of his foot, though the physician made a mistake in amputating it.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 43; Dec. Dig. § 34.\*]

**7. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—QUESTIONS REVIEWABLE.**

In considering assignments complaining of the refusal of instructions, the court is confined to the proposition stated under the assignments.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

**8. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THE CHARGE.**

It is not error to refuse a charge sufficiently stated in the charge given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 631; Dec. Dig. § 260.\*]

**9. DAMAGES (§ 132\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.**

A verdict for \$10,500 for a personal injury resulting in the crushing of plaintiff's foot, causing great suffering and necessitating the amputation of one of the toes, followed by a period of increased suffering and complications necessitating a second amputation of the foot and a part of the leg below the knee, is not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 380, 381; Dec. Dig. § 132.\*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by James B. Hanks against the Houston & Texas Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood and A. L. Jackson, for appellant. Ewing & Ring, for appellee.

REESE, J. This is a suit by James B. Hanks against the Houston & Texas Central Railroad Company to recover damages for personal injuries alleged to have been caused by the negligence of defendant. It was alleged in the petition, in substance, that while plaintiff was at work as an employé of the Dickson Car Wheel Company, repairing a small locomotive engine, standing on the repair part of a track belonging to said car wheel company, plaintiff being at work un-

der the engine, defendant's employes negligently operated an engine and cars so that one of the cars struck the engine upon which plaintiff was at work, causing it to move, whereby plaintiff's foot was caught under one of the wheels of the engine, crushing his foot, with the result that one of his toes had to be amputated, and afterwards the leg had to be amputated between the ankle and the knee. It was alleged that the track on which the engine upon which plaintiff was at work connected with the track of defendant, and that defendant was accustomed to operate engines and cars over the same in the performance of its business; that a barrier had been placed on the track to separate that part of the same upon which repair work was being done from that upon which engines and cars were operated; and that, upon the occasion in question, the engine and cars of defendant were operated with such unnecessary speed that one of the cars ran upon the barrier and struck it with such force and violence as to strike and move the engine upon which plaintiff was at work.

The defendant's answer set up as defense the following matters: (1) A general demurrer. (2) A general denial. (3) Contributory negligence, (a) in that plaintiff voluntarily entered and placed himself under the dinky locomotive when he knew, or by ordinary care would have known, that defendant's employes were operating cars on said track, and would not probably discover him in his position under the locomotive, and that he took no precaution, by posting a flag or otherwise, to guard or protect himself against the danger of collision between the locomotive that he was repairing and the cars that might be operated and moved by defendant's employes; and (b) in that plaintiff caused the locomotive which he was engaged in repairing to be moved so close to the barrier upon the track that its drawhead extended and protruded over said barrier, so that the barrier afforded no protection against collision with the moving cars on the track; and (4) that, in so far as defendant was concerned, the plaintiff's alleged injury was the result of an unavoidable accident. A trial with a jury resulted in a verdict and judgment for plaintiff for \$10,500 from which, its motion for a new trial having been overruled, defendant prosecutes this appeal.

We find that there was negligence on the part of defendant as alleged in the petition; that as a proximate consequence thereof appellee was injured substantially as alleged; that appellee was not guilty of contributory negligence; and that the amount of damages assessed by the jury is sustained by the evidence. *Nowlin v. Hall*, 97 Tex. 443, 79 S. W. 806.

By the first assignment of error appellant complains of the ruling of the court in admit-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ting, over his objection, the testimony of appellee's witness Dr. F. H. Neuhaus that he had examined the urine of the plaintiff, and found that the kidneys were involved. The objection to this testimony was that there was no pleading to sustain any injury to the kidneys, and the evidence was therefore irrelevant and incompetent. It appears from the record that, after the amputation of the toe, a condition or disease called "cellulitis," which was a diseased condition of the covering of the bones of the foot, developed, which, it was claimed, rendered the second amputation of the foot and part of the leg necessary. It appears from the bill of exception that, when the objection was made, appellee's counsel made the statement that no damages were claimed for any injury to the kidneys, and this evidence was only offered as symptomatic of the cellulitis. The objection was overruled. The witness testified that the condition of the urine indicated that the cellulitis was very severe, which was the condition relied upon to show the necessity for the second amputation. The court specially instructed the jury not to allow any damages for injury to the kidneys. The assignment is without merit and is overruled.

By the second assignment of error complaint is made of the ruling of the court in sustaining the objection of appellee to the following question propounded by appellant to the witness Carr: "If that engine had been far enough back not to have been reached by the drawhead of the car, would the movement of that car have injured Mr. Hanks in any way?" The objection was that the question was hypothetical, that it called for an opinion of the witness, and was argumentative. We see no error in the ruling. It was not a matter about which an opinion of the witness was admissible. Given the distance of the engine from the barrier and other facts, the jury could judge as well as the witness as to whether the engine was far enough back not to have been reached by the drawhead of the car. And besides that it was so reached is one of the undisputed facts in the case; the controversy being over the manner in which that result was effected. We overrule the assignment.

The third assignment of error challenges the refusal of the court to give to the jury a special instruction, requested by appellant, to return a verdict for the defendant. The first proposition stated under this assignment is that the switching crew in charge of the engine and cars which caused the injury were at the time in the employment of the Dickson Car Wheel Company, and not of appellant, and therefore the rule of respondeat superior had no application. This contention cannot be sustained. The most that can be gotten out of the evidence on this point is that the switch track on which the engine and cars were being operated belonged to the Dickson

Car Wheel Company, and, connecting with the track of appellant's railway, ran thence alongside the shops and platform of the car wheel company for the purpose of placing cars at the platform to be loaded or unloaded by the car wheel company, and upon the occasion in question the manager of the car wheel company called upon the foreman of the switching crew to "spot" some cars upon this switch track for greater convenience in loading or unloading the same. The car wheel company exercised no control over the men, or the manner in which they did their work, but only requested the moving of the cars. The men were in the employment of, paid and controlled by, appellant, and operating its engine. In spotting the cars they were doing what was, in fact, the work of the railroad company. It is entirely clear, we think, that they were at the time the agents and servants of appellant in this work, and that appellant must be held responsible for their negligence. None of the authorities cited by appellant have any application to the facts of this case. From appellee's brief we get the following authorities, which we think are in point: *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480; *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922.

Even if it be true that in the exercise of ordinary care the servants of appellant in the circumstances prevailing at the time of the accident, as shown by the evidence, had the right to rely upon the presumption that the car wheel company had performed the duty of maintaining a proper barrier and other safeguards for the protection of appellee while at work under the engine from the operation of trains on the switch track outside of such barrier, the evidence is sufficient to show that the accident was caused by the violent impact of one of the cars against this barrier caused by the unusual, unnecessary, and negligent manner in which the engine and cars were operated, and resulting in the forcible moving of the barrier, or the partial overrunning of it by the wheels of the car, thus causing the accident. This the car wheel company was not required to provide against, nor did the persons engaged in operating the engine and cars have the right to presume that it had done so.

The third proposition is based upon the assumed fact that appellee had caused the engine upon which he was working to be placed in dangerous proximity to the barrier, which is not established by the evidence, and which we must assume the jury found to be untrue. The evidence authorized such finding. The same must be said as to the fourth proposition. We conclude that the third assignment cannot be sustained.

None of the objections made to that portion of the court's charge objection to which is made the basis of the fourth assignment are well taken. The assignment and the

several propositions thereunder are therefore overruled.

That portion of the court's charge objected to, as set out in the fifth assignment of error, was given for the benefit of appellant. The jury was instructed: "If you find that it was customary, in case of a locomotive being repaired like that in question, for a flag of warning to be out, and that by the absence of the flag the defendant's employes were misled into the belief that no one was at work under or about the locomotive, and that in view of these facts, if shown, the defendant's employes were in the exercise of ordinary care, as before defined, in causing or permitting the car in question to strike and move the locomotive, if they did so, then let your verdict be for defendant, but, if you do not so find, let the verdict be determined on the other issues submitted." It is objected that the facts stated with regard to the absence of the flag was a complete defense without the addition that defendant was in the exercise of ordinary care. We do not think the objection is sound. Even on the hypothesis stated in view of the entire evidence, it was for the jury to say whether defendant's employes were in the exercise of ordinary care.

By the sixth assignment of error appellant presents objection to the following portion of the court's charge: "If you do not find plaintiff entitled to recover under the court's foregoing instructions, your verdict will be for the defendant, whether the Dickson Car Wheel Company was negligent or not; but, if you do find plaintiff entitled to recover under the court's foregoing instructions, then it will be neither a defense nor lessen damages for this defendant if you shall find that the Dickson Car Wheel Company was guilty of negligence towards plaintiff, and that such negligence helped to produce his injuries." This charge, in connection with other portions of the charge, does nothing more than tell the jury that the negligence of the car wheel company, if any, should not influence their verdict against defendant, if they failed to find that the servants of appellant were guilty of negligence, nor should such negligence of that company influence their verdict against appellee, if they found that appellant's servants were guilty of negligence in the matter charged. We think this is the law as applied to this case as made by the evidence. The case against appellant must stand or fall upon the negligence, or want of it, of its servants as a contributing cause of the accident, and appellee's guilt or innocence of contributory negligence. If the negligence of the car wheel company concurred with that of appellant in causing the injury, this would be no defense to appellant. *Markham v. Nav. Co.*, 73 Tex. 250, 11 S. W. 131; *Pac. Ex. Co. v. Lasker*, 81 Tex. 83, 16 S. W. 792. We cannot agree with appellant that, under the charge, the jury could not consider the evi-

dence with regard to the alleged negligence of the car wheel company, if any, as tending to show absence of negligence of appellant, if, indeed, it could have been given that effect, under any view of the evidence.

The giving of the following charge is objected to by the seventh assignment of error: "If you believe that the plaintiff in the selection of the physician or surgeon who treated him, and who amputated his leg, used 'ordinary care,' then, even though you may believe the surgeon made a mistake in the matter of amputating his foot, the plaintiff would be entitled to recover for the loss of his foot if you believe from all the evidence and the instructions herein given that the defendant company was responsible for the original injury, and that the loss of his foot was a natural and probable result of such injury." The only proposition under this assignment is that "a charge containing statements and hypotheses that are inconsistent and self-contradictory, and not supported by evidence, being calculated to confuse and mislead the jury, is erroneous." We confess that we are utterly unable to see anything in this charge to sustain this criticism. The assignment is without merit. The charge of the court on this issue was certainly as favorable to appellant as the evidence would allow.

Appellant requested the court to charge the jury, in substance, that if the barrier placed across the track by the car wheel company was placed there for the protection of appellee, and appellant's servants engaged in operating the engine and cars on the switch track knew this, it was the duty of the car wheel company to use ordinary care to make this barrier sufficient to protect appellee against injury from cars moved from the opposite side of the barrier in the usual and customary manner, and, if the car wheel company had failed to do this, and appellant's servants did not know, and in the exercise of ordinary care would not have known, that the barrier was so insufficient, and the cars were moved in the usual or customary manner, and without unusual violence, and that such failure of the car wheel company was the proximate cause of the accident, the verdict should be for the defendant. This charge was refused. Another charge asked and refused was in substance the same as the preceding with the exception that it omits the statement with regard to the want of knowledge of appellant's servants of the insufficiency of the barrier, and that they would not have known of such insufficiency in the exercise of ordinary care on their part. The refusal to give these charges is made the ground for the eighth and ninth assignments of error. Under each assignment, the following proposition is stated, which is the only proposition stated under either: "The defendant's crew, having gone upon the track of the Dickson Car Wheel Company, at the request of the latter,

to place the latter's cars, had the right to presume, and rely on the presumption, that the barrier customarily maintained by the car wheel company for the protection of its own employes engaged in repair work was in reasonably safe condition as a barrier, so far as ordinary care would accomplish this condition; and defendant did not owe any duty of anticipating negligence in this regard on the part of the Dickson Car Wheel Company, and its failure to so anticipate was not negligence on its part." In considering these assignments, we are confined to the proposition stated, which we do not think, under the evidence in this case, is a sound proposition of law. It cannot be said that the servants of appellant engaged in operating the engine and cars on the opposite end of the switch track had a right to presume that the barrier was at all events sufficient to protect against even an ordinary and usual movement of the cars. If they knew, or in the exercise of ordinary care should have known, that some one was at work in or about the small engine on the opposite side of the barrier, it was incumbent upon them at least to exercise ordinary care to learn whether the barrier was sufficient to protect such person from injury if cars were moved against the barrier, even in the usual and customary manner and without unusual violence. If they did not know, and in the exercise of ordinary care would not have known, that any one was engaged at work under or about the engine in a position that subjected him to risk of injury, under the charge of the court appellee would not have been entitled to recover. If they had or in the exercise of ordinary care would have had this knowledge, they had no right, without taking any care at all about the matter, to presume that the barrier was sufficient. The proposition not being sound, the assignments are overruled. *Railway v. Eberheart*, 91 Tex. 323, 43 S. W. 510.

There was no error in the refusal to give the requested charge set out in the tenth assignment. The court's charge upon this part of the case was full and clear, and sufficiently stated the law on the issue.

The same must be said with regard to the eleventh assignment of error.

The twelfth assignment complains of the verdict as excessive. The jury gave appellee \$10,500. The immediate consequence of the injury was a crushing of the foot, which after a considerable period of great suffering resulted in an amputation of one of the toes. This did not give relief, but a longer period of increased suffering resulted, and complications set up, threatening the most serious consequences, to avoid which a second amputation taking off the foot and part of the leg below the knee became necessary. This condition of suffering lasted for several months. We are not inclined to criticize the

verdict on account of its size. The assignment is overruled.

We find no error, and the judgment is affirmed.

Affirmed.

#### TEXAS CENT. R. CO. v. QUALLS.

(Court of Civil Appeals of Texas. Dec. 4, 1909.)

##### 1. RAILROADS (§ 481\*)—SETTING FIRES—SPARK ARRESTERS—EVIDENCE.

As tending to rebut the evidence of defendant in an action for the setting of fires by a locomotive that all its engines were provided with the same spark arresters used by other roads, and which were sufficient to prevent the escape of fire or sparks so as to set fire to grass, witness could testify that he saw other engines being operated on defendant's line about the time plaintiff's grass was set on fire, and that they were throwing live sparks, some as large as a man's thumb.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1719-1723; Dec. Dig. § 481.\*]

##### 2. EVIDENCE (§ 501\*)—OPINION EVIDENCE—VALUE.

Plaintiff in an action for the burning of his grass having stated it had a market value, it was not error to allow him to testify to such value, though he further stated he could make the amount of such estimated value by pasturing cattle and horses on it at a certain amount per head per month, as such added statement might materially strengthen his opinion in the estimation of the jury by giving a substantial basis for it.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.\*]

##### 3. DAMAGES (§ 174\*)—BURNING OF GRASS—EVIDENCE.

Testimony in an action for damages for the burning of grass and sod as to the number of cattle and horses the burned land would graze per month, and the price paid per head for such pasturage, was admissible.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 464; Dec. Dig. § 174.\*]

##### 4. RAILROADS (§ 454\*)—SETTING FIRES—DUTY AS TO SPARK ARRESTERS.

A railroad company has not the absolute duty of supplying its locomotives with the most improved spark arresters, and having them in a good state of repair; but its duty is to exercise ordinary care in these respects.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1670; Dec. Dig. § 454.\*]

##### 5. RAILROADS (§ 484\*)—FIRES SET BY LOCOMOTIVE—SUBMISSION TO JURY—PLEADING AND PROOF.

Negligence of defendant railroad with respect to the condition of its right of way should not be submitted to the jury as ground for recovery in an action for fires set by a locomotive; the petition not seeking a recovery on such ground, and plaintiff's evidence showing no negligence in that respect.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1744; Dec. Dig. § 484.\*]

##### 6. DAMAGES (§ 112\*)—MEASURE OF DAMAGES—BURNING OF GRASS AND SOD.

Where grass is burned and the sod injured by the fire, the measure of damages is the value of the grass burned and the difference in the value of the land just before and just after the fire.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 281-283; Dec. Dig. § 112.\*]

Appeal from Eastland County Court; E. A. Hill, Judge.

Action by R. H. Qualls against the Texas Central Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed, and remanded for new trial.

J. A. Kibler and Scott & Brelsford, for appellant. J. J. Butts, for appellee.

**SPEER, J.** This is an action by R. H. Qualls against the Texas Central Railroad Company to recover damages for grass burned and injury to the land, caused by the negligent escape of fire from one of defendant's engines. There was a verdict and judgment for the plaintiff, from which the defendant has appealed.

There was no error in permitting the witness Qualls to testify that he saw other engines being operated on appellant's line about the time appellee's grass was set on fire, and that said engines were throwing sparks of fire, some of which were as large as a man's thumb. Such evidence tended to rebut appellant's proof to the effect that all of its engines were provided with the same spark arresters used by other roads, and which were sufficient to prevent the escape of fire or sparks in such manner as to set grass on fire. Nor was there error in permitting this witness to testify as to the market value of his grass, he having stated that it had a market value, merely because he further stated that he could make the amount of such estimated value by pasturing cattle and horses on it at the rate of 25 cents per month per head for cattle, and 50 cents per month per head for horses. Such added statement in fact might materially strengthen the witness' opinion in the estimation of the jury by giving a substantial basis for it. What we have just said is an answer also to the fifth assignment of error, complaining that the court erred in permitting the witness Carodine to testify as to the number of head of cattle and horses the burned land would graze per month and the price paid per head for such pasturage.

There is an error, however, for which the judgment will be reversed contained in the following charge to the jury: "And in this case, should you find from the evidence that sparks escaping from the defendant's locomotive caused the burning of plaintiff's grass, you will find for the plaintiff, unless you further find that the defendant's locomotive was supplied with the most improved spark arresters, was in good state of repairs, that the locomotive was properly operated, and that its right of way was kept in such condition that fire was not communicated from it." It will be noticed that this charge imposed upon appellant the absolute duty of supplying its locomotives with the most improved spark arresters, and to have had the

same at the time in a good state of repair, whereas the law only imposed upon it the duty of exercising ordinary care in these respects. *St. Louis S. W. Ry. Co. v. Crabb*, 80 S. W. 408; *M., K. & T. Ry. Co. of Texas v. Hopkins*, 80 S. W. 414, and authorities cited in those cases. Moreover, the charge further submitted as a ground for recovery the negligence of appellant with respect to the condition of its right of way, when the appellee in his petition did not seek a recovery on this ground, nor indeed does his evidence show negligence in this respect. On another trial, if appellee recovers, he should be allowed to recover for the injury to the sod the difference in the value of his land immediately before and immediately after the fire, to which should be added the value of the grass burned.

For the error of the court in giving the charge discussed, the judgment is reversed and the cause remanded for another trial.

HOUSTON & T. C. R. CO. v. MAYFIELD.†  
(Court of Civil Appeals of Texas. Nov. 27, 1909. Rehearing Denied Jan. 8, 1910.)

1. MASTER AND SERVANT (§ 296\*)—INJURY TO SWITCHMAN—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In a suit for injury to a switchman in uncoupling cars, the main issue tried was whether the cars had stopped, as claimed by him, in obedience to his signal, or were moving when he went in between them, there being a rule of defendant prohibiting employees going between moving cars, and evidence showing it was customary and proper to go between standing cars to uncouple them; and the charge made the right to recover depend on the cars being still when he went between them, and the jury found in effect that they were. *Held*, that defendant was not injured by failure to give a requested charge denying recovery if plaintiff voluntarily went between the cars when he could have uncoupled them from the other side by means of a lift lever not exposing him to danger.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.\*]

2. MASTER AND SERVANT (§ 185\*)—OPERATION OF SWITCH TRAIN—NEGLIGENCE OF ENGINEER.

A train having stopped on a switchman's signal for the purpose of uncoupling cars, it was negligence for the engineer to start without a signal to that effect.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 185.\*]

3. TRIAL (§ 280\*)—INSTRUCTIONS ALREADY GIVEN.

In a suit for injury to a switchman while uncoupling cars, he claimed no right to recover except as based on the fact that the train stopped after he gave a stop signal, and was standing still when he went between the cars, and the court instructed that for him to recover the jury must believe he gave such signal and the train stopped, and he believed it was in obedience to his signal. *Held*, that, if the train stopped when he signaled, he could presume his signal was obeyed, within the rule requiring him to know the signal was seen, understood, and obeyed before placing himself in danger; and hence a special charge that it was his duty, if he gave

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

†Writ of error denied by Supreme Court.

a stop signal just before he went between cars to uncouple them, to see that it was seen and obeyed before he went between them, and that if he went between the cars without knowing his signal was seen or obeyed, his act was contributory negligence, and he could not recover, was substantially covered by the charge given, and no substantial injury resulted from failure to give it at defendant's request.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 851-859; Dec. Dig. § 260.\*]

**4. MASTER AND SERVANT (§§ 285, 287\*)—INJURY TO SWITCHMAN—NEGLIGENCE OF FELLOW SERVANTS—QUESTIONS FOR JURY.**

In a suit for injury to a switchman, based on the fact that a train stopped after he gave the stop signal, and was standing still when he went between cars to uncouple them, and was injured by the unexpected movement of the train, whether it was negligence of his fellow servants to fail to see his signal, and whether or not it was the proximate cause of injury, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1051-1067; Dec. Dig. §§ 285, 287.\*]

**5. NEGLIGENCE (§ 139\*) — ACTIONS — TRIAL — INSTRUCTIONS.**

In a suit for personal injury based on defendant's negligence, a charge coupling culpable acts of negligence by the conjunction, "and," and so making it necessary for all to exist before recovery could be had, was more onerous on plaintiff than necessary.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 139.\*]

**6. TRIAL (§ 296\*)—INSTRUCTIONS—ERROR OURD BY OTHER INSTRUCTION.**

A charge basing liability for negligence on specific acts was not subject to objection because it omitted to refer to the essential fact of negligence causing or contributing to plaintiff's injury, as another paragraph charged on contributory negligence; and, if a charge along the line suggested was desired, it should have been requested.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 296.\*]

**7. TRIAL (§ 191\*) — INSTRUCTIONS — INVASION OF PROVINCE OF JURY.**

In a suit for personal injury, the court charged that, if the jury believed plaintiff was in defendant's employ as a switchman, and, while engaged in switching cars, it became necessary for him to cut off a car from the rear of a string of cars, and, after giving a signal for the cars to move back on a certain track, he gave the stop signal, and the chain connecting the lift lever with the coupling pin was broken, and the train stopped, and he believed it had stopped in obedience to his signal, and went in between the cars to pull the pin with his hands, and the servants working with him failed to see his signal, and such failure was negligence on their part, and the engineer caused the train to move back, and caught his arm between the bumpers, and injured him as alleged, and such movement of the train was negligence, and such negligence in moving the train after it stopped was the proximate cause of his injury, and if they further found he was not himself guilty of negligence which caused or contributed to his injury, to find for plaintiff, unless they found for defendant under some other instruction. *Held*, that it did not assume that he was proceeding in a proper, careful, and correct manner to uncouple the cars.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 191.\*]

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

Suit by O. L. Mayfield against the Houston & Texas Central Railroad Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Baker, Botts, Parker & Garwood, R. S. Neblett, and Supple & Harding, for appellant. Randell & Randell and Farrar & Pierson, for appellee.

RAINEY, C. J. The following statement taken from appellant's brief, is substantially correct, and we adopt same, to wit: "This is a suit for personal injuries, alleged to have resulted from the negligent movement of a switch engine and cars by appellant in its yards at Ennis, Tex., on April 22, 1907. Appellee alleges, in substance, that on April 22, 1907, he was in the employ of appellant, as switchman, and while acting in a cautious manner in the performance of his duties, his left arm was crushed, necessitating amputation, and his nervous system and all his vital organs were damaged. The acts of negligence charged are: (1) That in switching the cars appellant failed to see appellee, and failed to see his signal in reference to the movement of the engine and cars; that appellant caused said cars to violently and unexpectedly move backwards and forwards, and irregularly stop and start, close up, and clash in an improper, unsafe, and dangerous manner, and failed to stop and start at the proper times and places. (2) That the track, switches, switch stands, grounds, and yards were improperly constructed, old, worn, and out of repair, and were so constructed as to prevent the seeing and hearing of signals. (3) That the cars, crossbeams, bumpers, drawheads, connecting and coupling apparatus for uncoupling said cars were improperly constructed, out of place, broken, old, worn, dangerous, defective, and unfit for use; that by reason of each and all of said acts and omissions, which were known to appellant, but not to appellee, he was caught and crushed between the cars. Appellant interposed general and special exceptions, and pleaded: (1) General denial; (2) contributory negligence, in that appellee voluntarily went between moving cars to uncouple them when the danger was obvious; (3) assumed risk, in that appellee voluntarily went between moving cars to uncouple same, in violation of appellant's rules, knowing said act exposed him to extraordinary danger; (4) assumed risk, in that appellee, having charge and control of the work, voluntarily selected a dangerous method of performing the same, and voluntarily chose a dangerous place to do his work, when a safe method and place had been provided by appellant; (5) assumed risk, in that appellee went between the cars before they became still, and was injured by reason of 'slack.' Trial was had, resulting in a verdict

and judgment in favor of appellee in the sum of \$11,000."

As conclusions of fact, we adopt the statement made by appellant as follows: "The testimony shows that appellee was, on the 22d day of April, 1907, the foreman of appellant's switching crew in its yards at Ennis, Tex.; that he had control of the engine and crew, directed their movements, and was then engaged in switching and placing cars in the yards, had been so employed for about two years, and was experienced in the work. At the time he was injured he was backing about 11 cars from the main lead, which runs northwest, north, onto the side track No. 14, leading from the main lead. On this side track he desired to place and leave the rear or north car of the backing train. This rear car was an S. P. car; the one coupled to it was a Rock Island car, which he desired to bring out and place on side track No. 11. It was the duty of appellee to cut off this rear car from the train by uncoupling it. The cars were equipped with automatic couplings, coupling by impact; an automatic coupler being on the end of each car. When coupled, the coupler was held by a lock pin, which went through each coupler. This pin is attached to a chain which connects with a lever extending out to the edge of the car, called a lift lever, and will uncouple the cars by being lifted or pulled by the switchman, without the necessity of going between the ends of the cars. It is so arranged that these levers extend each way from the coupling, so that one lever is upon each side of the cars. Appellee was working on the west side of the train, and the lift lever on that side failed to uncouple the cars when he pulled it, because the little clevis which connected the lock pin with the lift chain was broken, and therefore disconnected from the lever which controlled the coupler of the rear, or S. P. car. When appellee ascertained this, he stepped between the ends of the cars to pull the pin from the S. P. car with his hand, but could not get hold of the pin. He then reached across to pull the pin from the coupler of the Rock Island car, and while trying to pull this pin with his hands, his left arm was caught between the buffers and crushed. Appellee testified that the cars had stopped, in obedience to his signal, when he went between them, and that they moved again without his permission, injuring him; that: 'If I had known my arm was between the buffers, even if I had not expected the cars to move, I would not have put it there. I never noticed a bumping coming along up the line of cars; if I had heard it, I would have got out.' He also testified: 'Not many freight cars are equipped with buffers; they are dangerous; man-killers is a good name for them. They are about waist high to me; are on each side of and above the drawhead or coupling apparatus; are about 10 inches in length, setting against the ends of the

cars, and 5 inches by 7 inches in breadth, and come square together.'"

The appellant complains that the court erred in refusing to instruct the jury as requested by defendant's third special charge, viz.: "If you believe from the evidence that the plaintiff was unable to uncouple the cars in question by means of the lift lever upon the west side of the train, and that he had control of the train, and could have gone on the opposite side of the train and uncoupled the same by means of a lift lever upon the east side, and that such last-named way would not have exposed him to danger by causing him to go between the cars to uncouple the same, and that he voluntarily chose to go between the cars to uncouple the same with his hands, and that by reason of his choice of ways of doing his work his injury resulted, then you will find for the defendant." It seems the main issue on the trial below was whether the cars had stopped or were moving when appellee went between them to uncouple them; appellee testifying that the cars had stopped in obedience to his signal, and appellant's witnesses testifying that they were moving. The rule of appellant prohibited employes from going between the cars while moving. The evidence shows that it was the custom of employes, and proper for them, to go between the cars for the purpose of uncoupling them when they were still. With this issue sharply drawn the court by its charge made the right of recovery to depend upon the cars being still when appellee went between them. The jury by its verdict, in effect, found that the cars were still when the appellee went between them. Under these circumstances, we do not see that appellant was injured by the failure to give requested charge; for, if the cars were still, no question as to a safe or dangerous way arose, and the court was not required to submit such an issue. The train having stopped, it was negligence in the engineer to again start it to moving without a signal to that effect, and none was given.

The appellant complains that the court erred in not giving the requested charge as follows: "You are instructed that it was the duty of the plaintiff, if he gave a stop signal just before he went between the cars to uncouple the same, to see that his said signal had been seen and obeyed before he went between the said cars; and, if you believe that he did give such signal, and went between the said cars without knowing that it had been seen or obeyed, and that such act was negligence, and caused or contributed to his injury, then he cannot recover, and you will find for the defendant." Rule 308 of the railway company, introduced in evidence, is as follows: "It is dangerous to assume that signals given to the engineer or fireman have been seen, or, if seen, that they will be obeyed, when obedience to those signals on the part of the engineman or fireman is essential to

the safety of an employé in the performance of his duty. He must know that the signal has been seen, understood and obeyed before placing himself in a dangerous position. Otherwise he assumes all risk of danger arising from any misunderstanding or disregard of the signals." The appellee claimed no right of recovery except as based on the fact that the train had stopped after he had given the stop signal, and the train was standing still when he endeavored to uncouple the cars by going in between them. The court, in effect, instructed the jury that, in order for plaintiff to recover, they must believe that he gave a stop signal, and that the train did stop, and that he believed they stopped in obedience to his stop signal. Having given the stop signal, and the train having stopped, he had the right to presume his stop signal was obeyed. Therefore his conduct was in strict observance of said rule, and said requested charge was substantially covered by the court's charge, and no substantial injury resulted to appellant from the failure to give the special charge.

The fourth assignment of error presented is: "The court erred in instructing the jury as set forth in the seventh paragraph of the general charge, as follows: 'Now, having in mind the foregoing instructions, if you believe from the evidence that plaintiff was in the employment of the defendant company as a switchman, and that, while engaged in switching cars in the switchyards at Ennis, it became necessary for him to cut off a car from the rear of a string of cars, and that after giving a signal for the cars to move back onto track 14, he gave the stop signal, and that the chain connecting the lift lever with the coupling pin was broken, and that the train stopped, and that plaintiff believed it had stopped in obedience to his stop signal, and that plaintiff went in between the cars to pull the pin with his hands; and you further believe that the servants working with plaintiff failed to see his stop signal (if given), and that such failure (if any) was negligence on their part, and that the engineer in charge of the engine caused the train to move backward, and caught his arm between the bumpers on the cars, and injured him as alleged, and that such movement of the train was negligence, and you further believe from the evidence that such negligence (if any) in moving the train after it stopped, if it had stopped, was the proximate cause of plaintiff's injury; and if you further find from the evidence that plaintiff was not himself guilty of contributory negligence which caused or contributed to his injury—you will find for plaintiff, unless you find for the defendant under some other instructions given you by the court.' Three propositions are presented under this assignment: (1) "Recovery in a suit for damages is not authorized by the allegation and proof of an act or omis-

sion constituting negligence, unless such negligence is the proximate cause of the injury, and it was error for the court to submit as a basis for recovery the issue whether it was negligence of the servants working with appellee to fail to see his signal—that not being the proximate cause of the injury." (2) "It being elementary that plaintiff could not recover unless he was free from all negligence which caused or contributed to his injury, it was reversible error for the court to instruct the jury to find for plaintiff in the event they found certain grouped facts, omitting any reference to the essential fact of whether plaintiff was guilty of negligence causing or contributing to his injury." (3) "It being the exclusive province of the jury to determine the existence or nonexistence of facts, it was an erroneous invasion of the province of the jury for the court to assume the material fact in issue—that plaintiff was not guilty of any negligence causing or contributing to his injury." We are of the opinion that none of these propositions is well taken. It was a question for the jury to determine whether or not it was negligence in the servants working with appellee to fail to see his signal, and whether or not such negligence was the proximate cause of the injury. The charge, if anything, was more onerous on appellee than necessary, as all the acts of negligence were coupled with the conjunction "and," by which the charge made it necessary that all of said acts existed before a recovery could be had. Second. The court charged in another paragraph of his charge on contributory negligence; and, if appellant desired a charge along the line suggested, it should have requested it. Third. We do not agree with counsel that the charge assumes "that appellee was proceeding in a proper, careful, and correct manner to uncouple the cars."

We have carefully considered the other assignments of error presented, not here discussed, and are of the opinion that none show reversible error.

The judgment is affirmed.

#### CHICAGO, R. I. & G. RY. CO. v. THOMPSON.

(Court of Civil Appeals of Texas. Dec. 4, 1909.  
Rehearing Denied Jan. 8, 1910.)

#### 1. APPEAL AND ERROR (§ 232\*)—OBJECTIONS IN TRIAL COURT—CHANGE ON APPEAL.

The trial court's consideration of an exception to the admission of evidence being limited by District and County Court Rules 58 (67 S. W. xxiv) to the particular objection made to the evidence, the appellate court should not go beyond it; so that it is immaterial that the evidence was incompetent, the only objection made being that it was hearsay.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1430; Dec. Dig. § 232.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2 EXCEPTIONS. BILL OF (§ 27\*)—RECITALS OF FACTS—NOT CONCLUSIVE.**

Recitals of fact in a bill of exceptions to admission of evidence, which are mere assertions of counsel in stating the grounds of objection to the evidence, must be verified by other parts of the bill in order to require consideration on appeal.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 34; Dec. Dig. § 27.\*]

**3. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—STATEMENTS—SHOWING INJURY.**

Even if an instruction in an action for delay in transportation of cattle, whereby they were not sold till Friday, was on the weight of evidence, in assuming that they should have been in time to sell on Tuesday, the statement under the assignment of error fails to show the assumption was prejudicial; it not showing that Tuesday was not the proper day of sale, or, if it was not, what was the proper day, or that the market prices materially differed on the days between Tuesday and Friday.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

**4. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—STATEMENTS—SHOWING INJURY.**

The statement under an assignment of error to rejection of a requested charge should point out facts rendering the rejection prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

Appeal from Gray County Court; T. M. Wolfe, Judge.

Action by R. S. Thompson against the Chicago, Rock Island & Gulf Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Turner & Boyce, Clifford Braley, and Laster & Harrison, for appellant. S. E. Boyett and R. E. Underwood, for appellee.

CONNER, C. J. We are of opinion that the judgment must be affirmed. While the fact that R. S. Thompson actually received the net sum of \$671.05 would be incompetent as proof of what his cattle sold for on the market, it was certainly not hearsay, and no other objection appears to have been made to the testimony. The trial court's consideration of the exception was limited to the particular objection made (Rule 58 [67 S. W. xxiv] for District and County Courts), and obviously we should not go beyond it. See *Rector v. Hudson*, 20 Tex. 234; *Wheeler v. Railway Co.*, 91 Tex. 356, and cases cited on pages 359-360, 43 S. W. 876. The first assignment is accordingly overruled.

The second and third assignments are overruled on the ground that the bills of exceptions to the evidence therein complained of fail to show error in the court's rulings. The statement in bill of exception No. 3, that the witness "had already testified that he did not accompany the shipment," etc., and in bill No. 4, that the grade of appellee's cattle had not been shown, and that the copies of the *Daily Drovers' Telegram* had not been authenticated, appear merely as assertions of counsel in stating the grounds of objection,

and are not otherwise shown in the bills to be true. It has often been held that the recitation of facts in objections to testimony must be verified by other parts of the bill in order to require consideration on appeal. See *Anderson v. Anderson*, 23 Tex. 640; *Terrill v. McCown*, 91 Tex. 231, 43 S. W. 2; dissenting opinion in *Waggoner v. Dodson*, 96 Tex. 6, 68 S. W. 817, et s. c. Supreme Court, 69 S. W. 994.

The charge of the court is by no means perspicuous, but the objections thereto in the fourth and fifth assignments hardly require, we think, a reversal of the judgment. By the first paragraph of the charge, the jury, in order to find for appellee at all, were required to find, not only that appellee's cattle "lost weight" because of negligent delay, but also that appellee thereby "lost on the difference of price in the market." The charge, therefore, in submitting the measure of damage that, "if you find that plaintiff is entitled to recover damages under the foregoing paragraph, then the measure of his damages would be the difference of market value of prices from Tuesday until Friday, and the difference in shrinkage by such delays," is not on the weight of the testimony in that both elements were submitted. If so, in assuming that the cattle should have sold on Tuesday's market and were sold on Friday's market, nothing is pointed out in the statements under these assignments that shows the assumptions to be prejudicial. In other words, the statement fails to show what other day, if any, than Tuesday, was the proper day of sale, or that market prices were materially different on the several days between Tuesday and Friday. The same character of answer must be made to the remaining assignment, complaining of the rejection of special charge No. 1. The statement sets out the rejected charge only. If facts existed rendering its rejection prejudicial, they should have been pointed out, especially in view of the court's charge, which substantially, if inartistically, placed the burden of proof upon appellee to prove negligence.

We conclude that the judgment should be affirmed; and it is so ordered.

GALVESTON, H. & S. A. RY. CO. v. GRANT.†  
(Court of Civil Appeals of Texas. Dec. 8, 1909.  
Rehearing Denied Jan. 12, 1910.)

**1. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—STATEMENTS IN SUPPORT OF PROPOSITIONS.**

The proposition, under an assignment of error, that, the issue of contributory negligence having been raised by the pleadings and evidence, it was error not to submit such issue to the jury cannot be sustained; the statement under the proposition showing no evidence tending to raise such issue, and none appearing in the record.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 742.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

## 2. TRIAL (§ 296\*)—INSTRUCTIONS—OMISSION FROM MAIN CHARGE—SPECIAL CHARGES.

Any error in failing to submit, in the main charge, an issue of contributory negligence was not an affirmative one, but simply one of omission, and so could be cured by a special charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.\*]

## 3. TRIAL (§ 105\*)—RECEPTION OF EVIDENCE—EFFECT OF FAILURE TO OBJECT.

When plaintiff offers evidence not conforming to his petition, defendant should then object to its introduction; and, it having been admitted without objection, defendant may not have the question of variance raised by an instruction limiting the jury's consideration of plaintiff's proof to that conforming to his petition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.\*]

## 4. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTION OF FACT.

A charge being required to be read as a whole, a paragraph thereof, stating that if the jury should find for plaintiff, they should allow him such sum as will compensate him for the injuries sustained by him, does not assume he was injured; the paragraphs immediately preceding and following submitting the issue whether he was injured as alleged, and the jury not being allowed by the charge to find damages for him unless he was so injured.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.\*]

## 5. MASTER AND SERVANT (§ 264\*)—INJURY TO SERVANT—PLEADING—ISSUES.

Though the petition alleges that while plaintiff was at his work, and while the right side of his head was not more than an inch from a whistle, defendant's servant negligently blew it, it being a steam whistle of great power, and there being 185 or 190 pounds of steam on, and that the concussion from the noise and the steam striking against the right side of his head injured his ear, the substance of the issue, which alone has to be proved, is not whether his head was not more than an inch from the whistle, but whether it was near enough to it to make it, under all the facts and circumstances, negligence to sound it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.\*]

Appeal from District Court, El Paso County; A. M. Walthall, Judge.

Action by J. T. Grant against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood and Beall & Kemp, for appellant. Albert S. Eylar and T. A. Falvey, for appellee.

NEILL, J. The appellee sued appellant to recover damages for personal injuries alleged to have been inflicted by the negligence of the latter. The negligence is thus alleged: "That on or about the ——— day of December, 1905, plaintiff was in the employ of defendant as an engine inspector in its shops in the city of El Paso, Tex.; that he was ordered by the foreman of said shops to set and regulate the safety valves, commonly known as 'pops,' of an engine of defendant company that had just come into the yards of said shop

of said defendant; that said work was within the line of his employment as engine inspector; that he took with him Albert Ahr, an employé of said company, to aid him by keeping up the steam in said engine while he was regulating and setting said pops; that said engine was then in charge of and under the control of George Smith, a hostler in the employ of said defendant company, and that while the plaintiff was at work setting and regulating said pops, the said George Smith was seated in the cab of said engine; that said pops were situated on said engine close to the whistle, and that while bending over said pops at work, regulating them, and while the right side of his head was not more than an inch from said whistle, the said Smith carelessly and negligently gave three blasts to said whistle; that it was a steam whistle of great power and compass; that there was between 185 and 190 pounds of steam on at the time said whistle was blown; that the noise made thereby was deafening, and that the steam from the said whistle struck against the right side of plaintiff's head with great force, and that the concussion from said noise and steam against the right side of plaintiff's head has seriously and permanently injured plaintiff's right ear; that the said Smith, in the line of his duty as said employé, blew said whistle to notify the men in charge of the turntable in said yard to set in line the rail of the same, so that said engine could be taken into the roundhouse of defendant; that prior to blowing said whistle, while plaintiff was setting and regulating said pops, the plaintiff kept talking with the said Ahr, who was in the cab of said engine with the said Smith, and that he was walking backwards and forwards on the running board of said engine from said pops to the cab, where the said Smith was seated; that the said Smith could have seen plaintiff from his position in said cab, and knew, or could have known by the use of ordinary care, that the plaintiff was working over said pops at the time he blew said whistle, and that blowing the same would be attended with great injury to plaintiff." The defendant answered by a general denial and pleas of assumed risk and contributory negligence. The trial of the case resulted in a verdict and judgment in favor of the plaintiff for \$8,000.

### Conclusions of Fact.

The evidence is reasonably sufficient to show that defendant was guilty of the acts of negligence charged in plaintiff's petition, and that such negligence was the proximate cause of his alleged injuries, that the plaintiff was not guilty of any negligence proximately contributing to his injuries, and that by reason of his injuries so negligently inflicted by defendant the plaintiff has been damaged in the sum of money found by the verdict.

## Conclusions of Law.

1. The sixth paragraph of the court's charge is as follows: "If you believe from a preponderance of the evidence that at the time alleged in the petition said engine was then in charge and under the control of George Smith, then a hostler in the employ of said company, and that while the plaintiff was at work setting and regulating the pops on said engine, the said George Smith was seated in the cab of said engine, and that while plaintiff was bending over said pops at work regulating them, and that while the right side of plaintiff's head was in close proximity to said whistle, the said George Smith, acting in the line of his duty as an employé of the defendant company, gave three blasts to said whistle, and that said Smith knew that plaintiff was then working over said pops, and that said steam whistle was of great power and compass, and that there was between 185 and 190 pounds of steam on at the time said whistle was blown, and that the noise made thereby was deafening, and that the steam from said whistle struck against the right side of plaintiff's head with force, that the concussion from said noise and steam against the right side of plaintiff's head caused the injuries of which plaintiff complains, and that said blasts of said whistle were the direct and proximate cause of said injuries, and you further find from a preponderance of the evidence that the giving of said blasts of said whistle by said George Smith, if they were given by George Smith, was 'negligence,' as that word is defined to you in this charge, then and in that event you will find for the plaintiff; but, if you do not so find, your verdict should be for the defendant." It is complained of by the first and second assignments of error. The substance of the propositions under the assignments is that, the issue of contributory negligence having been raised by the pleadings and evidence, it was error not to submit such issue to the jury. The proposition cannot be sustained because (1) there is no evidence shown by the statement under the proposition, nor do we find any in the record, tending to raise such an issue; (2) if it were error for the court to fail to submit such an issue in its main charge, it was not an affirmative one, but simply one of omission, which could be cured by a special charge; and (3) a special charge upon such issue was given at the request of defendant's counsel.

2. The third assignment of error, which also complains of the same paragraph of the charge, is as follows: "The court erred in the sixth paragraph of its charge, in not confining the plaintiff to the proof of the specific allegation in his petition, that while setting and regulating said pops the right side of his head was not more than one inch from said whistle, and that when so situated the said Smith negligently gave three blasts of said whistle, thereby causing plaintiff's injury.

This charge was prejudicial to the defendant in this: That there was evidence introduced by the defendant showing that, if the right side of plaintiff's face had been within one inch of the steam whistle at the time it was blown, the steam would have scalded him badly and taken the skin off, and the evidence sharply raised the issue as to whether plaintiff was injured at all, at the time and in the manner alleged by him." The proposition advanced under it is: "It was the duty of the court, in the charge, to confine plaintiff's proof to the allegations in his petition." The conformation of "plaintiff's proof to the allegations in his petition" should be enforced at that stage of the trial when the evidence is being introduced; and, if evidence is offered which does not conform to such allegations, then is the time the defendant should object to its introduction, and reserve a bill of exceptions to the action of the court in admitting it over such objection; for, when evidence is admitted without objection, the question of variance cannot be raised upon an instruction to the jury. *Internat. Harv. Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 99; *Moffatt v. Sydnor*, 13 Tex. 628; *Huston v. Clute*, 19 Tex. 178; *Mangum v. Min. Co.*, 15 Utah, 534, 50 Pac. 836; 14 Ency. Pl. & Prac. 346.

3. The seventh paragraph of the charge is: "Should you find for the plaintiff, and allow him damages, you should allow him such sum as will in your judgment reasonably compensate him for the injuries sustained by him, and in estimating his damages you should take into consideration the character and extent of his injuries, and whether temporary or permanent." It is the subject of the fourth assignment of error. The substance of the propositions under it is that it assumes as an established fact that the plaintiff was injured as claimed. A charge must be read and construed as a whole. When this is done it is apparent that it does not assume as a fact that plaintiff was injured, for the next preceding and succeeding paragraphs clearly submit the issue as to whether plaintiff was injured as alleged in his petition, and the jury could not, under the charge, find damages for him unless he was so injured. *Telegraph Co. v. Chambers*, 34 Tex. Civ. App. 17, 77 S. W. 273; *Mo. Pac. Ry. Co. v. Lehmberg*, 75 Tex. 67, 12 S. W. 838; *City of Cleburne v. Elder*, 46 Tex. Civ. App. 399, 102 S. W. 464.

4. The eighth paragraph of the charge is as follows: "Should you not find from a preponderance of the evidence that the said George Smith, hostler in defendant's yards, at the time of the alleged injuries to plaintiff gave the said blasts of the engine whistle while plaintiff was in close proximity to said whistle, and while plaintiff was setting and regulating the said safety valves or pops on said engine, as plaintiff has alleged, and that said blasts were given by said Smith in the line of his duty as hostler to notify defend-

ant's employes in charge of the turntable in defendant's yards to set rail in line for said engine, and that said Smith knew that plaintiff was setting and regulating the pops on the engine when he gave the said blasts, or could have known by the exercise of such care as a man of ordinary prudence would commonly exercise under the same circumstances, and that plaintiff was injured by reason of said blasts of said whistle, and injured substantially as alleged, and that plaintiff himself was exercising such care to avoid injury to himself as a man of ordinary prudence would commonly use under the same circumstances, then and in that event you should find for the defendant." It is the subject of the fifth assignment of error. The only proposition under it is: "Evidence as to the time at which and the manner in which the accident happened resulting in the alleged injuries to appellee must be confined strictly to the allegations in plaintiff's petition." What we have said in disposing of the proposition asserted under the third assignment applies equally to this one. But we fail to perceive wherein the charge fails to conform to the pleadings and evidence. It is a cardinal rule of practice that the substance of an issue need only be proved, which was observed in this case. See *T. & P. Ry. v. Hightower*, 12 Tex. Civ. App. 41, 33 S. W. 541; *El Paso Elec. Ry. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 737; *Tex. & N. O. Ry. v. Scarborough*, 104 S. W. 413; *Louisville, etc., Ry. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 359, 57 Am. Rep. 120; *A. T. & S. F. Ry. v. Lannigan*, 58 Kan. 109, 42 Pac. 343; *Mangum v. Mining Co.*, 15 Utah, 534, 50 Pac. 834. The substance of the issue was not that plaintiff's head was "not more than an inch from the whistle," but whether or not it was near enough to it to make it, under all the facts and circumstances in the case, negligence for defendant's servant, Smith, to sound it, and by so doing injure the plaintiff's head.

5. If the defendant desired the issue of assumed risk submitted to the jury, it should have prepared and requested a special charge in accordance with its desire. The charge was good as far as it went; and, if it was error not to submit further issues, it was not affirmative, and could have been obviated by defendant's requesting their submission.

6. The testimony complained of by the seventh assignment of error was admissible in rebuttal of evidence introduced by defendant which tended to discredit the testimony of the plaintiff, as shown by the statement of the trial judge appended to the bill of exceptions taken by defendant to the testimony of the witness Dr. Schugt, which is the subject of the assignment. *St. L. & S. W. Ry. v. Garber*, 108 S. W. 743, and cases cited. See, also, *Greenl. Ev.* § 469. Besides, the

testimony was admissible as showing the history of the case given by plaintiff to his doctor for the purpose of treatment, which, in connection with other evidence introduced, served as an hypothesis for the witness's opinion, as an expert, as to the nature, character, and extent of plaintiff's injuries.

7. The remaining assignments complain that the verdict is excessive. We do not think it is; but, on the contrary, if the testimony of plaintiff is to be believed, we think it is a very conservative estimate of the damages he has sustained by reason of defendant's negligence.

There is no error in the judgment, and it is affirmed.

#### ROWAN v. STOCKWELL.

(Court of Civil Appeals of Texas. Dec. 10, 1909. Rehearing Denied Jan. 6, 1910.)

#### APPEAL AND ERROR (§ 931\*)—PRESUMPTION—CONSIDERATION OF IMPROPER EVIDENCE.

The case having been tried on an agreement of parties that all evidence should be considered as objected to as irrelevant, immaterial, hearsay, and not the best evidence, and the court having stated that it would not consider irrelevant, immaterial, hearsay, or inadmissible evidence, it must be assumed that any evidence inadmissible on any such grounds was not considered by the court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3765, 3766; Dec. Dig. § 931.\*]

Error from Brazoria County Court; *E. S. Atkinson*, Judge.

Action by *W. R. Stockwell* against *D. Noble Rowan*. Judgment for plaintiff. Defendant brings error. Affirmed.

*Bryan & McRae*, for plaintiff in error. *Elmer P. Stockwell*, for defendant in error.

*REESE, J.* In this case *W. R. Stockwell* sued *D. Noble Rowan* in the county court to recover \$286.26 and interest, alleged to be the balance due upon a contract made by *Stockwell*, who was a surveyor, with *W. A. Rowan*, defendant's agent for certain surveying, for which it is alleged that *Stockwell* was to be paid \$5 a day and the expenses incurred in making the surveys. The case was tried without a jury, resulting in a judgment for plaintiff for the amount sued for, from which defendant appeals.

It was alleged in the amended petition, and established upon the trial, that the contract for the surveying was made in 1893, and that the surveying was done in 1893 and 1894. The suit was filed in 1906. To meet the defense of limitation it was alleged that by the terms of the contract the amount due was to be paid when the lands were sold, which was not done until 1905. The evidence upon the whole case was conflicting. Some of it was clearly inadmissible, as contended by appellant, and presented by assignments

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of error in the brief; but the case was tried upon an express agreement, as set out in the statement of facts, that it should not be necessary for counsel on either side to object to any evidence as the same was offered, but that every part of the evidence offered by either side would be considered as objected to by the other side as being irrelevant, immaterial, hearsay, and not the best evidence, and exceptions reserved to the overruling of such objections the same as if made when the evidence was offered. The court stated that he would not consider irrelevant, immaterial, hearsay, and inadmissible evidence. So, with the exception of this kind of omnibus bill, there are no bills of exceptions in the record, and nothing to denote what objections were offered to any of the evidence. We would have to assume that if the evidence was inadmissible on any of the grounds set out, it was not considered by the court, and it would only remain to consider whether the findings of fact in the record were supported by such evidence as was admissible.

The evidence was very conflicting upon the questions of the contract, of the date when the account was to be paid, upon the authority of defendant's agent to bind him by the alleged agreement, and upon question as to whether anything was due upon the account. The trial court found in favor of appellee upon all of these contested issues, and from a careful inspection of the whole evidence we have concluded that his findings upon each of them are supported by evidence admissible under the agreement referred to, without the aid of such objectionable evidence as may have been admitted. We do not think it necessary to enter upon a discussion of the evidence. None of the assignments of error present sufficient grounds for reversal, and with their several propositions they are overruled, and the judgment affirmed.

**Affirmed.**

### CONE v. BELCHER et al.

(Court of Civil Appeals of Texas. Nov. 13, 1909. Rehearing Denied Dec. 11, 1909.)

#### 1. TRIAL (§ 139\*)—ISSUES—QUESTION FOR JURY.

Where there is any evidence on an issue raised by the pleadings, the court must submit it to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.\*]

#### 2. TRIAL (§ 143\*)—CONFLICTING EVIDENCE—QUESTION FOR JURY.

A party introducing sufficient evidence to support a verdict in his favor is entitled to go to the jury, however strong the contradictory evidence may be.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.\*]

#### 3. TRIAL (§ 179\*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

In determining the propriety of directing a verdict for defendant, the evidence must be con-

sidered in its aspect most favorable to plaintiff, disregarding conflicts and contradictions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 402; Dec. Dig. § 178.\*]

#### 4. FRAUDULENT CONVEYANCES (§ 308\*)—HUSBAND AND WIFE—GIFTS—VALIDITY—EVIDENCE—QUESTION FOR JURY.

Whether a gift by a husband to his wife was void as against his creditors, under the statute making every gift void as to prior creditors, unless the debtor was possessed of property sufficient to pay his debts, because made at a time the husband was not possessed of property sufficient to pay his debts, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 308.\*]

#### 5. HUSBAND AND WIFE (§ 270\*)—COMMUNITY PROPERTY—RECOVERY.

The husband alone can sue for community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 968, 971; Dec. Dig. § 270.\*]

#### 6. FRAUDULENT CONVEYANCES (§ 287\*)—EVIDENCE—ADMISSIBILITY.

On the issue whether a gift by the husband to the wife was fraudulent as against creditors, judgments against the husband are admissible, notwithstanding irregularities therein, to show that the husband was a debtor at the time of the making of the gift.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 287.\*]

#### 7. FRAUDULENT CONVEYANCES (§ 104\*)—HUSBAND AND WIFE—COMMUNITY PROPERTY—GIFTS.

An agreement between husband and wife, whereby the wife shall have as her separate property certain cattle and their increase, to be branded as hers, cannot control the statute defining community property, and the agreement can be given no greater effect than to vest in the wife a separate right to all the cattle branded prior to the husband's failure, if any, to be possessed of sufficient property to pay existing debts, and the branding of cattle thereafter is as against existing creditors a gift only.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 104.\*]

Error from District Court, Eastland County; T. S. Bell, Special Judge.

Action by N. C. Cone against J. H. Belcher and others. There was a judgment for defendants, and plaintiff brings error. Reversed and remanded.

Stubblefield & Patterson, for plaintiff in error. Earl Conner and J. J. Butts, for defendants in error.

CONNER, C. J. Plaintiff in error instituted this suit to enjoin the sale of 260 acres of the S.  $\frac{1}{2}$  of section 507, and the S. E.  $\frac{1}{4}$  and the S. W.  $\frac{1}{4}$  of section 508, S. P. R. surveys, in Eastland county, upon all which there had been a levy of an execution issued out of the county court of said county, by virtue of a judgment in favor of J. H. Belcher against W. R. Cone, the husband of plaintiff in error, and others for the sum of about \$1,475. Plaintiff in error claims the 260 acres of section 507 and the S. W.  $\frac{1}{4}$  of section 508 as her separate property, and the S. E.  $\frac{1}{4}$  of section 508 as a part of her homestead. She al-

leged facts showing that the title to her separate property was dependent in part upon matter not of record, and sought to attack the validity of the execution and judgment upon which it was based on the ground that the judgment was one rendered in an action purporting to revive a judgment of said county court theretofore rendered for \$683.63, and that the parties necessary to such revival had not been brought before the court in that the Farmers' Alliance Milling Company, one of the original defendants, and certain heirs of C. J. Stephens, deceased, also an original defendant, had not been made parties to the scire facias proceeding. Upon the conclusion of the testimony, the court peremptorily instructed the jury to return a verdict for appellees, except as to such portions of the land in controversy as they might find to be the homestead of plaintiff and her husband, W. R. Cone, not to exceed 200 acres of land, which the jury were required to designate and specify in their verdict.

We think the court erred, as assigned, in giving the peremptory instruction. There was evidence on the part of both plaintiff in error and W. R. Cone to the effect that soon after their marriage, some 30 years before the trial, plaintiff in error acquired a few cattle, and that it was specifically agreed between husband and wife that the increase of such cattle should be the separate property of the wife; that the cattle brand of W. R. Cone was "Cone"; that all increase of the wife's separate cattle were branded "Cone-K"; that about the year 1900 W. R. Cone sold all of the cattle then situated in Sutton county in both brands; that the "Cone-K" cattle brought about \$1,450, which was invested by plaintiff in error in said S. W. ¼ of section 508; that the proceeds of the "Cone" cattle amounted to about \$2,500, one-half of which W. R. Cone gave to his wife as her part of the community interest in the Cone cattle; this \$1,250 was invested in said 260 acres out of section 507.

The least that can be said of this testimony is that it tends to show such gift on the part of W. R. Cone to his wife as will invest her with the separate interest she claims, unless restrained by our statute regulating voluntary conveyances. This statute provides: "Every gift, conveyance, assignment, transfer or charge made by a debtor, which is not upon consideration deemed valuable in law, shall be void as to prior creditors unless it appears that such debtor was then possessed of property within this state subject to execution sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be void as to subsequent creditors, and though it be decreed to be void as to a prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers." In

construing this article our Supreme Court in *Maddox v. Summerlin*, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567, held that a conveyance not upon a valuable consideration is made prima facie void as to prior creditors, and that one claiming under it has the burden of proving that the grantor possessed property within the state subject to execution sufficient to pay his existing debts. And in *Walker and Lybrook v. Loring*, 89 Tex. 668, 36 S. W. 246, that the words in the statute, "subject to execution," mean, not only that the property should be such as may be legally levied upon and sold by the sheriff, but that it should also be such as is actually capable of being levied upon; the meaning of the statute being that the grantor must retain property, of which he has the open and visible ownership, of such value that, when subjected to forced sale, it will yield a sufficient sum to pay all existing debts, as well as the taxable costs of the collection. It was also held in the latter case that the ownership of property, the title to which was concealed from creditors, cannot be taken into account in determining whether the grantor retained sufficient assets to meet the just demands of his creditors.

Premitting a discussion of the objections to the judgment in the suit to revive the original judgment, the judgments together tend to show that appellant Belcher was a creditor of W. R. Cone at and prior to the sale of the Cone and Cone-K cattle in Sutton county. The evidence also shows that the Cone cattle while in Sutton county were held in the names of persons other than W. R. Cone with the purpose of avoiding the payment of said original judgment. But W. R. Cone testified, among other things, as follows: "We sold the cattle down in Sutton county in 1898. At the time I sold out those cattle down there in Sutton county there were about 600 head of my brother's cattle, mine and all, and we sold for \$14.50 a head; and there were about half of them that belonged to me and my wife, which brought a total of \$4,350, and I think about \$2,500 was paid in cash and the rest in notes. At that time I had other cattle in Eastland county—I guess some 75 head on the range. I was dealing in cattle at the time. I was acquainted with the market value of cattle here at that time, and it was in this county about \$15 per head. At that time I don't know that I had any other debts at all except this old security debt on the Farmers' Alliance Milling Company judgment. If I did, they were mighty small—might have owed some \$15 or \$25. I did not owe any other indebtedness that amounted to anything except this judgment. The judgment amounted at that time I think to about \$500. (SF-26-27.) \* \* \* The cattle I left up here in Eastland county were run in my name. The sheriff did not come along about that time and call on me for any property subject to execution, and never did.

\* \* \* I continued to run these cattle I had in Eastland county at that time in my name and in my brand just because I had them here and no one ever bothered or ever molested them. \* \* \* Of the property sold down there in Sutton county I gave my wife half of the proceeds of the community cattle, and there were 300 head about, which would make her part probably about \$2,175. That was in 1898 or 1899. It is not a fact that I sold those cattle and invested the proceeds in land in my wife's name to defeat that judgment. I had stuff they could get at—cattle right here on the range—stuff that could have paid the judgment. I was not buying cattle up in this country at the time I had these 75 head. I raised these cattle here, and they were left on the range, and I still raise cattle here—out on the open range.”

This testimony, we think, at least raises the issues of whether W. R. Cone made the gifts to his wife as he testifies, and, if so, whether at the time he was possessed of property within this state subject to execution sufficient to pay his existing debts within the meaning of the statute quoted. If so, the court should have submitted the issues to the jury, for the rule is well established that, where there is any evidence upon an issue raised by the pleadings, it is the duty of the court to submit the issue to the jury. *Citizens' Railway Company v. Griffin*, 109 S. W. 990, and authorities there cited. It is true that appellee introduced the record of marks and brands showing that the Cone brand was registered in the name of J. S. Cone, and not W. R. Cone; that W. R. Cone for the years 1897, 1898, 1899, and 1901 rendered for taxation only the S. E.  $\frac{1}{4}$  of section 508, claimed in this suit as part of the homestead, two mules at \$40, five cattle at \$50, and one wagon or buggy at \$25, but this was not as matter of law conclusive. The rule is that a party having introduced sufficient evidence to support a verdict in his favor is entitled to have the issue submitted to the jury, however strong the contradictory evidence may be, and that in determining the propriety of directing a verdict the evidence must be considered most favorable to plaintiff in error, disregarding conflicts and contradictions. See *Harpold v. Moss et al.* (Sup.) 109 S. W. 928. We therefore conclude that the court should not have taken the indicated issues away from the jury.

The questions raised on demurrer relating to supposed irregularities in the judgment are, we think, wholly immaterial on this appeal. If plaintiff in error establishes her allegations in reference to the homestead and of her plea of separate interest, she will be entitled to recover regardless of the form or effect of the judgment. Should she fail in this, then to the extent of such failure there would be no right of action in plaintiff in error, for all property not found to be sep-

arate would be community property and as to this the husband alone can sue, and he is not complaining of the judgment in this suit. *Speer on Law of Married Women*, § 287; *Maddox v. Summerlin*, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567. At all events, the judgments were admissible in evidence on the issue of whether defendant in error Belcher was a creditor of W. R. Cone at and prior to the time the latter made the asserted gifts to his wife. In this connection, and in view of another trial, we should perhaps also say that the agreement of W. R. Cone and wife cannot control our statute defining community property. It can be given no greater effect than to vest in Mrs. Cone separate right to all such of the Cone-K cattle as were so branded prior to W. R. Cone's failure, if any, to be possessed of sufficient property subject to execution to pay his existing debts. The imposition of the Cone-K brand on increase of cattle after that period as against existing creditors of W. R. Cone could amount to no more than a gift.

For the error discussed in the court's peremptory charge, it is ordered that the judgment be reversed and the cause remanded.

#### WESTERN UNION TELEGRAPH CO. v. BENNETT.†

(Court of Civil Appeals of Texas. Dec. 8, 1909.  
Rehearing Denied Jan. 12, 1910.)

##### 1. TELEGRAPHS AND TELEPHONES (§ 66\*)—TRANSMISSION AND DELIVERY OF TELEGRAM—ACTION FOR DELAY—EVIDENCE.

In a suit for failure to promptly transmit and deliver a telegram, evidence held to show the addressee could have been found at his place of business if defendant's agent had exercised ordinary diligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 63; Dec. Dig. § 66.\*]

##### 2. TELEGRAPHS AND TELEPHONES (§ 54\*)—UNREPEATED MESSAGE—EXEMPTION FOR LIABILITY.

A stipulation, so far as it relieves a telegraph company from negligence in not delivering or transmitting an unrepeatd message, cannot be enforced, but for mere errors or mistakes in transmission such a stipulation is lawful and reasonable.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 39; Dec. Dig. § 54.\*]

##### 3. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

In a suit for failure to promptly transmit and deliver an unrepeatd message, defendant was not injured by the sustaining of an exception to a part of its answer setting up a contract exemption from liability for mistakes or delays, as the court charged to find for it if the street number of the address was changed through error in transmission without negligence, thus giving it all the protection to which it was entitled.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4093, 4094; Dec. Dig. § 1040.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court February 2, 1910.

**4. TELEGRAPHS AND TELEPHONES (§ 74\*)—TRANSMISSION AND DELIVERY OF TELEGRAM—ACTION FOR DELAY—PLEADING—INSTRUCTIONS.**

In a suit for failure to promptly transmit and deliver a telegram, the petition alleged that by the negligence complained of plaintiff was delayed in reaching his mother in her last sickness, and was deprived of the comfort of being with her during her last conscious hours and of receiving her dying blessing, and that thereby he suffered great disappointment and grief, mental pain, and anguish in a specified sum. *Held*, that he thereby sought recovery for mental suffering sustained generally on account of inability to reach her before she became unconscious, and did not rest his case solely on damages sustained by deprivation of her dying blessing and the consolation he would have received if he reached her before, and hence the court did not err in refusing a special instruction limiting recovery to these two items of damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 77; Dec. Dig. § 74.\*]

**5. APPEAL AND ERROR (§ 662\*)—RECORD—CONCLUSIVENESS.**

The court on appeal is bound by a charge as stated in the record, and must assume that it is there correctly stated, where it differs from the statement thereof in appellant's brief.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2850-2852; Dec. Dig. § 662.\*]

**6. TELEGRAPHS AND TELEPHONES (§ 74\*) — TRANSMISSION AND DELIVERY OF TELEGRAM—ACTION FOR DELAY—INSTRUCTIONS.**

In a suit for failure to promptly transmit and deliver a telegram calling on plaintiff to come to his mother's dying bedside, defendant requested a special instruction that, even though the jury believed defendant negligently failed to deliver it in time to enable him to take a particular train, "still the plaintiff cannot recover unless the jury further finds that plaintiff would have derived comfort and consolation from being with his mother prior to her becoming unconscious and would have received her dying blessing, and if you find that he would have received such consolation and would not have received such dying blessing and did not suffer mental anguish because thereof, your verdict will be for defendant." *Held*, that it was correctly refused, as it was not correctly framed, and was at least confusing.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 77; Dec. Dig. § 74.\*]

**7. TELEGRAPHS AND TELEPHONES (§ 65\*) — TRANSMISSION AND DELIVERY OF TELEGRAM—ACTION FOR DELAY—ISSUES AND PROOF.**

Defendant, in a suit for failure to promptly transmit and deliver an unrepeatable message, having substantially and circumstantially pointed out in a special plea how a mistake in transmission did or could have occurred, it should be confined to facts there pleaded, and, not having mentioned that it could have occurred in transcribing by use of a typewriter, there was no error in limiting the defense of error or mistake in its transmission accordingly.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 60; Dec. Dig. § 65.\*]

**8. TELEGRAPHS AND TELEPHONES (§ 74\*) — TRANSMISSION AND DELIVERY OF TELEGRAM—ACTION FOR DELAY—INSTRUCTIONS.**

In a suit for failure to promptly transmit and deliver an unrepeatable message, a charge to find for defendant if the number of the street address was changed through error in transmit-

ting it without negligence gave defendant the benefit of all it was entitled to on the subject.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 77; Dec. Dig. § 74.\*]

**9. TRIAL (§ 191\*) — INSTRUCTIONS — ASSUMPTION OF FACT.**

In a suit for failure to promptly transmit and deliver an unrepeatable message, defended on the ground of a mistake in transmission, defendant requested a charge that "if the jury find that the cause of delay in the delivery of the telegram, sued on, was the mistake in the address of plaintiff in changing it from 214 to 215 Main street, then it becomes your duty to determine whether said mistake resulted from the negligence of the defendant," etc. *Held* to assume there was a mistake in the address, a question raised by the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 423, 429; Dec. Dig. § 191.\*]

**10. TELEGRAPHS AND TELEPHONES (§ 71\*) — DELAY IN TRANSMISSION AND DELIVERY OF MESSAGE—EXCESSIVE DAMAGES.**

For failure to promptly transmit and deliver a telegram resulting in the addressee not being able to reach his mother in her last sickness before she became unconscious, an award of \$1,150, while large, is not excessive.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 74; Dec. Dig. § 71.\*]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Suit by R. L. Bennett against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Spooztz, Thompson & Barwise, for appellant. Bell & Milam, for appellee.

**FISHER, O. J.** This is a suit by the appellee against the telegraph company to recover damages in the sum of \$1,950 for the negligent failure of the defendant to promptly transmit and deliver to appellee the following telegram: "Blossom, Texas, March 21, 1907. R. L. Bennett, No. 214 Main Street, Ft Worth, Texas. Mother worse. Come at once. [Signed] C. L. Bennett." C. L. Bennett is the brother of the plaintiff, R. L. Bennett. The mother referred to in the telegram was the plaintiff's mother.

The allegations of the plaintiff's petition are substantially to the effect that the telegram was delivered to defendant at Blossom about 8 o'clock p. m. March 21, 1907; that plaintiff did not receive the same until 9 o'clock and 25 minutes a. m. on the 22d of March; that upon receipt of the telegram he immediately left Ft. Worth and reached the town of Blossom at 11 o'clock a. m. on the 23d of March, that being the earliest hour at which he could reach that town after he was advised of the contents of the message; that when he reached that place his mother was unconscious and so remained unconscious until the time of her death, which occurred on the 24th of March at 8:30 p. m.; that if the message had been promptly delivered he could have reached the bedside

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of his mother before she became unconscious; that the defendant was guilty of negligence in failing to promptly transmit and to deliver the message to him after it was received at Ft. Worth, which was about 7:53 p. m. on the night of March 21st. It is also alleged that, by reason of the negligent failure to transmit and deliver the message, plaintiff was delayed in reaching his mother in her last sickness, and was deprived of the comfort and consolation of being with her during the last hours in which she was conscious and of receiving her dying blessing, and that by reason of the premises the plaintiff suffered great disappointment and grief, mental pain and anguish in the sum of \$1,950.

The defendant answered by general demurrer, general denial, and specially: That "if it undertook to send the telegram, as alleged in the plaintiff's petition, the same was sent subject to certain conditions and stipulations, which constituted the contract by virtue of which the telegram was sent. That sending telegrams by electricity is always subject to a great many contingencies, which are liable to cause a change in a telegram and which cannot be guarded against by the use of ordinary care. That the telegraphic alphabet consists of a series of dots and dashes, the combination of which constitutes letters and words. That it is frequently difficult for an operator to distinguish between a dot and a dash, or to correctly read the telegraphic signals, and any little interruption or interference with the wire, or any noise at the time of taking a message from the wire, and numerous other things, may interfere with the correct reading, transmission, and transcribing of a telegraphic message. That the only way to avoid mistakes of this kind is to provide for repeating the message; that is, telegraphing it back from the terminal office to the sending office for comparing. That the contract by virtue of which said message was sent provided as follows: 'To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any unrepeatd message beyond the amount received for sending the same.' Defendant says: That for some cause, not resulting from any negligence of it or its employes, the address in said message, during the process of transmission, became changed from No. 214 Main street to 215 Main street; that the change in said address was the cause of the delay in the delivery of said telegram; that, had said message been repeated, said mistake would not likely have occurred; that said message being an unrepeatd message, and said mistake having resulted without

negligence on the part of the defendant, and the delay in the delivery of said message having been caused by said mistake, defendant says that it is not liable to the plaintiff for the amount paid for the sending of said message, to wit, the sum of 25 cents."

To this special plea the plaintiff filed a special exception on the ground that it attempts to excuse the defendant on account of its own negligence. The trial court sustained this special exception. The verdict and judgment below were in appellee's favor for the sum of \$1,150.

We find: That the telegram as above set out was prepared at Blossom, Tex., by the plaintiff's brother, C. L. Bennett, and was promptly transmitted from that telegraph office to the appellant's telegraph office at Ft. Worth, Tex., where it was received about 7 o'clock and 53 minutes p. m. on the night of March 21st. Plaintiff at that time was on duty at his place of business at 214 Main street, which is the address as given in the telegram. That, by the exercise of ordinary care upon the part of appellant's messengers or delivering department, he could have been found at that place and the message delivered to him that night or early the next morning in time for him to have taken a train and reached the bedside of his mother at Blossom, Tex., before she became unconscious. That by reason of this negligence the plaintiff was deprived of the privilege of seeing his mother during her conscious hours and the consolation that would have resulted therefrom, and that she, from the time of his arrival to the time of her death, which occurred at the time alleged in the petition, never regained consciousness, and as a result of this negligence and for this breach of duty upon the part of appellant to promptly deliver the message there is evidence which tends to show that the appellee suffered mental anguish for being deprived of the privilege of being with his mother during her conscious hours.

The evidence on the subject of the supposed mistake in the telegram as received at Ft. Worth, in giving or not giving the proper street number of his address, is in such a condition that no definite and certain finding can be made upon it. There is evidence which tends to show that when the telegram was received at Ft. Worth the street number was given at "215," instead of "214," the proper number. On the other hand, the appellee testified, as shown on page 8 of the statement of facts, that the telegram that was delivered to him was not addressed to 215 Main street, but was addressed to 214 Main street, and stated that: "I do not know whether it was the original telegram or not. I do not know about that. As to whether the 214 had been stricken out and the 215 written in, I will say that there never was any 215 there. I am sure of that. I was on duty there that night." Then he

goes on to testify that the place where he was on duty was at 214, and there he could have been found. He did not receive the telegram until the next morning at the time alleged in the petition, when his evidence shows that he was informed by the party for whom he was working that there was a telegram for him at the telegraph office, where he promptly went, and it was delivered to him. Thereupon he made immediate preparation for departing, and left on the earliest train that he could take, in order to reach the bedside of his mother. But, assuming that the mistake was made in the transmission of the message, the evidence would justify the conclusion that the appellee could have been found at his place of business at 214, if the company or its agents had exercised ordinary diligence to discover his whereabouts. Furthermore, there is evidence, as shown by the testimony of the messenger boy, George Heare, as set out on pages 31 and 32 of the statement of facts, which tends to contradict the evidence offered by the defendant tending to show that the failure to deliver was on account of the mistake in the street number, wherein he testifies substantially to facts that would justify the conclusion that the message was never sent out that night by the telegraph company in an effort to deliver it to the plaintiff.

Appellant's first assignment of error complains of the action of the trial court in sustaining plaintiff's special exception to that part of its answer which pleaded the stipulation providing for repeating the message in order to guard against errors or mistakes. So much of this stipulation that attempted to relieve the telegraph company from its negligence in not delivering or transmitting an unrepeatable message could not be enforced. *W. U. Tel. Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; *Mitchell v. Telegraph Co.*, 12 Tex. Civ. App. 262, 33 S. W. 1019. But for merely errors or mistakes committed in the transmission, such a stipulation is lawful and reasonable. *Womack v. Telegraph Co.*, 58 Tex. 178, 44 Am. Rep. 614; *Telegraph Co. v. Neill*, 57 Tex. 291, 44 Am. Rep. 589. This stipulation was so broad that it attempted to relieve the appellant of all negligence or mistakes, even though negligently made, if the message was not repeated. Furthermore, no possible injury could have resulted to the appellant in the action of the trial court in sustaining the exception, because in the second paragraph of the charge the appellant was given the benefit of the rule that protected it against errors committed in the transmission, in that the jury was instructed, if the number of the address was changed through error in transmitting the telegram without negligence, to find for the defendant. If the demurrer had not been sustained, this instruction gave the defendant all the protection it would have been entitled to and was as far as the court could

lawfully go in that direction in submitting the issue to the jury. The action of the court in this respect shows no reversible error.

Appellant's second assignment is to the effect that the court erred in not submitting to the jury appellant's first special instruction, which is as follows: "Even though the jury believe from the evidence that the defendant was guilty of negligence in failing to deliver said message in time to enable the plaintiff to take the train that left Ft. Worth at 8 o'clock and 5 minutes on the morning of March 22, 1907, still the plaintiff cannot recover, unless the jury further finds that plaintiff would have derived comfort and consolation from being with his mother prior to her becoming unconscious, and would have received her dying blessing, and if you find that he would not have received such consolation and would not have received such dying blessing, and did not suffer mental anguish because thereof, your verdict will be for defendant."

On the subject of damages the court instructed the jury as follows: "Then you will return a verdict in favor of the plaintiff for such sum of money as you believe from the evidence will reasonably compensate him for such mental anguish so suffered by him, if any." It is contended by appellant that the pleadings of the plaintiff on the subject of damages related solely to the damages he sustained by reason of being deprived of his mother's dying blessing, and the consolation he would have received if he had been permitted to reach the bedside of his mother before she became unconscious. We do not understand the plaintiff's case, as made by the petition, to rest solely upon these two items; but it seeks to recover also for the mental suffering he sustained generally, on account of not being able to reach his dying mother before she became unconscious. The special charge was too restricted, and therefore was properly refused; but the charge as quoted above and as copied in appellant's brief will not stand a comparison with the charge as contained in the record. The difference consists in the words as appear in line 4 from the bottom of the charge as stated in the record. As we have copied this charge from the brief, it will be observed that the word "not" immediately preceding "have received such consolation" is stated in the charge as quoted. This word is not given in the charge as stated in the record. Of course, we are bound by the charge as copied in the record, and must assume that it is there correctly stated. This being true, it was correctly refused, if for no other reason than that it was not correctly framed. Therefore the charge presented to the court, and which it passed upon, and which it refused, after omitting certain parts already given, reads as follows: "Still the plaintiff cannot recover unless the jury further finds that plaintiff

would have derived comfort and consolation from being with his mother prior to her becoming unconscious and would have received her dying blessing, and if you find that he would have received such consolation and would not have received such dying blessing and did not suffer mental anguish therefrom, your verdict will be for defendant." This is virtually to the effect that, although he would have received consolation from being present with his mother and would not have received the dying blessing, he could not recover, unless the expression "and did not suffer mental anguish therefrom" refers to the fact that, although being deprived of the consolation, he suffered no mental anguish therefrom. The punctuation does not limit this expression solely in its application to the consolation that he was deprived of by not being present. The expression "did not suffer mental anguish" evidently applies to both elements, being deprived of the consolation and not receiving her dying blessing. The least that can be said of the charge as framed is that it is confusing.

Appellant's third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth assignments of error will be considered and disposed of together. In these assignments the appellant, in effect, contends that the failure to deliver the message in question was attributable either to an error in transmission or to the error of the operator in transcribing the message from the telegraph wire with the use of a typewriter, and that it was error for the trial court to limit the appellant's defense of error or mistake by its charge solely to the issue of transmission. The court in its charge No. 2 gave to the appellant the benefit of any error or mistake not attributable to its negligence that occurred in transmitting the message. Charge No. 1 of the trial court presented the theory of the plaintiff's case and instructed the jury substantially to the effect that plaintiff would be entitled to recover if the defendant was guilty of negligence in transmitting or delivering the message. These assignments present the question that the court erred in its general charge upon this subject in restricting the question to mistake and error committed in transmitting, and not submitting the question of error or mistake committed in transcribing the message from the telegraph wire with the use of a typewriter, and in refusing appellant's special charge No. 2, which was broadly to the effect that the jury could consider the mistake in the address however committed, unless it resulted from the negligence of the telegraph company. As we construe the special answer of the defendant upon this subject, it only relates to error committed in transmitting the message over the wire. The answer specially points out what could occur or happen during the process of transmission that might occasion or bring about such a

mistake, and there is nowhere mentioned in the answer the fact that the mistake occurred or could have occurred in the process of transcribing it by the use of a typewriter. It is true there is considerable evidence upon this question. There is an expert who testified to facts accounting for how a mistake of this kind could have occurred in transcribing by the use of a typewriter. Having substantially and circumstantially pointed out in its plea how the mistake did or could have occurred, we think the appellant should be confined to the facts there pleaded. Subdivision 2 of the general charge of the trial court gave the defendant the benefit of all that it was entitled to upon this subject. Furthermore, special charge No. 2, which was requested and refused, in effect assumed the existence of a fact about which in our opinion there was room for controversy. So much of the charge that relates to this question is as follows: "If the jury find that the cause of delay in the delivery of the telegram sued upon was the mistake in the address of plaintiff in changing it from 214 to 215 Main street, then it becomes your duty to determine whether said mistake resulted from the negligence of the defendant telegraph company," etc. This charge assumes that there was a mistake in the address. By reference to the finding of fact, it will be seen that we have quoted the evidence of the plaintiff upon this subject. It is sufficient to raise the question whether the message as received at Ft. Worth and transcribed gave the wrong number of plaintiff's address. The effect of the testimony of the plaintiff tends to show that the message was correctly addressed; that is, 214 Main street. The evidence of the mistake was furnished by the defendant's witnesses. The jury were not bound to believe them and could have concluded that this question of mistake in the street number was an afterthought, in order to justify or excuse the negligence of the delivering department of appellant's company in not promptly delivering the message. Some of these assignments also complain of the second paragraph of the court's charge, in that it was misleading and confusing. They are also overruled on this point.

Our findings of fact substantially dispose of appellant's eleventh assignment of error.

The twelfth assignment complains of the charge of the trial court on the subject of damages. This has been practically disposed of in considering appellant's second assignment of error. The mental anguish was not confined solely to the comfort and consolation of being with his mother during her last hours or receiving her dying blessing.

Our findings of fact dispose of the thirteenth and fourteenth assignments.

The fifteenth assignment complains of the verdict and judgment as excessive. As before stated, the verdict and judgment are for \$1,150. While it may appear to be large,

we cannot say it is excessive. There is nothing in the record indicating that the jury were influenced by passion or prejudice. We find no error in the record, and the judgment is affirmed.

### HOOKS v. KIRBY.†

(Court of Civil Appeals of Texas. Nov. 27, 1909. On Motion for Rehearing, Dec. 29, 1909.)

#### 1. PUBLIC LANDS (§ 173\*)—SALE—TIMBER—RIGHTS OF PURCHASER—STATUTES.

Acts 1895, p. 63, c. 47, § 8, relating to the sale of public school lands, provides, in section 3, for a classification thereof and when classified to be subject to sale but to actual settlers only, with a limitation of quantity in certain cases, and provides, in sections 8 and 9 (pages 64 and 65), the time for settlement of the land and proof thereof. Section 16 (page 68) of the act provides that the Commissioner of the General Land Office shall adopt regulations for the sale of the timber on timber lands, and that purchasers of timber shall have five years to remove the timber, and that when all the timber is taken off the lands may be classified and sold as grazing land, and that a purchaser of timber within the five years may purchase the land on which the timber is purchased "under the provisions of the act." *Held*, that the statute evidently contemplated two classes of purchasers, actual settlers on the land and purchasers of timber, and the quoted words at the end of section 16 did not refer to preceding sections, and hence a purchaser of timber buying the land was not obliged to settle thereon to get good title.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 547; Dec. Dig. § 173.\*]

#### 2. PUBLIC LANDS (§ 173\*)—SALE—PURCHASE OF TIMBER—SETTLING ON LAND—REPEAL OF STATUTE.

Acts 1895, p. 68, c. 47, § 16, gave a purchaser of timber on public school lands the right to buy the land itself within five years without settling on the land. Acts 1901, p. 296, c. 125, § 8, contained the identical terms as section 16, except that, after providing that the owner of the timber shall have the right to purchase the land, it further provides "at the valuation fixed by the commissioner on the same terms and conditions as other lands of like classification are sold under the provisions of this chapter," and the sections other than section 8 provided for sale to actual settlers only. *Held*, that section 8 would be construed to change the rule in section 16 that a timber owner could purchase the land itself without settling on the land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 547; Dec. Dig. § 173.\*]

#### 3. CONSTITUTIONAL LAW (§ 93\*)—IMPAIRMENT OF VESTED RIGHTS—PURCHASERS OF PUBLIC LANDS.

Where by Acts 1895, p. 68, c. 47, § 16, a purchaser of timber on public lands has the right to purchase the land itself within five years without being an actual settler thereon, this right could not be affected by Acts 1901, p. 296, c. 125, § 8, passed thereafter, containing the same provisions as section 16, except that purchasers of timber must settle on the land, since the right was a part of the consideration for the sale of the timber and was a vested right which could not be impaired by subsequent legislation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 183; Dec. Dig. § 93.\*]

#### 4. PUBLIC LANDS (§ 178\*)—SALE—CLASSIFICATION—TIMBER—INNOCENT PURCHASERS.

A purchaser of timber on public school land, which purchase was duly recorded in the land office under Acts 1895, p. 63, c. 47, § 16, giving him the right to purchase the land without settling on the same, exercised that right, and the proper instrument was filed in the land office. Before the right was exercised, the land was classified as "grazing land" under a provision of the act permitting this when all the timber had been removed, but as a fact the timber had not been removed. The land was sold to another as grazing land, and such other sold it to his vendee, who had no actual knowledge of the rights of the purchaser of the timber. *Held*, that the vendee was not an innocent purchaser, since he was charged with knowledge that there was timber on the land, and that the records of the land office showed that the purchaser of the timber had the option to purchase the land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 580; Dec. Dig. § 178.\*]

#### 5. PUBLIC LANDS (§ 173\*)—SALE—RIGHT OF TIMBER OWNER—STATUTES.

Acts 1895, p. 68, c. 47, § 16, providing that a purchaser of timber on public school lands shall have five years to remove the timber and within such five years to purchase the land, does not limit the owner of the timber to purchase only the land on which timber is left at the time of the purchase.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 547; Dec. Dig. § 173.\*]

On Rehearing.

#### 6. TRESPASS TO TRY TITLE (§ 47\*)—SALE OF PUBLIC LANDS—CONFLICTING SALES—RELIEF AWARDED.

In pursuance of Acts 1895, p. 68, c. 47, § 16, a purchaser of timber on public land exercised the right given by the section to purchase the land itself, but did not comply with all the terms of the section in making his application to purchase. Before he made application the land had been erroneously classified as "grazing land" and so sold and patent issued to the purchaser, the title of whom was void as against the purchaser of the timber, if he had complied with the terms of the section. *Held*, in trespass to try title by the purchaser of the timber against the vendee of the purchaser of grazing land, that the court, on adjudging that plaintiff was entitled to the land on his compliance with the provisions of the act granting him the right of purchase, would not cancel the patent to defendant's vendor, since such patent conveyed a good title until plaintiff established a better title by compliance with the statute.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 69, 71; Dec. Dig. § 47.\*]

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Trespass to try title by G. W. Hooks against John H. Kirby. From a judgment for defendant, plaintiff appeals. Reversed, and judgment rendered.

W. H. Davidson, F. J. & R. C. Duff, and A. L. Davis, for appellant. Denman, Franklin & McGown, and Lanier & Martin, for appellee.

McMEANS, J. Suit of trespass to try title, brought by G. W. Hooks against John H. Kirby to recover 640 acres of land, being section No. 82, certificate No. 25/1207, Houston

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

& Texas Central Company survey, situated in Jasper county. The plaintiff's petition contained only the ordinary allegations in actions of trespass to try title. Defendant answered by general denial and a plea of not guilty. The case was tried by the court without a jury and resulted in a judgment for defendant, from which plaintiff has appealed.

The trial judge filed his findings of fact and conclusions of law, which are as follows:

"(1) On the ——— day of ———, 1897, and under the act of the Legislature of 1895, and 1897, T. J. Hooks, who was vice president and general manager of the Hooks Lumber Company, who owned and operated a sawmill, applied to purchase from the Commissioner of the General Land Office public school section No. 82, located by virtue of certificate issued to Houston & Texas Central Railroad Company, No. 25/1207, being the land in controversy.

"(2) The plaintiff, G. W. Hooks, was also interested in the Hooks Lumber Company. That all of the timber was cut and removed from the said section of land by T. J. Hooks and delivered to the Hooks Lumber Company, a corporation who manufactured same into lumber, except about one-half a million feet, worth about \$500, and that prior to the passage of the act of the Twenty-seventh Legislature, p. 292, concerning the sale of public school lands and repealing all laws in conflict therewith, T. J. Hooks conveyed the remaining timber on the land to the plaintiff, George W. Hooks. The original deed was deposited in the General Land Office at Austin, and was never recorded in the deed records of Jasper county.

"(3) That T. J. Hooks on the ——— day of August, 1901, sold the remaining timber on the land to George W. Hooks. That in 1900 C. H. Howard, acting as timber classifier of the state, at the instance of the Commissioner of the General Land Office, inspected this land and reported to him that all of the timber had been cut and removed. Subsequently, about the 1st of August, 1901, at the instance of plaintiff, the said Howard reinspected the said land and reported to the Land Office that there was about one-half million feet of timber remaining on the land; that through a mistake he had overlooked it. Plaintiff then made application to the Commissioner of the General Land Office to purchase this land under the acts of 1895 and 1897, and offered to the State Treasurer \$2 per acre in payment therefor. The application was refused by the Land Commissioner and the money by the Treasurer, because the land was patented already to C. M. Votaw. Previous to Votaw's purchase from the state, some ties had been cut off the land and sold to the Kirby Tie Company, of which defendant was president.

"(4) That the land prior to the application of C. M. Votaw had been classed as 'dry grazing land' on the report of the district survey-

or and classifier of the General Land Office, that the timber had been cut and removed therefrom, and (was) placed on the market for sale, and C. M. Votaw made his application to the General Land Office prior to the passage of the act of April 19, 1901, and under the acts of 1895 and 1897, to purchase the land. It was awarded to him, and, on payment of the consideration of the land, was patented to him before the purchase of the timber by the plaintiff, G. W. Hooks, and before the act of April 19, 1901, was passed.

"(5) That C. M. Votaw by general warranty deed and the consideration recited therein conveyed the land to John H. Kirby on the ——— day of May, 1901. That at the time John H. Kirby purchased the land from C. M. Votaw there was no deed for the land or timber on file in the deed records of Jasper county, to T. J. Hooks or George W. Hooks, nor was there any application to purchase the land by G. W. Hooks, nor has there ever been one filed with the county clerk of Jasper county, Tex., nor has George W. Hooks ever paid any money to said clerk for the land or filed his obligation with him to the state therefor.

"(6) That at the time C. M. Votaw conveyed the land to John H. Kirby the latter had no actual or constructive notice of any application by George W. Hooks to purchase the land, nor did he know that the said George W. Hooks had ever purchased the timber from T. J. Hooks. That the said Kirby paid C. M. Votaw the full value of the land at the time it was conveyed to him.

"(7) That neither T. J. Hooks nor George W. Hooks ever settled on the land, nor did either one of them ever reside or intend to reside in Jasper county, but were residents of Hardin county.

"The land never having been settled on by the plaintiff or his vendor, the acts of 1895 and 1897 were not complied with; nor was Acts 1901, p. 292, complied with either. Besides settling on the land, he should have filed with the clerk of Jasper county accompanied with the necessary money to pay for the land filed with the said clerk, nor any affidavit of settlement as required by said act made by the plaintiff. That the act under which the timber was bought by T. J. Hooks, in so far as the purchase of the land is concerned, is repealed by the act of April 19, 1901. That George W. Hooks had no such vested right to buy the land more than any other citizen of Texas. Therefore he had no right to buy the land without settling on it, nor any right to buy it after it had been patented to C. M. Votaw.

"I conclude he has no title to the land, and if he had he had not offered to do equity by tendering the money paid by C. M. Votaw to the state for the land to the defendant, Kirby. Hence it follows he has no title.

"I conclude that the land having been patented to C. M. Votaw by the state, and Votaw

having conveyed the same to Kirby for a valuable consideration without notice on the part of George W. Hooks to buy the land for the timber from the state, and Kirby, having bought the land from Votaw in good faith, is the owner of the legal title under the law and also owner of the equitable title. That the plaintiff, George W. Hooks, not having complied with the laws of 1895, 1897, and 1901, in any particular, has no interest in the land sued for.

"Judgment is, accordingly, rendered herein for the defendant."

Appellant by an appropriate assignment of error attacks the sixth finding of fact and by many assignments challenges the court's conclusions of law. Several of these are not presented in such a way as to entitle them to consideration, and those properly presented will not be passed upon in detail. In order to get a clearer understanding of the issues involved, we restate in chronological order the various transactions leading up to the controversy:

On May 24, 1897, pursuant to an application theretofore made by T. J. Hooks, the timber on the land in question was sold to him by the Commissioner of the General Land Office. This conveyance was evidenced by an instrument in writing which was filed and retained in the General Land Office.

Some time in 1900, one Howard, timber classifier for the state, at the instance of the Commissioner of the General Land Office, inspected the land and reported to the commissioner that all of the timber had been cut and removed; and thereupon the land was classified by the commissioner as "dry grazing land."

On March 30, 1901, C. M. Votaw made application to purchase the land as a detached section.

On August 27, 1901, T. J. Hooks sold to G. W. Hooks, the appellant, the timber rights on the land acquired by him in his purchase from the state. This sale was evidenced by an instrument in writing which was filed in the General Land Office.

On October 9, 1901, the land was patented to Votaw.

It appears that in October, 1901, the classifier, Howard, reinspected the land and reported to the commissioner that he was mistaken as to the land having been denuded of timber, as stated in his former report, but that the timber had not been removed off of about 15 acres in the northwest corner of the section, and that there was some timber on other portions of it. This report was sworn to by him on October 7, 1901, but the evidence does not show when it reached the General Land Office. A letter written by Howard to the commissioner in regard to the same matter is dated October 17, 1901.

January 2, 1902, Votaw, by proper deed of conveyance, sold the land to appellee, Kirby, who had no actual notice of the purchase of

the timber by T. J. Hooks, nor of its sale by the latter to G. W. Hooks.

May 10, 1902, appellant, G. W. Hooks, made an application to the Commissioner of the General Office for the purchase of the land under the provisions of the act of 1895, and amendment thereto of May 18, 1897, claiming the right to purchase as the owner of the timber by virtue of his purchase from T. J. Hooks, and at the same time paid to the State Treasurer \$2 for each acre in the section. This application was rejected by the commissioner.

Section 16, c. 47, p. 68, Gen. Laws 1895, which is carried into Sayles' Ann. Civ. St. 1897, as article 4218q, provides:

"Sec. 16. The Commissioner of the General Land Office shall adopt such regulations for the sale of the timber on the timbered lands as he may deem necessary and judicious. Such timber shall not be sold for less than five dollars per acre, cash, except in such cases as the commissioner may ascertain by definite examinations by an approved agent appointed by him for that purpose, to be paid by the purchaser, to be sparsely timbered or containing timber of but little value, in which case he may sell the timber on such sections or part of sections at its proper value; provided such timber is sold at not less than two dollars per acre. The purchaser shall have five years from the date of his purchase within which to remove the timber therefrom, and in case of failure to do so, such timber shall thereby be forfeited to the state without judicial ascertainment; provided, that all timbered lands from which the timber has been cut and taken off may be placed on the market and sold as agricultural or grazing lands, according to the classifications to be made by the land commissioner; provided, that the purchaser or his vendees of any such timber shall have the right to purchase the land upon which such timber so purchased is situated at two dollars per acre, cash, at any time before the expiration of five years from date of purchase of timber under the provisions of this act."

This act was amended by the Legislature in 1897 without change in the language of this section.

The act of 1895 provides for "the sale of all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools and the several asylums," etc. It provides for the classification of all such lands, and when classified to be subject to sale, but to actual settlers only, and limits the quantity that may be purchased by any one actual settler to 640 acres, unless the land has been classed as "pasture lands," in which case not exceeding four sections may be sold to one person. Section 8 (page 64) of the act gives a preference right to a bona fide settler upon any of such lands to purchase the same within 90 days from the time the act went into effect or within 90 days after such

land is placed on the market, and confers the right upon such settler who may purchase one section of agricultural land to purchase under certain circumstances three strictly pastoral sections. The ninth section (page 65) requires that the purchaser or his vendee reside upon his purchase for three consecutive years next succeeding the date of purchase, and within two years after the expiration of such period to make proof of such occupancy to the Commissioner of the General Land Office.

From the foregoing reference to the act we think it will be seen that the law contemplated two classes of persons to whom sales of lands should be made, viz., actual settlers and persons who should purchase timber. The right is given to the purchaser of the timber obviously to protect him for the money he has been required to pay to the state in advance, and which would be lost to him if it were impossible to remove the timber within the five years given him by the act. That the law did not contemplate that the purchaser of the timber should become an actual settler on the land as a condition precedent to his right to purchase within five years after his purchase of the timber is manifest, we think, from the language of section 16, as well as the general scope and purpose of the act itself. This will best be seen by a comparison of the sections relating to the two classes of contemplated purchasers. One is limited in the quantity he may buy, the other is not; one purchaser only on time, the other is required to pay cash; one must pay according to a classification of the land, the other is required to pay a price certain which is fixed by the act; one must be an actual settler, and therefore an individual, the other is not required to occupy the land, and, for aught that appears in the section quoted, may be a corporation. We think this sufficient to show that there was in the legislative mind the two classes above referred to, and that it was not intended that the purchasers of timber who should within the prescribed time apply for the purchase of the land upon which their timber was situated should be governed by the same rules prescribed for the actual settler who should apply for the purchase of the land for a home.

It is contended that the last sentence of section 16, which provides that the purchaser, or his vendee, of any such timber, shall have the right to purchase the land upon which said timber so purchased is situated at \$2 per acre, cash, at any time before the expiration of five years from date of purchase of timber "under the provisions of this act," clearly shows that such purchasers come within the provisions of the act limiting sales to actual settlers only, and, as appellant was not an actual settler, he had not shown in himself any right to purchase the land superior to that of the grantee, Votaw. We think that the language,

"under the provisions of this act," clearly refers to the provisions conferring rights upon timber purchasers and to buy the land without occupancy, at a fixed price for cash, and was not intended to bring such purchasers within the provisions of the sections requiring sales to be made to actual settlers only, upon credit only, and at a price to be determined by classification.

But it is contended that the acts of 1895 and 1897 were superseded by the act of 1901 (Acts 27th Leg. p. 292, c. 125), and that, as appellant did not make his application to purchase the land until after the latter act went into effect, his rights must be determined and are controlled by that act. The eighth section (page 296) of the act of 1901 is identically the same as section 16 of the act of 1895, and article 4218g, except in the closing sentence, where, after providing that the owner of the timber shall have the right to purchase the land, further provides "at the valuation fixed by said commissioner on the same terms and conditions as other lands of like classification are sold under the provisions of this chapter." The other provisions of the act, save the eighth section, having reference to sales of timber and the purchase of timbered land by the owners of the timber, provide for sales to actual settlers only, and we think the language of the eighth section, above quoted, should be construed in connection with the entire act so as to require actual settlement upon the land by the purchaser of the timber or his vendee, as a condition precedent to his right to purchase it. But does the act of 1901 govern the rights of appellant in the purchase of the land in controversy? We think not. The law under which the timber was purchased from the state gave the absolute right to the purchaser to buy the land at any time within five years from the date of the sale of the timber to him, or at least until all the timber is removed. This right formed a part of the consideration paid for the timber, and entered into the contract as much as did the cash consideration of the \$5 per acre which he paid. When he paid the cash and took a deed to the timber, the law wrote into the contract that he was also thereby granted the right to buy the land within a certain time for a certain further consideration, and this right became vested and cannot be impaired by subsequent legislation. *Jumbo Cattle Co. v. Bacon* (Sup.) 17 S. W. 138.

It follows therefore that the issuance of the patent to Votaw was, in view of the circumstances, erroneous, and that the patent should be canceled, and that the land should be awarded and patented to appellant upon compliance by him with the law under which his application for purchase was made.

We cannot subscribe to the proposition of appellee that Kirby was an innocent purchaser. True he had no actual notice

of the prior right of Hooks to purchase the land, but he was charged with notice of such facts pertaining to the sale of the land by the state as he would have acquired by an investigation of the records of the General Land Office, and such an investigation would have disclosed to him that the state, by selling the timber, had granted to T. J. Hooks, or his vendee, the right to purchase the land under the provisions of section 16, Acts 1895, and that this right might be exercised at any time within five years from the date the timber was sold, unless all the timber was sooner removed; and Kirby was chargeable with notice that all the timber had not been taken from the land.

Nor do we think that the right of appellant to purchase was limited to the number of acres from which the timber had not been removed, or to the 80 acres upon which such remaining timber was situated, as contended by appellee. Hooks purchased the timber on 640 acres, and until all of it was removed he or his vendee had the right to purchase the land.

Other propositions urged by appellee in support of the judgment cannot be sustained.

We think that, under the undisputed facts, the judgment of the court below should have been for appellant, and said judgment is therefore reversed, and judgment is here rendered for appellant.

Reversed and rendered.

#### On Motion for Rehearing.

On further consideration we are of the opinion that our conclusion that the patent issued to Votaw should be canceled is erroneous, and that statement in the opinion is hereby withdrawn. The patent having issued to Votaw, the title evidenced thereby is good as against any one not showing a superior claim to the land.

This, we think, was shown by the appellant; but to entitle him to a patent he must comply with the law in force at the time he made his application to purchase.

The motion for a rehearing will be granted to the extent of the withdrawal of the statement that the Votaw patent should be canceled, and in all other respects the motions is refused.

#### DE ZAVALA et al. v. DAUGHTERS OF THE REPUBLIC OF TEXAS.†

(Court of Civil Appeals of Texas. Nov. 27, 1909. Rehearing Denied Dec. 22, 1909.)

#### 1. APPEAL AND ERROR (§ 1011\*)—REVIEW—CONCLUSIVENESS OF FINDINGS.

A finding of fact by the trial court on conflicting evidence will not be disturbed on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

#### 2. CORPORATIONS (§ 513\*)—ACTIONS—NECESSITY FOR ALLEGING AUTHORITY TO BRING SUIT.

It is not necessary, in a suit by a private corporation, to allege in the petition that the suit is authorized by the governing body thereof.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 513.\*]

#### 3. CORPORATIONS (§ 426\*)—ACTIONS NOT AUTHORIZED BY GOVERNING BODY—RATIFICATION.

If the bringing of a suit in the name of a private corporation without authority of the governing body, but only by the individual action of the members thereof, was illegal, the subsequent ratification of such action by the governing body at a regular meeting in proper form operated to legalize the action from the beginning (citing Words and Phrases, tit. "Ratification").

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 426.\*]

#### 4. CORPORATIONS (§ 518\*)—ACTIONS NOT AUTHORIZED BY GOVERNING BODY—RATIFICATION—NECESSITY FOR PLEADING.

To warrant the admission of evidence of such ratification, it was not necessary to plead it.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 518.\*]

#### 5. INJUNCTION (§ 70\*)—OFFICERS OF CORPORATION—JURISDICTION OF EQUITY.

Where persons chosen as officers of a corporation are in full possession of their respective offices and in full discharge of the duties thereof, being de facto officers, equity has jurisdiction of a suit by the corporation to enjoin others claiming to hold such offices who have not intruded into or usurped them, but who by their acts interfere with the management of the business affairs of the corporation to its detriment, where such persons seek to justify their acts by their claim that they have the legal right to do what they are doing as officers of the corporation, though the court could not primarily take jurisdiction to determine the legality of an election of directors, or to remove a director in possession of the office.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 70.\*]

#### 6. CORPORATIONS (§ 284\*)—PROCEEDING OF GOVERNING BODY—ADJOURNMENT—LEGALITY.

The act of the first vice president of a corporation, entitled to preside over a meeting of the members under the corporate constitution, during the meeting declaring her inability to act, and installing a substitute who was not entitled to preside, did not effect a forfeiture of her right to further preside at that meeting, and she having resumed her position as presiding officer, and having regularly put to the members a motion to adjourn regularly made, and having regularly declared the result of a viva voce vote thereon, and in accordance with the sense of the majority then present declared the meeting adjourned sine die, the adjournment was legal, and the minority of the members, presided over by an officer who had the right to preside in the absence of the first vice president, had no authority to remain and elect officers of the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 284.\*]

Error from District Court, Harris County; L. W. Moore, Special Judge.

Action by the Daughters of the Republic of Texas against Miss Adina De Zavala and others. Judgment for plaintiff, and defendants bring error. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court January 19, 1910.

Love & Channel, John T. Duncan, and Don A. Bliss, for plaintiffs in error. Webb & Goeth, Lane, Wolters & Storey, and Wm. A. Vinson, for defendant in error.

**REESE, J.** This is a suit by the Daughters of the Republic of Texas, a private corporation having that corporate name, against Miss Adina De Zavala and 12 other persons named in the petition as defendants. The purpose of the suit can best be shown by a brief statement from the petition, as follows:

Plaintiff is a private corporation created and organized under the general laws of the state of Texas under that name. The objects and powers of the association, as set out in the charter, are:

"First, to perpetuate the memory and spirit of the men and women who have achieved and maintained the independence of Texas. Second, to encourage historical research into the earliest records of Texas, especially those relating to the Revolution of 1835, and the events which followed; to foster the preservation of documents and relics, and to encourage the publication of records of individual service of soldiers and patriots of the Republic. Third, to promote the celebration of March 2d (Independence Day), and April 21st (San Jacinto Day); to secure and hallow historic spots by erecting monuments thereon; and to cherish and preserve unity of Texas, as achieved and established by the fathers and mothers of the Texas Revolution.

"This association may have and hold, by purchase, grant, gift or otherwise, real estate on which battles for the independence of Texas were fought; such monument or monuments as may be erected thereon; and burial grounds where the dead, who fought and died for Texas independence, are buried; and personal property, consisting of books, manuscripts, and other historical records, relating to the early history of Texas, and relics."

It was provided by the constitution of the association that the general management of its affairs during its recess should be vested in an executive committee of nine members. The executive committee at the date of the institution of this suit was composed of Mrs. Marie B. Urwitz, as chairman, and eight others named in the petition.

Plaintiff owns many valuable relics relating to the early history of Texas, gathered from the battlefield of San Jacinto and elsewhere; it owns papers and documents relating to the revolutionary period of Texas history; these relics and papers are valuable by reason of their historical interest; they are worth to plaintiff thousands of dollars; they cannot be valued by any rule of commerce; their destruction or loss would be irreparable only to this plaintiff, which could not be adequately compensated by any recovery of damages in money.

By the act of the Legislature of Texas approved January 26, 1905, known as chapter 7, p. 7, of the Laws of Texas, of the Acts

of 1905, providing for the purchase, care, and preservation of the "Alamo property," described in said act, it was provided that upon receipt of the title of said land the Governor shall deliver the property thus acquired, together with the "Alamo Church" property, already owned by the state, to the custody and care of plaintiff, to be maintained by it in good order and repair, without charge to the state. By the terms of section 3 of said act the duty of keeping, managing, controlling, and retaining the custody of all of said property is imposed upon the plaintiff, and not upon any chapter of plaintiff corporation. The affairs of plaintiff are managed and controlled by its executive committee. The executive committee of plaintiff, provided for by its charter, constitution, and by-laws, is the one body connected with plaintiff corporation, empowered by said act of the Legislature to manage and control said "Alamo property" and said "Alamo Church," and in the name of plaintiff to make contracts and rent same, and to collect and receipt for the rents therefor in the name of plaintiff. The "Alamo property" and the "Alamo Church" are sacred trusts imposed in plaintiff by the state of Texas, to be maintained, controlled, and protected by plaintiff, through its duly elected and lawfully qualified executive committee. All of the said property—that is to say, the "Alamo property" and the "Alamo Church"—is of the market value of \$200,000; but, by reason of its historical worth, it is valuable beyond price. That it is the duty in law and honor of plaintiff, through its proper executive committee, to care for this sacred property, and to keep clear the title thereto in plaintiff, in accordance with the laws of Texas.

Plaintiff owns and holds in trust funds amounting to over \$1,000. Said funds are in the custody of plaintiff's duly elected and qualified treasurer, Miss Belle Fenn, and plaintiff's duly elected and legally qualified secretary, Mrs. Charles H. Milby, who retained custody of said funds under the control, direction, and supervision of plaintiff's executive committee.

The ladies named in paragraph 2 of the petition constitute the duly elected and legally qualified executive committee of plaintiff, and under the charter, constitution, and by-laws of plaintiff are charged with the management and care of the "Alamo property," by plaintiff, all relics, and the historical documents belonging to plaintiff. Said executive committee is charged with the duty of managing and controlling the affairs of plaintiff, as is provided by the charter and constitution of the organization. The executive committee named in paragraph 2 has continuously, ever since their election, been in charge and control of the affairs of plaintiff corporation, lawfully exercising the duties imposed upon them in accordance with the authority and power in them vested by the charter, constitution, and by-laws of plain-

tiff, and have ever since their election to said committee had charge of the custody and control of the "Alamo property," "Alamo Church," all funds belonging to plaintiff, and the relics and historical documents belonging to plaintiff. Mrs. Charles H. Milby is the duly elected and legally qualified secretary of plaintiff corporation, and has been ever since such election, and is now, in charge of the proper books, papers, and documents pertaining to said office, together with the seal of the plaintiff corporation, and has, ever since her election, exercised the duties imposed upon her as such secretary, and is still the qualified secretary of plaintiff corporation. Miss Belle Fenn is the duly elected and legally qualified treasurer of plaintiff. Upon her election she took charge of the funds belonging to plaintiff, and, under the control and direction of the executive committee, has kept charge and control of said funds ever since her election to said office, and is still in charge and control of same, exercising the duties thereof.

"Plaintiff represents: That it is a going concern, carrying out the duties imposed upon it by the laws of the state of Texas, and the powers granted it by its charter, and the duties imposed by its constitution through its legally elected executive committee, as named in paragraph 2 herein. That it is important to the interests of the property owned by plaintiff as well as property intrusted to plaintiff by the state of Texas, as well as the perpetuation of the memory and spirit of the men and women who have achieved and maintained the independence of Texas, the encouragement of historical research in the earliest records of Texas, the fostering of the preservation of documents and relics, the encouragement of the publication of records of individual service of soldiers and patriots of the republic, the promotion of the celebration of March 2d and April 21st, the securing and hallowing of historical spots, by erecting monuments thereon, and of cherishing a preservation of the unity of Texas, as achieved and established by the fathers and mothers of the Texas Revolution, that the affairs of this plaintiff be managed and controlled by its duly elected and legally constituted officers, the executive committee, and not by other persons who have not been legally elected and are not duly constituted officers and members of the executive committee of plaintiff."

It is charged in the petition: That the defendants, together with various other persons to plaintiff unknown, have confederated together for the purpose of wrongfully and unlawfully taking charge of the affairs of plaintiff; that in furtherance of such confederation they have declared themselves to be the executive committee of plaintiff, and are undertaking, in violation of the provisions of the charter and constitution of the association, to manage all the affairs of plaintiff; that they have, without authority,

represented and announced that certain persons are vice presidents of plaintiff association; that one of their number is secretary general, another assistant secretary general, another corresponding secretary and assistant treasurer of the association, which is not true, such offices being held and exercised by other members; that Miss De Zavala, who claims and pretends to be chairman of the executive committee, has directed in writing the Planters' & Mechanics' National Bank of Houston and T. W. House, banker, where plaintiff's funds are deposited, not to pay the checks drawn against the same by plaintiff's legally qualified treasurer or secretary, but to pay such funds only to certain of defendants wrongfully claiming to be authorized to control said funds. The petition, at great length, and with much exuberance of diction, charges various acts of interference by defendants, under their claim that they are the executive committee and other officers of plaintiff association, with the business affairs and property rights of plaintiff, to the serious and substantial damage of plaintiff, and prays for a temporary injunction to be issued instantly putting a stop to the acts charged specifically, naming them, and that on final hearing the injunction be made perpetual with prayer for general relief.

To this petition defendants interposed a plea in abatement alleging that the institution of suit was not authorized either by the members of the association at a regular or special meeting thereof, or by its duly elected executive committee or board of directors acting during a recess, but was instituted and prosecuted in the name of the association by a few individual members of such corporation without lawful authority so to do. As a further ground of abatement of the suit, it was alleged: That the suit was instituted by certain members of plaintiff corporation for the sole purpose of determining their right to the offices claimed by them, in the said corporation or association; that some of defendants themselves, naming them, are the duly elected members of the executive committee, Miss De Zavala being chairman, and other of said defendants, naming them, are, respectively, the duly elected secretary, assistant secretary, treasurer, and first vice president of the association, the said executive committee being under the constitution and by-laws solely authorized to manage and control the business affairs of the corporation in the interim between meetings of the members thereof; that the suit is merely a contest for the offices of the corporation by plaintiffs; and that they have no right to prosecute the same in the name of the corporation by injunction, as set up in the petition, but should be required to do so in an action at law in their individual names. And upon the grounds set out they pray that the suit be abated. Defendants further answered by general demurrer and special exceptions, and urged the same grounds as set

out in the plea in abatement, and by special answer set out the history of the controversy, and alleged: That at the annual meeting of the Daughters of the Republic, held on April 19 and 20, 1907, in the city of Austin, the following were elected as officers of said association: Mrs. Anson Jones, president; Mrs. Wharton Bates, first vice president; Mrs. J. J. Swan, second vice president; Mrs. Laura W. Wearington, third vice president; Mrs. Jessie Briscoe Howard, fourth vice president; Mrs. Sara D. Adams, fifth vice president; Mrs. Sara D. Adams, historian; Miss Mary Briscoe, secretary; Miss Annie Hume, assistant secretary; Mrs. Lucy Sherman Craig, treasurer. That the executive committee or board of directors of said corporation were duly elected at the annual meeting of said corporation held in the city of Austin on April 19 and 20, 1907, are Miss Adina De Zavala, chairman; Mrs. Wharton Bates, Miss Bettie Ballinger, Mrs. L. D. L. Tuttle, Mrs. W. J. Redding, Mrs. Willard Simpson, Mrs. Alminta B. Abney, Mrs. Sue S. LeCand, Mrs. W. E. Craddock, Miss Nellie Lytle, and Miss Mary Briscoe. It is further alleged that after said Austin meeting was called to order, and during the proceedings of the meeting, some of the ladies at whose instance this suit was brought, becoming dissatisfied with the proceedings, attempted to adjourn the meeting and bolted the convention and left the hall; that the meeting continued in session and transacted its business, and, among other business disposed of, it fixed the date for holding the annual meeting for the year 1908 in the city of Beaumont, Tex. The answer also alleges facts showing that those at whose instance the suit was brought were attempting to obtain control of the offices of the association and to manage its affairs in their own interest and for the purpose of diverting the Alamo property, from the uses for which it had been purchased and to which it had been dedicated, to commercial uses and to purposes of profit, against the will of the association and a majority of the members thereof, and that such efforts upon their part had precipitated the controversy over the officers of the association which had occasioned the filing of the suit. All of which was generally and specially denied by plaintiff in a supplemental petition, the further allegations of which need not be here set out.

A temporary injunction in terms, as prayed for, was granted. The court overruled the pleas in abatement and upon trial, without the assistance of a jury, rendered judgment for plaintiff perpetuating the injunction. From the judgment defendants prosecute this appeal.

The fact of the incorporation of plaintiff for the purposes stated in the petition, and the material facts with regard to provisions of the constitution as therein stated, was not disputed. The only questions of fact arise out of the action of the association at its reg-

ular meeting in the city of Austin on April 19, 1907. We adopt the finding of the trial court that at the date of said meeting the following were the officers of the association: Mrs. Anson Jones, president; Mrs. Rebecca J. Fisher, first vice president; Mrs. Wharton Bates, second vice president; Mrs. Nannie H. Skinner, third vice president; Mrs. Edward K. Lewis, fourth vice president; Mrs. Stephen H. Darden, fifth vice president; Mrs. Nettie Houston Bringham, historian; Mrs. Chas. H. Milby, secretary general; Miss Belle Fenn, treasurer. Committee executive: Mrs. Marle B. Urwitz, Mrs. J. J. McKeever, Jr., Mrs. Cornelia Branch Stone, Mrs. Charles Milby, Mrs. Walter Gresham, Miss Emma K. Burleson, Mrs. M. Wheeler, Mrs. Jas. B. Dibrell, Mrs. Cone Johnson. And that, under the constitution, these officers held office until the succeeding regular meeting in 1908; the constitution providing for the election of officers biennially, which course has been followed since the creation of the corporation. This conclusion of the trial court is not challenged by appellants in their brief.

This meeting seems to have adjourned in a most unseemly row, precipitated by the unauthorized action of the first vice president, who not feeling physically able to preside over the proceedings of the meeting, and instead of yielding the gavel to the second vice president, who had the undoubted right to preside in such case, undertook, in the face of the constitution, to substitute another person as such presiding officer in her stead. The president of the association was not present, and, in such case, it was the duty and the right, under the constitution, of the several vice presidents to preside in their numerical order from first to fifth. The second vice president was present and claimed the right to preside, if the first vice president did not choose to do so, and in this right she was seconded by quite a number of the members. After a tumultuous session in the forenoon under the presidency of the first vice president for a part of the time and at other times of the substitute appointed by her, many members protesting and claiming that the second vice president should preside if the first vice president did not choose, or was not able, to do so, the meeting took a recess until 2 o'clock p. m. At this hour the second vice president called the meeting to order, but the first vice president immediately appeared, took the gavel, and turned it over to her substitute. The second vice president, seconded by many members, but less than a majority, still protested and still insisted upon the right of the second vice president to preside, and their right to have her preside, and undertook to appeal from the ruling of the chair, to no avail. There ensued great confusion. The trial court finds, and this finding is fully supported by the evidence, although there is much evidence to

the contrary, that the first vice president, who had at all times been in the hall, then assumed the chair, when some member offered a motion to adjourn sine die. The motion was duly seconded, and was regularly put to the association, and adopted; a majority of the members voting in the affirmative. The first vice president declared the motion carried, and the association adjourned sine die. There was no decision called for, and no appeal from the decision of the chair declaring the motion carried. There is much contradiction of the testimony on this point; but there was sufficient evidence to support the findings of the trial court, several of the witnesses testifying very positively in accordance with such findings, while others testified that the whole proceeding was under control of the unauthorized substitute of the first vice president. In such state of the evidence, this court is not authorized to disturb the finding of the trial court.

After such adjournment the first vice president, together with a majority of the members, left the hall, whereupon the second vice president and those supporting her remained. She assumed the chair, and the meeting thus organized proceeded to do business, finally electing a full corps of officers; the executive committee being the persons named as defendants in this suit. In 1908, adopting the finding of the trial court, the annual meeting of the organization was held at San Antonio under the call of the first vice president aforesaid, who, upon the death of the president in the meantime, assumed the office of acting president. At this meeting there was a full election of officers; the first vice president being elected president with a string of five presidents, a historian, a secretary general, a treasurer, and nine members of the executive committee, being the same persons claimed by appellee in its petition to constitute its officers. In April, 1908, as the trial court finds, those members of the organization who constituted the minority, and who remained in the hall at the Austin meeting, after meeting had been declared adjourned by the first vice president, met at Beaumont, presided over by the first vice president elected by them, after such adjournment. Both of these branches of the association had elected the same person as president, who died, after the split. At this meeting at Beaumont a full set of officers was elected, consisting of a president, who was the second vice president at the Austin meeting, a full corps of vice presidents, and all other officers, including an executive committee, who are the persons named as defendants in this suit.

There were thus two separate and independent organizations; each claiming to be the only genuine one. The officers elected at the San Antonio meeting are claimed by appellee to be the "regular officers" of the corporation, and are in possession of the

several offices with the perquisites and incidents thereof, including the books, records, and other property of the corporation.

We adopt the finding of the trial court to the effect that the officers elected by the minority of the members at the Austin meeting in 1907, and subsequently at the Beaumont meeting, are doing and have done the several acts charged against them by the petition in the way of interference with the management and control, by those claimed by appellee to be its regular officers, of the business affairs and property of the corporation, which action it is the purpose of the suit to enjoin and restrain.

Prior to the bringing of this suit, the chairman of the executive committee (as claimed by appellee), by correspondence with the other members of the committee, except two of them, one of whom was ill and the other absent, and procured the authority of each to institute this suit in the name of the corporation; but there was no regular meeting of such committee for that purpose until after the suit was filed. Subsequently there was a regular meeting of the executive committee, which ratified the institution of the suit, and the form and manner in which it was brought.

The constitution of the association provides that the vice presidents shall preside, in their numerical order, in case of the absence of the president or her inability to act.

By their first assignment of error appellants challenge the action of the court in overruling their exceptions to the jurisdiction of the court, upon the grounds, as stated in the several propositions under the assignment: First, that the suit not having been authorized by the members of the association in regular meeting, nor by the action of the executive committee at a regular session thereof, was unauthorized; second, that the authority for bringing the suit was not stated in the petition; and, third, that in so far as the subsequent ratification of the institution of the suit by the executive committee at a regular meeting thereof is concerned, the same was not pleaded, and cannot be considered.

As to the second ground of the objection, we are of the opinion that in this, as in the case of a suit by any other private corporation, it is not necessary to allege in the petition that the suit is authorized by the board of directors or other governing body of the corporation. Appellants cite no authority in support of this contention to the contrary.

Passing by the contention that the suit being shown affirmatively to have been brought without authority of the executive committee by action of the committee at a regular meeting thereof, but only by the individual action of the members authorizing the same, which under the authority of *Fayette v. Krause et al.*, 31 Tex. Civ. App. 509, 73 S. W. 51, may be well taken (see, also, 3 Thomp-

son, Corp. §§ 3905-3908; 7 Thompson, Corp. § 8476), we are of the opinion that the subsequent ratification of such action by the committee at a regular meeting in proper form operated to legalize such action from the beginning. *Brown v. McConnell*, 56 Tex. 232; 7 Words & Phrases, tit. "Ratification," and cases cited. This is not, in fact, questioned by appellants, but it is insisted that in order to avail of such ratification it must be pleaded. We do not think this is correct. 16 End. Pl. & Pr. p. 904, and cases cited.

The second assignment of error is as follows: "The court erred in holding as a matter of law that this suit, which was really a contest over the offices of the Daughters of the Republic, between the members of said organization, was properly instituted in the name of the corporation." Under this assignment the proposition is stated that "a bill in equity for an injunction, seeking to restrain those acting and claiming to be officers or directors of a corporation, which has for its real and only purpose the determination of the right to such offices, as between several claimants, cannot be maintained."

With this question, as it arises upon the facts of the present case, we have had much difficulty. The following cases cited by appellants seem to tend to support the proposition as it applies to this case: *Carmel Gas Co. v. Small*, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476; *Jenkins v. Baxter*, 160 Pa. 199, 28 Atl. 682; *Hughes v. Parker*, 20 N. H. 58. But we think there is a clear distinction between them and the present case. The rule is thus stated in *Pomeroy's Equity Jurisprudence* (volume 5, § 307): "A court of equity will not primarily take jurisdiction to determine the legality of directors, or to remove a director who is in possession of the office. The court will inquire into the regularity of the election, or the right of the person to the office only when the question arises incidentally and collaterally, in a suit of which the court has rightful jurisdiction on other grounds." We think the facts of this case bring it within the latter clause. Those persons chosen as officers at the San Antonio meeting are in full possession of their respective offices, and are in full discharge of the duties, and in full enjoyment of the privileges thereof. They are unquestionably the de facto officers of the association. The court has found that they are the de jure officers as well, but we will let that pass. They have no need to sue for their respective offices, nor can it be said that the defendants have intruded into or usurped those offices, so as to authorize a quo warranto proceeding under the statute. They are, however, by their acts interfering with the management of the business affairs of the corporation to its manifest detriment, and in such a manner as to justify an appeal to the equitable remedy of injunction for protection. When, in answer to such appeal, the defendants seek to

justify their acts by their claim that they have legal right to do what they are doing, as officers of the association, this issue must be determined, and the court, having acquired jurisdiction to interfere by way of injunction to protect the interest of the corporation, may, as incidental to that, determine whether defendants have the right as officers of the corporation to do what they are doing. The corporation has an interest in the subject, entirely independent of the individual rights of the rival claimants of the offices, that is, the right that its business be not obstructed, but be carried on in accordance with the purposes of its charter, and cannot be required to submit to this state of confusion in its business affairs, until the matter of who constitute de jure its officers can be settled in a private litigation between them. These views are, we think, sustained by authority. *Chicago Macaroni Mfg. Co. v. Boggiano*, 202 Ill. 812, 67 N. E. 17; *Johnston v. Jones*, 23 N. J. Eq. 216.

The second assignment of error and the several propositions thereunder are overruled.

There is no merit in the third assignment of error, which, with the several propositions thereunder, is overruled.

The fourth assignment of error challenges the conclusion of fact of the trial court that the first vice president was at any time in charge of the annual meeting at Austin in 1907. The fifth assignment assails the judgment as contrary to and unauthorized by the evidence, and also the conclusion of law of the trial court. The ground of objection urged is that the court concluded as a matter of law that the appointment by the first vice president of a substitute, to preside over the meeting, was void, and that any business done while she was so presiding was null and void, and the great weight and preponderance shows that, if the second vice president was not presiding at the time of the attempted adjournment, the said substitute was so presiding, or attempting to preside, at that time. These two assignments, with the propositions thereunder, present the question of the legality of the adjournment of the meeting at Austin, immediately after the meeting reconvened after noon.

If it were true, as stated by appellants, that the finding of fact referred to, by the trial court, was against the great weight and preponderance of the evidence, we would probably be thereby authorized to set aside such finding, and substitute our own; but we do not agree that the finding is of this character. All of the findings of fact, of the trial court, with regard to what occurred at the meeting in question, appear to us to be well supported by the testimony of witnesses, especially as to the fact that the first vice president was presiding over the meeting, in person, when the motion to adjourn was made, that she herself put the motion, declared the result, and, in accordance with the

sense of the majority then present, declared the meeting adjourned sine die. Appellants seek to avoid the effect of this evidence by the contention that after the first vice president had once declared her inability to preside, and had installed her substitute, she forfeited her right to further preside at that meeting. To this we cannot agree, and it appears from all of the testimony that this was not the opinion of the second vice president, and those acting with her in resisting the arbitrary and unwarranted conduct of the first vice president. This testimony shows that only the right of the substitute to preside was resisted, and that whenever she was ousted and the first vice president appeared her right to preside was immediately conceded. It may be, as contended by appellants, that the first vice president was only intent, not upon presiding herself, but in compelling submission to her desire that the person chosen by her and not the one named by the constitution should preside in her stead; but amid all the bewildering confusion the fact stands out, as found by the court, and well supported by the evidence, that the first vice president was in the chair, gavel in hand, when the motion to adjourn sine die was made, that the motion was regularly made and put by her to the members, that a viva voce vote was taken thereon, and that the first vice president declared that the result was in favor of such adjournment, and thereupon declared the meeting adjourned sine die, there being no call for a decision and no appeal from the ruling of the chair. This finding is absolutely conclusive of the legality of the adjournment, unless we concede appellants' contention that the first vice president, after having once installed her substitute, had no right thereafter to return to the chair and resume her authority. In this we think appellants are clearly wrong. And it is not to be forgotten that the first vice president had with her a majority of the members present at the meeting. We do not mean by this that a majority, no matter how large, could deprive the minority of their constitutional right to have the second vice president preside, in case of the absence or inability of the first vice president; but they had the right to adjourn the meeting, provided it was done in a proper manner.

The first vice president in her testimony naively stated that she thought the circumstances justified her in setting aside the provision of the constitution in question. In this she was greatly in error, and the minority had a perfect right to resist her unlawful action; but this does not affect the essential fact that, at last, and in an entirely constitutional way, the meeting was adjourned sine die, which settles the question of who are the de jure officers of the association in favor of appellee's contention.

The fourth and fifth assignments of error

must be overruled, with the several propositions thereunder.

The other assignments of error do not require further discussion, but are severally overruled.

We find no error in the judgment, and it is affirmed.

Affirmed.

WALKER et al. v. THORNTON et al. †  
(Court of Civil Appeals of Texas. Dec. 8, 1909. Rehearing Denied Jan. 12, 1910.)

1. APPEAL AND ERROR (§ 1097\*) — SUBSEQUENT APPEALS—FORMER DECISION AS LAW.

The opinion of the Court of Civil Appeals in an action to construe a will which has received the approval of the Supreme Court is the law of the case on a subsequent appeal in an action to construe the same will.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.\*]

2. WILLS (§ 634\*) — CONSTRUCTION — VESTED INTERESTS.

Testator, after making several bequests, bequeathed the remainder of his estate in trust for the children born and to be born to his son and his daughters until said children, respectively, became of legal age. *Held*, that the interests of the children of any one of testator's children became vested when the first child entitled to receive a share became of age, and that, on the death of any of the minor children after the estate vested, the interest of such deceased child would descend to the heirs of such child in accordance with the statute of descent and distribution, and the fact that the title while it remained in the trustees was only an equitable one would not prevent it from vesting.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 634.\*]

3. WILLS (§ 628\*) — CONSTRUCTION — VESTED INTEREST.

When the time of division of an estate devised is of the substance of the gift, it is contingent, but, when the time is mentioned only as a qualifying clause of payment or division, it is vested.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1460; Dec. Dig. § 628.\*]

4. WILLS (§ 707\*) — PROBATE—FEES.

Where an action to construe a will is an attack upon a former opinion of the appellate court construing the same will, it is not error to refuse to make the plaintiff's attorney's fee a charge upon the fund devised by the will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 707.\*]

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by Charlotte Walker and others against Lucy T. Thornton and others for a construction of a clause in the will of James T. Thornton, by which the testator devised the remainder of his estate to his son and daughters and a brother, in trust for the children born and to be born of the son and daughters until said children, respectively, become of legal age. From a judgment in favor of plaintiffs, defendants appeal. *Affirmed*.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
† Writ of error denied by Supreme Court.

Ogden, Brooks & Napier and Clinton G. Brown, for appellants. William Aubrey and Hicks & Hicks, for appellees.

JAMES, C. J. This suit is by the trustees of the will of James T. Thornton with respect to the property embraced in the residuary clause of said will, and by them as the next friends for William Thornton and Woodford Thornton, minors, against Minnie Tobin and her husband, John W. Tobin, and Charlotte Walker and her husband, Geo. P. Walker, and Lucy T. Thornton, for the purpose of having the court construe clause 13 of the will, in order to determine what became of the shares of James T. Thornton and Lucy Thornton, two of the children of James S. Thornton and grandchildren of the testator, who died while minors, after Minnie Thornton, the first child of James S. Thornton, became of age.

The trial court held that the one-fifth of the residuum of the estate (the testator's son, James S. Thornton, being one of his five children) vested in the children of James S. Thornton at the time his eldest child, Minnie, became of age, to the exclusion of any child born after that time; that Minnie was then entitled to receive her share, and that the others were entitled to receive theirs from the trustees, as they, respectively, came of legal age; and that, in the event any one of these died while a minor, the share of such deceased member descends in accordance with the statute of descent and distribution. The said two children of James S. Thornton, viz., James T. Thornton and Lucy Thornton, having been of this class, and having died during their minority, after Minnie became of age, the court decreed accordingly that their shares passed by the law of inheritance, and their heirs and the shares of such heirs were decreed to be as follows: To Minnie Thornton, now Tobin, and to Charlotte Thornton, now Walker,  $207/1008$  of the fifth appertaining to the children of James S. Thornton each, which they are now entitled to receive; to William Thornton and Woodford Thornton, who are still minors, each  $210/1008$  thereof as a vested right and with the right to receive same on becoming of age, respectively, and Lucy Thornton, the widow of James S. Thornton,  $174/1008$  thereof, which she is now entitled to receive.

The will is sufficiently set forth in a former opinion of this court. *Thornton v. Zea*, 22 Tex. Civ. App. 509, 55 S. W. 798, by which opinion it was held that under said clause the one-fifth of the residuum of the estate devised to this set of grandchildren vested in them all at the time that Minnie, the eldest child, became of age. That opinion was delivered in the construction of the will, and particularly of said clause 13, but all the circumstances had not then arisen, and a construction of the will was not expressly obtained, in reference to what would be the proper disposition to make of the share of

one of the minor grandchildren, who should die while yet a minor, after the period of distribution or division as fixed by the decision in that cause.

Appellant in her answer claims that, such a child so dying, its interest was prospective only, and had not vested, and did not upon its death go to the heirs under the laws of descent, but remained in the trust estate held by the trustees for the children of James S. Thornton; that under the will and clause 13 thereof its interest did not vest and would not have vested before it reached 21 years of age; that as Charlotte Walker, one of the children of James S. Thornton, is now of age, and as there are now only four of the children living, the said Charlotte Walker is now entitled to one-fourth of the residuary estate held by the trustees for the children of James S. Thornton. The position of appellant, therefore, is that the minor children of J. S. Thornton who have died did not under the will acquire title to any part of the property that their inherited title would not have vested in them until they, respectively, arrived of age; that the intention of the testator was that each set of his grandchildren, and his grandchildren only, should have and enjoy the part of his estate set apart to the children of James S. Thornton; and that upon the death of any grandchild of that set before reaching the age of 21 its share should remain in the hands of the trustees for the benefit of those remaining. The appellee's position is that the interest of the deceased grandchildren had become vested in them, and that such interest descended as the law provides in cases of intestacy, and appellee further pleaded that the question at issue here was so adjudicated and settled by the judgment in the former cause. We find from the record, which contains the judgment of the district court and that of this court on the former appeal that the question as to how the interest of such minor decedent would pass, was not there answered in terms, nor considered. The conditions that go to present this question did not exist as they now do, and it would have been judicially inadmissible for a court to undertake to answer it then. The deaths of these two grandchildren have occurred since that decision.

Under appellant's assignments of error from 1 to 7 the following is the proposition: "As James T. Thornton and Lucy Thornton, children of James S. Thornton, deceased, and grandchildren of the testator, James T. Thornton, deceased, died while still minors, the shares in the testator's residuary estate held for them by the trustees and to which said minors would have been respectively entitled had they respectively lived to become of legal age never vested in them, but under the terms of the will remained a part of the trust estate, to be held by the trustees for such of the children of that class as might become of legal age."

Our conclusion concerning the will in this particular is as follows: As was held in the former opinion, the devise to the children of James S. Thornton was a contingent one at the death of the testator, and remained so until the period of distribution, when it became resolved into a vested right in them, and the period of distribution or division arrived when Minnie, the eldest child, reached her majority. We have in this record the will and all the facts, which the opinion in the former cause shows were before the court at that time, and the decision in that cause, having received the approval of the Supreme Court, is an unmistakable and authoritative declaration of what the law is, which is applicable to the same question in this case. In so far, therefore, as the position taken by appellant is that the two deceased children had not acquired a vested title at the time of their death, it cannot be sustained.

The fact that the will placed the legal title to the property in the trustees and it remained in the trustees makes no difference, for it is clear that the testator intended the devise to be to them merely for the benefit of the grandchildren, and it was in reality a devise to the latter. There can be no question, seriously made, that an equitable title in property may be the subject of a vested right, as well as a legal title. *Williams v. Williams*, 135 Wis. 60, 115 N. W. 342. We consider the opinion in *Thornton v. Zea* of itself a sufficient authority on this question. The rule for determining whether a bequest or devise is a vested or contingent one is that, when the time of division is of the substance of the gift, it is contingent, but, when the time is mentioned only as a qualifying clause of payment or division, it is vested. *Crawford v. Engram*, 153 Ala. 420, 45 So. 584; *Hall v. Ayers*, 105 S. W. 911, 32 Ky. Law Rep. 288. The will now in question disposes of a share of the remaining property to the trustees for the benefit of children of James S. Thornton, and the period of distribution; likewise, the provision for the trustees withholding from the minors their shares were simply incidental to the purpose of the testator, to give the property to the grandchildren. We think without doubt that, on the attainment by Minnie of her majority, the equitable title to the property became a vested title in the grandchildren, the children of J. S. Thornton, subject only to the retention of the property and its accumulations in the hands of the trustees in the case of those under age.

We search this will in vain for any expression of the testator directing how, on the death of a minor grandchild, its interest shall pass. In the case of the testator's children, he did see fit to provide that upon the death of any of them without issue living such portion should go to his other children, but, when it deals with what he disposes of to his grandchildren, his will on

this subject is silent. Presumably he would have made a like direction, if he intended, or looked far enough into future contingencies to contemplate, such a thing as a similar disposition in the case of grandchildren. It is true he intended the property for his grandchildren, and he so disposed of it primarily, but the contingency of the death of one of them while a minor he did not provide for, and for the court to hold that the interest of such one to pass to the survivors of that set of grandchildren would be to that extent making a will for the testator. The above disposes substantially of the assignments from 8 to 12 inclusive.

The thirteenth assignment of error is that the court erred in not decreeing that the defendants Charlotte and George Walker be allowed a reasonable sum for attorney's fees expended in this suit, and that such allowance be paid out of the property and funds in the hands of the trustees set aside to the children of James S. Thornton. The proposition is: "This is a bona fide suit for construction of the will brought by the trustees, and Charlotte Walker, being a beneficiary who takes under the will, is entitled to reasonable attorney's fees for asserting her claims under the will." The contentions made by appellant in this case are based upon the theory that the grandchildren did not, upon the eldest child of James S. Thornton coming of age, acquire a vested title, and this contention is an attack upon the former opinion of this court, which plainly holds that they acquired a vested interest. The legal consequence of such rule, there being no language in the will from which an intent on the part of the testator is discovered to direct otherwise, is that upon the death of these minors their interest passed by the law of inheritance. The effort of appellant in this case was, we think, to combat the manifest effect of what was previously held in reference to the minors' estate being a vested one. We conclude the court did not err in refusing to make appellant's attorney's fee a charge upon the fund.

The fourteenth and fifteenth assignments are not propositions of law in themselves, and no proposition under them is advanced in the brief. They are not entitled to consideration. Evidently their purpose is directed to the plea of *res judicata*. There is nothing in the decree which makes it appear that the judge, before whom the case was tried, considered the matter of *res judicata*. The decree appears to construe the will in connection with the testimony presented, as an original proposition.

The writer takes occasion to state that upon the copy of the former opinion of this court, as it appears in this record, there was a notation that he was disqualified and did not sit. There is no such notation in connection with the opinion as it appears in the reports. The writer knows of no reason for his disqualification in that nor in this case,

and has therefore proceeded to discharge the duty that has in the regular course come to him.

**Affirmed.**

**SAN ANTONIO & A. P. RY. CO. v. MIDDLEBROOKS.†**

(Court of Civil Appeals of Texas. Dec. 11, 1909. Rehearing Denied Jan. 6, 1910.)

**1. MASTER AND SERVANT (§ 279\*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANTS—EVIDENCE.**

In an action for injuries to a brakeman, evidence *held* insufficient to show negligence on the part of the engineer and fireman causing the injuries.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 279.\*]

**2. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.**

In an action by a brakeman for personal injuries, whether he was negligent *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

Appeal from District Court, Lavaca County; M. Kennon, Judge.

Action by Edgar Middlebrooks against the San Antonio & Aransas Pass Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Patton & Schwartz, for appellant. Paulus & Ragsdale and R. B. Allen, for appellee.

**REESE, J.** This is an appeal from a judgment of the district court for \$6,500 in favor of appellee, as damages for personal injuries alleged to have been received by him by having his foot caught and crushed between the couplers or drawheads of two cars, while he was engaged in the performance of his duties as a brakeman in the service of appellant. A motion for a new trial was made and overruled.

The case, as stated in the amended petition, is that the train on which plaintiff was a brakeman was at the town of Moulton, at which place it was necessary to set out a water-tank car, on which plaintiff was riding, and which was next to the engine. Plaintiff, for this purpose, uncoupled the car from the car next to it, and signaled to the engineer and fireman to go forward with the engine and tank car, in order that this car might be placed on the switch, where it was to be left. After uncoupling the car and giving the signal, plaintiff discovered that he had not disconnected the air hose. Plaintiff then turned the air cock on the air hose, and in getting back to his proper place on the tank car the remaining portion of the train which had been uncoupled continued to move towards the car on which plaintiff was riding, bumped up against the

same, and caught his foot and crushed it. It is alleged: That the engineer only partially obeyed plaintiff's signal to go ahead, and only went ahead a short distance and stopped. That if he had kept on the uncoupled part of the train would not have run against the car on which plaintiff was riding. Appellant answered by general denial and general demurrer, and specially excepted that the allegations of the petition show that the accident was caused by plaintiff's own negligence, which was also specially pleaded as a defense. The court overruled the demurrer, and upon a trial with the assistance of a jury there was a judgment for plaintiff as above stated.

We conclude that the assignments of error to the ruling of the court upon the demurrer should be overruled.

The assignments of error as to the insufficiency of the evidence to support the verdict and judgment, and that they are without evidence to support them, must be sustained.

The only evidence as to the manner in which the accident occurred, and the movement of the cars, is the testimony of appellee and the fireman on the engine. The following is the testimony of the appellee as to the manner in which the accident occurred, and the material facts connected therewith:

"I was a brakeman at the time of my injury on the Sap Railroad. I was working as a student brakeman. The duties of a student brakeman are to follow the instructions of the conductor; whatever he says he is to do it. I received instructions what to do on that trip. The work we were to do at Moulton that day was to unload local and set a car out. We were traveling south from Cameron going towards Yoakum, the end of the division. There was a car to be set out at Moulton, and in order to set that car out it was necessary for a brakeman to uncouple the cars and make a flying switch and drop the car in the siding. The car to be set out at Moulton that day was a flat car with two water tanks on it. A flat car is about 8 feet wide and 28 feet long and is attached to other cars by coupler at each end. The coupling pin is drawn by a lever from one end of the car to the coupling when a coupling pin is desired to be drawn or when a coupling is desired to be made. That lever is a piece of iron about 3 feet in length and then makes a kind of an elbow with about a foot for a handle, and that is to lift the coupling pin and uncouples the car. This lever is right even with the decking of the car right at the top of the car. In uncoupling a coupling it can be made from the ground, and it can also be made from the top of a flat car. After you have made an uncoupling of a car from the balance of the train, and the air hose has not

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

been disconnected, in the event of a separation of that car from the remaining portion of the train, the air blows out of the pipe and wastes the air in the engine; the engineer loses his air. That air can be saved by turning the angle cock. The angle cock is situated sort of right under one side of the coupler, below and to one side of the coupler about three inches. That angle cock is a kind of a trick you turn just like a faucet, only you can just turn it one way and let the air go through, or you can turn it back and it will be cut off. The handle of that faucet is about four or five inches long. You can be on the car or on the ground either one to make that uncoupling, to turn off the angle cock. I uncoupled the car in this instance at Moulton, and I was on the left-hand side of the train going south at the time I uncoupled it. I gave the go ahead signal to the fireman. There was nothing left undone at the time I gave the signal that should have been done by me prior to signaling the engineer except to uncouple the air hose. I knew what would happen with the engineer and the air in his train if it was permitted to be pulled apart rather than to be cut off. After I discovered the fact that the air was not uncoupled, I run down and turned the angle cock to save the air in the water car and the engine, and it took me about two seconds to do that. I did it as quickly as I could. I succeeded in cutting off the air. My signal had been obeyed. I know that because the car separated, the one that I was on, from the rest of the train. I am positive of that fact, that they separated. In my judgment about 18 inches to 2 feet space existed between the drawheads. When I made this uncoupling, the train had almost stopped; I couldn't tell whether it had stopped or not. It had almost come to a stop. I caught the pin and gave him the signal to go ahead, and that signal was obeyed. My foot got caught in reaching down to turn the angle cock to save the air in the engine and the water car. I put my foot in the coupler to brace myself, and he stopped the engine, and the other cars rolled down on me and caught my foot. I put my foot in there as a brace to rise up from off my knees, and the other car ran down and caught my foot while I was in that position.

"I had been working for the railway company at that time as a student brakeman since January 16, 1907; I had made one run for pay prior to that time, on the 14th of February, and this accident was on the 27th of February. I have no idea how far the engineer went with the train before he stopped. At the time I started to get up on my feet at the place I did, with reference to the signal I had given, I thought the engineer was going on; I believed then he was going on. The fact that the cars were separating is what led me to that belief. If the engineer had continued and obeyed my signal

and gone on, my foot would not have been caught by this train from behind, because I would have got up if he hadn't stopped his engine. I would have been up in one more second or more. I was not on the ground. I was on the car. Had he moved forward with the car I was on, it would have been on the side track. It would have been going away from the rest of the train and been cut loose from the engine. The duty of a fireman in connection with signals given him by brakemen is that he has got to obey the signals the same as the engineer, and he has to give them to the engineer. When he sees a signal, he has to communicate it to the engineer. At the time of my injury, I had been in the employment of the San Antonio & Aransas Pass Railway Company since the 16th of January, and this occurred on the 27th of February. This was the beginning of my service with the railway company in that department. I had been in the employ of the company some time before that as a car repairer, about 16 months before. The character of my services as car repairer was looking after the cars and fixing them up. I had to fix all broken parts or disordered parts of them and was familiar with the construction of cars. I know all about these couplers. They frequently had to be repaired while I was in that service, and I know them thoroughly. I had been 16 months in that particular service and knew how the cars were fastened and unfastened. It was a flat car with two water tanks on it that I was on; don't know exactly the size of the tanks. They were for the purpose of transporting water, and I guess they would hold about 1,500 gallons each. They were, I guess, about 6½ or 7 feet across the bottom, and the car was about 8 feet broad.

"I didn't attempt to couple these cars by getting down off the car. I said it was as convenient and safe to couple them on the top of the car as to get down and couple them. This coupler is an instrument invented to couple or uncouple a car without going between them. I did not have to get down between the cars because that is an invention to prevent that necessity; I also could have released this cock, which kept the air, from the bed of the car, and I did do it from the bed of the car. It is necessary, in order to separate the cars, to release both of them. They would tear apart if you did not release both of them. It is the duty of brakeman to uncouple and release them both. In properly uncoupling a car you would have to turn the angle cock first. I accidentally forgot to do that and released the coupler first, and afterwards discovered that I hadn't released the angle cock, and I did that afterwards. The proper way would have been to release the angle cock and then uncoupled the coupler. The air, the steam that fills these pipes, it is applied to the brakes in some way so as to help in braking or stopping the train, and it

is connected with the engine by pipes that are joined together with these couplings. They run the length of the train. When they are wanted to be uncoupled, they turn the angle cock to keep this air or steam from escaping, and then you uncouple the car. I forgot to do this at the time, and I discovered that I had not turned the angle cock so as to save the steam, and I got down to do that, and when I did that I went to get up and put my foot between the couplers and got it cut. I got my foot caught by this other train, that I had uncoupled, coming up on me. They were separated about 18 inches, the drawhead of the car. They could not have been more than that, or they would have turned loose the air. I said then they had about come to a standstill. He pulled his engine up, and the cars moved down on it. A kind of a grade or slack of the train was what pushed the cars down on me. I guess there was not a grade at the depot such as a train of cars would run away on at that point. They must have had some impetus from the engine to have moved. It could not have moved up from the air hose. The train had not stopped at the time.

"I gave that signal (indicating by wave of the hand); that means to move on. There wasn't anything the matter with my eyes to keep me from seeing that that train was moving. I can see that that pencil is moving there. I wasn't paying any attention to the car moving, the one that was coming back; I was on the car in front. I was not looking back towards the work I was doing; I was turning the angle cock and was looking where I was working. I was working down there between those two cars. I was turning the angle cock when he stopped the train. I didn't reach down between the train and look way off the other way. I was looking down towards the ground.

"I had a book of rules furnished me, and in that was a rule requiring me not to go between cars for any purpose, and I was familiar with those rules. I understood the coupling of cars because I had worked on the construction of cars. I knew if the cars came together where I put my foot that they would catch it, and I knew it would hurt it pretty bad, likely mash my foot. I put my foot there in getting up, and if the engineer had kept going on it wouldn't have hurt it. I had uncoupled before I realized the air hose was not uncoupled and discovered that. In a hurry I jumped down to do that, and in getting up I put my foot there without thinking. I knew it wasn't any proper place to put my foot. I knew that if it came together while my foot was there that would crush my foot. I did that inadvertently and unthoughtedly. My body never left the top of the car in making this coupling. The only portion of my body that was below the top of the flat car was that portion of my foot which extended down to the coupling. I put my foot

down there for the purpose of bracing myself to get up, and I did that believing that the car upon which I was riding was going forward, and it was going forward."

The fireman testified: That before getting to Moulton there is a long downgrade, and then an upgrade; that the momentum acquired by rolling down the long grade carries the train to the station; that upon the occasion in question the tank car was to be set out on a side track at Moulton; that this was done every other day; that in doing this the train is stopped at a certain point, to allow the uncoupling to be done, at which time the engineer "blows out" his engine, which requires about two minutes, when the tank car is set out on the siding by means of a flying switch. He testified: That at the time of the accident he saw no signal from appellee (who was on the same side of the train that the fireman was, the fireman being in his cab on the left-hand side of the engine, and appellee on the far end of the tank car, on the left-hand side); that he was not expecting any signal to stop at that place, as they had not reached the regular place to stop and uncouple; and that the train had not, in fact, stopped until the stop made which caused the accident, as stated by appellee.

None of this testimony of the fireman is contradicted by appellee, except his statement that he had not received the go ahead signal which appellee gave, and did not move ahead in obedience to this signal. It is not contended that the engineer saw or could have seen this signal; but the whole case, as to the negligence of appellant, is based upon the fact that the fireman saw the signal, and, in obedience thereto, moved off with the engine and tank car, causing them to separate from the balance of the train and then came to a stop, whereby the balance of the train, unexpectedly to appellee, ran up and caught his foot in the coupling.

Assuming that appellee's testimony is true in every particular, as to the facts testified to by him, his testimony that the fireman saw and partly obeyed his signal is his conclusion from the fact that the engine and tank car attached separated from the balance of the train, to the extent of 18 inches, the entire train not having come to a standstill, but continued moving at the time of the uncoupling, and at the time he put his foot in the coupling, after turning the angle cock of the air hose. From the statement that it would have taken him only about two seconds after giving the signal to turn the angle cock and get back to his position of safety on the car, it is apparent that the engine moved only a few feet after the signal was given. The separation of the car for that short space could and would naturally have followed the uncoupling of the train from the engine and tank car, and this fact affords no basis for the conclusion drawn therefrom by appellee that the engine had

moved forward in obedience to his go ahead signal. There was no necessity for appellee to have done this uncoupling before the train was stopped for this purpose, and it does not appear that the fireman had any reason to suppose that he would do so, or any occasion to be on the lookout for signals at that time and place. As we have said, the entire case as to the negligence of appellant rests upon the fact that the signal was seen and partly acted upon, inducing appellee to think that the engine would go ahead and the cars would continue to separate. We think that the conclusion of negligence on the part of the engineer and fireman cannot be drawn from this testimony.

Upon another ground we think the evidence as to negligence fails. According to appellee's testimony, there was no necessity for him to place himself in a position where he could have been injured by the cars coming together. He uncoupled the cars from his place on the tank car by means of a device provided for that purpose. Before doing this it was his duty to disconnect the air hose. Not only this, but in disconnecting the air hose and turning the angle cock, after having uncoupled the cars, both parts of the train still moving, and the distance between the cars being 18 inches, or at most not more than 2 feet, he placed his foot in the coupler of the car he was on. He testified that he did this without thinking, "Inadvertently and unthoughtedly." How can it be said that such a result, or any like result, or any injury of any kind to anybody, could have been reasonably foreseen as likely to occur from the moving forward of the engine a few feet, and then stopping, conceding that the fireman saw the signal and did partly obey it, as claimed by appellee? Without this there could not be actionable negligence.

It might be seriously questioned whether the act of appellee in the circumstances did not constitute contributory negligence, as a matter of law; but we are of the opinion that this was a question for the jury. We are, however, of the opinion that there is no evidence to support the verdict, and that the jury should have been instructed to return a verdict for defendant. It appears conclusively to us, from appellee's own testimony, that this is simply an unfortunate accident, lamentable in its consequences to appellee, but for which no blame can attach to the persons operating the engine. We have not referred to the contradiction between the testimony of appellee and previous statements made by him, as to the manner in which the accident occurred. That was a matter for the jury. The evidence seems to have been fully developed, and we can see no good reason for remanding the cause.

The judgment of the trial court is reversed, and judgment is here rendered for appellant. Reversed and rendered.

**ERIE CITY IRON WORKS v. NOBLE et al.**  
(Court of Civil Appeals of Texas. Dec. 13, 1909.)

**1. SALES (§ 437\*)—BREACH OF WARRANTY—SET-OFF IN ACTION FOR PRICE—EXTENT OF RECOVERY.**

A buyer who, in an action for the balance of the price, pleads breach of warranty and damages therefor, may not recover the partial payment made on the delivery of the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1256; Dec. Dig. § 437.\*]

**2. APPEAL AND ERROR (§ 172\*)—QUESTIONS REVIEWABLE — QUESTIONS NOT RAISED IN TRIAL COURT.**

Where plaintiff did not present to the trial court his right to recover attorney's fees, the court on appeal could not take the matter of attorney's fees into consideration in considering the question of the excessiveness of a verdict for defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1070, 1074; Dec. Dig. § 172.\*]

**3. DAMAGES (§ 157\*)—ISSUES—RIGHT TO INTEREST.**

Interest may be allowed by way of indemnity as a part of damages for breach of contract, where the amount claimed in the pleading praying for general relief is laid in a sum sufficient to cover the loss at the time of the accrual of the cause of action and interest thereon from that date to the time of trial; but where there is no prayer for interest, or where the damages laid do not include interest in addition to the specific damages claimed, there can be no recovery of interest.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 438; Dec. Dig. § 157.\*]

**4. TRIAL (§ 260\*)—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THE CHARGE GIVEN.**

It is not error to refuse instructions covered by the main charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

**5. EVIDENCE (§ 142\*) — SIMILAR FACTS — VALUE.**

In an action for breach of contract to install a pumping plant on a rice plantation, resulting in the loss of rice crops, evidence of the amount and value of crops raised by a third person on similar land some 30 miles distant is admissible to show what the yield on plaintiff's land would probably have been had the pumping plant afforded a sufficient supply of water for irrigation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 421; Dec. Dig. § 142.\*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by the Erie City Iron Works against W. C. Noble and another. From a judgment for defendants, plaintiff appeals. Conditionally affirmed.

Lane, Wolters & Storey, for appellant. Hogg, Gill & Jones, for appellees.

McMEANS, J. W. C. Noble and Willett Wilson, defendants in the court below, being the owners of a plantation near Edna, in Jackson county, Tex., approached the Erie City Iron Works, plaintiff in the court below, for the purpose of contracting for the pur-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

chase and erection by the plaintiff of a complete pumping plant on said plantation. They explained to the plaintiff that they were ignorant of the character of the machinery necessary for that purpose and as to what would constitute a complete pumping plant. They further explained that they desired to grow rice on their land, and that the rainfall was not sufficient for that purpose, and that it was important to them that the plant be erected as soon as possible and in such manner as to irrigate their rice farm, otherwise they would suffer damage should their rice crop fail for lack of water. Thereupon plaintiff and defendants entered into contract, whereby the plaintiff agreed to furnish the necessary machinery and erect the pumping plant on defendant's land for the contract price of \$3,225, and the purchasers agreed to pay to the contractor one half of said sum on arrival of the machinery at Edna and the other half, \$1,662.50, on November 15, 1903; the deferred payment to bear 7 per cent. per annum interest from the date of delivery, together with 10 per cent. attorney's fees in case suit should be brought therefor. Plaintiff, in said contract, warranted the machinery to elevate 3,000 gallons of water per minute against a total head of 55 feet, when properly operated by a competent person and with the proper fuel, and guaranteed all material and workmanship. Defendants agreed to make all excavations necessary to properly install the plant, to furnish the brick and do the foundation work, and to haul the machinery from Edna to the pumping site in good order and as received, etc. Defendants made the first payment for the plant, but declined to pay the second payment, or to execute their notes therefor, because they claimed that they had been damaged in excess of that amount by failure of the plaintiff to erect such a plant, and within the time, called for by the contract. Hence plaintiff filed suit for the balance claimed to be due to it, together with 7 per cent. interest thereon from March 28, 1903, the date of the arrival of the machinery at Edna, and for 10 per cent. attorney's fees, and for foreclosure of certain liens, a further reference to which will be unnecessary, also claimed the sum of \$85, made up of certain items of machinery which plaintiff claimed to have furnished the defendants, and for the service of one of its men sent to work on the plant. The amount of the items going to make up the \$85 was not allowed by the jury, and no complaint as to this is urged by the plaintiff. Defendants admitted the execution of the contract and the payment of \$1,662, denied compliance by plaintiff in many particulars with its contract, and pleaded breach of the warranty as to the pumping capacity of the plant. They further pleaded that by reason of the alleged breaches on the part of plaintiff the consideration for said contract failed, and that they did not owe ap-

pellant anything, but that they had been compelled, by reason of plaintiff's default, to expend cash, as follows:

Cash paid plaintiff upon arrival of machinery at Edna.....	\$1,662 50
Freight on parts shipped.....	6 03
Paid Richberg, plaintiff's employé.....	10 00
Merchandise at Edna.....	7 75
Service of Malone.....	4 75
Cash paid Carruth at plaintiff's request.....	27 00
Richberg's board.....	17 85
Hauling extra wheel and freight.....	10 00
Labor on defective foundations.....	12 00
Paid W. E. Anderson, engineer, for testing plant, which did not come up to test.....	35 00
Total .....	\$1,792 88

For which sum they prayed judgment against plaintiff. They also, by further plea in reconvention, sought to recover the value of their rice crop lost in 1903, amounting to \$2,000, and for 1904, amounting to \$875, and also for an additional sum of \$1,000, which they alleged would be necessary to expend to complete the plant in accordance with the contract. There was no testimony offered in support of this last item, and defendants' claim therefor appears to have been abandoned. Upon a trial before a jury a verdict was returned in favor of defendants for the sum of \$1,697.15. Defendants having entered a remittitur of \$697.15, thereby reducing the amount of recovery to \$1,000, a judgment for defendants was entered for said sum, and plaintiff's motion for a new trial, complaining, among other things, that the verdict was excessive, being overruled, plaintiff has appealed.

Appellant's first and second assignments of error complain that the verdict is excessive, and that the court erred in allowing to defendants an award of damages which is not justified by either the law or the evidence, nor authorized by the pleadings of defendants. It will be observed that the specific amounts for which defendants sue aggregate \$4,667.88. One of the items was a claim for \$1,662.50, being the amount agreed to be paid by defendants, and which was paid by them to plaintiff upon the arrival of the machinery at Edna, and which defendants sought to recover from plaintiff. Manifestly this recovery ought to have been denied them, and was in fact denied them, by the court. Deducting this sum from the total amount claimed leaves \$3,005.38, for which the jury, under the evidence, might have found in their favor. The plaintiff was entitled to a finding in its favor for the deferred payment of \$1,662.50, the balance of the agreed price for the machinery, with 7 per cent. interest thereon from March 28, 1903, which together amounted to \$2,305.80. Deducting this sum from the \$3,005.38, which the jury might have found for defendants, leaves \$699.58, which is the largest sum that the jury was authorized, under the pleadings and evidence, to find in favor of defendants. The jury, however, found the amount due to defendants to be

\$1,697.15, and of this sum there was remitted \$697.15, leaving a balance of \$1,000, for which judgment was entered. Thus we see that the judgment is for \$300.42 more than it should have been under the pleadings and evidence.

But appellant contends that it was entitled to attorney's fees of 10 per cent. upon the principal and interest of the deferred payment, which would amount to \$232.97, and that this sum should be also deducted from the amount of appellees' recovery. Appellees' liability to appellant for attorney's fees was pleaded, but it does not appear that any evidence was offered in support of the claim other than the contract, which provides that appellees should become liable therefor in certain contingencies. However that may be, the charge of the court did not authorize a recovery for attorney's fees, and no special charge requesting a submission of the claim to the jury was asked, and no complaint of the failure to submit the question was made in the motion for new trial, or presented by any assignment of error; and we think that appellant's contention that this court should take the matter of attorney's fees into consideration in considering the question of the excessiveness of the verdict comes too late.

But appellees contend that they were and are entitled to interest upon the various items of damage pleaded by them in their cross-bill and allowed by the jury, and that when such interest is taken into consideration the amount due them far exceeds the sum for which judgment was rendered in their favor. There was no prayer for interest upon the amounts sought to be recovered by appellees in their cross-bill; but, as there was a prayer for general relief, it seems that a specific prayer for interest would not be necessary, but that interest may be allowed by way of indemnification as part of the damages, provided the amount claimed in the pleadings be laid in a sufficient sum to cover the loss at the time of the accrual of the cause of action and the interest thereon from that date to the time of trial. *Railway Co. v. Addison*, 96 Tex. 61, 70 S. W. 200; *W. U. Tel. Co. v. Garner*, 83 S. W. 433.

It will be noted that the appellees pleaded specifically the items of damage that went to make up the total amount of their claim, and the aggregate of these was \$4,667.88. One of the items was the \$1,682.50 which they had paid plaintiff and sought to recover from it, which manifestly they had no right to do, and which the court below so instructed the jury, and of which appellees do not complain. The remaining specific items aggregate the amount the jury must have allowed them, as shown by the figures presented by appellees in their brief, and comprises the entire amount they claimed after deducting the amount of this payment to appellant. Had there been a prayer for interest, or had they laid their damages in such a sum as to in-

clude the interest in addition to the specific damages claimed, they would be right in their contention; but, having failed to do either, they must be held to a recovery of only the specific damages sued for.

The court did not err in refusing to give appellant's special charges Nos. 1 and 2, as complained of in the third and fourth assignments of error. These instructions were sufficiently covered by the main charge.

Nor was it error to permit the witness Ross Clark to testify to the amount and value of crops raised by him in 1903 and 1904 in Victoria county upon land situated some 30 miles distant from that of appellees. It was shown that the lands were practically the same as to character and fertility, and the testimony was admissible to show what the yield on appellees' land would probably have been during said years had the pumping plant been such as to have afforded a sufficient supply of water for irrigation.

We have examined the other assignments presented by appellant and are of the opinion that no reversible errors are shown upon this appeal except that raised by the first and second assignments; and for the error indicated the judgment of the court below will be reversed, and the cause remanded for a new trial, unless the appellees shall within 20 days from December 9, 1909, file in this court a remittitur of \$300.42, and in such event the judgment of the court below will be affirmed.

#### STEGER et al. v. BARRETT. †

(Court of Civil Appeals of Texas. Dec. 23, 1909. Rehearing Denied Jan. 13, 1910.)

#### 1. APPEAL AND ERROR (§ 1001\*)—VERDICT—CONCLUSIVENESS.

A verdict supported by sufficient evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3934; Dec. Dig. § 1001.\*]

#### 2. APPEAL AND ERROR (§ 1070\*) — SPECIAL FINDINGS DISREGARDED BY COURT.

Where the findings of the jury on all the issues and all the items of damages were separate and distinct, the action of the court in denying recovery on a specified item cured errors as to that item committed during the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231-4233; Dec. Dig. § 1070.\*]

#### 3. DAMAGES (§ 228\*)—REMITTITUR.

A remittitur of special damages cures errors in respect thereto occurring in the trial.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 576-579; Dec. Dig. § 228.\*]

#### 4. TRIAL (§ 365\*)—SPECIAL FINDINGS—NATURE.

Findings of the jury on special issues should be treated as in chancery practice, and the court may set aside any particular finding of damages as not being legally recoverable, and accept and base the judgment on the remaining findings.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 365.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court February 2, 1910.

**5. MASTER AND SERVANT (§ 318\*)—"INDEPENDENT CONTRACTOR."**

Where the operator of a cornsheller employed the owner of a traction engine to assist in shelling corn and to furnish power for the work at a specific sum per day for the use of the engines and for his services, the owner being subject to the orders of the operator and liable to be discharged at any time, the owner was not an "independent contractor," but was the servant of the operator, for whose acts the operator was liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1257; Dec. Dig. § 318.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3542, 3543; vol. 8, p. 7686.]

**6. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.**

Where the jury returned the only verdict that could have been rendered legally, the error in a charge submitting an issue was not reversible.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4227; Dec. Dig. § 1068.\*]

**7. TRESPASS (§ 14\*)—INJURY TO PROPERTY—LIABILITY.**

One trespassing on the land of another by stationing an engine thereon and operating it for his own benefit is liable for the destruction of property by fire set by sparks from the engine, irrespective of his negligence.

[Ed. Note.—For other cases, see *Trespass*, Dec. Dig. § 14.\*]

**8. LANDLORD AND TENANT (§ 75\*)—SALE OF LEASEHOLD.**

A leasehold cannot be sold without the consent of the landlord, and it has no market value.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 222-229; Dec. Dig. § 75.\*]

**9. TRESPASS (§ 50\*)—DESTRUCTION OF PROPERTY—MEASURE OF DAMAGES TO LESSEE.**

In an action against trespassers for the destruction by fire of improvements of a lessee on leased premises, under a lease providing that the leasehold shall not be assigned or sublet, the court, in the absence of proof to the contrary, may assume that the property has no market value, and may confine the jury in determining the damages to fair, actual value.

[Ed. Note.—For other cases, see *Trespass*, Dec. Dig. § 50.\*]

**10. DAMAGES (§ 69\*)—INTEREST—TORTS—DESTRUCTION OF PROPERTY.**

One suing for the negligent destruction of property by fire may recover interest from the date of the loss.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 137-140; Dec. Dig. § 69.\*]

**11. TRIAL (§ 351\*)—SPECIAL VERDICT—REQUEST—NECESSITY—FINDINGS OF COURT.**

In the absence of any request that the jury make the finding, the court may, under the statute relating to special verdicts, make a finding of interest on the damages awarded by the jury making separate and distinct findings on all items of damages.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 834-839; Dec. Dig. § 351.\*]

**12. APPEAL AND ERROR (§ 1028\*)—HARMLESS ERROR.**

Where the evidence, in an action for the loss of property by fire, showed negligence in setting the fire and authorized a judgment on that ground, the error, if any, on the issue of promise to indemnify against loss, was not reversible.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4084; Dec. Dig. § 1028.\*]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by W. L. Barrett against J. P. Steger and others. From a judgment for plaintiff, defendants appeal. Affirmed.

On October 14, 1908, certain buildings and personal property therein, owned by appellee and located on certain premises leased by him for a term of years from the true owner, were destroyed by fire. He sued appellants for their value, claiming that they negligently and wrongfully entered as trespassers on his premises, and, over his continued objection and without his consent at and before the injury, located and operated thereon a traction steam engine, which was not equipped with any spark arrester or other reasonably sufficient means to prevent the escape of fire or sparks therefrom, and negligently operating the engine caused it to emit fire and sparks, which set fire to and destroyed his property. Appellants answered by general denial, plea of contributory negligence, and a want of liability because the injury was not caused by their act, but by the act of an independent contractor. The case was tried to a jury, and upon their special findings a judgment was entered for appellee.

The findings of the jury on all issues of the case being adverse to appellants, and their findings being supported by sufficient testimony in the record, we are bound by such findings, as being within the function of the jury. As found by the jury, and such findings here are sustained in deference to their verdict, the appellee's property was destroyed by fire by means of sparks emitted from the traction steam engine wrongfully placed at the time on appellee's premises by appellants, and negligently equipped, as having no spark arrester or other reasonably safe means of preventing the escape therefrom of live sparks, and negligently operated in such condition by appellants through their servant, Jim James, in charge thereof. The appellants, as found by the jury and supported by the evidence, at the time of the injury were upon appellee's premises, and had stationed and were operating for their benefit and use the traction engine in question thereon, without appellee's consent or permission and over his continued protest and objection and insistence of its removal, and the finding is supported that appellee was not guilty of negligence proximately causing the injury, and the amount of the judgment is sustained by the evidence.

E. L. Agnew and Thurmond & Steger, for appellants. McGrady & McMahon, for appellee.

LEVY, J. (after stating the facts as above). Appellants by several assignments, 1, 2, 6, 11, 21, and 22, here grouped by us for ruling, complain of the rulings of the court in re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

spect to the claim of appellee for damages for the lessened value of his leasehold and its use to him because of the destruction of the buildings thereon. The court submitted special issues to the jury, and their findings on all issues and items of damages were separate and distinct findings. The jury's findings on the lessened value and use of the leasehold were by the court, when he entered the judgment, excluded and not allowed as a recovery to appellee. This final action of the court was tantamount to a finding in favor of appellants on this particular item of damage claimed by appellee, and operated, we think, to cure all errors, if errors, in respect to the questions presented on this appeal, and no injury, by the rulings, could be held in the case to result to appellants. The finding being separate and itself definite, and a recovery therefor being denied, it eliminated previous errors in respect thereto, as much so as remittitur would in cases of excessive damages. It is the established rule that a remittitur of special damages cures all errors in respect thereto occurring in the trial. The court in this case had the power to set aside and hold for naught this particular finding of damages by the jury, as being in his opinion not legally recoverable, and to accept and then base the judgment on the remaining findings of the jury. Findings on special issues are unlike a general verdict. We quote: "Findings of a jury upon special issues are not to be regarded in the light of a verdict, but should be treated as in chancery practice." *Adkins v. Ware*, 35 Tex. 577.

The appellants plead that Jim James owned, operated, and controlled the engine under an independent contract with them, and that they had no control, and were not responsible for his acts or omissions. Appellants by their third, eighth, twelfth, and fifteenth assignments contend, in effect, that in the case James, as a matter of law, was an independent contractor, and not a servant of appellants. By the tenth assignment it is claimed the issue submitted to the jury in this respect was as worded erroneous. The court submitted to the jury the finding as to whether James was an independent contractor with appellants, and they found in the negative. The evidence shows without conflict that appellants were using a gasoline engine for power in shelling corn at their sheller, and it would not properly do the work. Until they could get other power of their own, they employed Jim James, the owner of the traction engine in question, to assist in shelling the corn and to furnish the power and do the work, agreeing to pay him \$3 per day for the use of the engine and for his services, and appellants agreeing to furnish fuel and water. Appellants placed the engine on appellee's premises. The employment of James was not for any special time, but at the option of appellants by the day. It would not have been error, we think, for the court to have held, as a matter of law, the evidence

being conclusive, that James in operating the engine was the servant of appellants, acting within the scope of his authority, and for whose acts in the case appellants would be liable. *Railway Co. v. Couch*, 121 S. W. 189; *O'Neill v. Blase*, 94 Mo. App. 648, 68 S. W. 764; 26 Cyc. 1548, note 19. He was laboring by the day, assisting them in shelling their corn, subject to their orders, liable to be discharged at any time, and working at their will. In view of the other facts, his ownership of the engine becomes immaterial. Appellants furnished the water and fuel, and directed him when and where to operate it. If the issue submitted to the jury as worded was erroneous as assuming that James was a servant of appellants, it was not reversible error, as no other finding, we think, could legally have been returned. This, therefore, is sufficient answer to the assignments, and they are overruled. Even if negligence in the case had not been shown, which we think has clearly been done, appellants being trespassers, as it appears, on the premises of appellee, they might be held liable in the case, regardless of their or James' negligence. *Wood v. Pacolet*, 80 S. C. 47, 61 S. E. 95; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408. See *Frazier v. Bedford*, 66 S. W. 573; *Railway Co. v. Dooley*, 35 Tex. Civ. App. 364, 80 S. W. 566.

By the fourth assignment it is contended that the court erred in refusing the special charge instructing the jury that "the measure of plaintiff's damage by loss of his improvements was fair market value at the time they were burned, or, if they had no market value, then their fair value to him." The court instructed the jury to ascertain and find from the evidence the "fair actual value" on the day of the burning of the buildings. The improvements were located on leased premises, as it appears. The lease contract in evidence expressly provided that the leasehold should not be assigned or sublet. As a matter of law, a leasehold cannot be sold without the consent of the landlord, and consequently has no market value. *Moser v. Tucker*, 87 Tex. 94, 20 S. W. 1044. Such things are not usually sold on the market. In the absence of proof to the contrary, as in this case, the court was authorized, as a matter of law, we think, to assume that such property has no market value; and in confining the jury to "fair actual value" the charge was in accordance with the evidence, and there was no reversible error in refusing the special charge. *Railway Co. v. Nicholson*, 61 Tex. 550; *Sinclair v. Stanley*, 64 Tex. 67; *Railway Co. v. Holliday*, 65 Tex. 521.

By the eighteenth assignment it is contended that the court erred in allowing interest on the judgment, because the jury did not find interest in their verdict. Appellee prayed for interest, and was entitled to interest from the date of loss. *Watkins v. Junker*, 90 Tex. 584, 40 S. W. 11. As au-

thorized by the statute relating to special verdicts, the court was authorized to make the finding of interest in the absence, as in this case, of a request on the part of appellants to have the jury make the finding. In the absence of a request on the part of appellants for such finding, there was no reversible error. *Moore v. Pierson*, 100 Tex. 113, 94 S. W. 1132.

The fifth and thirteenth assignments are overruled. Even if it should be held that appellants' promise to indemnify against loss for being allowed to remain on the premises, if made, would not estop them from showing a want of liability, yet the errors assigned in this respect could not operate as reversible error, because the evidence clearly establishes negligence and authorizes a judgment upon that ground, and without the question of their promise of indemnity, if any, being considered. The findings on the several issues were separate, and appellants defended and offered evidence on the question of negligence, and were not deprived of their right in this respect.

All the other assignments have been considered, and were ordered overruled.

The judgment was ordered affirmed.

#### FIRST NAT. BANK OF EAGLE LAKE v. ROBINSON.

(Court of Civil Appeals of Texas. Nov. 24, 1909. On Motion for Rehearing, Jan. 12, 1910.)

##### 1. BILLS AND NOTES (§ 254\*)—DISCHARGE OF INDORSER—"INSOLVENCY" OF MAKER.

"Insolvency" of the maker of a note, so as to excuse the holder from suing thereon at the request of the indorser, is an absence of property of the debtor out of which the debt can be made by execution.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 254.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3647-3655; vol. 8, p. 7689.]

##### 2. BILLS AND NOTES (§ 516\*)—DISCHARGE OF INDORSER—INSOLVENCY—EVIDENCE.

In an action by the holder against the indorser of a note, in which the indorser claimed a release because of the failure to sue the maker, evidence held sufficient to show that the maker was insolvent, excusing suit by the holder.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 516.\*]

On Motion for Rehearing.

##### 3. EVIDENCE (§ 158\*)—SECONDARY EVIDENCE—INSOLVENCY—PETITION IN BANKRUPTCY.

To show that a person is insolvent, secondary evidence that he had filed a petition in bankruptcy and turned over his property to the trustees is improper.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 158.\*]

##### 4. BILLS AND NOTES' (§ 462\*)—LIABILITY OF INDORSER—INSOLVENCY OF MAKER—PLEADING.

In an action by the holder of a note, maturing September, 1907, against an indorser without suing the maker, the petition alleged

that the maker had filed a petition in bankruptcy on November 8, 1907, and was adjudicated insolvent and bankrupt and prayed for a judgment against the indorser, as he was the only party thereto who was then solvent. Held, that the petition sufficiently alleged the insolvency of the maker at the time of maturity of the notes.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 462.\*]

##### 5. PLEADING (§ 72\*)—STATEMENT IN PRAYER—EFFECT AS ALLEGATION.

Where the prayer for relief in a petition contains a statement of the fact on which it is intended to base a prayer for relief, it is entitled to be given the force and effect of an allegation.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 72.\*]

##### 6. EXEMPTIONS (§ 40\*)—DIAMOND RING.

Under the statute exempting wearing apparel, a diamond ring worn on the finger is exempt from execution.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 45; Dec. Dig. § 40.\*]

Appeal from Colorado County Court; J. J. Mansfield, Judge.

Action by the First National Bank of Eagle Lake against S. S. Robinson on a note. From a judgment for defendant, plaintiff appeals. Reversed and rendered.

Strickland & Roos and Adkins & Green, for appellant. Carothers & Brown, for appellee.

JAMES, C. J. The action is upon a note executed by R. E. Walker and J. F. Canaday payable to S. S. Robinson, or order, for \$250, due on or before September 1, 1907, which note was for value indorsed in blank by Robinson to the bank on or about September 11, 1907. The bank brought this action on January 9, 1908, against Robinson, alleging, among other things, that when said note matured Canaday was insolvent and a nonresident of Texas, and that Walker had, on November 8, 1908 (meaning November 8, 1907, as clearly appears from the context), filed a petition in the United States District Court at Houston to be adjudicated a bankrupt and was by said court adjudicated insolvent and a bankrupt. The prayer was for judgment against the defendant Robinson. The defendant pleaded, besides a general denial, that on or about April 2, 1908, he required plaintiff by notice in writing to forthwith institute suit on the note and against Canaday and Walker, and two terms of the county court elapsed without any suit brought against the makers, by reason of which the defendant is discharged of liability. The court found as facts on September 11, 1907, Robinson indorsed and sold the note to the bank, and that in April, 1908, he gave the bank the written notice alleged, and that two terms of the county court having jurisdiction have since elapsed, and no suit has been filed as required, and that Walker was solvent at the time of the maturity of the note,

and has been solvent at all times since. Upon this finding judgment was rendered for the defendant. The court made no finding as to Canaday, which was unnecessary, if Walker was solvent, as was ascertained.

There is a statement of facts, and we think the finding as to the "solvency" of Walker, as that term is used in the statute, cannot be sustained. The sense in which the term "insolvency" is used is defined in *Smith & Co. v. Ogerholm* to be the absence of property of the debtor out of which a debt may be made by execution. Now, Walker testified, and it is an undisputed fact, that on or about November 7, 1907, he filed a petition in bankruptcy; that he had turned over all his property to the trustees in bankruptcy, and the same is still in their hands. Walker further testified that at the time of the trial he had about 80 head of cattle which were mortgaged for the purchase money, but this transaction did not take place until about July 1, 1908, which appears to have been long after this suit was filed. Upon the above evidence, Walker was clearly insolvent in the meaning of the statute, and defendant had no defense in the fact that Walker had not been sued.

As to Canaday, the judge made no finding. As to him Walker testified that he was intimately acquainted with him and did not know of any property that he had then or since the execution of the note, and he never had any property that witness knew of except a diamond ring which he wore, and that he did not know of his whereabouts, except that witness had received two letters from him from Missouri. The witness Stephens testified that Canaday had no property that he could find; that he had made inquiry, but could not find any, but made no inquiries outside of Colorado county; that his residence was unknown to witness. Leeseaman, the county clerk of Colorado county, testified that he had examined his records back four years, and they disclosed no property in the name of Canaday; that he is personally acquainted with Canaday, and never knew or heard of his owning any property subject to execution. Strickland testified, when the note was placed in his hands for collection, that Canaday was not in Eagle Lake, and had not been for a long time; that witness went to Houston looking for him and could not find him; that his residence was unknown to witness; that he had known him a long time and never knew of his owning any property; that he had made inquiry of Dr. Norris if Canaday had any property, and Norris replied that he did not know of any, that he had a debt against him, and he had never been able to collect it; also of Frank Stephens, whose reply was the same as that of Norris; and he had made inquiry of others, and all told him that they did not know of any property that Canaday had.

The above is all of the testimony on the subject, and, though the judge made no find-

ing thereon, there is no room for any other finding than that Canaday was insolvent or notoriously so at all times. The diamond ring worn by him was exempt from execution under the statute, in our opinion.

We conclude that the judgment should be reversed, and judgment rendered here in favor of appellant on the note.

Reversed and rendered.

#### On Motion for Rehearing.

It is claimed by appellee that there was no legal evidence that Walker was insolvent, and that the court correctly found that he was solvent. He says that the court ruled out the documentary evidence offered by Robinson to prove that Walker filed a petition in bankruptcy and was adjudicated a bankrupt. This ruling, we find, was made, and the documents excluded; the court sustaining certain objections thereto.

However, Walker testified as set forth in the main opinion, consisting of his statement that he, on or about November 7, 1907, filed a petition in bankruptcy; that he turned over all his property to trustees in bankruptcy; that the same was still in their hands; that his property amounted to about \$65,000, and his liabilities to about \$41,000; that he has now about 80 head of cattle; that he borrowed the money from Mrs. Stafford to buy them with, about July 1, 1908, and gave her a mortgage on them; and that said cattle are the only property he has had since the filing of his petition for bankruptcy.

It appears from the record that appellee objected to certain of the above testimony of Walker, and his objections were overruled. The objections went to so much of his testimony as stated that he had filed a petition in bankruptcy in the federal court at Houston on or about November 7, 1907, and, as stated, that he had turned his property over to trustees in bankruptcy, and same is still in their hands. Appellee claims that said facts should have been shown by certified copies from the proper court, and not by this secondary evidence; and in connection with this motion asserts that, although the court admitted the evidence, when it came to rendering judgment, it practically excluded it from consideration. The record does not show this. It probably was improper to admit secondary evidence of the petition in bankruptcy, and that Walker had turned over his property to trustees in bankruptcy. But in reference to his solvency Walker testified to more than said two facts, and outside of those facts his testimony was not objected to and not controverted. It certainly was proper for him to testify that from on or about November 7, 1907, an interest in certain cattle, which he obtained about July 1, 1908, was the only property he had. If we eliminate his statement so far as it refers to the petition in bankruptcy and the transfer to trustees, and adopt what was left, there was sufficient left

to show that he was without any property at the date material in this case, and this, as before stated, would be uncontroverted. But appellee's brief, in order to show us that Walker was solvent and the finding of the court supported, cites and relies upon what Walker stated concerning his bankruptcy. This is a quotation from the brief: "Walker testified that on November 7, 1907, he filed a voluntary petition in bankruptcy, and that his property then amounted to about \$65,000, while his debts amounted to about \$41,000. That about July 1, 1908, he owned 80 head of cattle which were mortgaged for an amount not stated." It is evident that the court did not ignore this testimony as claimed, but that it based its finding of Walker's solvency upon it, just as appellant has undertaken in his brief to support the finding. Whether it be considered, or not, the result is that Walker appeared to be insolvent at the material date, and this was the only finding warranted.

We think there is in plaintiff's pleadings allegation that the makers of this note were insolvent at all material dates. The date of the maturity of the note as extended appears to have been on or about January 1, 1908. The suit was filed January 9, 1908. The original petition is not in the record, and we do not know what it alleged. The amended petition on which the trial was had was filed July 21, 1908. It alleged, as to Walker, that on the 8th of November, 1907, he filed a petition in bankruptcy and was adjudicated insolvent and a bankrupt. This was intended to be and was practically an allegation that he was insolvent at that time. The prayer of the same pleading asked for judgment against Robinson, "as he is the only party thereto who is now solvent." While this occurs in the prayer, it is nevertheless the statement of a fact upon which it was intended to base a prayer for relief, and it is entitled to be given the force and effect of an allegation. The supplemental petition, as we construe it, contains a direct allegation of fact that Walker was actually and notoriously insolvent at the time of the maturity of the note as extended. The same is equally applicable to Canaday.

Appellee endeavors to show that this supplemental petition contained only matters of demurrer and no allegations of facts. The various facts set up and stated in this supplemental petition were evidently intended to meet the allegations in clause 3 of the answer, and, this being so, we regard the form in which the pleading was drawn as wholly immaterial. It closed with a prayer, not merely that the clause be stricken out, but that "said clause be stricken out, and that plaintiff recover judgment as prayed for."

As to Canaday having a diamond ring which he wore, we fail to appreciate the reasoning which would subject it to execution.

If worn by the owner, it was a constituent part of his attire, and in our judgment is within what the Legislature meant to include by the term "wearing apparel." Rings are customarily worn, and under appellee's theory of the exemption a sheriff with an execution could remove the pendants from a lady's ears, or a badge from the veteran's coat.

Motion overruled.

# INTERNATIONAL & G. N. RY. CO v. KENT.†

(Court of Civil Appeals of Texas. Dec. 18, 1909. Rehearing Denied Jan. 8, 1910.)

## 1. RAILROADS (§ 282\*)—INJURIES TO PERSONS AT STATIONS—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to plaintiff, struck by a baggage truck on defendant's depot platform, evidence held sufficient to make the question of his contributory negligence one for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 917; Dec. Dig. § 282.\*]

## 2. RAILROADS (§ 278\*)—INJURIES TO PERSONS AT STATIONS—ASSUMPTION OF RISK.

Where the plaintiff, a hotel keeper, was injured while standing on defendant's depot platform, with the knowledge and consent of defendant's servants, as had been his custom for 15 months, to solicit custom for his hotel, by being struck in the back by a loaded baggage truck pushed rapidly through the crowd, he cannot be held to have assumed the risk, where he had never seen the truck moved at that time or in that manner before.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 891-900; Dec. Dig. § 278.\*]

## 3. RAILROADS (§ 274\*)—OPERATION—INJURIES TO PERSONS AT STATIONS.

Where a hotel keeper was on defendant's depot platform, with the knowledge and consent of the railway company's employees, as had been his custom for some time, to solicit custom for his hotel, it was the duty of the employees to exercise ordinary care to prevent injuring him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 868-872; Dec. Dig. § 274.\*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Action by H. S. Kent against the International & Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

King & Morris and Baker & Baker, for appellant. Frazier & Shurtleff, for appellee.

TALBOT, J. Appellee, Kent, sued the appellant to recover damages for personal injuries inflicted upon him while he was on appellant's depot platform at the town of Mertens in Hill county, Tex., through the negligence of one of appellant's servants. The defendant answered by general demurrer, general denial, contributory negligence, assumed risk, and that appellee's injuries were the result of an accident. The case was tried before a jury, and verdict and judgment rendered in favor of appellee for the sum of \$6,200, from which appellant prosecutes this appeal.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

The material facts are as follows: Appellee was the proprietor of a hotel in the town of Mertens, and regularly, for 15 or 16 months prior to his injuries, had been in the habit of going upon appellant's depot platform at said town in company with his customers to assist them in getting off on appellant's trains, to solicit customers from incoming trains, and to conduct them to his hotel. This habitual use of appellant's platform by appellee was without any objection whatever on its part, but knowingly permitted and acquiesced in. On the night of December 31, 1907, pursuant to the custom stated, appellee went to appellant's said depot in company with one of his guests, assisting in carrying his baggage, who intended to and did become a passenger of appellant; and while standing on the platform, just immediately after the arrival of one of appellant's passenger trains, soliciting, or for the purpose of soliciting guests for his hotel, appellee was struck in the small of the back with the end of a heavily loaded truck, or by the baggage or boxes on the truck, and knocked down and seriously injured. The truck at the time appellee was struck was being rapidly pushed backwards by one of appellant's agents engaged in the performance of the railway company's business, and through quite a crowd of people standing or walking on the platform. Appellant was guilty of negligence in pushing the truck against appellee in the manner stated, and as the proximate result thereof appellee received a gash or cut in his forehead, extending to the bone, and a very serious and probably permanent injury to his spinal column. The appellee was not guilty of contributory negligence, nor did he assume the risk of the injuries received.

Appellant's first assignment of error complains that the court erred in refusing to give the following instruction: "It appearing from the evidence in this case that the plaintiff is guilty of contributory negligence, as a matter of law, you will find for the defendant." From the record it appears that this charge was given, but evidently the indorsement thereon to that effect is a clerical error of the clerk, and we shall treat it as having been refused. It is so treated by the briefs of both parties. The charge seems to have been predicated upon the authority of the case of *Railway Company v. Edwards*, 100 Tex. 24, 93 S. W. 106, and the statement of the appellee in which he said: "I had been going there in that same business between fifteen and eighteen months. They had the same lights there that night they usually had. I knew that. The car afforded very little light on the outside of the car. It afforded some light. I also knew that Mr. Dew was in the habit of backing the trucks after loading them. If I had been looking for the trucks I suppose I could have seen them, and if I had been listening for the trucks I could have heard them. I knew it

was dark. I had a lantern and I knew the agent had a lantern. Mr. Morris Dew had been there four, or five, or six months, don't know how long. I had seen him handle those same trucks before in the same way frequently." In addition, however, to the testimony quoted, appellee testified: "I said that I had seen those trucks backed there by Mr. Dew many times before. I had never seen the trucks backed there while the train was still standing there, and the crowd still there on the platform. It waited until the train had left. At that time the trucks were loaded with trunks and baggage and express. The train was standing there at that time, had its engine headed south. The train was still there at the platform at that time. Morris Dew was moving the trucks north at the time they struck me, and in my direction." The case is clearly distinguishable from the case of *Railway Co. v. Edwards*, supra. It appears from the opinion in the latter case that Edwards was struck by the engine of a passing train at the crossing of a public country road over the railroad and the evidence without contradiction showed that he walked along the road at night approaching the railroad obliquely, with his side toward it, until he came near the crossing when he turned with the road across the track and was struck as he reached the center thereof. The train was visible by its electric headlight upon a straight track for a mile or more before it reached the crossing, and the noise of its motion was plainly audible. Edwards admitted that before stepping on the track he neither looked nor listened for the train, although he was familiar with the crossing and knew of the frequent passing of trains, and that he could have seen and heard had he done so. It further appears that Edwards relied alone upon the fact that the whistle was not blown, nor the bell rung as required by the statute, claiming that he was listening for those signals, and because he did not hear them, did not look for the train, nor pay any attention to the noise of the train.

In this state of the record the Supreme Court, after stating the well-settled rule "that a traveler approaching a railroad crossing must exercise ordinary prudence in going upon the track to see that he may do so with safety," held, in effect, that Edwards exercised no care whatever to avoid the collision, and offered no excuse whatever for his failure to do so; that "while persons using a railway crossing have the right to expect that the law requiring signals will be obeyed, this is not a substitute for the duty of exercising care for themselves and they are not excused from that duty by the fault of the other party." In the case at bar appellee was upon appellant's depot platform, at the time he was injured, with the knowledge, acquiescence, and implied permission of appellant, if not by its invitation, soliciting guests for his hotel in the manner and way in which

it had been done, without accident or injury to him for 15 or 16 months. He had never seen, during all this time, the truck backed along or over the platform while the crowd was there and the train still standing at the depot, as was the case on this occasion; and especially in view of the fact that a number of appellant's passengers were on the platform, to whom it owed the highest degree of care not to injure, the moving of the truck through them as was done, was not to be expected by appellee. According to his testimony the work of moving the baggage, express, etc., on the trucks previous to this time had been done after the people at the depot had dispersed and the train gone. From the testimony of Morris Dew, the agent of appellant who pushed the truck against appellee, it may fairly be inferred that he was moving the truck at an unusual time and with unusual haste, as indicated by the testimony of appellee. He said, "I loaded this five hundred or six hundred pounds on that truck as quick as I could. The boys were up at the depot waiting for me to get through as quick as I could, and go with them. \* \* \* I and the other boys were preparing to go up and ring the school bells and church bells, and ring out the old year, when I got through work. I was trying to get through my work as quick as I could and go with them. When I got down to the station there I found the train was twenty-five minutes late. Just as soon as the trucks were loaded I backed those trucks right through the crowd of people. \* \* \* I could have, if I wanted to take the time, pulled the trucks around and pulled them through the crowd. In pulling the trucks that way I could have seen whether or not there was anybody in the way. It would have taken more time to have pulled them around. I did not do it that way that night. \* \* \* I knew that the platform was a place where people frequently assembled whenever trains came in." Under these circumstances, if appellee was required to keep a lookout to save himself from being struck and injured by the truck, of which we have grave doubts, we think it cannot be said, as a matter of law, that he was guilty of contributory negligence; that he offered no such excuse for failing to look and listen for the truck as entitled him to have the question of whether or not he was guilty of negligence proximately contributing to his injuries submitted to the jury for their determination. *Chambers v. Dallas Con. Elec. St. Railway Co.*, 120 S. W. 582.

The fourth assignment of error complains that the court erred in refusing to instruct the jury, at appellant's request, as follows: "You are instructed that the plaintiff, H. S. Kent, assumed the risk of being injured at the time and place he was injured, and unless you find that the injury was intentionally inflicted, or was the result of gross negligence, or the willful or reckless disregard

of plaintiff's presence, you will find for the defendant." We think this charge was properly refused. Appellee was, at least, a licensee and not a trespasser upon appellant's depot platform. He had notoriously, and with the actual knowledge, permission, and implied consent of appellant's agents in control of said platform and depot house at Mertens, constantly sought and secured upon said platform for 15 or 16 months, from among appellant's passengers arriving there, guests for his hotel. From such permissive use of its platform, appellee's presence there, at the time he was injured, for the purpose of soliciting customers, could reasonably be expected by appellant's agents, and they owed him the duty of exercising ordinary care to avoid injuring him. Especially is this true since appellee's injuries were the result of the active negligence of appellant's agent in driving the truck against him, and not the passive negligence of failing to keep its platform in a safe condition. In this respect, as well as in the fact that no such use had been made of its premises by Post with the railway company's knowledge, acquiescence, or implied consent, as was made by appellee of appellant's platform, the case is clearly unlike the case of *Post v. Texas & Pac. Ry. Co.*, decided by this court and reported in 23 S. W. 708. In that case it did not appear that Post had ever been to the railway company's depot before the night he was injured to secure boarders, and while it was shown that he was there at the invitation of an employé of the company, it was not shown that it was within the scope of such employé's agency to invite boarding house keepers to the depot to solicit customers. The railway company had constructed a platform around its depot about four feet high, and, in leaving, Post fell from it and was injured. In affirming the judgment of the district court, this court said: "The appellant was at the depot solely on his own business, with which the railway company was in no way concerned, and was under no duty to appellant (Post) to keep its depot in a safe condition; that if it could be said appellant was at the depot by invitation of the railway company's agent there was nothing to show that such invitation was within the scope of his authority so as to bind the company." That is a materially different case from the one now before us, and the principle therein announced is not applicable to the facts of the present case. We have not discussed the case from the standpoint, as we probably might safely have done, that appellant's depot grounds, by reason of the general use to which they are appropriated, are quasi public, and that inasmuch as appellee accompanied one of his guests to appellant's depot, who intended to and did become a passenger of appellant, for the purpose of assisting him in carrying his baggage and to see him depart, as well as to meet and so assist such customers, as he might secure, to his hotel, he was as rightfully upon the

platform as the passengers themselves. 83 Cyc. 762; *Tobin v. Portland, etc., Ry. Co.*, 59 Me. 183, 8 Am. Rep. 415. We have preferred to rest our decision upon the ground that appellee was a licensee, under such circumstances, as required the exercise of ordinary care on appellant's part not to injure him. However, in the case of *Tobin v. Railway Co.*, supra, it was held that a hackman carrying passengers to the railway company's depot for transportation and aiding them to alight upon the platform of the company was as lawfully on the platform as the passengers alighting.

The assignment that the verdict is excessive will be overruled. The evidence is sufficient to warrant the conclusion that appellee by the negligence of appellant, as charged, not only received a severe scalp wound, but a serious permanent injury to his spinal column, which has and will, probably, cause him much physical and mental pain, and largely impair his capacity to labor and earn money.

We have found no reversible error in the record, and the judgment of the court below is therefore affirmed.

#### LESSOFF v. GORDON.

(Court of Civil Appeals of Texas. Dec. 10, 1909.)

##### 1. PARENT AND CHILD (§ 13\*)—TORTS OF CHILD.

A father is not liable for the torts of his child committed without his knowledge or consent and not in the course of his employment of the child.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. §§ 146, 147; Dec. Dig. § 13.\*]

##### 2. PARENT AND CHILD (§ 13\*)—TORTS OF CHILD.

A father's liability for the acts of his child done in the course of his employment of the child is governed by the rules applicable to the relation of master and servant.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. §§ 146, 147; Dec. Dig. § 13.\*]

##### 3. MASTER AND SERVANT (§ 302\*)—LIABILITIES FOR INJURIES TO THIRD PERSON—ACTS OF SERVANT.

A master is not liable for acts of his servant which are unauthorized and not within the real or apparent scope of the employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1217-1219; Dec. Dig. § 302.\*]

##### 4. PARENT AND CHILD (§ 13\*)—TORTS OF CHILD.

A minor, in the absence of his father and without his knowledge or authority and against the express wishes of his mother, attempted to pen a cow which ran into plaintiff. The boy did not have charge of the cow and had never attended her, except to feed her occasionally. Held, that his acts were not within the scope of any duty or service so as to render the father liable.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. §§ 146, 147; Dec. Dig. § 13.\*]

Appeal from District Court, Galveston County; Lewis Fisher, Judge.

Action by Adelia Lessoff against S. P. Gordon. From a judgment for defendant, plaintiff appeals. Affirmed.

W. F. Kelly, for appellant.

MCMEANS, J. Suit by appellant, Adelia Lessoff, against appellee, S. P. Gordon, to recover damages for personal injuries sustained by appellant by reason of being run over by a cow belonging to appellee which was being driven on the streets of the city of Galveston by appellee's minor son. Appellant, in effect, alleged that on the date of her injury appellee was the owner of a dangerous and vicious cow, which he kept on his premises in the city of Galveston, and which he, on said date, negligently permitted to escape and run loose upon the streets, and that he negligently and carelessly drove and caused the cow to be driven by his minor son, who was not a competent person to handle and drive such a cow, and who drove the cow in a careless and unskillful manner upon the sidewalk in front of plaintiff's residence, where the cow, without fault of plaintiff, gored her, knocked her down, broke her arm, and otherwise injured her. She prayed for judgment for \$2,000. The defendant answered by general denial and specially pleaded: That the cow was permitted to escape from the pen, where she was confined, by trespassers who entered his cow lot without his knowledge or consent, leaving the gate open; that he was not present when the cow escaped; that without his knowledge or consent, and against the express wishes of defendant's wife, his minor son undertook to catch the cow and return her to the cow lot; and that the injuries received by plaintiff through the attempt of his said son to pen the cow were received by her as the result of such unauthorized act of his said minor son. The case was tried before the court without a jury, and after hearing the evidence the court rendered judgment in favor of defendant, and plaintiff appeals. No briefs for appellee are on file.

At the request of the plaintiff, the court filed its findings of fact, which are as follows:

"Plaintiff and defendant are both residents of the city and county of Galveston, Tex. That the plaintiff is a widow, about 42 years of age, and earns her livelihood by means of sewing. That she has no other means of making a living. That on or about the 3d of September, 1908, she was run into and knocked down by a cow belonging to the defendant. That at the time of the accident she was on the sidewalk in front of her residence. That she was bruised and injured about the abdomen, and her clothes badly torn, and her right arm was broken between

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the wrist and elbow. That the fingers on the right hand were sprained. That her injuries are probably permanent. That as a result of the injuries sustained she suffered considerable pain, physical and mental. That since the injury she has been unable to do work of any character towards making a living for herself.

The court further finds the facts to be: "That the defendant, S. P. Gordon, was the owner of the cow which injured Mrs. Adelia Lessoff, the plaintiff. That the defendant had owned the cow for about four years, during which time the cow was never known to develop any vicious habits, but, on the contrary, was a gentle cow. That the defendant kept the cow at his residence on Twenty-Ninth street between Avenues H and I in the city of Galveston, Tex. That the inclosure in which she was kept was well fenced, and the gate consisted of a double gate with a bar on the inside. That on the day of plaintiff's injuries the defendant, Gordon, was absent from home. That when he left home the cow was safely inclosed. That about 4 o'clock in the afternoon of September 3, 1908, some negro boys were playing baseball in a lot near the defendant's cow lot, when one of the boys knocked a ball into the defendant's cow lot. That one of said negro boys climbed the fence into the said cow lot for the purpose of recovering the ball. That in leaving the cow lot the negro boy opened the gate, and the boy and the cow came out of the gate about the same time. That a few minutes thereafter defendant's minor son, Herbert Gordon, who was playing near by with other boys, but not with the negro boys heretofore mentioned, saw the cow leave the lot, and immediately ran home and secured a horse, which he mounted and attempted to drive the cow back into the lot, and in doing this the cow traversed through several streets, in a trot, in the neighborhood, during which time the said cow hooked or butted the plaintiff, as heretofore recited. That the cow ran over or frightened one child, and also shook her head at one or two other persons, while she was out on the streets and defendant's son was attempting to drive her home. That the defendant's son had no experience in driving cattle and testified that this was the first time that he had ever been on horseback. That defendant's son left his home in express violation of his mother's wishes; his mother, at the time of his leaving in pursuit of the cow, calling to him to come back. That his father was not at home at the time and had given the son no instruction in the premises. That while defendant's son was attempting to return the said cow to the pen she ran about the streets and sidewalks in the neighborhood. That the cow appeared to be excited and was frothing at the mouth. That the defendant's son, Herbert Gordon, is 14 years of age and attends school. That he did not have charge of the

cow and never attended her, except occasionally to give her some hay. He does not milk the cow. The boy lives at home with his father and does not work other than to do errands around the home. He does those things which his father tells him to do if he feels like it. It is not his duty to look after things about the place when his father is absent from home. Defendant owned the horse on which his son was riding. Defendant testified that, if the cow got out during his absence, it would not be a part of his son's duty to drive her home and back into the lot, and 'if the cow got out, and Herbert was to put her back into the yard, I would not whip him for that. If the cow got out, and he would pen her, I would be glad of it, but I don't mean that he shall do this when I am at home. Then I would pen her myself.' That the cow had never been out on the streets before. That, if plaintiff had been entitled to recover any damages under the foregoing facts, the court would have assessed the damages at \$750."

Upon the foregoing findings of fact, the court concluded, as a matter of law, that the evidence disclosed no liability of appellee for the injuries sustained by appellant.

Appellant, by her second assignment of error, complains that "the court erred in concluding as a matter of law that there was no liability on the part of defendant to plaintiff for the injury she sustained by reason of the collision with the cow of defendant while being driven in the manner and at the time and place as shown by the evidence, and the court's findings of fact." In the proposition following she urges that "a father is liable for the torts of his minor son who is living with him and under his direction, when such tort is committed by the son while using such father's horse, in and about his father's business." Appellant contends that, while a father is not liable for the torts of his minor son by reason alone of such domestic relation, the facts in this case show liability on the part of appellee for the tort of his minor son upon the principle of master and servant, and that this case should be determined by the rules applicable to that relation.

It seems well settled that at common law the father is not liable for the torts of his child committed without his knowledge, consent, participation, or sanction, and not in the course of his employment of the child. *Ritter v. Thibodeaux*, 41 S. W. 492; *Chandler v. Deaton*, 37 Tex. 406; *Schouler, Dom. Rel. § 263*; 29 Cyc. 1665. If then the appellee can be held liable for the act of his son in causing appellant's injuries, the liability does not grow out of the relation of parent and child, but must be based on the relation of master and servant, and is governed by rules applicable to such relation. 29 Cyc. 1665. It is stated to be the universal rule that, whether the act of the servant be of omission or commission, wheth-

er his negligence, or even wrongful misconduct, occasion the injury, so long as it be done in the scope of his employment, his master is responsible in damages to third persons. And it makes no difference that the master did not give special orders; that he did not authorize, or even know, of the servant's act or neglect; for, even though he disapproved or forbade it, so long as the act was done in the scope of the servant's employment, he is none the less liable. Schouler, Dom. Rel. 490. But the rule of the master's liability for the acts of his servant does not extend to unauthorized acts, not connected with, incident to, or within the real or apparent scope of the employment. If therefore the servant does an act not necessary to or arising properly from his service and the reasonable scope thereof, whereby an injury is inflicted upon the person of another, the servant alone is liable, for the master cannot be held in law to contemplate any extraordinary act of his servant not authorized directly or indirectly, and which is outside of and unnecessary to a proper performance of the service. The criterion for determining the master's liability in such cases is to ascertain if the act was done within the real or apparent scope of the authority of the master. Rogers, Dom. Rel. § 795. The court, in its findings of fact, which are not challenged by the assignment of error, finds: That the act of appellee's son which resulted in injury to the appellant was done without the knowledge of the father and against the express wishes of his mother; that appellee had given the boy no instructions in the premises; that the boy did not have charge of the cow, and that he never attended to her, except to give her hay occasionally.

We think the evidence wholly insufficient to show that the acts of the boy were within the scope of any duty or service exacted of him by the appellee, or to show facts which authorize a judgment against appellee for the act of his son based on the relation of master and servant, and that under the facts found by the court judgment was properly rendered for appellee. This conclusion relieves us from the necessity of passing upon the only other question raised by appellant's assignment of error.

The judgment of the court below is affirmed.

Affirmed.

#### PHILLIPS v. HENRY et al.

(Court of Civil Appeals of Texas. Dec. 2, 1900. Rehearing Denied Jan. 13, 1910.)

#### 1. DEEDS (§ 200\*)—DELIVERY—EVIDENCE.

On the issue whether the delivery to a bank of a deed by P., the grantor, operated to pass the title to the grantees, H. or K., depending on whether, when he delivered the deed to the

bank's cashier, he intended to finally part with possession and control of it, he having delivered it in an envelope indorsed by him, "P. or H. or K.," and the cashier having placed it in the bank's vault, where it remained till P.'s death, evidence that P., after so delivering the deed, listed the land with his agent for sale, and never withdrew it, was admissible.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 200.\*]

#### 2. DEEDS (§ 200\*)—DELIVERY—EVIDENCE.

On the issue whether there was a delivery of a deed, executed by P. to H. and K., for a recited consideration of \$25 paid by them to him and his love and affection for them as his stepdaughters, such deed having been delivered by him to the cashier of a bank, who deposited it in the bank's vaults, where it remained till P.'s death, evidence that when he married the mother of H. and K. he had run through with all his property, through dissipation, and when his wife died, four years before he executed the deed, he was worth \$12,000 or \$15,000, was inadmissible; it not appearing that P. was under any obligation to H. or K. on account of an interest owned by them in the community estate between their mother and P., or otherwise.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 200.\*]

#### 3. FRAUDULENT CONVEYANCES (§ 172\*)—IMPEACHMENT BY GRANTOR OR HIS ADMINISTRATOR.

Neither one who executes a deed, nor his administrator, can question it on the ground that its purpose was to defraud creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 523, 527-529; Dec. Dig. § 172.\*]

#### 4. DEEDS (§ 200\*)—DELIVERY—EVIDENCE.

The only tendency of evidence that when one signed and acknowledged a deed to his stepdaughters, and delivered it to a bank, he was indebted, being that he made and delivered it to the bank with intent to defraud his creditors, it is not admissible in favor of his administrator, on the issue whether the delivery to the bank was intended and operated as a delivery to the grantees.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 200.\*]

#### 5. TRIAL (§ 203\*)—INSTRUCTIONS—AFFIRMATIVE AND NEGATIVE OF ISSUES.

The petition of P.'s administrator to cancel a deed of P. to H. and K. and the record thereof, on the ground that it had not, during P.'s lifetime, been so delivered by him as to become effective, alleged that P., after executing it, deposited it with a bank for safe-keeping. The answer pleaded a general denial and that the deed was delivered by P. to S., cashier of the bank. Held that, in charging to find for plaintiff, if the jury believed P. deposited the deed with the bank intending at the time to retain control of it, it was proper to also charge to find for defendants, if the jury believed P. deposited it with the bank intending at the time to finally part with control of it; this being authorized by the allegations of the petition, even if the averment of the answer be construed as one of delivery to S., in his individual capacity.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 203.\*]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by W. H. Phillips, administrator, against Pat Henry and others. Judgment for defendants. Plaintiff appeals. Reversed and remanded for new trial.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

May 9, 1905, T. J. Patillo, a widower without children of his own, executed an instrument purporting to be a deed conveying to his stepdaughters, Mary Henry, wife of Pat Henry, and Josephine Kearnes, who afterwards intermarried with C. C. Ridings, 81 acres, more or less, of the John Reynolds survey in Fannin county. After it had been signed and acknowledged by Patillo the deed was placed in an envelope, on which was printed a return card as follows: "After ten days return to Pat Henry, County Clerk of Fannin County, Bonham, Texas, County Courthouse." At a time not otherwise identified than as "in the spring of 1905," the envelope containing the deed, sealed and indorsed in Patillo's handwriting as follows: "T. J. Patillo or Mary Henry or Miss Josephine Kearnes"—was delivered by Patillo to S. D. Simpson, then the cashier of a bank in Bells, who deposited it in the bank's vault, where, it seems, it remained until after Patillo's death, which occurred September 13, 1906. September 15, 1906, the envelope containing the deed was delivered to Mary Henry by Blanton, then the cashier of said bank, and on the same day it was filed with the county clerk of Fannin county for record. Having qualified as administrator of Patillo's estate, on the ground that the deed had never, during said Patillo's lifetime, been so delivered by him as to become effective as a conveyance of the land, and that same and the record thereof was a cloud on his intestate's title, M. W. Leonard, as such administrator, commenced the action resulting in the judgment from which this appeal is prosecuted. Leonard died during the pendency of the suit. Having qualified as administrator de bonis non of said Patillo's estate, appellant Phillips continued the prosecution of the suit; and a judgment having been rendered against him in accordance with the verdict of a jury, as such administrator he prosecutes this appeal.

S. F. Leslie and Richard B. Semple, for appellant. McGrady & McMahon and Thurmond & Steger, for appellees.

WILLSON, C. J. (after stating the facts as above). Appellant offered to prove by the witness Springfield that in September, 1905, Patillo "listed with said witness for sale the land in controversy, authorizing him to sell it for the best market price, and that he continued to leave it in his charge to sell until his death; that said witness was with said Patillo a good many times subsequent to the deposit of said deed in the Bells Bank; and that he never withdrew said land from said witness who had been made by said Patillo his agent to sell said land." On appellees' objection thereto on the ground that it was irrelevant and immaterial, and was a self-serving declaration on Patillo's part as impeaching his deed, the court excluded the testimony. In so doing we think he erred. *Barziz v. Graves*, 25 Tex. 322. The issue in the

case was as to whether the delivery of the deed to the bank operated to pass the title to the parties named therein as grantees or not. Whether it so operated or not depended upon Patillo's intention. If, when he delivered the deed to the cashier, Patillo intended to finally part with the possession and control of it, the title to the land passed to the grantees; otherwise it did not. Acts and conduct on Patillo's part after such delivery, tending to show his intention, were relevant. Assuming ownership and control of the land after such a delivery of the deed, we think would tend to show an intention on his part not to thereby and finally relinquish his right to possession and control of the deed. In the case cited above *Mrs. Graves* claimed certain slaves as property belonging to her separate estate by virtue of a gift thereof to her made by her husband in 1847. Her husband died in 1856. In a contest between herself and her husband's administrator as to the ownership of the slaves, the latter offered as evidence a will made in 1851 by which the husband disposed of the slaves as his own property. The trial court refused to permit the will to be read as evidence. In reversing the judgment the Supreme Court said: "The dispositions of the will, in relation to this woman and child, amounted to a clear act of ownership on the part of the deceased, which ought to have been submitted to the consideration of the jury, inasmuch as the plaintiff's claim to the woman and child was supported solely by parol evidence of the oral declarations of the deceased." Appellees insist that the ruling made in that case is not authority for the contention appellant makes, because *Mrs. Graves'* claim was based upon an oral gift, while their claim is based upon a deed. Such a view of the question ignores the fact that the controversy was as to whether the deed had become effective by a delivery, so as to furnish a basis for a claim on their part or not. If the deed was not delivered to the bank with the intent on the part of Patillo thereby to finally and forever part with control over it, it never became effective as a conveyance to them, and their claim not only was without a deed as a basis for it, but it was without a basis of any kind. In other words, the argument of appellees assumes as determined in their favor the only issue in the case. As in the *Graves Case* the plaintiff sought to establish her claim by parol evidence of a gift, so in this case appellees sought by parol evidence to establish such an intent on Patillo's part as made his deed effective as a gift to them when he deposited it in the bank. If, in the *Graves Case*, acts of ownership by *Graves*, after the time it was claimed he had made the gift, were admissible as evidence to impeach the gift as claimed, we see no reason why, in this case, similar acts by Patillo should not be admissible to impeach the claim made by appellees that said Patillo intended when he

deposited the deed in the bank to part with all control over it.

Patillo and Mrs. Kearnes, the mother of Mrs. Henry and Mrs. Ridings, were married in 1882. Mrs. Patillo died in 1891. The deed in question was executed May 9, 1905, and deposited in the bank "in the spring of 1905." Over appellant's objection thereto on the ground that it was immaterial and irrelevant, appellee Pat Henry was permitted to testify that at the time he married Mrs. Kearnes Patillo "was a very dissipated man and had run through with everything that he had. He was broke and greatly in debt. He was notoriously down at the bottom in a financial way from his dissipation. At the time of his wife's death he was worth from \$12,000 to \$15,000." It does not appear from the record that at the time he executed the deed, or afterwards, Patillo was under any obligation to either Mrs. Henry or Mrs. Ridings on account of an interest owned by her in the community estate between her mother and Patillo or otherwise. The consideration for the conveyance of the land as recited in the deed in question was \$25 paid to Patillo by Mrs. Henry and Mrs. Ridings, and his love and affection for them as his stepdaughters. We are unable to see how the testimony objected to tended to either establish or disprove the only issue in the case, to wit, whether Patillo intended when he delivered the deed to the bank to thereby part with all dominion and control over it. We think the testimony, on the grounds urged to it, should have been excluded.

We do not think the court erred in refusing to permit appellant to prove that Patillo was indebted, and the amount of his indebtedness, at the time he executed the deed in question. So far as we see to the contrary, such testimony would have tended only to show that he made the deed and delivered it to the bank for the purpose and with the intent thereby to defraud his creditors. Neither Patillo in his lifetime, nor his administrator after his death, could be heard to question its validity on such a ground. *Wilson v. Demander*, 71 Tex. 605, 9 S. W. 678.

Article 2302, Sayles' Ann. Civ. St. 1897, declares that "in actions by or against \* \* \* administrators \* \* \* in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with or statement by the \* \* \* intestate \* \* \* unless called to testify thereto by the opposite party." After excluding as evidence, because inhibited by said statute, the testimony of appellee Pat Henry, offered in his own behalf and in behalf of the other appellees, as to declarations made to him by Patillo, in regard to the disposition he had made of the land in controversy, the court, over appellant's objection thereto on the ground that it was irrelevant and immaterial, permitted

said appellee to testify that Patillo made a statement to him in regard to the land. The issue in the case being as to whether Patillo when he delivered the deed, to the cashier of the bank intended thereby to part with all control over it, we are not prepared to say that, on the grounds urged to it, the testimony was inadmissible. We cannot say that an inference tending to support appellees' contention as to Patillo's intent legitimately could not have been drawn from it by the jury.

In his petition appellant alleged that Patillo after executing the deed deposited it with the bank for safe-keeping. In their answer appellees pleaded a general denial, and alleged that the deed was delivered by Patillo to one Simpson, cashier of the bank. The court instructed the jury to find for appellees if they believed from the evidence that Patillo deposited the deed with the bank or its cashier, etc. The instruction is complained of on the ground that the issue made by the answer was as to whether Patillo deposited the deed with Simpson, and not as to whether he deposited it with the bank or not. The evidence was uncontroverted that the deed was delivered by Patillo to Simpson as cashier of the bank. If the allegation in the answer should be construed as an averment of a delivery to Simpson in his individual capacity, we think the charge in the particular complained of nevertheless was authorized by the allegations in the petition. In instructing the jury to find for appellant if they believed that Patillo deposited the deed with the bank intending at the time to retain control of it, it was proper to charge them, on the other hand, to find for appellees if they believed he deposited it with the bank intending at the time to finally part with control of it.

The remaining assignment questions the sufficiency of the evidence to support the verdict of the jury. As the case will be remanded for a new trial, we will not any further than already has been done in the statement of the case, recite the evidence, but will content ourselves with the remark that a majority of the court are of the opinion that the assignment should be overruled.

For the error of the trial court in excluding the testimony referred to of the witness Springfield, the judgment is reversed, and the cause is remanded for a new trial.

#### HUDMAN v. HENDERSON et al.

(Court of Civil Appeals of Texas. Oct. 30, 1909. Rehearing Denied Dec. 4, 1909. On Motion for Second Rehearing, Jan. 1, 1910.)

#### 1. VENDOR AND PURCHASER (§ 224\*)—BONA FIDE PURCHASERS—CHARACTER OF CONVEYANCE.

A conveyance, reciting that grantor sells, releases, and quitclaims unto the grantee all his right, title, and interest, is not a conveyance

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the land, but merely of the grantor's right and title, and the grantee cannot claim to be an innocent purchaser for value.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 469-473; Dec. Dig. § 224.\*]

**2 PUBLIC LANDS (§ 178\*)—CONTRACTS TO CONVEY—VALIDITY.**

A contract, whereby one of the parties agreed to convey to the other a certain section of state school land after a suit then pending involving the title should have terminated in favor of the contracting party, was not invalid, whether it should be interpreted as meaning that such party should continue to occupy the land for the prescribed time and make the necessary proof, or whether it contemplated a substitution of the one to whom the conveyance was to be made as purchaser.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 579-582; Dec. Dig. § 178.\*]

**On Motion for Second Rehearing.**

**3. SPECIFIC PERFORMANCE (§ 58\*)—OBJECTIONS TO RELIEF—PROVISIONS FOR DAMAGES.**

Where a contract, whereby one of the parties delivered personal property to the other in consideration of his agreement to convey certain lands after a suit involving the title thereto should have terminated in his favor, provided that if a deed should not be delivered the prospective grantor should redeliver the personal property transferred or pay the reasonable value thereof, the provisions as to a return of the property or payment of value did not preclude the other from maintaining a suit for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 179, 180; Dec. Dig. § 58.\*]

Appeal from District Court, Lynn County; L. S. Kinder, Judge.

Action by W. F. Hudman against R. A. Henderson and another. Appeal by plaintiff from a judgment in favor of defendants. Reversed and rendered in part, and in part remanded. Motion for rehearing overruled.

H. C. Ferguson, for appellant. L. W. Dalton, G. W. Perryman, Jno. P. Marrs, and Wm. J. Berne, for appellees.

**SPEER, J.** W. F. Hudman sued R. A. Henderson and M. M. Redwine to enforce specific performance of the following contract:

"The State of Texas, County of Lynn. This agreement this day entered into between R. A. Henderson, party of the first part, and W. F. Hudman, party of the second part, witnesseth: That said party of the first part, for and in consideration of the following described property, to wit: One bay horse about 14½ hands high, nine years old and unbranded. Also one bay horse about 14½ hands high, four years and branded ½ on left thigh. Also two sorrel horses one four and one five years old branded R. F. on left shoulder. Also four buggies, one Perry buggy been in use about thirteen months and three new Banner buggies. Two new sets of single buggy harness and one set of old single buggy harness and one set of new double harness. Said prop-

erty of the reasonable market value of three hundred and twenty dollars. Said property this day sold and delivered by the party of the second part to the said party of the first part herein. The said party of the first part agrees to make, execute and deliver to the party of the second part a good and sufficient deed to a certain section of state school land in Lynn county, Texas, after a certain suit which is now pending involving the title to said land shall have been terminated in favor of the party of the first part herein. Said land described as follows, to wit: Being all of state school section No. 448, Cert. No. 446 in block No. 1, E. L. & R. R. R. Co. Said land of a reasonable market value of three hundred and twenty dollars. It is further agreed and understood by and between the parties herein mentioned that if the said party of the first part herein shall fail or refuse from any cause to execute and deliver said deed to said party of the second part, then and in that event the party of the first part shall deliver to the party of the second part said property herein conveyed by him and in the event of his failure or inability to deliver said property then the party of the first part shall pay to the party of the second part the reasonable market value of said property. It is further agreed and understood between and by the parties to this contract that the party of the second part agrees to pay off and discharge any and all indebtedness that may be against said property herein conveyed and to warrant and defend the title to the same against any and all incumbrances, liens, and claims whatsoever. In testimony whereof we have hereunto set our hands and seals this 5th day of September, 1908. R. A. Henderson, Party of the First Part. W. F. Hudman, Party of the Second Part."

M. M. Redwine pleaded specially that he was a purchaser of the land in good faith from Henderson, paying therefor a valuable consideration; and, furthermore, that the contract sought to be enforced was void as being in contravention of public policy, the land being state school land. The court, before whom the case was tried, denied plaintiff a recovery of the land, but gave him judgment against Henderson for its agreed value, and the plaintiff has appealed.

In the view we take of the case, an examination of the instrument of conveyance under which Redwine claims is fatal to his right to recover the land. The deed is as follows: "The State of Texas, County of Lynn. Know all men by these presents: That I, R. A. Henderson, of the county of Lynn and state of Texas, for and in consideration of the sum of five hundred dollars (\$500.00), and other consideration to me in hand paid by M. M. Redwine, of the county of Lynn and state of Texas, the receipt of which is hereby acknowledged, do by these presents bar-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gain, sell, release and forever quitclaim unto the said M. M. Redwine, his heirs and assigns, all of my right, title and interest in and to that certain tract or parcel of land lying in the county of Lynn, and state of Texas, described as follows, to wit: All of section (102) one hundred and two, block 1, Cert. 113, D. & W. R. R. Co., and all of section (448) four hundred and forty-eight, block 1, Cert. 446, E. L. & R. R. Co. Said land sold and awarded by the Com'r of the General Land Office to Jno. Green, October 1, 1902, at \$2.00 per acre and transferred by Jno. Green to R. A. Henderson, July 31, 1903. To have and to hold the said premises together with all and singular, the rights, privileges and appurtenances thereto in any manner belonging unto the said M. M. Redwine, his heirs, and assigns forever so that neither I, the said R. A. Henderson, nor my heirs, nor any person or persons claiming under me shall at any time hereafter have, claim or demand any right or title to the aforesaid premises or appurtenances or any part thereof. Witness my hand at Tahoka, this 9th day of Jan., A. D. 1905. [Signed] R. A. Henderson."

That this instrument is not a conveyance of the land, but merely of the grantor's right, title, and interest, or, in other words, the mere chance of title, is settled by the cases of: *Hunter v. Eastham*, 95 Tex. 648, 69 S. W. 66; *National Oil & Pipe Line Co. v. Teel*, 95 Tex. 586, 68 S. W. 979; *Slaughter v. Coke Co.*, 34 Tex. Civ. App. 598, 79 S. W. 863. And it is useless to cite authorities for the proposition that one cannot claim to be an innocent purchaser for value under such a conveyance.

We know of nothing in our school land law, either statutory or otherwise, that would prohibit a contract such as that entered into between appellant and Henderson. If the proper interpretation of this contract is that Henderson should continue to occupy the land for the prescribed time and make the necessary proof of occupancy, then the transaction finds authority in the case of *Witcher v. Wiles*, 33 Tex. Civ. App. 69, 75 S. W. 889, where the awardee of state school land made a bond for title agreeing to convey the land two years and ten months from date, or after proof of three years' occupancy had been made by him. The validity of this instrument was attacked by another, who desired to purchase the land and had made application for it, but the transaction was sustained both in this court and in the Supreme Court by the refusal of a writ of error. On the other hand, if the proper interpretation is that Hudman contemplated a substitution of himself as purchaser when the *Sprott-Henderson* suit had been terminated, then clearly the same is authorized by our statute regulating the sales of school land.

We find it unnecessary to determine what effect should be given to the conduct of Redwine in paying a part of the purchase mon-

ey to Henderson, after notice of appellant's rights. The judgment of the district court is reversed, and as to the title to the land in controversy judgment is here rendered in appellant's favor; but the cause will be remanded for trial between appellant and appellee Redwine on the issue of improvements made in good faith.

Reversed and rendered in part, and remanded in part.

On Appellee Redwine's Motion Asking Leave to File a Second Motion for Rehearing.

On October 30, 1909, the judgment in this cause was reversed, and the judgment rendered in favor of appellant Hudman. Thereafter, on December 4th, appellees' motion for a rehearing was overruled, and we now have presented to us the prayer of appellee Redwine for leave to file a second motion for rehearing, raising what he denominates a "fundamental error" apparent on the face of the record which was overlooked by us on the former hearings. The point made is this: In the contract between Henderson and Hudman, specific performance of which was decreed by our original opinion, the following stipulation occurs: "It is further agreed and understood by and between the parties herein mentioned that if the said party of the first part herein shall fail or refuse from any cause to execute and deliver said deed to said party of the second part, then and in that event the party of the first part shall deliver to the party of the second part said property herein conveyed by him, and in the event of his failure or inability to deliver said property then the party of the first part shall pay to the party of the second part the reasonable market value of said property." The insistence is that, by virtue of this stipulation, Henderson expressly reserved the right to refuse to carry out the contract to convey the land, in which event the extent of his liability would be for the reasonable market value of the property conveyed to him, which it was agreed was \$320. The case of *Durst v. Swift*, 11 Tex. 273, is urged as being decisive of the question. Without entering into a lengthy review of that decision, we think it is sufficient to call attention to the fact that the Supreme Court in that case held the contract to be one "for the conveyance of 5½ leagues of land lying in certain named counties, but not by any defined or certain boundaries, or local description. It is, in other words, a contract to make title to so much land generally, but not to any particular tract of land so described as to be capable of being identified and made the subject of a suit for specific performance. And in case of the failure of the defendant to comply with the undertaking to make the titles within the time specified, it is stipulated that he shall in lieu thereof pay to the obligee, his heirs and assigns, a certain specified sum of money. It is therefore a contract for the payment of money; not abso-

intely, but conditionally, in the event of the failure to make title."

The present case is more analogous to, and should be ruled by, the decision of our Supreme Court in *Moss & Raley v. Wren*, 113 S. W. 739. Mr. Chief Justice Gaines there says: "We have numerous decisions holding that although there is a stipulation in the contract of this character (for) payment of a fixed sum of money as liquidated damages does not affect the contract for sale of the land, but that the seller can enforce specific performance"—and the authorities are cited in that case. A rehearing was subsequently granted (120 S. W. 847), but this principle was reaffirmed. The stipulation of the contract above quoted is obviously intended only as an agreement on the part of Henderson to return the consideration in the event he should fail or refuse to convey the land covered by the contract. The primary and principal purpose of the parties was the sale and purchase of the land, and not an undertaking on the part of Henderson to pay any sum of money whatever.

Appellee's motion for leave to file a second motion for rehearing is therefore refused.

#### KNOTT v. GODAIR et al.†

(Court of Civil Appeals of Texas. Dec. 4, 1909.  
Rehearing Denied Jan. 8, 1910.)

#### BROKERS (§ 86\*)—RIGHT TO COMMISSIONS—EVIDENCE.

Evidence held not to show a contract, express or implied, to pay a broker commissions for anything he may have done towards securing a purchaser for lands.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 86.\*]

Appeal from District Court, Tarrant County; W. T. Simmons, Judge.

Action by C. S. Knott against W. H. Godair and others, in which G. H. Colvin intervened. Judgment for defendants and intervenor, and plaintiff appeals. Affirmed.

Templeton & Agerton and J. Y. Cummings, for appellant. A. L. Mattock, W. D. Williams, R. M. Rowland, and Capps, Cantey, Hanger & Short, for appellees.

CONNER, C. J. This action was brought in the district court of Tarrant county by C. S. Knott against W. H. Godair, the Bob Pyron Land Company, Bob Pyron, Sam Bucklew, and E. H. Holcomb, to recover the sum of \$7,306.20, which was claimed by plaintiff to be due him as commissions for services rendered in assisting defendants to procure a purchaser for 12 leagues of land owned by the defendant Godair, and which had been sold on terms satisfactory to the owner. The petition charged that said lands had been sold through the joint efforts of plaintiff and the Bob Pyron Land Company, and that by agreement the commissions on such sale were

to be divided between them. The plaintiff also sued in the alternative on a quantum meruit for the value of his services, rendered at the request of said Bob Pyron and the Bob Pyron Land Company, in assisting them to find a purchaser for said lands. The defendants denied that plaintiff had rendered any assistance in procuring a purchaser for said lands, and denied his right to recover anything for such alleged services. G. H. Colvin intervened, and claimed an interest in said commission of \$4,000, which interest he claimed had been assigned to him by the Bob Pyron Land Company. A trial before a jury resulted in a verdict and judgment for the defendants and intervenor.

On this appeal from the verdict and judgment mentioned numerous errors are assigned, but they are all sufficiently disposed of by the conclusion reached by us that, under the undisputed evidence, no recovery in appellant's behalf would have been authorized. As briefly as we can state them, the undisputed facts are substantially that appellee Godair was the owner of 12 leagues of land situated in Glasscock, Hutchinson, Moore, and Loving counties, Tex., for the sale of which, at \$5.50 per acre, he, on June 30, 1906, appointed the Oliver Land & Immigration Company to all the rights of which the Bob Pyron Land Company afterwards succeeded exclusive agent. The commission agreed upon was 5 per cent. As early at least as July 27, 1906, Bob Pyron, as manager of the Oliver Land & Immigration Company, began communication with R. W. Higginbotham, of the firm of Higginbotham Bros., in the effort to make a sale of the Godair lands. The negotiations with the Higginbothams continued under the terms of the original contract of exclusive agency until September 3, 1906, when Bob Pyron, as manager of the Bob Pyron Land Company, consummated the sale of the said lands with R. W. Higginbotham and John G. Harris, who were acting for themselves and for J. M. Higginbotham and H. L. Harris. The sale was made at the price per acre originally authorized, but Bob Pyron reduced his commission from 5 per cent. to 2½ per cent. in order to obtain the consent of Godair, who was present and participating in the final negotiations, to an alteration in the terms of payment.

Appellant's claim for commissions must rest upon the following facts, viz.: That on May 7, 1906, appellant, who was a real estate broker at Colorado, Tex., wrote to Mr. Godair for price and terms at which the lands in question could be bought, in response to which Godair wrote the following letter:

"Chicago, Ill., June 1, 1906. O. S. Knott & Son, Colorado, Texas. Your letter of May 7th sent to me here from Roswell, in regard to my land in Dawson county. I have twelve leagues of land in a body, besides some scat-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
† Writ of error denied by Supreme Court February 2, 1910.

tering sections outside of the solid land. I am now pressing [pricing] the twelve leagues in a body at \$5.50 per acre, but should my man sell a part of it off in small tracts, I would then take it off and sell it all in small pieces at a higher price. I get one-third cash and the balance on time at eight per cent. I would not give any option on it. Yours truly, W. H. Godair."

Thereafter appellant, some time in June, 1906, as he thinks, met Mr. John G. Harris, one of the final purchasers, and informed him of the Godair lands, with which he was familiar, in answer to a statement of Mr. Harris that he was "looking for a piece of land." He also later met and talked with the Higginbothams about the land, from one of whom on August 29, 1906 he received the following letter:

"Dublin, Texas, Aug. 28, '06. Messrs. C. S. Knott & Son, Colorado, Texas.—Gentlemen: We had a letter from our Mr. H. L. Harris in regard to 50 sections of the Godair land at 5½. He indicated that you would probably take one-fourth of this and if we like it we will take the other ¾. Please wire me upon receipt of this, if I am correctly informed, and at what time and place I can meet you to see the land. Yours truly, J. M. Higginbotham."

To this letter the plaintiff replied by wire, as follows, viz.:

"August 29, 1906. J. M. Higginbotham, Dublin, Texas. Will take an interest with you if I am interested in the sale."

On receipt of this message J. M. Higginbotham replied by letter as follows, viz.:

"Dublin, Texas, August 29, 1906. Mr. C. S. Knott, Colorado, Texas.—Dear Sir: Your message received. We do not care to come out and look at the land unless we are quite sure of making a deal. Can we get option until we had [have] time to look at the land; if so and you could go with us to look at same, we could meet you at Big Springs Monday. How far is this land from Sparinburg? What per cent., do you think is first-class land; what terms can we get; how many sec. will we have to buy? Please let us know all you can tell us about the land and where it is. If you can send us plat of same would like to have it. Yours truly, J. M. Higginbotham."

This letter of August 29th was received by appellant on August 30th, and, having before this been informed that appellee Pyron claimed to have the exclusive agency to sell the lands, he sent the following telegram:

"Colorado, Texas, Sept. 1, 1906. Bob Pyron Land Co., Fort Worth, Texas. If you control Godair ranch, wire price; party would inspect it Monday. C. S. Knott."

To this message Pyron replied by wire as follows, viz.:

"Fort Worth, Texas, Sept. 1, 1906. C. S. Knott, Colorado, Texas: Price five-fifty per acre; one-third cash, or twenty-four thousand cash. Seventy-five thousand January

first; balance three years, at six per cent; must have answer Monday. Your commission two and one-half per cent; act quick. Bob Pyron."

Pyron also wrote the following letter:

"Fort Worth, Texas, Sept. 1, 1906. Mr. C. S. Knott, Colorado City, Texas.—Dear Sir: Your telegram just received. It read as follows: 'If you control Godair ranch, wire price; party would inspect Monday.' I wired you as follows: 'Price \$5.50 per acre; one-third cash, or \$25,000 cash, \$75,000 Jan. the 1st, balance three years at 6 per cent. Must have answer Monday. Your commission 2½ per cent. Act Quick. Answer.' Now, Mr. Knott, Godair is here. Judge Lindsey and others have been getting him a little excited, telling him that they could sell this land at from \$10.00 to \$12.00 per acre, which I expect they could do without any trouble. He has, after a week's wrangling, decided to give me until Monday night to sell it as a whole at \$5.50 per acre; ¼ cash, payments as follows: \$25,000 now; \$75,000 Jan. the 1st, balance 1, 2 and 3 years, payable annually at 6 per cent. interest. Now he will give longer time than this if the party so desires, the party to assume the amounts due the different counties. I inclose you herein a statement showing the amounts. Now, if you ever did get busy, let it be now. Rush your man over the land, and wire me, so I can get as early Monday evening as possible. for if the trade is closed as above stated, it will make us a nice piece of money and can be carried out without any trouble. However, if you start into it, and cannot possibly wire me Monday, wire me as early Tuesday as you can, or close it just as early as you can, and let me know and we will make him come through some way anyway, but for goodness' sake try to get your party to accept the proposition Monday. This is certainly a cheap piece of land and whoever gets it will make a barrel of money. I am sending this by the conductor so you will be sure to get it at the train. Hoping that you will make the deal and let me know as early as possible Monday evening, I am, Yours very truly, Bob Pyron Land Company, by Bob Pyron."

After the receipt of the above telegram of September 1st, in answer thereto, before the receipt of the letter last quoted, appellant sent the following telegram:

"Colorado, Texas, Sept. 1, 1906. Bob Pyron, Fort Worth, Texas. Telephone Higginbotham, Dublin; tell them I say buy. C. S. Knott."

He at the same time wired J. M. Higginbotham, at Dublin, as follows:

"Telegraphed Pyron to telephone you; land all very fine; bargain; buy; I am ready. Twenty-five thousand cash."

He also went to work in Colorado City to find other parties who would take the lands in the event the Higginbothams and Harris could not be induced to purchase them: On

the following Monday morning, September 3d, this arrangement with the Colorado parties was made, whereby it was agreed that they would take the land at the price and on the terms stated, provided the deal with the Higginbothams and Harrises did not go through; these negotiations being expressly made subject to the negotiations then pending with the Higginbothams and Harrises. Pending the negotiations with the Colorado parties, however, and in answer to appellant's telegram to Bob Pyron of September 1st, above quoted, Pyron wired appellant as follows:

"Fort Worth, Texas, Sept. 2, 1906. I have had the sale of the Godair land up with Higginbothams for a month. Bob Pyron."

Early the next morning, September 3, 1906, the plaintiff wired Pyron as follows, viz.:

"Sept. 3, 1906. Bob Pyron. I think can make sale if you will divide commissions again and Godair will make several deeds. C. S. Knott."

Later in the day and after arrangements with the Colorado parties had been made, as above stated, the plaintiff further wired Pyron as follows, to wit:

"September 3, 1906. Bob Pyron, Fort Worth. If Higginbothams have not bought land I have made sale here. C. S. Knott."

This message was sent in the forenoon. About sundown that evening appellant received from Pyron the following answer:

"Sept. 3d. C. S. Knott, Colorado, Texas. Godair lands sold. Bob Pyron."

Thereafter, on September 4th, appellant came to Ft. Worth, inquired of Pyron if he (appellant) was "interested" in the deal, and, when informed that his name was not mentioned in the transaction, informed Pyron of the arrangement he had made with the Colorado parties to take the land, and told Pyron that he was authorized to put up a forfeiture to secure the deal with the Colorado people. Pyron again told appellant that the land had been sold to the Higginbothams, and appellant thereupon demanded of Pyron one-half of the commissions on that deal. Pyron denied appellant's right to any part of such commissions, and hence the suit.

It should, perhaps, be further stated that after appellant's visit to Pyron on September 4th, as above stated, he further got into communication with J. M. Higginbotham of Dublin, and inquired whether he had been admitted as one of the purchasers. Higginbotham in reply informed him to the effect that the trade had really been closed through R. W. Higginbotham, without consultation with him. R. W. Higginbotham testified to the effect that he and John G. Harris came to Ft. Worth and closed the sale with Mr. Godair, and that they did not know appellant in the transaction; that they acted for J. M. Higginbotham and H. L. Harris without final consultation with them; that they did not desire appellant as one of the co-purchasers, and that they did not pay any attention

to Knott. J. M. Higginbotham testified that Knott's telegram of September 1st had no influence with him in inducing the purchase, and Pyron testified that about August 1, 1906, he had informed Knott in a conversation that he (Pyron) had the Godair ranch for sale, and was negotiating with the Higginbothams to sell to them. Appellant remembered the conversation, but did not remember that Pyron told him he was trying to sell to the Higginbothams. It should also be further stated that prior to appellant's telegram to Pyron on September 1st to "telephone Higginbotham; Dublin; tell them I say buy"—Pyron had no knowledge that appellant was or had been negotiating with either the Higginbothams or the Harrises.

It seems clear to us that this evidence affords no reasonable basis for a recovery by appellant. Regardless of the inference arising from the evidence that appellant's efforts to interest the Higginbothams and Harrises was with a view of himself becoming a part purchaser, and not merely to procure purchasers for Godair, there is nothing to sufficiently support a conclusion that there was a contract, express or implied, to pay appellant commissions for what he did. Godair's letter to him of June 1, 1906, was a mere answer to an inquiry for prices, etc., and cannot reasonably be construed as an appointment of agency, authorizing appellant as such to procure purchasers. His acts in the premises, as to Godair, were mere gratuities, particularly in view of the fact that Godair had not requested said services nor had knowledge thereof. What appellant did between the date of Godair's letter and the date of his first communication with Pyron seems altogether too inclusive to form a foundation for a claim against Godair for reasonable compensation therefor. As to Bob Pyron, and we here use the name as representing the Oliver Land and Immigration and the Bob Pyron Land Companies, as well as himself, it cannot reasonably be pretended that appellant performed any service, for which Pyron was bound to compensate, prior to Pyron's answer of September 1st offering to divide commissions. Prior to this date as to Pyron, appellant was evidently a mere volunteer. What did he do after that? Nothing that we can find, save to wire Pyron to telephone Higginbotham and tell them to buy, and to also wire J. M. Higginbotham to buy, accompanied with the assurance that he, appellant, was ready. Can it be said that this, under the circumstances, renders Pyron or Godair liable for commissions? Neither prior to this had any knowledge that appellant was, or had been, dealing with the Higginbothams, and Pyron promptly repudiated appellant's interference with the Higginbothams, with whom he had been negotiating more than a month, and with whom he had a sale almost concluded. We do not think that appellant could thus intrude, or that in view of the Higginbothams' testimony that

the telegram to Higginbothams did not influence the final purchase on their part in any degree. Nor do we think appellant's efforts with the Colorado parties can be a basis for commissions. He knew at the time that a sale to the Higginbothams was imminent, and expressly acted subject thereto.

We conclude that all assignments of error should be overruled and the judgment affirmed. It is ordered accordingly.

### WM. CAMERON & CO. v. MATTHEWS.

(Court of Civil Appeals of Texas. Dec. 7, 1909.

On motion for rehearing, Jan. 7, 1910.)

#### 1. TRIAL (§ 256\*)—INSTRUCTIONS—REQUESTS—MORE SPECIFIC.

In an action for breach of contract by which plaintiff agreed to work and ship, and defendant agreed to give orders for, lumber, with as little delay as possible, the lumber to be worked according to defendant's orders, the court instructed that if plaintiff was performing his part of the contract in a reasonable manner, and preparing to deliver lumber as described in the stock sheet, upon defendant's orders, in a reasonable time, and of the character and quantity as described in the contract at the time defendant abandoned it and refused to make further orders, and plaintiff was damaged thereby, the jury should find for plaintiff. *Held*, that the court's description of the lumber delivered as "of the character and quantity" described in the contract included the grade and quantity, and the instruction that it was to be delivered "upon the orders" of defendant required a finding that the lumber was called for by such orders, and was sufficient in those respects, in absence of a request for a more specific instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 638; Dec. Dig. § 256.\*]

#### 2. SALES (§ 81\*)—CONTRACT—CONSTRUCTION—"WITH AS LITTLE DELAY AS POSSIBLE."

A contract requiring plaintiff to fill defendant's orders for lumber "with as little delay as possible" meant within a reasonable time (citing 1 Words and Phrases, title "As soon as possible," p. 528).

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 219; Dec. Dig. § 81.\*]

#### 3. APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS.

In an action for breach of contract by which plaintiff agreed to work and ship lumber to defendant "with as little delay as possible," and defendant agreed to furnish orders therefor, "with as little delay as possible," any error in charging that plaintiff was only required to fill defendant's orders in a reasonable time could not have prejudiced defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221; Dec. Dig. § 1064.\*]

#### 4. SALES (§ 71\*)—CONSTRUCTION—QUANTITY.

If defendant bought lumber as listed in a stock sheet, he could only be required to take the quantity of lumber of any particular dimension which was listed therein.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 189; Dec. Dig. § 71.\*]

#### 5. SALES (§ 383\*)—DAMAGES FOR BREACH—SUFFICIENCY OF EVIDENCE.

In an action for damages for a breach of a contract to purchase lumber, evidence *held*

not to support a verdict for plaintiff in the amount rendered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1097; Dec. Dig. § 383.\*]

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Action by L. M. Matthews against William Cameron & Co. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Hogg, Gill & Jones and Sleeper, Boynton & Kendall, for appellants. Andrews, Ball & Streetman, for appellee.

REESE, J. In this case L. M. Matthews sued Wm. Cameron & Co., incorporated, to recover damages for breach of contract for sale and delivery by Matthews to Cameron & Co. of a certain lot of lumber. Upon trial, with the assistance of a jury, there was a verdict in favor of plaintiff for the amount claimed, \$3,393.48, upon which judgment was rendered. A motion for a new trial having been refused, defendant appeals.

There is no merit in the first assignment of error, which is overruled without discussion.

The contract was for the sale by appellee to appellant of 1,250,000 feet of lumber, to be delivered on board of cars at Caroline switch. A stock sheet, showing the amount and dimensions of the lumber, was attached to, and made a part of, the contract, to show the lumber sold, being a lot of lumber which appellee had on hand at his sawmill near Caroline switch. The contract was dated August 24, 1907. The lumber was "to be worked according to orders of" appellant. Appellant agreed to furnish appellee orders for the lumber "with as little delay as possible," and appellee agreed to work, load, and ship same "with as little delay as possible." On November 20, 1907, appellant notified appellee that it would not take any more of the lumber, justifying such action mainly upon the ground, as alleged, of delay on the part of appellee in shipping lumber upon orders sent him. Appellant had, previous to this, received and paid for 119,506 feet of lumber under the contract.

The court gave the jury the following charge: "You are further charged that if you believe from the evidence that the plaintiff was proceeding to carry out the said contract, and was performing his part of said contract in a reasonable manner, and was preparing and delivering the lumber as in said stock sheet described, upon the orders of the said defendant, in a reasonable time, and of the character and quantity of lumber as described in said contract, up to the 20th day of November, 1907, when the said defendant brought the said contract to an end by its notice of that date, and refused thereafter to make any further orders for said lumber, and thereby if you believe the plain-

tiff was damaged, then you will find for the plaintiff as damages the difference between the price of the said lumber on the date of their said contract as fixed thereby, which was dated July 11, 1907, and the value of said lumber on the 20th day of November, 1907, and 6 per cent. interest thereon from the 20th day of November up to the present time." This charge is assailed by the second assignment of error on several grounds, as set out in the several propositions thereunder. We do not think any of them present substantial merit. The description of the lumber appellee was preparing and delivering as "of the character and quantity" described in the contract was sufficient to include the grade and quantity. The lumber was to be delivered "upon the orders" of appellant, which was sufficient to require the jury to find that it was such lumber as was called for by such orders. If appellant desired more particular and specific instructions upon these points, a special charge should have been requested. It is objected that the jury might, under the charge, have included the lumber that had been accepted and paid for. No issue was made as to this, and it is entirely clear that it was not so included in the verdict.

The fourth and fifth propositions advanced under this assignment are, in substance, that, appellee being bound under the contract to deliver lumber on appellant's orders "with as little delay as possible," it was error to instruct the jury, in effect, that he was bound to do so "in a reasonable time." If this were an original question, we would be inclined to hold that by the use of such a phrase as "as soon as possible," or "with as little delay as possible," both meaning substantially the same thing, the parties to the contract meant that more diligence should be used in doing the particular thing required than would be required where it is only agreed, either in express terms or by implication of law, that the thing is to be done "in a reasonable time." When we consider, however, that what is a reasonable time depends upon all the facts and circumstances of the particular case, which might require a much higher degree of diligence and much greater expedition in one case than in another, and that, after all, the phrase "as soon as possible," or "with as little delay as possible," has still that element of what is reasonable in it, in connection with the word "possible," which, unless such meaning be clearly expressed, or clearly appear from the context, does not mean more than "reasonably possible" in the particular case, there seems some solid ground for the conclusion at which courts have arrived that the phrase used in this contract means that the orders shall be filled within a reasonable time, as stated in the charge of the court. In *Lund v. St. Paul, M. & M. R. Co.*, 31 Wash. 286, 71 Pac. 1032, 61 L. R. A. 506, 96 Am. St. Rep. 906, "reasonable time" was held to mean "as soon as cir-

cumstances will permit," which means substantially the same thing as "as soon as possible," or "with as little delay as possible." This definition, however, is slightly different from that adopted in *Bowen v. Detroit City Ry. Co.*, 54 Mich. 496, 20 N. W. 559, 52 Am. Rep. 822. That is: "So much time as is necessary, in the circumstances, to do conveniently what the contract requires." We find this statement of the law on this question in 2 *Mechem on Sales*, § 1134: "All these terms require construction, and, as to such terms as 'forthwith,' 'immediately,' 'as soon as possible,' and the like, it must be construction in view of the circumstances of the case and the situation of the parties. Each of these expressions may be somewhat indefinite in meaning, but they are all expressive of promptness to a greater degree than would ordinarily be indicated by such a phrase as 'a reasonable time,' though under peculiar circumstances they may mean no more." We conclude, however, that the weight of authority sustains the rule as stated in the charge of the court that appellee was only required to fill appellant's orders in a reasonable time. 1 *Words and Phrases*, title "as soon as possible," and authorities cited. At all events it does not appear that, if the charge were erroneous as contended, appellant was prejudiced thereby.

As to the sixth proposition under this assignment, it appears with reasonable clearness from the evidence that the market value as testified to by appellee, as well as the contract price, was for lumber loaded on cars at Caroline switch. We can see no reason, however, why the evidence should not have been made indisputably clear upon this and many other questions presented, upon which it is not at all so.

There is no merit in the seventh proposition, and the entire assignment is overruled.

The third assignment of error presents no ground for reversal. Certainly the charge objected to is not affirmative error.

Although the contract called for 1,250,000 feet of lumber, the stock sheet attached to the contract and made a part thereof only showed about 989,988 feet had been delivered. Appellee in his petition claimed as his damages the refusal to take the entire 1,250,000 feet less the amount delivered, which is stated to be 1,006,099 feet, and the difference in the contract price and the market value at date of breach, at the place of delivery, is claimed to be \$3,893.48, which is the exact amount of the verdict; it thus appearing with reasonable conclusiveness that the jury had adopted the appellee's statement, instead of being guided by the charge of the court. After motion for new trial had been filed, appellee remitted a proportionate amount, according to the estimate of \$3.86 per thousand, which seems to have been the estimate made by appellee and adopted by the jury as his damages. In making this estimate, however, no attention

seems to have been paid by appellee to several material matters which necessarily entered into the question of the amount of appellee's damages. In making his estimate appellee first figured out the contract price of the lumber, taking the price for lumber of the various dimensions, such price varying from \$18.25 per thousand for some of it to \$12.25 for lumber of different dimensions, with what appears to be rather an arbitrary deduction for that portion which was of the grade of No. 2. In arriving at the market value this is stated for the entire list to be \$11 per thousand for No. 1 and \$10 for No. 2, taking no account of the varying values of the different dimensions of lumber. Furthermore, there is no evidence which we have been able to find in the record as to the proportion of the lumber, of the grade of No. 2, which was an important matter, as under the terms of the contract appellant was only required to take of No. 2 lumber such portion as did not exceed 20 per cent of the whole, and was not required to take any of it that was under this grade. Thus, in order to recover the amount adjudged to him, after the remittitur, appellee was required to show affirmatively that all of the lumber on hand was No. 2 or better, and further, that not more than 20 per cent. of it was of the grade of No. 2. In appellee's estimate upon which the verdict was based, he makes allowance arbitrarily for 20 per cent. of the lumber as No. 2, and rather assumes, than shows by evidence, that none of it was of a lower grade, which appellant was not required to take.

Appellant in its brief also points out, and it is not denied by appellee, that the estimate of appellee shows that, of certain dimensions of the lumber, there were larger quantities than are embraced in the stock sheet. As appellant bought only the lumber listed in the stock sheet, it seems to us that he could only be required to take of lumber of any particular dimensions the quantity of lumber of the dimensions listed in the stock sheet. No account was taken of this in arriving at the verdict.

These objections to the verdict are not here, nor were they in the motion for a new trial, as specifically presented, probably, as they should be, but we are of the opinion that they are sufficiently so to entitle them to consideration, and the assignments of error which go to the insufficiency of the evidence to support the judgment for the amount thereof must be sustained.

The evidence was sufficient to authorize the finding that the appellant had breached the contract, and the assignments of error presenting that question are overruled.

For the errors indicated we are of the opinion that the judgment should be re-

versed, and the cause remanded, and it is so ordered.

Reversed and remanded.

On Motion for Rehearing.

Our attention has been called, in motion for rehearing, to an error in our opinion in this cause. In the opinion as filed the following statement is made: "Although the contract called for 1,250,000 feet of lumber, the stock sheet attached to the contract and made a part thereof only showed about 989,988 feet had been delivered." The statement should have been that the stock sheet only showed 989,988 feet, of which 119,506 feet had been delivered.

The motion is overruled.

#### TEXAS & P. RY. CO. v. JONES.

(Court of Civil Appeals of Texas. Dec. 4, 1909.)

##### 1. CARRIERS (§ 230\*)—INJURIES TO STOCK—INSTRUCTIONS.

In an action against a railroad for injuries to plaintiff's stock in transportation, where plaintiff alleged negligence of defendant in handling the stock, an instruction that, if the stock were damaged by defendant as alleged in transportation, the jury should find for plaintiff, was erroneous as in fact instructing that, if the stock were injured in the manner alleged, defendant was responsible, irrespective of any question of whether or not it was guilty of negligence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 230.\*]

##### 2. CARRIERS (§ 219\*)—INJURIES TO STOCK—DAMAGES—INSTRUCTIONS.

In an action against a railroad for damages to plaintiff's stock in transportation, where the evidence showed that the stock was shipped over defendant's road to W. and thence to H. over another road, and that they were kept in stockpens in W. a whole day awaiting shipment to H., defendant was not liable for depreciation in the market value of the animals on their arrival at destination in excess of such as resulted from injuries occurring on its line, and hence an instruction allowing further damages for injuries occurring after termination of the shipment over defendant's road was erroneous.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. § 219.\*]

##### 3. EVIDENCE (§ 472\*)—OPINION; EVIDENCE—MARKET VALUE.

In an action against a railroad for injuries to stock in transportation, a witness was incompetent to express an opinion as to the reasonable market value of one of the animals if it had reached the destination with only such injuries as ordinarily occur after a reasonable and ordinary run; the issue as to whether or not the run was a reasonable one being one of negligence for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186, 2187; Dec. Dig. § 472.\*]

Appeal from Taylor County Court; T. A. Bledsoe, Judge.

Action by J. D. Jones against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for another trial.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Wagstaff & Davidson, for appellant. Cunningham & Oliver, for appellee.

**DUNKLIN, J.** The Texas & Pacific Railway Company has appealed from a judgment in favor of J. D. Jones for \$450 recovered in the county court of Taylor county in a suit for damages resulting to a shipment of 29 head of horses and mules from Merkel to Ft. Worth.

The trial court gave the jury the following instruction: "You are charged that if you believe from the evidence that plaintiff delivered said stock to defendant company, as alleged in plaintiff's petition and that said stock were damaged by defendant company, as alleged in plaintiff's petition, then you will find for plaintiff." By the first assignment of error appellant challenges the correctness of the foregoing instruction, on the ground that it in effect instructs the jury that, if the stock were injured in the manner alleged in plaintiff's petition, then defendant was guilty of negligence, authorizing a recovery by plaintiff. The allegations in plaintiff's petition were in effect that the running board on which the animals passed from the loading pens into the car at Merkel broke with some of the animals upon it, and thus caused them to be injured; that by reason of the delays in transportation occurring at Merkel and various other places en route to Ft. Worth, and rough handling of the car, in which the animals were transported, the market value of the animals was greatly depreciated, and that in failing to provide safe facilities for loading, and in failing to avoid such delays and such rough handling of the car, the defendant was guilty of negligence. Appellee insists that by the language used in the charge above quoted, "and that said stock were damaged by defendant company as alleged in plaintiff's petition," the jury must necessarily have understood that, in order for plaintiff to recover, he must prove, not only that the animals were damaged as alleged, but that such damage was occasioned through defendant's negligence. We cannot concur in this contention. Perhaps one learned in the law would so interpret the charge, but it is entirely probable that the jury, composed of laymen, construed the instruction as meaning that a verdict should be returned in plaintiff's favor if the animals had sustained damage in the manner alleged, irrespective of any question as to whether or not defendant was guilty of negligence, which was the proximate cause of such damage. Appellant's first assignment of error is therefore sustained. *Bering Mfg. Co. v. Femelat*, 35 Tex. Civ. App. 36, 79 S. W. 869, and authorities there cited.

Appellant's second assignment of error is as follows: "The court erred in his charge to the jury as follows: 'If you should find for the plaintiff \* \* \* you will first find from the evidence what the reasonable value of said stock in the market at Hillsboro,

Tex., on the 11th day of October, 1906, would have been with only such damages as ordinarily occur in shipping stock that distance with ordinary care.'" The foregoing assignment sets out only a portion of the charge on the measure of damages. Following the portion quoted above, the court continued: "You will then find from the evidence the reasonable value of said stock in the market at Hillsboro on said date in their damaged condition, if you find they were injured or damaged in value. And, if this last amount is less than the value found under the preceding subdivision 'A' of this charge, you will then ascertain the difference in said amounts, and said difference, if any, will be the amount of your verdict for the plaintiff." It is doubtful whether this assignment is a sufficient predicate for the proposition urged by appellant, that the portion of the charge quoted in the assignment authorized the jury to allow plaintiff damages for all injuries to the animals occurring during the entire trip from Merkel to Hillsboro; but as the judgment will be reversed for other errors, and in view of another trial, we suggest that there was error in the charge upon the measure of damages taken as a whole. The undisputed evidence showed that the owner of the animals accompanied the shipment; that they were shipped over appellant's road from Merkel to Ft. Worth, and thence to Hillsboro over the Missouri, Kansas & Texas Railway; and that they were kept in stock pens in Ft. Worth a whole day, awaiting shipment to Hillsboro. Plaintiff testified in part as follows: "I have been shipping mules and horses nearly all my life, and know the effect of long delay and rough handling upon the market value of such animals. In addition to bruising and crippling them, they depreciate in weight and flesh and in appearance, their hair gets rough, and tends to make them unsalable, and reduces their market value." In no event would appellant be liable for depreciation in market value of the animals upon their arrival at destination in excess of such as resulted from injuries occurring on its own line, but the charge upon the measure of damages above quoted allowed a recovery for any further damages occurring after the termination of the shipment over appellant's road. *Railway v. Vaughan*, 41 S. W. 415; *Railway v. Leibold*, 55 S. W. 368.

The following question was propounded to plaintiff by his counsel: "What would have been the reasonable market value at Hillsboro, Tex., of the black mare which died if she had reached Hillsboro with only such injuries as ordinarily occur after a reasonable and ordinary run from Merkel, Tex., to Hillsboro, Tex., via T. & P. Ry. and the M. K. & T. Ry. of Texas?" Defendant objected to the question upon the ground that the answer of the witness would be the expression of his opinion upon a mixed question of law and fact. The objection was overruled, and the

witness was permitted to answer the question favorably to plaintiff, and this ruling is the basis of appellant's fifth assignment of error. The issue as to whether or not the run over defendant's line was a reasonable run was an issue of negligence, and the test for its determination was whether or not the same was such a run as a carrier of ordinary prudence would have made under similar circumstances. This was an issue to be determined by the jury, upon which it was improper for the witness to express an opinion, and the court erred in overruling appellant's objection to the question. *Railway v. Roberts* (Sup.) 108 S. W. 808; *Railway v. Schults*, 100 S. W. 445; *Railway v. Noelke*, 110 S. W. 82; *Railway v. Evans-Snyder-Buel Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1026; *Railway v. Thompson*, 2 Tex. Civ. App. 170, 21 S. W. 138; *Sonnefield v. Mayton*, 39 S. W. 167.

For the errors above indicated, the judgment of the trial court is reversed, and the cause is remanded for another trial.

### ✓ DIAMOND v. ROTAN et al.

(Court of Civil Appeals of Texas. Dec. 16, 1909.  
On Rehearing, Jan. 14, 1910.)

#### 1. PERPETUITIES (§ 6\*)—RESTRAINT OF ALIENATION.

A general restraint on the power of alienation, when incorporated in a deed or will otherwise conveying a fee-simple right to the property, is void.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-56; Dec. Dig. § 6.\*]

#### 2. DEEDS (§ 124\*)—CONVEYANCE OF FEE—REPUGNANT LIMITATION.

A deed from a mother to her son remised, released, and quitclaimed to the son described property, to have and hold during his natural life, unless the same or some part thereof be sold by him or some creditor of his, in which event the title to immediately vest in his children, if living, or, if not living, in L., if living, or, if he then have no children and L. be dead, then in the heirs of L., and at the death of the son, if the title should still be in him, the same to become the property of his heirs. *Held*, that the limitation in the deed was a restriction on alienation and void as repugnant to the fee intended to be granted.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 439; Dec. Dig. § 124.\*]

#### 3. ESTATES (§ 10\*)—MERGER—DEFEASIBLE FEE AND REVERTER.

Where a mother conveyed a fee-simple estate in land to her son and sole heir, with a limitation over to his children in case his creditors should subject the land to his debts, and the son was unmarried at the death of the mother, the mother's reversionary estate, which would have existed until the birth of children to the son, passed by inheritance to the son, and merged with his defeasible fee so as to confer on him the complete title, and, such title having once vested in the son, any contingent remainder in unborn children was defeated, and hence the limitation over would not take effect on a

breach of condition after marriage of the son and birth of issue.

[Ed. Note.—For other cases, see Estates, Cent. Dig. §§ 9-13; Dec. Dig. § 10.\*]

#### 4. ESTATES (§ 10\*)—MERGER—DEFEASIBLE FEE AND REVERSION—EFFECT OF STATUTE.

This result was not obviated by Sayles' Ann. Civ. St. 1897, art. 626, providing that the union of any particular estate with the inheritance by purchase or by descent shall not operate to defeat the remainder, since the purpose of the statute was to abolish the common-law technicalities regarding the characteristics of particular estates, essential to support a remainder, and to prevent such results from following the union of the particular estate with the inheritance in the same person, and in the present case there was an absorption of all the estates possible to be carved out of a fee-simple estate in the son.

[Ed. Note.—For other cases, see Estates, Cent. Dig. §§ 9-13; Dec. Dig. § 10.\*]

#### 5. DESCENT AND DISTRIBUTION (§ 8\*)—POSSIBILITY OF REVERTER.

While the possibility of reverter limited to take effect on the happening of a condition is not an estate which may be conveyed, it is one capable of being inherited.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 33; Dec. Dig. § 8.\*]

#### On Rehearing.

#### 6. ESTATES (§ 1\*) — DISTINCTION BETWEEN "ESTATE ON LIMITATION" AND "ESTATE ON CONDITION."

The distinction between an "estate on limitation" and one "on condition" is that in the former the event or occurrence relied on to determine the first estate and as the beginning of another merely marks the end or limit of the first, and thus indicates the boundary between the two, while in estates on condition it actively defeats what might otherwise be a greater interest.

[Ed. Note.—For other cases, see Estates, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4164-4165; vol. 8, p. 7707; vol. 2, pp. 1394-1400.]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by W. L. Diamond, guardian, against J. W. Rotan and others. From a judgment for defendants, plaintiff appeals. *Affirmed*.

M. L. Morris and Richard B. Semple, for appellant. McGrady & McMahon, for appellees J. W. Rotan and J. G. McGrady. Spence & Baker for appellees Mrs. Daisy D. Leonard and Rhodes S. Baker.

HODGES, J. The determination of the principal question presented in this appeal involves the construction of a deed of gift from Mrs. Leanna Leonard to her son, W. H. Leonard. It was made in 1888, and conveyed to W. H. Leonard the land in controversy. Omitting the description of the land, the deed is as follows:

"This indenture made this Feb. 18, 1888, by and between Leanna Leonard as a single person of the county of Buchanan and state of Missouri, party of the first part, and William Henry Leonard of the county of Buchanan, state of Missouri, party of the second

part, witnesseth, that whereas the said party of the first part for and in consideration of love and affection and the sum of one dollar to her paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents remise, release and forever quit-claim unto the said party of the second part the following described lots, tracts or parcels of land lying and being and situate in the county of Fannin and state of Texas, subject to the conditions herein stated, to wit: (Description omitted.) To have and to hold the same unto him the said William Henry Leonard for and during his natural life unless the same or some part thereof should be sold by him or some creditor of his, in which event said land and the title thereto is to immediately vest in his children if any there be living at the time, share and share alike, or if he then have no children living then in the said Leanna Leonard if living, or if he then have no children and the said Leanna Leonard should be dead, then in the heirs of said Leanna Leonard, and at the death of said William Henry Leonard if the title to said land should still be in him, without being vested in others, as herein before provided, then same is to go to and become the property of his heirs, together with all and singular the rights, privileges and appurtenances thereto belonging."

Mrs. Leonard died in 1890 or 1891 without leaving any other children, so far as is disclosed by the record. At the time of the execution of this deed, and at the time of the death of Mrs. Leonard, W. H. Leonard was unmarried. In 1895, about six years after the death of his mother, he married Daisy Leonard, one of the appellees in this suit, by whom he had two children, Henry and John, aged ten and seven years, respectively, at the time of the trial in the court below. W. H. Leonard and his wife resided upon the land in controversy as their homestead for several years prior to the institution of this suit, and 200 acres of that land is still claimed as a homestead by the wife, Daisy Leonard. In 1908 R. L. Holcomb recovered a judgment against W. H. Leonard for the sum of \$706.55 and costs of suit. By virtue of an execution issued upon this judgment the land in controversy was sold, and the appellees McGrady and Rotan claim under that sale.

On May 30, 1908, a conveyance was executed by W. H. Leonard, in which he was joined by his wife, conveying the property in suit to their minor children Henry and John L., and Rhodes S. Baker—to the latter in the double capacity as trustee for Mrs. Daisy Leonard and in his individual behalf. The deed set apart in trust for Mrs. Leonard for life 150 acres; to Baker, in consideration of his services as an attorney in securing the deed of settlement and for money advanced to Leonard as a consideration for the conveyance, a reasonable interest in the entire

tract of land, to be fixed by some court of competent jurisdiction upon application therefor; to the minors Henry and John L. was given an absolute fee-simple title to all the remainder of the premises, and all interest in remainder after the termination of the life estate of Mrs. Leonard. The consideration expressed was love and affection for the children, the payment of \$50, and the legal services rendered by Baker.

The testimony showed that Leonard was a man of spendthrift habits, that he wasted his means and failed to support his family. The family was without any property or means of support except the premises in controversy and the income from it. Rhodes S. Baker was employed by Mrs. Leonard to secure the deed of settlement above referred to, and he advanced the \$50 recited as a part of the consideration. In October, 1908, this suit was instituted by John L. Leonard, as the next friend of the minors Henry and John L., against Rotan, W. H. Leonard, Daisy Leonard, and Rhodes Baker, to recover all of the land described in the original deed. Previous to the trial John L. Leonard died, and W. L. Diamond was appointed guardian of the estates of the minors and permitted to appear and prosecute the suit. In his petition Diamond sets forth the facts substantially as stated here, and claims that the estate of W. H. Leonard in the land terminated by the sale made by the creditor Holcomb and by Leonard's deed to Baker and Mrs. Leonard, charging that these were breaches of the conditions imposed in the original deed; that by the terms of that instrument the occurrence of those contingencies operated to vest the remainder in fee in the minors for whose benefit he sues. He asks for judgment for the entire tract of land, in his capacity as guardian. The defendants in the court below answered, setting up their claims as evidenced by the deeds under which they claimed. The case was tried before the court without a jury, and a judgment rendered in favor of the defendants, denying the right of the guardian to any portion of the property, but recognizing the distribution made in the deed above referred to from W. H. Leonard. To Baker was given, as a reasonable compensation for his services, a one-tenth interest in the property. The title of the appellees McGrady and Rotan was limited to the excess over the homestead of 200 acres. The guardian alone has appealed.

At the request of the appellant, the court filed conclusions of fact and of law, and in his conclusions of law holds that the original deed from Mrs. Leanna Leonard to W. H. Leonard vested in the latter a fee-simple estate to the entire tract of land. The only errors assigned in this court are those which question the correctness of this conclusion of law and the further conclusion holding that the appellees McGrady and Rotan were entitled to any portion of the property. If the

court was correct in concluding that Leonard took from his mother an absolute fee-simple estate in the land, it logically follows, from the facts in evidence, that he must also have been correct in holding that the excess over the homestead claim of Leonard was subject to execution and sale at the instance of a creditor, and that McGrady and Rotan had acquired a good title to that portion. It is apparent therefore that the entire appeal must be determined by a review of the legal conclusion complained of by the first assignment of error. The question is: Did W. H. Leonard take under the deed from his mother an absolute fee-simple estate, or merely a qualified fee held upon condition? The grant was for and during his natural life, and at his death, if the title was still in him without having been divested by a breach of the conditions named, it passed to his heirs generally. The legal effect of this language, if the conditions imposed are to be ignored as void, conveys an absolute fee-simple estate. *Seay v. Cockrell* (Sup.) 115 S. W. 1160. But if those conditions are to be given effect, then Leonard took only a qualified, or conditional, fee, and the court erred in holding to the contrary.

The only ground upon which the court could have disregarded the conditions specified in the deed is that they were void as being a restraint upon the alienation of a fee-simple estate. That a general restraint upon the power of alienation, when incorporated in a deed or will otherwise conveying a fee-simple right to the property, is void, is now too well settled to require discussion. *Potter v. Couch*, 141 U. S. 290, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Seay v. Cockrell* (Sup.) 115 S. W. 1160; *Kessner v. Phillips*, 189 Mo. 515, 88 S. W. 66, 107 Am. St. Rep. 368; *Simonton v. White*, 93 Tex. 50, 53 S. W. 339, 77 Am. St. Rep. 824; *White v. Dedmon*, 57 S. W. 870; *Laval v. Staffel*, 64 Tex. 371; *Bouldin v. Miller*, 87 Tex. 359, 28 S. W. 940; *Latimer v. Waddell*, 119 N. C. 370, 26 S. E. 122, 3 L. R. A. (N. S.) 668, and cases cited in notes; *Tiedeman on Real Prop.* § 204; 24 Am. & Eng. Ency. 864. The apparent uniformity of the ruling does not extend to all the forms in which this restrictive power is sought to be exercised in deeds and wills. The most frequent occasions where courts have been called upon to interpose this objection occur where the deed or will merely contains a clause forbidding the alienation indefinitely, or providing that the property conveyed shall not be sold for the debts of the grantee by any creditor, without at the same time providing that the first estate shall thereby terminate and vest in another. In such cases the rule has been upheld with practical unanimity by the courts of the country, as well as by the text-writers. But in cases where the instrument to be construed contains a provision to the effect that if the grantee sells any part of the property, or it shall be sold

at the instance of a creditor, the estate conveyed shall cease and the title to the property thereupon pass to another named person or revert to the grantor, there has arisen some diversity of opinion as to the propriety of holding such restrictions void. *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *Bennett v. Chapin*, 77 Mich. 538, 43 N. W. 893, 7 L. R. A. 377; *Conger v. Lowe*, 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165; *Fowlkes v. Wagoner* (Tenn. Ch.) 46 S. W. 586. The use of language falling within the last-named class of cases is what surrounds the construction of the deed here under consideration with some difficulty. The deed provides that W. H. Leonard should have and hold the land during his natural life "unless the same or some part thereof should be sold by him or some creditor of his, in which event said land and the title thereto is to immediately vest in his children if any there be living at the time, share and share alike, or if he then have no children living then in the said Leanna Leonard if living, or if he then have no children and the said Leanna Leonard should be dead, then in the heirs of said Leanna Leonard, and at the death of said William Henry Leonard if the title to said land should still be in him, without being vested in others, as herein before provided, then same is to go to and become the property of his heirs." It is evident, from the language quoted, that, if the condition be treated as one which may legally be ingrafted upon instruments of this character, it would have the effect of terminating the estate of W. H. Leonard upon an alienation of the property by him or by any creditor of his.

While adhering to the application of the general rule as hereinbefore stated, the courts of this state, so far as we have been able to ascertain, have not passed upon a provision couched in language precisely, or substantially, the same as that contained in this instrument. However, we are not without eminent authority from other sources. In the case of *Potter v. Couch*, supra, the Supreme Court of the United States uses this language: "But the right of alienation is an inherent and inseparable quality of an estate of fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void because repugnant to the estate devised. \* \* \* For the same reason, the limitation over in case the first devisee shall alien is equally void whether the estate be legal or equitable. (Citing authorities.) And on principle, and according to the weight of authority, a restriction, whether by way of condition or of devise over, not forbidding alienation to particular persons or particular purposes only, but against any and all alienation whatever during a limited time of an estate in fee, is likewise void as repugnant to the estate of the first taker by depriving him during that time of the inherent power of alienation." The language of

that decision is especially applicable here, and may be considered authoritative, inasmuch as the case there being reviewed involved the construction of a provision very similar to the one in this deed. In *Kessner v. Phillips*, also cited above, the instrument construed contained a provision stipulating that in case the grantee should sell, or attempt to sell or incumber, the premises conveyed at any time during 30 years, the title should immediately vest in other named parties, or their heirs or assigns. In disposing of the question, the Supreme Court of Missouri, after citing and discussing a large number of cases, reached the conclusion that such a provision should be treated as a nullity, by reason of being a restriction upon the free alienation of an estate otherwise absolute.

Upon principle we can see no distinction between the two classes of cases, when it appears from the whole instrument that the primary purpose of the condition, or restriction, is to prevent alienation of the property, and not merely to affix a limitation to the estate conveyed. If clauses forbidding alienation, when unaccompanied by any terms of forfeiture, or devises, or grants over, rise to the dignity of conditions capable, if valid, of defeating the continuation of the estate in the first grantee, they stand upon an equal footing with conditions containing those express stipulations. If they do not, then it would not become necessary to hold them invalid in order to preserve the first estate conveyed. It is only when they are treated as conditions, and not as mere covenants, and insurmountable, if valid, that it becomes necessary to eliminate them by assailing their validity. If a clause restraining the free alienation of property is not expressed in terms which are sufficient to determine the estate, it cannot be said that it has that effect, and there is no occasion to invoke the powers of the courts to declare them invalid. On the other hand, if the language used creates such a condition, which, if valid, would defeat the first estate, the form in which the intent of the grantor may be expressed is immaterial. The fact that the grantor says the first estate shall upon the happening of such contingency terminate is entitled to no more weight than should be given language from which the law would imply such an intention.

In the present case it clearly appears that the primary purpose of Mrs. Leanna Leonard was not to limit the tenure of her son, but to shield him from his creditors and his own improvidence. While endowing him with full power to manage and control the property, enjoy all of its usufruct, and pass it at his death to his heirs generally, thus vesting in him an estate in fee simple, she sought to take from her grant some of the essentials which the law invariably attaches to such property rights. This was evidently done, not for the purpose of limiting or di-

minishing a right, but of protecting and prolonging the right and its enjoyment. If Mrs. Leanna Leonard desired to create a spendthrift trust, the law has pointed out a method by which this can be done. *Kessner v. Phillips*, supra. But she could not invest her son with an absolute legal and equitable title to the property and take from him those elements and liabilities with which the law clothes such owner.

There is still another view that may be taken of this case, and, while not resting our decision upon that ground, we think it worthy of being referred to. The record fails to show that Mrs. Leanna Leonard at her death left any child, or children, or their descendants, other than the appellee W. H. Leonard. If we may infer from this that he was the only heir of his mother at her death, then upon the happening of that event he became invested with all the rights and interests held by her, including the possibility of reverter, based upon the occurrence of the contingency mentioned in the deed. The testimony shows that there was an interval of about six or eight years between the death of Mrs. Leanna Leonard and the birth of the first child of W. H. Leonard. Let us suppose that during that time a creditor had sold the property, or that Leonard had himself disposed of it. What then would have been the estate acquired by such purchaser? If we treat the condition in this deed as valid, and the alienation as *ipso facto* terminating his estate under the deed, Leonard's rights as an heir to the reversion, and remainder, would immediately come into existence and form the basis of a fee-simple estate. In short, there was during that time merged in him all the component parts of a complete fee-simple right. The limitation to his children, then unborn, was a mere contingency that did not amount to a vested estate. During the interval between the death of his mother and the birth of his children, Leonard stood as the sole representative of all those who could take for a breach of the conditions in the deed. Having thus been endowed at one time with all the component parts of the entire estate, it would seem that there was a complete merger, and the contingent remainder limited to the children thereby defeated. Article 626, Sayles' Rev. Civ. St. 1897, provides that the union of any particular estate with the inheritance, by purchase, or by descent, shall not operate so as to defeat, impair, or in any wise affect the remainder. It was probably the purpose of this statute to abolish the common-law technicalities regarding the characteristics of the particular estate essential to support a remainder, and also to prevent equally technical results from following the union of the particular estate with the inheritance in the same person. Here, however, we have not only a union of the inheritance with the particular estate, but of the contingent remain-

der also. It does not present the situation of destroying an intervening estate by the union of the extremes, but one in which there is an absorption by one person of all the estates possible to be carved out of the fee simple. This being true, the birth of children afterwards would not operate to divest him of the contingent remainder limited over. While the possibility of reverter, limited to take effect upon the happening of the contingency provided against, is not an estate which may be conveyed, it is nevertheless one capable of being inherited. *North v. Graham*, 235 Ill. 178, 85 N. E. 267, 18 L. R. A. (N. S.) 624, 126 Am. St. Rep. 189. Having been inherited by Leonard from his mother at her death, it completed in him the fee-simple estate.

As stated, while not resting our disposition of the assignments of error upon this proposition, we think it entitled to some consideration, assuming the validity of the conditions discussed.

For the reasons first given, the judgment of the district court is affirmed.

#### On Rehearing.

In the motion for rehearing, counsel for appellant insist with much earnestness that we have placed an erroneous construction on the deed from Mrs. Leonard to W. H. Leonard. It is contended that the legal effect of that deed was to invest W. H. Leonard with "an estate upon limitation," and his children with an "estate upon conditional limitation." It is immaterial, in disposing of this question, whether we construe the deed from Mrs. Leonard as conveying to W. H. Leonard the fee or only a life estate subject to the conditions inserted, if we hold that his is not an "estate upon limitation" as defined in law. The question is: Was his an estate upon condition, or one upon limitation? Mr. Tiedeman, in his work on Real Property (section 211), says: "An estate upon limitation is one which is made to determine absolutely upon the happening of some future event as an estate to A., so long as she remains a widow. The technical words generally used to create a limitation are conjunctions relating to time, such as during, while, so long as, until, etc. But these words are not absolutely necessary; for where it is necessary, in order to carry out the intent of the grantor, to construe an estate to be a limitation, it will be done, even though words, ordinarily used in the creation of an estate upon condition, appear in their stead. An estate upon limitation differs from one upon condition in this, that the estate is determined ipso facto by the happening of the contingency, and does not require any entry by the grantor in order to defeat it. A conditional limitation is an estate limited to take effect upon the happening of the contingency, and which takes the place of the estate which is determined by such contingency. Some

authors, among others Mr. Washburn, have used the terms conditional limitations and limitations interchangeably, referring in both instances to the estate which is determined by the happening of the event. But it appears to be the better method to apply the term conditional limitation to the estate which takes effect, and limitation to the estate which is determined. A conditional limitation is an estate limited to take effect after the determination of an estate, which in the absence of a limitation over would have been an estate upon condition. Strictly speaking, a conditional limitation cannot be limited after an estate upon limitation, except where the contingency which constitutes the limitation, is not sure to happen and the estate is a fee upon limitation. Thus in a grant to A. during widowhood, and upon her marriage to B., A.'s estate would be an estate upon limitation, and consequently B.'s estate would be a good, common-law remainder." Mr. Washburn also in discussing the same subject, uses this language: "In a conditional limitation, the estate determines, ipso facto, upon the happening of the event, and goes over, at once, to the grantor by reverter, or to the person to whom it is limited upon the happening of such contingency. So if the breach of a condition be relieved against in chancery, or excused by becoming impossible by the act of God, the estate to which it is annexed remains unimpaired, whereas a limitation determines an estate from whatever cause it arises. This distinction may be illustrated by a familiar example. A grant to A. B., provided she continues unmarried, is an estate upon condition, and if she marries nobody can take advantage of it to defeat the estate but the grantor or his heirs. But a grant to A. B. so long as she continues unmarried is a conditional limitation. The moment she marries, the time for which the estate was to be held has expired, and the estate is not technically defeated but determined." 2 Wash. on Real Prop. (3d Ed.) p. 20. The distinction between an estate upon limitation and one upon condition may in most instances be easily discerned. In the former the event or occurrence, relied upon to determine the first estate and as the beginning of another, merely marks the end or limit of the first, and thus indicates the boundary between the two; while in estates upon condition it actively defeats what might otherwise be a greater interest. In the deed before us the granting clause is sufficient to invest W. H. Leonard with an estate for life, defeasible if he or any creditor sells the property. But for this provision Leonard would unquestionably be endowed with an estate in fee for life. It would have been otherwise had Mrs. Leonard conveyed the land "until he became insolvent," or "until he or some creditor sold it." Here no greater estate than that marked by the occurrence of insolvency or alienation would have

been possible under the terms of the grant. The condition of insolvency, or the act of alienation, would not operate as a forfeiture to defeat an otherwise greater estate, but simply indicate the termination of the only interest conveyed.

If the estate held by Leonard be one upon condition, and the condition be void for the reasons pointed out in the original opinion, it logically follows that he was endowed by the deed from his mother with such an interest as the terms of the deed would convey with the condition omitted. This we held would be a fee, and we still adhere to that conclusion.

The motion is overruled.

### ABILENE LIGHT & WATER CO. v. CLACK.

(Court of Civil Appeals of Texas. Dec. 4, 1909.)

#### 1. RECEIVERS (§ 143\*)—SALE OF PROPERTY—LIABILITIES OF PURCHASER.

Where defendant became the owner of the property of a water company at a receiver's sale, and had no notice of the company's agreement with plaintiff concerning the maintenance of a bridge, and did not voluntarily agree to maintain the same, it was not liable for plaintiff's expenses in repairing it.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 143.\*]

#### 2. LIMITATION OF ACTIONS (§ 55\*)—TORTS—CONTINUING INJURY.

Under the rule that where the structure constituting a nuisance is permanent and the injury is constant, or certain to occur, the whole damage may be recovered at once, plaintiff, failing to sue for damages on the permanent raising of a dam resulting in the inundation of his land, was barred by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 55.\*]

#### 3. LIMITATION OF ACTIONS (§ 55\*)—TORTS—ACCRUAL.

That on the permanent raising of a dam resulting in the inundation of plaintiff's lands defendant paid plaintiff a certain sum per year as damages did not stop the running of the statute of limitations; there being no evidence to show that plaintiff's cause of action was merged in the contract for the payment of damages.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 55.\*]

Appeal from Taylor County Court; T. A. Bledsoe, Judge.

Action by M. M. Clack against the Abilene Light & Water Company. Judgment for plaintiff, and defendant appeals. Reversed, and judgment rendered for defendant.

Wagstaff & Davidson, for appellant. Cunningham & Oliver, for appellee.

SPEER, J. M. M. Clack recovered judgment against the Abilene Light & Water Company for damages growing out of the maintenance of a dam across Lytle Creek, near the city of Abilene, by which water was caused to back over about 10 acres of land, rendering the same wholly useless, and to re-

cover a further sum which he was forced to expend in repairing a bridge across said creek. In addition to the general issue, the defendant pleaded the statute of limitations of two years, and upon this appeal insists that the trial court should have given its requested summary instruction in view of the undisputed evidence.

With respect to the bridge, it is insisted by appellee that the Lytle Water Company, appellant's predecessor, erected the dam, and shortly thereafter, in pursuance of an agreement to do so, constructed a bridge across the creek to furnish him passage from one part of his land to another, and agreed to maintain the same; that this appellant bought the property of the Lytle Water Company in the year 1906. This agreement on the part of the Lytle Water Company was verbal. It does not at all follow from this that appellant is liable on the covenant of the Lytle Water Company to maintain the bridge. On the contrary, it is undisputed that appellant became the owner of the property of the Lytle Water Company at a receiver's sale, and had no notice whatever of its agreement with appellee concerning the maintenance of the bridge. This being true, and the appellant having in no manner voluntarily agreed to maintain the bridge, it cannot be held liable for appellee's expenses in repairing it.

It remains to be seen, then, if in any event appellant is liable for the damages growing out of the overflow of appellee's land. The appellee thus states his contention in this respect: "In 1889 and 1890 the Lytle Water Company raised the dam about 32 inches higher to its present height, and the dam has been maintained at this height to the present time, and this increase in the height of the dam caused water to back over 10 or 12 acres of appellee's land. The Lytle Water Company paid him \$100 a year on account of this overflow and the backing of water while it owned the property, and during the two years prior to the filing of this suit water had stood on the land from six weeks to three months during the year and part of the spring and summer. The lake is full from one to two times each year, and covers this land from six weeks to six months each year. When the water goes down in the lake, the water goes off the land leaving it dry for a portion of each year, but not long enough to enable him to cultivate a crop on the land." In his testimony appellee further stated: "That when the water is not on the land it is boggy and the water rises on it. The grass will not grow on it, and the land is not worth a button by reason of the dam being erected and raised. That this condition of affairs has been the same since Lytle Water Company raised the dam in 1889 or 1890, and since the dam was raised he has abandoned the use of it for cultivation, as it has been worthless for that purpose since said time."

As before stated, this suit was filed in 1908. Under these facts, we do not think appellee was entitled to recover anything, and our conclusion is predicated, of course, upon a holding that his cause of action as to the land in controversy arose when the Lytle Water Company raised the dam to its present height, thereby submerging appellee's land. It is perfectly apparent to our minds that the dam across Lytle creek is a permanent structure, and that, upon its being raised so as to inundate appellee's land in the manner shown by his testimony, he could at once have instituted suit for his damages. If he could have sued then he ought to have done so, and if he failed, he was under the penalty of a bar by the statute of limitations. Where the structure constituting a nuisance is permanent and the injury is constant or certain to occur, then the whole damage may be recovered at once. *Tex. Central R. R. Co. v. Brown*, 38 Tex. Civ. App. 610, 86 S. W. 659, and authorities there cited. It is further worthy of notice that no special damages occurred during the two years immediately preceding the filing of this suit, but the conditions were identical with those existing for many years prior thereto; thus showing clearly that the real cause of action asserted in this suit accrued with the raising of the dam.

It is perhaps well to notice one further contention of appellee. It is insisted that limitations could not run, because, after Lytle Water Company raised the dam to its present height, it paid appellee in compensation for his damages the sum of \$100 per year until it failed in business and the appellant became the owner of its property. But this does not at all follow. The mere fact that Lytle Water Company paid to appellee the sum of \$100 per year damages does not at all show that his cause of action had not fully accrued when the dam was raised, or even hold in abeyance the statute of limitations. There is neither pleading nor evidence to show that appellee's cause of action was merged in a contract whereby Lytle Water Company undertook to pay the sum of \$100 per year, even if that would affect the question.

We see no way to avoid the conclusion that the statute has long ago barred the appellee's right to recover, and the judgment in his favor is therefore reversed, and judgment here rendered for appellant.

**TEXAS & PACIFIC COAL CO. v. McWAIN.**†  
(Court of Civil Appeals of Texas. Nov. 13, 1909. Rehearing Denied Dec. 11, 1909.)

**1. MASTER AND SERVANT (§ 92\*)—INJURY TO SERVANT—MALPRACTICE IN MEDICAL TREATMENT.**

Defendant, a mining company, is not entitled to immunity from liability for malpractice in treatment of plaintiff, an injured employe,

by the company's physician, on the ground that the physician was selected by plaintiff's employe's union, and defendant only acted gratuitously in taking from employe's wages a certain amount monthly, and paid out the same for medical treatment of injured employe, where the evidence fails to show that the union selected or employed the physician who, after the first few days, treated plaintiff for a number of months.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 143; Dec. Dig. § 92.\*]

**2. MASTER AND SERVANT (§ 284\*)—INJURY TO SERVANT—MEDICAL TREATMENT—ACTION FOR MALPRACTICE—QUESTION FOR JURY.**

Evidence, in an action by an employe for malpractice by a physician, employed by the master, called to treat his injuries received in his employment, held not to entitle defendant to a directed verdict on the ground that it failed to show that defendant contracted for plaintiff's medical treatment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1000; Dec. Dig. § 284.\*]

**3. MASTER AND SERVANT (§ 264\*)—INJURY TO SERVANT—DISCONTINUED MEDICAL TREATMENT—ACTION FOR MALPRACTICE—VARIANCE.**

In an action against his employer for malpractice by the physician called by defendant, plaintiff alleged that, when he was employed by defendant, they agreed that defendant would take 50 cents per month from his wages, and in consideration thereof defendant would furnish all necessary medical and surgical treatment in case of injury while in defendant's employment; that the names of the physicians who would so treat plaintiff were not mentioned; that such contracts were made with all of defendant's employes; and that such amount was deducted from plaintiff's wages each month and became the money of defendant. Plaintiff testified that 50 cents was taken from every employe's wages each month, for which he "was to get doctor, medical, and surgical attention." Defendant's general manager testified: "That the only way the miners can keep from paying the 50 cents per month is not to enter the employment of the company. When an employe leaves the employment of the company he has no interest in this fund. \* \* \* For his 50 cents we give the miner medical attention, \* \* \* and the attention of each one or all three of the physicians who are in the employ, or the surgeons as they may be. We give that to the individual himself. If he calls for a physician outside of the three he pays for that himself. \* \* \* We have to furnish the employes three good physicians. That is the understanding now between the employes or their committees and myself, with hack and blankets and bandages, etc., covered by the contract in pamphlet form that has been produced." Held, that there was no variance between the pleading and proofs in failing to prove the contract to employ medical treatment for plaintiff as alleged.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 870; Dec. Dig. § 264.\*]

**4. MASTER AND SERVANT (§ 291\*)—INJURY TO SERVANT—MEDICAL TREATMENT—MALPRACTICE—INSTRUCTIONS.**

In an action by an employe against his master for malpractice of a physician employed by the master, the complaint charged that, when plaintiff was employed by defendant, it was agreed that a certain amount should be deducted monthly from plaintiff's wages, for which the master would furnish all medical and surgical treatment, in case of injury while so employed. Held, that an instruction to find for defendant if the employe, through their union, by their contract with defendant, had the right to regulate the amount of the collections for the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court January 19, 1910.

hospitals and physicians fund, and it was not intended that any profit should be made from this source, and that the receipts and disbursements for the fund were substantially equal each month, was properly refused, as it was substantially equivalent to a charge denying recovery on the express contract for treatment, though it were proved.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1133; Dec. Dig. § 291.\*]

**5. APPEAL AND ERROR (§ 1033\*)—PERSONS ENTITLED TO APPEAL — RULINGS IN APPELLANT'S FAVOR.**

Appellant cannot complain of an instruction in his own favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4056-4058; Dec. Dig. § 1033.\*]

**6. TRIAL (§ 256\*) — REQUESTS FOR INSTRUCTIONS—NECESSITY.**

In the absence of a request for a special instruction, defendant cannot complain of a correct instruction on the ground that it is not sufficiently favorable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 628; Dec. Dig. § 256.\*]

**7. MASTER AND SERVANT (§ 92\*) — MEDICAL TREATMENT—LIABILITY FOR MALPRACTICE.**

Where a mining company undertakes to furnish medical treatment for its employes, it is liable for the negligence of the physician employed by it in discharge of such undertaking, though it makes no deduction therefor from the wages of the employes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 143; Dec. Dig. § 92.\*]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by D. G. McWain against the Texas & Pacific Coal Company. Plaintiff had judgment, and defendant appeals. Affirmed.

John W. Wray, for appellant. Q. T. Moreland, for appellee.

**SPEER, J.** Appellee, D. G. McWain, an employe of the Texas & Pacific Coal Company, sued that company for damages for alleged maltreatment of a broken arm, averring that the defendant had contracted to treat him, as one of the employes, for injuries received while in its service, and that by reason of its negligence in this respect he had sustained injuries in the amount sued for. The defendant answered generally and specially that it was incorporated under the general laws of Texas for the sole purpose of mining and transporting coal, and was without legal power to make the contract sued on; that plaintiff was a member of a labor union, and the matter of employment of the physicians was wholly in the hands of such union; that it merely distributed the fund accumulated by the contributions of its various employes; and that its services in this respect were without compensation, and rendered at the request of its employes, who selected the physicians that treated them. There were some further special answers that need not be noticed. The trial resulted in a verdict and judgment in the plaintiff's favor for \$5,000, from which the defendant prosecutes this appeal.

The greater part of appellant's brief is devoted to the assignment that the court erred in not instructing the jury summarily to find for the defendant; the following contentions being made under this assignment, to wit: First, that the selection of the physicians, upon whose treatment negligence is predicated in the case, was shown to be in the hands of the labor union of which appellee was a member; second, that the record shows indisputably that appellant did not undertake to treat appellee for compensation, but that it tendered its good offices to its injured employes as a gratuity; and, third, that there is a fatal variance between the contract pleaded and that proved. While there are a great number of propositions submitted under this assignment, it is believed the foregoing will cover all the pertinent issues raised by them.

Upon the issue raised by appellant's insistence that the labor union had selected the doctors who treated appellee, the trial court charged the jury as follows: "If you believe from the evidence that Dr. Gerino was employed by defendant as one of the surgeons at the mine at the instance and request of a committee, and that some of the members of said committee were the duly authorized agents of the local union of which plaintiff was a member, then, even though you should believe from the evidence that Dr. Gerino failed to treat the plaintiff with that degree of skill and care which a surgeon of ordinary prudence of that vicinity would have treated him, and that plaintiff sustained damages by reason thereof, you cannot allow plaintiff any damages therefor." The evidence indicates that Dr. Gerino was first called to visit appellee when his arm was broken, but that his services only extended over a few days at most, when Dr. Binney, another surgeon, was called in, and whose services extended over some eight or nine months. The appellee's case is predicated upon the negligence of both of these physicians, but a charge as to Dr. Binney similar to the foregoing as to Dr. Gerino was neither given nor requested. In truth, we have found nothing in the record to indicate, much less conclusively to show, that the union had anything whatever to do with the selection of Dr. Binney as a surgeon. Conceding, therefore, that appellant's contention is legally sound, it must nevertheless fail because of our finding of the facts above.

Appellant's next contention is that the undisputed evidence shows that it made no contract to treat appellee, and that therefore it should have had the instruction. Upon this point the testimony shows that appellee was in the employ of appellant company as a coal miner. At the time of his employment nothing was said about deductions from his wages for doctor's fees, but he knew that it would be taken out and made no objec-

tions to it. That the sum of 50 cents was taken from every employé's wages per month, for which appellee testified he "was to get doctor, medical, and surgical attention—the very best medical and surgical attention." The vice president and general manager of appellant, who is shown to be its alter ego in Texas, testified: "The only way the miners can keep from paying the 50 cents per month is not to enter the employment of the company. When an employé leaves the employment of the company, he has no further interest in this fund. None of it is returned to the employé, as such. For his 50 cents we give the miner medical attention, bandages, conveyances from the mines, a hack to ride from the mines to his home if he is hurt in the mines, and the medical attention of either one or all three of the physicians who are in the employ, or the surgeons as they may be. We give that to the individual himself. If he calls for a physician outside of the three he pays for that himself. Dr. Binney has been in the employ of the company for about 18 years. Dr. Gerino is not in the employ of the company now, but offhand I should say he was in the employ of the company two years, 1905 and 1907, I believe. We have to furnish them (the employés) three good physicians; that is the understanding now between the employés or their committees and myself, with hack and blankets and bandages, etc., covered by the contract in pamphlet form that has been produced." When appellee was injured, one of appellant's employés, the weigh boss, phoned for a doctor, when Dr. Gerino responded, and after three or four days' treatment Dr. Binney took charge of the case and had the patient in charge for the time already shown. These quotations from the evidence are sufficient, we think, to answer appellant's contention that it was entitled to an instruction on that score.

Finally, it is urged that because of the variance already referred to the instruction should have been given. Some of appellee's allegations in this respect are as follows: "Plaintiff further avers and charges that, at the time of the employment of plaintiff by the defendant, it was then and there understood and agreed by and between plaintiff and the defendant and its servant and agent, one Nichols, the pit boss, that as a part of the contract of employment plaintiff was to pay defendant the sum of 50 cents monthly during every month he was in the employ of the defendant, and that the same was to be deducted monthly from the wages of the plaintiff by the defendant, that this is the agreement the defendant makes with all of its employés, and that the 50 cents is deducted monthly from the wages of the employé and all of the employés of the defendant, and it is so agreed to and understood by all of these in the employ of the defendant, and plaintiff alleges that the same was deducted monthly from his wages while he was

in the employ of the defendant, and that he consented and agreed to the same. In consideration of the monthly deduction and payment by the plaintiff, the defendant then and there undertook and agreed to furnish plaintiff hospital conveniences and attendance, and competent medical and surgical treatment in case of sickness or injury while in the employ of the defendant, and to treat plaintiff by its own servants and agents and surgeons and physicians selected and employed and paid by defendant, in a proper and skillful manner, in the event plaintiff should become sick, or injured by accident, or otherwise, while in the employ of the defendant. That the names of the physicians and surgeons, who should or would treat plaintiff in case of sickness or injury, were not mentioned or specified in the making of the contract with plaintiff. But such contract is made with all miners in the employ of the defendant, and the 50 cents per month is deducted by the defendant from all wages of those in its employ for the 'doctor,' and the money is the money of the defendant company and is of profit to defendant." There is no variance between the contract thus pleaded and the one proved in the quotations hereinbefore made.

A number of special charges were refused, and properly so, for the following reasons: Special charge No. 2 required a finding for appellant if the employés, through their unions, by their contract with appellant had the right to regulate the amount of the collections for the hospital and physicians' fund, and it was not intended that any profit should accrue to it from this source, and that the collections and expenditures ran about equal each month. This, if given, would have excluded appellee from a recovery on his express contract for treatment, however much the proof may have justified a verdict on such issue. Besides, the court's charge was favorable enough to appellant in this respect. The same may be said of special charge No. 3, wherein the jury were instructed to find for appellant if it did not undertake to furnish and provide appellee with medical attention for profit. Special charges Nos. 5 and 7 directed a verdict for the appellant in the event of certain findings with reference to Dr. Binney, which would have excluded appellee's right to recover for Dr. Gerino's negligence, and special charges Nos. 6 and 8 contained the same error with reference to Dr. Gerino. So that none of these charges could have been given under the evidence.

In the tenth assignment appellant attacks the second paragraph of the court's charge, already quoted in this opinion, and insists that it was error for the court thus to single out the particular local union of which the appellee was a member, and to require it to provide that some of the members of the committee that demanded the employment of Dr. Gerino were from this local, before he

would be bound by the action of the union committee. It is sufficient answer to this assignment to say that the charge is one in appellant's favor, directing a verdict for it in the event of a particular finding, and to this extent at least is correct, according to appellant's own contention. If appellant was entitled to a more favorable charge, it should have requested it. *C. I. & G. Ry. Co. v. Johnson*, 108 S. W. 964, 111 S. W. 758, and authorities there cited.

From the entire record we conclude that the evidence not only raises all issues submitted by the court, but is abundantly sufficient to support the jury's findings upon them. This court has recently had occasion to pass upon a very similar question to the one involved in this appeal in the case of *J. L. Zumwalt v. Tex. Cen. R. R. Co.* (not yet officially reported) 121 S. W. 1133. In that case the trial court instructed a verdict in favor of the defendant, but this court reversed the ruling because the evidence tended to show that the railroad company, in consideration of a monthly deduction of 50 cents from the wages of the employé plaintiff, undertook to furnish him medical treatment and hospital conveniences, even though the evidence further showed that the entire fund derived from this source was expended by the defendant company in payment of its surgeon's salary. This, we think, is the true rule. If there was a contract whereby this appellant undertook, in consideration of the monthly deduction from appellee's wages, to furnish him medical treatment, then appellant is liable for the negligence of its physicians supplied by it in discharge of such undertaking, notwithstanding it may be that no profit accrues to it from the deductions thus imposed upon its employes. Indeed, its liability would be the same if no deduction whatever was made. It is inherent in the very contract of employment, and to furnish careful treatment where it has contracted to do so is as much a part of its duty as to exercise care in furnishing a safe place to work and safe tools and appliances with which to labor.

We find no error in the judgment, and it is affirmed.

#### LATTIMORE et al. v. TARRANT COUNTY.

(Court of Civil Appeals of Texas. Nov. 20, 1909. Rehearing Denied Dec. 18, 1909.)

##### 1. DISTRICT AND PROSECUTING ATTORNEYS (§ 5\*)—COMPENSATION AND FEES.

Sayles' Ann. Civ. St. 1897, art. 2495c, provides that the county attorney shall receive in addition to his stated salary one-fourth of the excess of the fees collected by him. Article 2495d requires a sworn statement showing the amount of fees collected and the amount of fees charged and not collected. Article 2495f declares that all fees due and not collected shall be collected by the officer to whose office the fees accrued, and out of such part of delinquent fees

as may be due the county the officer making such collection shall be entitled to 10 per cent. and the remainder shall be paid into the county treasury. *Held*, that, before the county is entitled to any fees collected by the county attorney, it must appear that when he received such fees, he had collected in fees the maximum compensation allowed him by law, for, until then, he is entitled to all fees collected, and the county has no interest therein.

[Ed. Note.—For other cases, see *District and Prosecuting Attorneys*, Cent. Dig. §§ 18-25; Dec. Dig. § 5.\*]

##### 2. DISTRICT AND PROSECUTING ATTORNEYS (§ 5\*)—COMPENSATION—EXTRA SERVICES.

Sayles' Ann. Civ. St. 1897, art. 299, which makes it unlawful for a county attorney to accept any fees for the prosecution of any case, applies only to cases which he is required by law to prosecute, and does not prevent his employment by the county for services outside of his official duties and receiving compensation therefor.

[Ed. Note.—For other cases, see *District and Prosecuting Attorneys*, Cent. Dig. §§ 18-25; Dec. Dig. § 5.\*]

##### 3. DISTRICT AND PROSECUTING ATTORNEYS (§ 5\*)—COMPENSATION—EXTRA SERVICES.

Sayles' Ann. Civ. St. 1897, art. 800, makes it the duty of the county attorney when any county official "intrusted with the collection or safe-keeping of any public funds" to institute such proceedings as are necessary to protect the public interests, and article 297 provides the compensation which he shall receive for such services. *Held*, that the county attorney is not entitled to receive compensation for such services in excess of the amount so provided, and the county commissioners have no authority to contract for further compensation.

[Ed. Note.—For other cases, see *District and Prosecuting Attorneys*, Cent. Dig. §§ 18-25; Dec. Dig. § 5.\*]

##### 4. TRIAL (§ 255\*)—SUBMISSION OF ISSUES—NECESSITY FOR REQUEST.

Complaint cannot be made that the trial court failed to submit certain issues where no request to submit such issues was made.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 627-641; Dec. Dig. § 255.\*]

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by Tarrant County against O. S. Lattimore and others. Plaintiff had judgment, and defendants appeal. Reversed.

Smith & Latimore and C. K. Bell, for appellants. R. E. L. Roy and W. P. McLean, Sr., for appellee.

SPEER, J. Tarrant county instituted this suit against O. S. Lattimore and his official bondsmen to recover a sum alleged to be due above the maximum amount allowed by law to said Lattimore as county attorney for the years 1900, 1901, 1902, and 1903. Plaintiff alleged that defendant Lattimore collected and received during the year 1903 the sum of \$166.05, which he received and retained as commission on fees collected by him, and which accrued before the beginning of his term of office; that during said year he collected, received, and retained \$54.60 as commission of 10 per cent. on fees of office, which accrued prior to the beginning of his term of

office; that of said sums the defendant was entitled to retain one-fourth only, leaving a balance due the state of \$165.49. It was also alleged that the defendant Lattimore collected and received during the year 1903 the sum of \$500, which he claimed as a fee for defending a certain suit in the district court of Tarrant county, in which Tarrant county was plaintiff and Sam Butler et al. were defendants; said suit being brought to recover a large amount of money claimed by Tarrant county against said Butler as county clerk of said county, and the other defendants as his bondsmen. It is further alleged that defendant Lattimore during his four years' incumbency of the office of county attorney received and retained the sum of \$600 under an order of the commissioners' court allowing the same to him as "ex officio" salary. The petition alleges that these sums of money constituted fees of office, and were in excess of the amount allowed and collected by the defendant as salary and all expenses of his office allowed by law, including the salary of his assistants. As to these allegations, the defendants answered that defendant Lattimore had collected the sum of \$2,206.50 upon which he had retained a commission of 10 per cent. as fees allowed by law for making such collection, and that the whole amount was justly due to him in addition to the other fees of office allowed by law; that, as to the other items claimed by the plaintiff, he was justly entitled to retain said sums so paid him by the county, for the reason that the same were paid to him as compensation for legal services outside the scope of his duties as county attorney. There were other issues not necessary to be noticed, however, in view of the disposition of the case below. Upon the summary instruction from the court, the jury returned a verdict in the plaintiff's favor for the foregoing items with interest to the date of trial. From a judgment based upon this verdict, the defendants have appealed.

The first and second assignments of error raise a question based upon an ambiguity in the pleadings, which it will be unnecessary to discuss since the cause is to be remanded for another trial, and the supposed error may be easily avoided by an amendment of what appears to be an error of calculation. The judgment of the district court will be reversed because of error in giving the summary instruction to find for the county. Under article 2495c, Sayles' Ann. Civ. St. 1897, appellant Lattimore as county attorney of Tarrant county was allowed a salary not to exceed \$2,500 per annum, and, in addition thereto, one-fourth of the excess of the fees collected by him. Article 2495d provides "the amount allowed to each official mentioned in article 2495c may be retained out of the fees collected by him under existing laws; \* \* \* and all fees collected by officers named in article 2495c during the fiscal year in excess of the maximum amount allowed

and of the one-fourth of the excess of the maximum amount allowed for their services and for the services of their deputies or assistants hereinafter provided for shall be paid to the county treasurer of the county where the excess accrued." This article also provides for a sworn statement by the official showing the amount of fees collected by him during the fiscal year, and the amount of fees charged and not collected, etc. Article 2495f declares: "All fees due and not collected as shown in the report required by article 2495d, shall be collected by the official to whose office the fees accrued and out of such part of delinquent fees as may be due the county, the official making such collection shall be entitled to ten per cent. of the amount collected by him and the remainder shall be paid into the county treasury as provided by article 2495d." Now, it is clear from these articles, treating the items of commissions as fees of office accruing to appellant Lattimore, as we think they should be treated (*Ellis County v. Thompson*, 95 Tex. 22, 64 S. W. 927, 66 S. W. 48), that to entitle appellee to a judgment it must appear that at the time appellant Lattimore received such fees he had then collected in fees of office the maximum amount allowed him by law, for until such time by the very letter of the statute, as well as its spirit, he is entitled to retain all fees collected by him, and the county has no interest in them. For aught the petition in this case shows appellant Lattimore had not, when these commissions came into his hands, received in fees the maximum amount allowed him by law. Furthermore, the proof in this respect is equally wanting. In the agreed statement of facts it is stated: "That each year of said Lattimore's incumbency in said office there was an excess of fees over the maximum allowed by law." But the extent of this excess is nowhere shown. It may have been \$1, or \$10,000. Neither the pleadings nor the evidence therefore showed that appellee was entitled to recover any amount of the commissions retained by appellant Lattimore upon the collection of past due fees to his office.

Neither was it proper to instruct a verdict as to the item of \$600 alleged to have been paid to appellant Lattimore for "ex officio" services as county attorney. It is quite true that there is no provision of law allowing the commissioners' court of a county to pay to the county attorney an ex officio salary as such, but it is equally true that the commissioners' court may lawfully employ the county attorney to represent the interest of their county in any cause where such duty is not enjoined upon him by law. *Browning v. Tarrant County*, 111 S. W. 748. In other words, article 299, Sayles' Ann. Civ. St. 1897, which makes it unlawful for a county attorney to accept any fee, article of value, compensation, reward or gift, for the prosecution of any case, or for services in any case, applies

only to cases which he "is required by law to prosecute." Now the designation by the commissioners' court of the allowance to appellant Lattimore as "ex officio" might, standing alone, indicate that the allowance was by virtue of his office, and not in fact a compensation for services rendered beyond the duties of his office. But the evidence is not left in this shape. In the agreed statement of facts it is stated: "That during the years immediately preceding the making of such allowance to said Lattimore, said Lattimore, at the request of said commissioners' court, represented said commissioners' court in various and sundry matters, and had at the request of said commissioners' court rendered to them various and sundry legal services, such as written opinions on election and school matters, and in several suits, and that such services so rendered were of the reasonable value of six hundred dollars." It thus appears that the services rendered were in pursuance of a contract of employment, and there is no evidence that such contract was inhibited by law. The presumption, therefore, is that such employment and agreement to pay were lawful. The burden of proof rests upon the county to show that these fees had been unlawfully retained, and not upon appellant Lattimore to show that the contract under which he retained them was lawful.

As to the item of \$500 paid to appellant Lattimore for his prosecution of the Butler suit, we think the court's instruction was correct. We have seen that the law forbids the receiving by a county attorney of any fee or compensation for services required of him by law as such official. Article 300, Sayles' Ann. Civ. St. 1897, makes it the duty of the county attorney when it shall have come to his knowledge that an official in his county, "intrusted with the collection or safe-keeping of any public funds, is in any manner whatsoever neglecting or abusing the trust confided in him," to institute such proceedings as are necessary to protect and preserve the public interests. Article 297 provides the compensation which the county attorney is to receive in such a case. It therefore clearly appears, we think, that the attempted contract whereby the commissioners' court of Tarrant county agreed to pay to appellant Lattimore \$500 in lieu of any and all other claims to compensation for the prosecution of the Butler suit was forbidden by law and void. That appellant's services were worth \$500 to the county cannot, of course, affect the question. The law has provided the compensation for him, and he and the commissioners' court would not be at liberty to disregard that law and substitute a different compensation, however desirable such arrangement might be to all parties.

The cross-assignment of error must be overruled, because it complains of the trial

court's failure to submit the issue of appellee's right to recover another item pleaded, when no request was made to have such issue submitted. We have thought it best, however, not to affirm the case as to any item, but to reverse the same as a whole, and remand the cause for another trial.

Reversed and remanded.

CITY LOAN & TRUST CO. et al. v.  
STERNER et al.†

(Court of Civil Appeals of Texas. Nov. 13, 1909. Rehearing Denied Dec. 18, 1909.)

1. CONTINUANCE (§ 46\*)—PROCEEDINGS—AFFIDAVIT.

An application for a continuance on the ground of the absence of the president and manager of a defendant corporation who had testified by deposition was properly denied, where there was no affidavit to support the statement in a telegram that he was absent because of sickness in his family, and where it was not shown by affidavit that by reason of his absence during the trial counsel could not fully develop the defense.

[Ed. Note.—For other cases, see Continuance, Dec. Dig. § 46.\*]

2. JURY (§ 25\*)—TRIAL BY JURY—DEMAND.

Where, after a case had been called and postponed, defendant's counsel paid the jury fee, but made no demand for a jury trial, and did not call the court's attention thereto until after the case was regularly called for trial on the nonjury docket, and the granting of a jury trial would necessitate a postponement of the trial to a subsequent week, and greatly inconvenience plaintiff, who was a nonresident, and who had twice journeyed from his home to attend the trial, the refusal to grant a jury trial was proper under Sayles' Ann. Civ. St. 1897, art. 3189, requiring a party desiring a jury trial to apply therefor in open court on the first day of the term of the court at which the suit is to be tried.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 154-173; Dec. Dig. § 25.\*]

3. APPEAL AND ERROR (§ 750\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error that the court erred in not sustaining the plea in abatement in an action begun in September, 1908, on a note payable January 1, 1908, because the evidence showed that the suit was prematurely brought on the ground that the right of action did not accrue until January 1, 1909, could not be considered, where there was no assignment attacking a finding that the note matured January 1, 1908, and that the time of its payment had not been extended.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 750.\*]

4. BILLS AND NOTES (§ 137\*)—TIME OF PAYMENT—EXTENSION OF TIME—AGREEMENT.

Where the payee of a note maturing January 1, 1908, wrote to the maker in November, 1907, that he would extend the time of payment for a year if interest was paid when due, but interest was not paid until about three months after maturity, there was no binding agreement extending the time of payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 334-337; Dec. Dig. § 137.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court January 26, 1910.

**5. PLEDGES (§ 58\*)—ENFORCEMENT OF RIGHT OF ACTION PLEDGED—RIGHT OF PLEDGEE.**

In an action on a note secured by the pledge of an unmatured vendor's lien note, the court properly foreclosed the lien on the note pledged and ordered the same sold to satisfy the judgment on the note sued on, instead of foreclosing the vendor's lien.

[Ed. Note.—For other cases, see Pledges, Dec. Dig. § 58.\*]

Appeal from District Court, Erath County; W. J. Oxford, Judge.

Action by J. D. Sterner and another against the City Loan & Trust Company and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Green & Blanton, for appellants. Templeton & Agerton and Young & Johnson, for appellees.

DUNKLIN, J. J. D. Sterner, as plaintiff, recovered judgment for \$6,858.80 against defendants, the City Loan & Trust Company and E. B. Blanton, on a promissory note executed by defendants. The judgment further decreed a foreclosure of lien upon certain vendor's lien notes held by plaintiff as collateral security for the note sued on, and from this judgment defendants have appealed.

The case was first called for trial on December 22, 1908, at which time defendants applied for a postponement of the trial on account of the absence of defendant E. B. Blanton, and upon such application the trial was postponed to January 18, 1909. Upon the last-named date the case was again called for trial, and again defendants moved for a postponement on account of the absence of E. B. Blanton; but this application was overruled, and this ruling is assigned as error. This application was supported by the affidavit of defendants' counsel, containing the statement that E. B. Blanton was president and sole manager of defendant company; that counsel needed his presence and assistance in conducting the defense; and that counsel had just received a telegram from Blanton to the effect that it was impossible for him to be present at the trial on account of sickness in his family. Blanton had testified fully by depositions which were introduced in evidence upon the trial. The record fails to show any affidavit from any source that the statement contained in the telegram was true, or that by reason of Blanton's absence during the trial his counsel was unable to fully develop the defenses to plaintiff's suit, and the court committed no error in refusing the application for a postponement of the trial. *Hunt v. Makemson*, 56 Tex. 9; *Berry v. Burnett*, 23 Tex. Civ. App. 558, 56 S. W. 769; *Bond v. Bank*, 53 S. W. 71; *Finn v. Krut*, 13 Tex. Civ. App. 36, 34 S. W. 1013.

Neither did the court err in refusing defendants a trial by jury, as complained of

in appellants' second assignment of error. When the case was called on December 22, 1908, and after it was postponed and set for January 18, 1909, defendants' counsel paid the jury fee requisite to have the case placed on the jury docket; but no demand was then made of the court for a trial by jury, and the matter was not called to the attention of the court until after the case was regularly called for trial on the nonjury docket on January 18, 1909. In an explanation attached to the certificate of the trial judge in approving defendants' bill of exception to this ruling, it appears that plaintiff lived in a distant state and had twice journeyed from his home to Stephenville to attend the trial, the former occasion being on December 22, 1908, when the trial was postponed over his protest. The jury docket had been assigned for subsequent weeks of the term, and to have granted this demand for a jury trial would have resulted in a postponement to some subsequent week, and perhaps the necessity of another trip to the state by plaintiff to attend the trial. The statutes have prescribed certain regulations governing parties who desire trials of civil cases by a jury, and whenever it is shown that to comply with a demand for a jury trial, in the absence of a compliance with those regulations, will materially affect the rights of the opposing party, the demand should be refused. *Sayles' Ann. Civ. St.* 1897, art. 3189; *Hunt v. Makemson*, 56 Tex. 9; *Cabell v. Shoe Co.*, 81 Tex. 104, 16 S. W. 811; *Petri v. Bank*, 83 Tex. 424, 18 S. W. 752, 29 Am. St. Rep. 657; *Cruger v. McCracken*, 28 S. W. 282.

Appellants' third assignment of error is as follows: "The court erred in not sustaining the plea in abatement interposed by the defendants, the City Loan & Trust Company and E. B. Blanton, because the overwhelming weight of the evidence shows that the plaintiff's suit was prematurely brought, and that a right of action did not accrue to plaintiff until January 1, 1909." The trial court filed findings of fact, one of which was to the effect that the note sued on matured January 1, 1908, and that the time of its payment was never extended by any valid or binding agreement between the parties thereto. Upon the decisions in *Sup. Council A. L. of H. v. Storey*, 75 S. W. 905, *Bandy v. Cates*, 97 S. W. 710, 711, and *Best v. Kirkendall*, 107 S. W. 932, 933, appellee insists that appellants' third assignment above quoted cannot be considered, in view of the fact that appellants filed no assignment attacking the findings of the court above referred to, and we are of the opinion that the contention is well taken. However if we are in error, in this holding, we are of the opinion that appellants' third assignment should be overruled in view of the fact that there was abundant evidence to support the action of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the court in overruling the plea in abatement. The note sued on was by its terms made payable January 1, 1908. The suit was instituted September 14, 1908. Appellants pleaded that Sterner had agreed with appellants that the time of payment of the note should be extended to January 1, 1909. Appellants introduced in evidence a letter written by Sterner, of date November 11, 1907, containing the following: "In reference to this note, as stated in previous letter, I am willing you should pay the interest when due, and extend the time of payment until January 1st, 1909." Appellants failed to pay this interest on January 1, 1908, but did pay it March 23, 1908, and appellant E. B. Blanton testified that on March 23, 1908, Sterner agreed to an extension of the note until January 1, 1909. He further testified that he did not remember whether anything was said at that time about reserving the privilege to pay the note before January 1, 1909, but it was his impression that he did say something to Sterner about selling the collateral notes and taking up the note sued on. This testimony of Blanton was flatly contradicted by Sterner, and the letter written by Sterner above quoted did not sustain the plea in abatement, as the interest was not paid when due.

By their fourth assignment appellants contend that the court erred in not foreclosing the vendor's liens retained in the collateral notes, instead of foreclosing the lien upon those notes and ordering them sold to satisfy plaintiff's judgment against appellants. The court found that the collateral notes were not due. These findings seem supported by the evidence, and appellants have presented no assignment challenging their correctness. The fourth assignment of error is therefore overruled.

We have found no error in the judgment, and it is affirmed.

### WEINMAN v. SPENCER.

(Court of Civil Appeals of Texas. Dec. 11, 1909.)

#### 1. BROKERS (§ 88\*)—ACTION FOR COMMISSIONS—INSTRUCTIONS.

In an action for broker's commissions, where the undisputed evidence showed that the sum of \$150 had been paid by defendant to the broker as commissions, and the sole issue was whether there was a balance due of \$150, and the court charged defendant's request that if the broker agreed to take \$150 commissions, and, if thereafter the trade was made, defendant should recover, a charge that, if defendant agreed to pay the broker \$300, the broker should recover the sum of \$150, with interest, etc., was proper.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 88.\*]

#### 2. NEW TRIAL (§ 150\*)—PROCEEDINGS TO OBTAIN—ABSENT WITNESS—ABSENCE OF AFFIDAVIT OF WITNESS.

Where the affidavit of a proposed witness corroborative of a statement of the party in the

motion for new trial, on the ground of newly discovered evidence, as to what such witness' testimony would be, is not attached to the motion nor its absence accounted for, although the witness is shown to be an employee in the party's office, so that the affidavit could easily have been obtained, it is ground for denying the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 306-310; Dec. Dig. § 150.\*]

Appeal from Tarrant County Court; Chas. T. Prewitt, Judge.

Action by Charles F. Spencer against L. B. Weinman. Judgment for plaintiff, and defendant appeals. Affirmed, with damages for delay.

Bryan & Spoons, for appellant. A. J. Clendenen, for appellee.

SPEER, J. This is an action by Charles F. Spencer against L. B. Weinman to recover a balance of \$150 alleged to be due as a broker's commission in effecting a purchase of real estate. There was a judgment in favor of the plaintiff for the amount sued for, and the defendant has appealed.

The cause has been advanced upon a suggestion of delay made by the appellee and has been considered upon the appellee's brief alone, since the appellant has failed to file briefs. This proceeding is authorized by rules 42 and 43 for the Courts of Civil Appeals (87 S. W. xvii). Rule 42 provides that when the "appellant or plaintiff in error has failed to prepare the case for submission, by the omission of what is required after bond or affidavit filed for appeal and for writ of error with citation served, the appellee or defendant in error, before the call of the case, may file in the appellate court a brief in the manner required of the appellant or plaintiff in error—except that his propositions will be shaped so as to show the correctness of the judgment—which the court may, in its discretion, regard as a correct presentation of the case, without examining the record further than to see that the judgment is one that can be affirmed upon the view of the case as presented by appellee or defendant in error." Rule 43 authorizes the submission of such a case upon a suggestion of delay, whereupon "the record will be examined sufficiently to ascertain that it is or is not properly a delay case, and if found to be a plain case of delay, it will be acted on as such; but if not, it will be reversed or referred back for a brief, or brief and argument, on one or both sides, as may be directed." This rule further provides, in a case like the present, "the court will be required to look only to the substantial merits as they may appear in the record."

Only two assignments of error were filed by appellant, and they are thus presented in appellee's brief:

"The court erred in the first paragraph of his charge to the jury.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"The court erred in not granting the defendant a new trial and in overruling defendant's motion for a new trial because of the newly discovered evidence of Frank Singleton."

Appellee's proposition under the first assignment of error is: "The charge of the court submitted in appropriate language the only issue in the case and was in all respects correct." The charge complained of was as follows: "You are instructed that if you believe from the evidence that the defendant, Weinman, agreed to pay plaintiff \$300, you will find for the plaintiff, Charles F. Spencer, for the sum of \$150, with interest at the rate of 6 per cent. per annum from the 19th day of January, 1908; unless you so believe, you will find for the defendant." The following special charge was also given at the request of appellant: "You are instructed that if you believe Spencer agreed to take \$150 commission on the trade, and that thereafter the trade was made, you will find for defendant."

The undisputed evidence showed that the sum of \$150 had been paid by Weinman to Spencer on account of this transaction, and the sole issue was whether or not there was a balance due of \$150. We see no possible error in the court's presentation of this issue, and the first assignment is therefore overruled.

As to the second assignment of error, an examination of the motion for a new trial discloses that the affidavit of the proposed witness Frank Singleton corroborative of the statements of appellant in the motion as to what such witness' testimony would be is not attached to the motion, nor is its absence accounted for, although the witness is shown to be an employé in the office of appellant, and the affidavit could easily have been obtained. We think this within itself justifies the trial court in exercising his discretion against granting the motion if there were no other reasons. We have further examined the record to see if the "substantial merits" of the case have been reached as required by rule 43 above cited, and are fully satisfied that it is a "plain case of delay," and should be acted on as such. The judgment of the county court is therefore affirmed, together with 10 per cent. on the amount in dispute as damages as provided by law. *Sayles' Ann. Civ. St. 1897, art. 1024.*

Affirmed, with damages.

# INTERNATIONAL & G. N. R. CO. v. OWENS.†

(Court of Civil Appeals of Texas. Dec. 8, 1909. Rehearing Denied Jan. 12, 1910.)

## 1. APPEAL AND ERROR (§ 686\*)—BILL OF EXCEPTIONS—SUFFICIENCY TO SHOW ERROR—CHALLENGE TO JUROR.

A bill of exceptions, showing that a challenge for cause to a juror was overruled, and

counsel, on renewing the objection, stated that unless the challenge be allowed they would lose a peremptory challenge, of which they had only one left, and which they wished to use against one of two other jurors, and the challenge was again overruled, and the juror was peremptorily challenged, does not show error in overruling the challenge for cause, where it is not shown by the bill that the two jurors for one of whom they wished to save the peremptory challenge actually served on the jury.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 686.\*]

## 2. MASTER AND SERVANT (§ 285\*)—INJURIES TO SWITCHMAN—PROXIMATE CAUSE—QUESTION FOR JURY.

In an action for injuries to a switchman by cars becoming detached by reason of a defective coupler, and which could not be stopped because of defective brakes, evidence held sufficient to take the question to the jury whether defendant's negligence was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002-1010; Dec. Dig. § 285.\*]

## 3. MASTER AND SERVANT (§ 210\*)—INJURIES TO SWITCHMAN—ASSUMPTION OF RISK.

Where a switchman knows that loose cars are approaching the rear end of a train, and in obedience to an order climbs on the train to signal the engineer to keep out of way, and while his back is turned to the approaching cars is thrown from the car by the collision, which was made possible because of defective brakes on the loose cars, the switchman does not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 554-556; Dec. Dig. § 210.\*]

## 4. MASTER AND SERVANT (§ 233\*)—INJURIES TO SWITCHMAN—CONTRIBUTORY NEGLIGENCE.

Neither under such facts is the switchman guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 233.\*]

## 5. APPEAL AND ERROR (§ 294\*)—MOTION FOR NEW TRIAL—NECESSITY.

That the evidence does not support the verdict cannot be assigned as error, when such point has not been raised in motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1724, 1735; Dec. Dig. § 294.\*]

Appeal from District Court, Bexar County; Arthur W. Seeligson, Judge.

Action by W. M. Owens against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

King & Morris and Hicks & Hicks, for appellant. T. J. Newton and Will A. Morriss, for appellee.

JAMES, C. J. Appellee, Owens, sued for damages for personal injuries, which he alleged he received while in the service of the railway company as a switchman in the yards in San Antonio. He alleged that his duties at the time were to aid in switching trains and cars, which included riding on trains and cars being switched and giving signals to the engineers; that on this occasion, while on

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

a box car at the rear end of a train being switched, a number of loose or detached cars in motion ran into the rear of the train upon which he was working, and knocked him off the car, seriously injuring him. The sum and substance of plaintiff's allegation is that defendant was negligent in permitting the said coupler to become old, defective, and broken, whereby the train became uncoupled; also, that defendant's servant on the detached cars failed to apply the brakes; also, in that the brakes thereon were old, worn, broken, and out of repair to such an extent that they could not be operated and the cars stopped by the use thereof, each and all of which acts of negligence directly and proximately caused plaintiff his injury. Defendant answered by general denial, contributory negligence, and assumed risk. Plaintiff was awarded \$5,000.

By appellant's first assignment a question is presented as to error in overruling appellant's objection to the juror Collins. The bill is as follows: "Be it remembered that upon the trial of the above-styled cause one Collins was one of the regular jurors who qualified as a member of the jury on their voir dire as a member of the regular jury panel for the week; that upon examination of said juror Collins by counsel for defendant, it was developed that there was an affidavit pending in the county court of Bexar county, Tex., charging said Collins with theft under \$50, and that the case had not yet come to trial and was still pending, and that one of the counsel of record for plaintiff, and who was actively engaged in the trial of the case at bar, was the county attorney of Bexar county, Tex., charged with the duty of prosecuting said Collins on said charge. Thereupon counsel for defendant challenged said Collins for cause on the ground that the law required jurors to be of good moral character, and because of the facts above set out, and the effect it might have upon said Collins in considering the verdict in this case under the circumstances, which objection was by the court overruled; to which action of the court the defendant then and there excepted. That thereafter, and after the parties had retired to make their peremptory challenges to the array of jurors, counsel for defendant notified the court that they would have to challenge Collins peremptorily unless he was excused by the court, and that such challenge would exhaust their peremptory challenges, and that they desired to challenge two more jurors peremptorily and renewed their challenge for cause of Juror Collins, which challenge was again overruled by the court, and defendant required and did peremptorily challenge Juror Collins, and defendant again excepted, and here and now presents this its bill of exception No. 1 to the action of the court, and asks that same be allowed, filed, and made a part of the record in this case, which is accordingly done, this the 10th day of February, 1909."

No error is shown to have been committed by the ruling. The bill does not show that either of the two jurors for one of whom appellants desired to save its remaining peremptory challenge served on the jury. Granting that plaintiff had one challenge left and was desirous of using it upon one other of the panel, still, as Collins did not serve on the jury, and there is nothing to show that either of the other two served, enough does not appear from the bill to show that appellant was prejudiced by the ruling. For all we know the other two may have been stricken by the plaintiff.

Under appellant's second assignment there are two propositions, referring to the refusal of a peremptory instruction. The first proposition is: "In order for plaintiff to recover it must appear, among other things, that the alleged negligence was the proximate cause of the injury to the plaintiff, whatever that may have been."

We find testimony which supports the following conclusions of fact: That the cars became detached from a train by reason of a defective coupler. That they came with considerable speed down towards where plaintiff was engaged. That its approach was discovered, and plaintiff was assigned the duty of getting upon the rear end of the train, which was in the way of the approaching cars, and of signaling the engineer on the other end of that train to move it forward in order to avoid being run into by the loose cars. That whilst so engaged with his back to the approaching cars the car he was upon was struck by the loose train with sufficient force to knock him down to the ground, causing him his injury. The cause or causes of this collision are found to be the inability of those who got upon the moving cars to check or stop them, to do so, from the fact that the brakes were defective and insufficient for the purpose. If the above proposition means that there was no evidence that any negligence of defendant was the proximate cause of the accident, we must overrule it. And the proposition does not extend any further.

The second proposition is: "Where a switchman sees loose cars approaching his train and has ample time to get out of the way and get into a position of safety, but fails to do so and takes a position upon the handholds upon the top of the car immediately at the point where the loose cars must strike his train, and continues there after seeing cars move slowly towards his train, he assumes the risk incident thereto and cannot recover for any injuries resulting to him by being knocked off the car by the concussion when the loose cars coupled onto his train."

Appellee, of course, knew of the approach of the cars, for he was in the act of endeavoring to get the train he was on out of their way. He knew, of course, that his train was liable to be run into by the cars, and

this he and the others were working to avoid. But that he knew or realized that there was a present danger of a collision, or one sufficient to produce the result it did, does not appear. On the contrary, he did not know that the brakes on the loose string of cars would not work properly, and he, of course, had the right to assume, and to act upon the assumption, that they were capable of stopping or adequately checking the cars in the usual way. His duty lay in front of him, giving signals ahead to cause the engineer to keep moving. He was obeying the order to "get out of the way," which meant to get the train out of the way, and this he seems to have been intent on. His back was towards the coming cars when they struck.

In the circumstances of this case, there was no assumed risk, nor of contributory negligence, as matters of law; the latter being alleged in a third proposition. The judge probably considered these issues as really not in the case, and did not submit them. But it is enough for us to say that such defenses did not appear as matters of law.

Besides this (although we place the decision on the foregoing grounds), the assignment under which these matters are briefed and presented is simply that the court refused a peremptory instruction which was in general terms. Now it seems to be settled that such points as that the evidence does not support the verdict cannot be assigned as error when such point has not been raised in the motion for new trial. *Ellis v. Brooks* (Sup.) 102 S. W. 94. The motion for new trial did not state as a ground that the verdict should be set aside because the evidence showed that plaintiff assumed the risk, or was guilty of contributory negligence. We doubt that appellant would have the right to assign such a matter as error directly, for the reason just given, and we therefore doubt that it can reach the same result indirectly by presenting the same in connection with an assignment which charges error in refusing a peremptory instruction.

Judgment affirmed.

#### HARRISON v. LITTLEFIELD.

(Court of Civil Appeals of Texas. Nov. 20, 1909.)

COURTS (§ 480\*)—ACTION IN ANOTHER COURT.

District court is without jurisdiction to enjoin prosecution of a similar suit between the same parties previously begun in another district court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1270-1278; Dec. Dig. § 480.\*]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Action by C. W. Littlefield against Edward T. Harrison, receiver. From an order grant-

ing plaintiff an injunction, defendant appeals. Reversed and remanded.

J. L. Goggan, D. A. Eldridge, and W. J. J. Smith, for appellant. Penix & Eberhart, for appellee.

SPEER, J. This appeal is prosecuted from an order of the district court, granting the writ of injunction upon the following petition:

"C. W. Littlefield v. W. Hogue et al. No. 3,802. In the District Court of Palo Pinto County, Texas, September Term, 1909. Now comes C. W. Littlefield, plaintiff in the above styled and numbered cause, and shows to the court that W. J. Hogue and J. A. Lucas and C. W. McKinney and Edward T. Harrison, receiver for the Union Live Stock Insurance Company, who reside in Dallas county, Tex., are the defendants in said cause.

"Complainant further shows to the court: That this suit was filed in this court on the 4th day of February, 1909, in which the present defendants, except the said Edward T. Harrison, were defendants therein, and that the said Edward T. Harrison, as receiver aforesaid, by amendment in vacation filed on the 25th day of August, 1909, was made a party hereto as a proper and necessary party to clear the title to the land sued for in plaintiff's petition. That the said Edward T. Harrison, receiver, and all other defendants were duly served with citation and are now legally before this court. That the said Edward T. Harrison, as receiver, aforesaid, filed herein his plea of privilege and also his plea in abatement on the 6th day of September, 1909, and also on said date filed an original answer in this case. That the plea of privilege and plea of abatement were set down for hearing on the 10th day of September, 1909, and that on said date said plea of privilege and plea of abatement were heard by this court, and evidence was introduced in support thereof, and after hearing the said pleas and the evidence produced thereon the court on said date overruled same and set this cause down for trial on the 4th day of October, 1909, and that same is now pending trial in this court on said date. That the said Edward T. Harrison, as receiver, aforesaid, on the 17th day of August, 1909, brought a suit at Dallas, in Dallas county, Tex., styled Edward T. Harrison, Receiver, v. C. W. McKinney et al., Defendants, in the Sixty-Eighth district of said Dallas county, and being numbered on the docket of said court No. 6,887-C, in which suit the plaintiff herein and C. W. McKinney, one of the defendants herein, are defendants. That the subject-matter in the suit at Dallas is the same and identical with the subject-matter in this cause and was so conceded and announced to this court by the attorneys for the said Edward T. Harrison, receiver defendant in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

this cause, upon the trial of the said plea of privilege and plea in abatement aforesaid. That W. J. J. Smith, J. Lawson Goggans, and D. A. Eldridge, all of whom reside in Dallas county, Tex., are the attorneys, as plaintiff is informed, for the said Edward T. Harrison, receiver, aforesaid, in the said suit brought by him in Dallas county, Tex., against this plaintiff and others as aforesaid. That the said cause in Dallas county has been set down for trial on the 16th day of September, 1909, and notwithstanding the order of this court overruling the plea of privilege and plea of abatement as aforesaid the said Edward T. Harrison, receiver as aforesaid, will prosecute to trial against this plaintiff and others said cause No. 6,087-C, in the Sixty-Eighth district court in Dallas county, Tex., and will thus accomplish the same purpose as though his plea of privilege and plea in abatement had been sustained by this court, and by so trying said cause will nullify in effect the order of this court and will in effect thus deprive it of jurisdiction to try this cause and will furthermore be permitting a multiplicity of suits between the same parties about and concerning the same subject-matter.

"And complainant further shows to the court that to permit a trial of said cause in Dallas county will necessitate this plaintiff in going in person to said Dallas, in Dallas county, Tex., and taking the depositions of quite a number of witnesses, and thus deprive him of being sued in his own county and in the county in which the land the subject in litigation herein is situate and will entail a great expense on the part of this plaintiff in going to said Dallas and in taking the depositions aforesaid and in employing counsel to defend said cause in Dallas county, Tex.

"Wherefore complainant prays your honor to grant an order restraining the said Edward T. Harrison, as receiver, as aforesaid, and his attorneys, W. J. J. Smith, J. Lawson Goggans, and D. A. Eldridge, as the agents of said Edward T. Harrison, as receiver, as aforesaid, from further prosecuting said suit aforesaid in Dallas county, Tex., and upon final hearing hereof said temporary injunction be made final, and for general and special relief."

We sustain appellant's contention that the trial court erred in granting the restraining order on the foregoing petition. The authorities all agree that, as matter of comity between the courts of the country, that court which first acquires jurisdiction over a cause will be permitted to retain it to the end. There may possibly be some exceptions to this rule, but this cannot be one of them. Now, the foregoing petition does not disclose that the district court of Palo Pinto county first acquired jurisdiction over this cause of action between the present parties, but, in-

deed, rather discloses that the district court of Dallas county first acquired such jurisdiction. So that we hold that the district court erred in granting the injunction, without discussing the interesting question of whether or not one district court can make an order enjoining the prosecution of a suit in another court of co-ordinate jurisdiction. See *Gulf, C. & S. F. Ry. Co. v. Cleburne Ice & Cold Storage Co.*, 83 S. W. 1100; *Rains v. Reasonover*, 46 Tex. Civ. App. 290, 102 S. W. 176; *Wilson v. Baker*, 64 Cal. 475, 2 Pac. 253.

Reversed and remanded.

FT. WORTH & D. C. RY. CO. v. ARTHUR.†  
(Court of Civil Appeals of Texas. Dec. 8, 1909.  
Rehearing Denied Jan. 12, 1910.)

1. EVIDENCE (§ 471\*)—OPINION EVIDENCE—CONCLUSION OF WITNESS.

A statement by a witness in an action against a railroad for loss of property by fire that the fire was set on the right of way, that he did not see the fire when it first started, but saw it when it burned off the right of way onto the prairie, and that the fire was set on the right of way and came from the right of way onto the prairie, made in response to a question whether he knew, of his own knowledge, where the fire was first set, is a statement of a fact, and not the conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2151; Dec. Dig. § 471.\*]

2. DEPOSITIONS (§ 64\*)—EXAMINATION OF WITNESS—RESPONSIVE ANSWERS.

A statement by a witness in an action against a railroad for loss of property by fire that the fire was set on the right of way, that he did not see the fire when it first started, but saw it when it burned off the right of way onto the prairie, and that the fire was set on the right of way and came from the right of way onto the prairie, is responsive to interrogatories whether he knew where the fire was first set out, and whether it was set out on the right of way and burned off of the right of way, or whether it was set off of the right of way and burned onto the right of way.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 64.\*]

3. EVIDENCE (§ 474\*)—OPINION EVIDENCE—COMPETENCY OF WITNESS.

A witness stating that he knew what a barn destroyed by fire was worth was competent to testify as to its value, notwithstanding his statement that he had made inquiries as to prices; it not appearing that his opinion was based solely on such inquiries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2217; Dec. Dig. § 474.\*]

4. APPEAL AND ERROR (§ 1051\*)—REVIEW—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The error, if any, in admitting incompetent evidence to prove a fact established by competent evidence sufficient to support the verdict, is not reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

5. EVIDENCE (§ 474\*)—OPINION EVIDENCE—COMPETENCY.

A witness stating the amount of time required to erect a building, and giving the char-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

acter of the material used and the dimensions of the building, is competent to give his opinion as to the value of the building.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2217; Dec. Dig. § 474.\*]

**6. EVIDENCE (§ 550\*)—OPINION EVIDENCE—COMPETENCY.**

An expert as to the value of building material may give his opinion as to the value of the material in a building destroyed by fire, based on a detailed statement of another of the dimensions of the building, and the character and kind of lumber contained therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2366; Dec. Dig. § 550.\*]

**7. EVIDENCE (§ 525\*)—OPINION EVIDENCE—COMPETENCY.**

An expert may show that a disc plow, which was in a building at the time of its destruction by fire, was of no value after the fire.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 525.\*]

**8. RAILROADS (§ 465\*)—FIRES—LIABILITY.**

Where fire escaped from an engine and set fire to inflammable material negligently permitted by the railroad to accumulate on its right of way, whereby it was communicated to the grass on adjacent land and subsequently burned a building thereon, the fire was the proximate cause of the injury, notwithstanding the fact that a common wind was blowing from the direction of the fire toward the building, as the company must anticipate the existence of winds.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1692; Dec. Dig. § 465.\*]

**9. RAILROADS (§ 457\*)—FIRES—NEGLIGENCE.**

The servants of a railroad going to the rescue of the property of an individual threatened with destruction by fire set by an engine must use ordinary care to see that the fire is put out before they leave, and a failure to do so is negligence, and, where the servants left ties smoldering and smoking, they failed to exercise proper care, rendering the railroad liable for the destruction of a building by fire escaping from the burning ties.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1661; Dec. Dig. § 457.\*]

Appeal from District Court, Clay County; A. A. Carrigan, Judge.

Action by W. N. Arthur against the Ft. Worth & Denver City Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Spoontz, Thompson & Barwise and Allen & Jones, for appellant. P. M. Stine and H. A. Allen, for appellee.

RICE, J. This suit was brought by appellee against appellant for the recovery of damages for the destruction of his property occasioned by fire, claimed to have been set out and communicated thereto by the negligence of the appellant. It is alleged that the appellant negligently permitted grass and other inflammable material to collect upon its right of way, and that it negligently operated engines upon its road that were defectively constructed and without proper appliances to prevent the escape of fire therefrom; that, by reason thereof, fire escaped from its engines and was communicated to the grass upon its right of way, from whence it spread on to plaintiff's land, burning his

grass, destroying the turf, setting fire to and consuming a barn with its contents, as well as a cow shed and other personal property. It was further alleged that, after the discovery of the fire, appellant negligently failed to extinguish the same. Appellant replied by general demurrer and general denial and a plea of contributory negligence on the part of appellee in failing to exercise ordinary care to put out the fire. There was a jury trial, resulting in a verdict and judgment in behalf of appellee, from which this appeal is prosecuted.

The first and second assignments will be considered together, since the same questions are, in effect, raised by each. Mrs. M. R. Cole, a witness, testified by deposition, and appellant moved to suppress her answers to the third cross-interrogatory, and also objected to her answers thereto. Said motion to suppress, as well as the objection to her testimony, was based upon the contention that said witness had failed to answer some of the questions propounded in said interrogatory, and that it appeared from her answer thereto that she was only giving her conclusions or opinion as to where the fire originated. The interrogatory to which reference is made is as follows: "Do you know of your own knowledge where the fire was first set out? Do you know whether it was set out on the right of way and burned off of the right of way, or whether it was set off of the right of way and burned onto the right of way? If you say you know, state how you know. Did you see the fire when it was first set out, and did you see who set it out?" To which the witness answered: "The fire was set out on the right of way. I did not see the fire when it first started, but saw it when it burned off the right of way onto the prairie. The fire was set on the right of way and burned off the right of way. The fire did not come from off the right of way, but come from the right of way off onto the prairie." We think it is clear that both the motion and the objection to the testimony were properly overruled. The witness was testifying to what she in fact saw, and her answers were substantially in response to the questions asked, for which reason both assignments are overruled.

By the fourth and fifth assignments appellant insists that the court erred in permitting the plaintiff to testify as to the value of the barn and the cow shed, because as to the former it is contended that the witness based his opinion upon hearsay, and, as to the latter, he based his statement upon the amount of labor it took to build the shed, whereas the witness stated that he did not know how much labor it took to build the same. With reference to the first contention, as presented by the fourth assignment, we do not think it maintainable, because the witness also testified that he knew what the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

barn was worth, and was a competent witness as to its value notwithstanding the fact that he further testified that he had made inquiries as to prices, and so on, because it does not clearly appear that his opinion was based solely upon said inquiries. Again, if it be granted that this answer should have been excluded on the ground urged, we do not think any material harm resulted therefrom, because there was other evidence as to the value of the barn coinciding with that of plaintiff, which was not objectionable, and upon which the jury could have based their verdict.

With reference to the last objection as raised by the fifth assignment, we think it sufficient to say that it appears from the testimony that this witness did give the amount of time required to build the cow shed, and that, in addition thereto, he gave the character of material used and the dimensions of the shed, and upon which it seems he based his opinion as to its value. We therefore overrule both of these assignments.

Nor did the court err in permitting the witness Peters to testify, over the defendant's objection, as to the value of the material in the barn that was burned, as presented in appellant's sixth assignment, because it is shown from the record that this witness was an expert as to values of lumber and building material. And the testimony further disclosed that, while he had not seen the barn, a detailed statement of its dimensions and the character and kind of lumber contained therein, was given to him by the plaintiff, who also swore to the correctness of the statement furnished the witness upon which he based his opinion. It was therefore in our judgment competent for said witness to express his opinion as to the value thereof.

We overrule the seventh assignment, because we think it was competent for the witness, who was an expert, to show that the disc plow which was in the burned building and had gone through the fire was of no value thereafter.

Appellant complains of the action of the court in overruling its motion for a new trial, in this: That the fire which consumed the barn and its contents appears not to have been the proximate cause of the damage, but that the same was due to an intervening agency. It is shown that the fire originated about 9 o'clock in the morning, and the barn was not burned until about 6 o'clock in the afternoon. Near the barn there was a pile of cross-ties. The fire had burned from the railway right of way across appellee's pasture during the early part of the day, and had been communicated to this pile of ties. The appellant's section boss, with a crew of hands together with other persons, during the day put out the fire at other places as well as the barn where it had caught twice, and had also partially extinguished

the fire which had caught in said pile of ties; but that the wind had been blowing and continued to blow from the direction of where the ties were toward the barn, that the ties were smoking at the time the section hands left the place, and it was further shown that it was dangerous to so leave them. It was also shown that whirlwinds were of common occurrence in that section during the summer, and that a number had been blown during that day. It appears that about an hour after the section hands had left the fire in this condition that one of the whirlwinds mentioned sprang up and blew fire from this pile of ties into the hayloft of the barn, thereby setting fire to the barn and causing its destruction, together with its contents. It is alleged in plaintiff's petition, as one of the acts of negligence upon which he relies for recovery, that it was the duty of the defendant, its agents, servants, and employes, when they discovered said fire, to use due diligence to extinguish the same, and thereby prevent the destruction of plaintiff's property; that by the use of due care they could have put out said fire, and so have wholly saved plaintiff's property from injury; but that they failed so to do and negligently and wrongfully permitted the same to continue to spread and burn until the same had destroyed plaintiff's property, etc. Plaintiff and his tenants were not at home during the day of this fire.

We think the evidence sufficiently shows that the fire escaped from appellant's engines, setting fire to the inflammable material negligently permitted by it to accumulate upon its right of way, whereby it was communicated to the grass upon plaintiff's land, which subsequently burned the barn and its contents. The fire was therefore the proximate cause of the injury. The intervening cause in this instance, to wit, the whirlwind, might, under the evidence, have reasonably been anticipated by appellant, and it was its duty so to do, where the prevalence of such whirlwinds was common and known to the company. *Seale v. G., C. & S. F. Ry. Co.*, 65 Tex. 277, 57 Am. Rep. 602. In that case it was held that: "If, subsequent to the original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote." But it is also held, as shown by the syllabus, that: "Where, however, the intervening cause and its probable or reasonable consequences are such as could reasonably have been anticipated by the original wrongdoer, the causal connection between the original wrongful act and the subsequent injury is not broken, and an action may lie therefor."

Besides this, we think it appears that the defendant was clearly guilty of negligence in leaving the pile of ties burning, from which the damage is shown to have resulted. It was the duty of defendant's servants who went to the rescue of plaintiff's property to

have used ordinary care to see that the fire was put out before they left, and a failure so to do would constitute negligence. But, instead of this, it is shown that the ties were left by them smoldering and smoking, from which danger could reasonably have been anticipated. We think this was such a failure of duty on the part of appellant as would justify the recovery against it, and that the verdict is amply supported by the evidence. See *Mo. Pac. Ry. Co. v. Platzer et al.*, 73 Tex. 117, 11 S. W. 163, 3 L. R. A. 639, 15 Am. St. Rep. 771. Also see *Poeppers v. Railway*, 67 Mo. 726, 29 Am. Rep. 518; *Railway Co. v. Nitsche*, 126 Ind. 229, 26 N. E. 51, 9 L. R. A. 750, 22 Am. St. Rep. 582.

Finding no error in the judgment of the court below, the same is in all things affirmed.

**Affirmed.**

### BATTLE & MCKINNEY v. WHITE.

(Court of Civil Appeals of Texas. Dec. 15, 1909. Rehearing Denied Jan. 12, 1910.)

#### 1. JUSTICES OF THE PEACE (§ 87\*)—GARNISHMENT—INTEREST ON FUNDS GARNISHEED—RECOVERY OF.

Under Rev. St. 1895, art. 225, which provides that, after the service of a writ of garnishment, it shall not be lawful for a garnishee to pay to defendant any debt or deliver to him any effects, where plaintiff, in an action before a justice of the peace, garnisheed \$1,250 belonging to defendant, on a showing that the affidavit made to obtain garnishment was false, defendant was entitled to recover interest upon the \$1,250 garnisheed from the time the writ was served until it was quashed, and is not limited to a recovery of interest on an amount which would have satisfied plaintiff's claim and costs of suit.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 87.\*]

#### 2. GARNISHMENT (§ 248\*)—WRONGFUL GARNISHMENT—ACTION—DEFENSES.

A garnishment of funds of a nonresident defendant to an excessive amount having been quashed for defects in the bond, it was no defense to an action for wrongful garnishment that plaintiffs had no other means of bringing the defendant into the courts of the state, that not depriving them of all other remedy, as the courts of the state of defendant's residence were open to them.

[Ed. Note.—For other cases, see *Garnishment*, Dec. Dig. § 248.\*]

Appeal from Taylor County Court; T. A. Bledsoe, Judge.

Action by Battle & McKinney against Julia J. White. Judgment for defendant, and plaintiffs appeal. **Affirmed.**

Wagstaff & Davidson, for appellants. John Bowyer, for appellee.

**KEY, J.** This case originated in the justice of the peace court, and was appealed to the county court. Appellants, who were plaintiffs in the county court, sued appellee seeking to recover \$62.50 alleged to be owing them as a commission for negotiating the sale of

certain real estate belonging to appellee. In the justice's court the plaintiffs sued out a writ of garnishment, which was served on a bank that had just received \$1,250 belonging to appellee. The writ of garnishment was quashed because of a defect in the plaintiffs' bond. Appellee filed a cross-action, in which she sought to recover both actual and punitive damages. At the trial in the county court the jury returned a verdict for the plaintiffs for \$62.50 for the commission claimed by them, and for the defendant for \$85 damages on her cross-action. Upon that verdict the court rendered judgment for the defendant against the plaintiffs for \$22.50 and costs of suit, and the plaintiffs have appealed.

In the sworn application upon which the writ of garnishment was issued one of the plaintiffs stated that the defendant did not have in her possession within this state subject to execution property sufficient to satisfy the plaintiffs' debt. In her cross-action the defendant alleged that that averment and statement was false, and that she did have at the time that affidavit was made other property in the state subject to execution more than sufficient to pay the plaintiffs' debt. The plaintiff who made the affidavit to procure the writ of garnishment testified on the stand that he knew when he made the affidavit that the defendant owned real estate in the town of Abilene, the county seat of the county in which the suit originated, of the value of about \$1,400. He further stated that he did not read the affidavit, nor was it read to him before he signed and swore to it, and that he did not know that it contained the statement that the defendant did not own any other property in the state. The trial court instructed the jury, in substance, that, if the affidavit made for the purpose of obtaining the writ of garnishment was false, the defendant would be entitled to recover interest on the money held by the bank for her from the time the writ of garnishment was served on the bank to the time it was quashed. That instruction is complained of; the contention being that it was not necessary for the garnishee to hold more than \$150 in order to satisfy the plaintiffs' claim and costs of suit, and therefore, although the garnishment may have been wrongfully sued out, the defendant would not be entitled to recover interest upon more than \$150.

Article 225 of the Revised Statutes of 1895 declares that from and after the service of writ of garnishment it shall not be lawful for the garnishee to pay to the defendant any debt or deliver to him any effects. In view of that statute, we overrule the contention urged, and hold that interest was recoverable upon the entire sum.

There is no merit in the contention that, because the defendant was a nonresident, the plaintiffs had the right to sue out the writ of garnishment for the purpose of bringing her

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

into court. If it be conceded that garnishment or attachment was the only means by which the plaintiffs could bring the defendant into a Texas court, it does not follow that they had no other remedy. The courts of the state of which the defendant was a resident were open to them, and they could have sued her in that state, without invoking the aid of a writ of garnishment or attachment.

The other assignments assail the verdict, which we hold is amply supported by testimony.

No error has been pointed out, and the judgment is affirmed.

# CATHEY v. MISSOURI, K. & T. RY. CO. OF TEXAS.

(Court of Civil Appeals of Texas. Oct. 23, 1909.  
On Motion for Rehearing, Jan. 8, 1910.)

## 1. EVIDENCE (§ 174\*)—BEST AND SECONDARY— TRAIN RECORDS.

In an action for the destruction of property by fire, claimed to have been set from sparks from passing locomotives, it was error to allow the agent at the station near the burned property to read statements from his record, which were copied from slips of paper or cards furnished by conductors of the trains as to the time certain passenger trains passed the station on the day of the fire, where the original slips were in the possession of the agent, and there was no evidence that the time entered on the slips was correct, and it does not appear that the testimony of the persons who made the entries on the slips could not have been obtained.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 561; Dec. Dig. § 174.\*]

## 2. EVIDENCE (§ 318\*)—HEARSAY—TRAIN RECORDS.

In an action for injuries from fire claimed to have been set by sparks from passing locomotives, it was error to allow the agent at the station near the burned property to read from records made by the conductors of freight trains showing the time their trains passed the station on the day of the fire, where these records were not made in the presence of the agent, where he stated that he had no personal knowledge of their correctness, and it did not appear that the testimony of the persons who made the records could not have been obtained.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1196; Dec. Dig. § 318.\*]

## 3. EVIDENCE (§ 318\*)—HEARSAY—TRAIN DISPATCHER'S RECORD.

In an action for injuries from fire claimed to have been set by sparks from passing locomotives, it was proper to allow the train dispatcher to testify from information on his "train sheets" made up from telegraphic reports transmitted to him from stations along the line as to the time certain trains passed the station, near which the fire occurred, where he stated that the record was made by him in the regular course of his business, that its entries were correct, and it did not appear to have been altered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1196; Dec. Dig. § 318.\*]

On Motion for Rehearing.

## 4. TRIAL (§ 412\*)—RECEPTION OF EVIDENCE— OBJECTION—WAIVER.

Where improper evidence was admitted over objection, and on cross-examination the object-

ing party brings out the same evidence, he waives his objections thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 182; Dec. Dig. § 412.\*]

Error from District Court, Dallas County; R. M. Scott, Special Judge.

Action by Mrs. M. W. Cathey against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for defendant, plaintiff brings error. Affirmed.

Carden, Starling & Carden, for plaintiff in error. Coke, Miller & Coke and Thomas & Rhea, for defendant in error.

TALBOT, J. The plaintiff below, Mrs. M. W. Cathey, brought this suit against the defendant in error, the Missouri, Kansas & Texas Railway Company of Texas, to recover damages resulting to her from the destruction by fire of her house and its contents in Greenville, Tex., about June 19, 1906. It is alleged that through the negligence of defendant's servants sparks of fire were emitted and thrown from one of its passing engines upon the house of J. M. Tisdal, setting fire thereto, which spread and was communicated to plaintiff's house and contents, and destroyed the same. The defendant pleaded a general denial, and specially that, if the fire was communicated from defendant's engine to plaintiff's property, said engine was properly equipped for the prevention of the throwing of fire, in that the same was equipped with the best approved appliances used by practical railroad men for such prevention, and that said engine was carefully and properly handled. A jury trial resulted in a verdict for the defendant, and plaintiff appealed.

There are three assignments of error urged in the brief of the plaintiff in error for a reversal of the case, each relating to the admission of certain testimony over the objection of the plaintiff in error. The first is, in effect, that the trial court erred in permitting the witness M. E. Tateman, who was the operator and station keeper of the defendant at its west yards in Greenville, Tex., on the date of the fire in question, to use the register purporting to show the time that passenger trains passed said yards on the date of such fire, and to read and state therefrom to the jury the time when passenger trains passed said yards, when it appeared that, although the witness had made the entries in the register on the date of the arrival and departure of such trains, he made them from slips or cards purporting to show such times which were prepared and furnished him by the trainmen operating said trains, which slips or cards were not produced, but were in his office and possession at Greenville. The testimony as to the time the fire occurred is conflicting. The statements of the several witnesses relating thereto vary as to such time from 10:25

to 10:30 a. m. to about 12 o'clock. The witness Tatemán was permitted, over the objection of the plaintiff, to read from the register the following entries made therein by him from cards prepared and handed him by the conductors of the respective passenger trains, to wit: "The Flyer No. 5 passed the west yards at 10:07 a. m. The McKinney train passed the west yards at 10:30; that is No. 261." He testified, in substance, that the record did not show that any other passenger train passed the west yards on the date in question between 8 and 12 o'clock; that these entries were in his handwriting, and that he entered them in the register from slips of paper or cards furnished him by the conductors of the trains therein mentioned, purporting to show the time when said trains passed through the west yards at Greenville; that said slips were then in his office and possession at Greenville. He further stated: "My record for June 19th is practically correct." He did not testify, however, of his own knowledge when these trains passed through the west yards, or that he had any personal knowledge of such time. Neither did he testify that the written memoranda furnished him by the conductors, and from which the record used in evidence was made, correctly stated the times when said trains passed. The conductors did not testify at all, nor was the correctness of the time indorsed on the slips or cards by them established by other evidence. In this state of the evidence we think the objection of the plaintiff to the effect that the register itself, or the recital by the witness of the entries made therein was hearsay and incompetent, should be sustained. It was held in *Railway v. Leggett*, 86 S. W. 1066, that the admission of similar testimony in a similar state of the record was erroneous, and required a reversal of the case. In the case of *Missouri Pac. Ry. Co. v. Johnson* (Sup.) 7 S. W. 833, the appellee sued to recover of appellant the value of certain wheat delivered to appellant for transportation, and alleged to have been lost in transit. Upon the trial it became necessary for the plaintiff to show the actual weights of the wheat placed by him in the defendant's cars; and, in order to do so, he was permitted to read from his books the account kept by him with the defendant of the amounts of the several consignments of wheat delivered. Preliminary to the introduction of this evidence, the plaintiff testified that the wheat was shipped from two points—McKinney and Farmersville—that he attended to the business at McKinney in person in connection with W. B. Harrison, his clerk; that the books were kept there; and that one D. P. Johnson, as his agent at Farmersville, attended to the weighing and shipping the produce from that point. It was also shown by the testimony of the plaintiff himself and

of Harrison that the weights of a portion of the wheat shipped were first entered upon a book known as "scale book" and a memorandum of a part made and retained, and that the entries in the book offered in evidence and read to the jury were made from the "scale book" and this memorandum. Said witnesses also testified that either the one or the other of them weighed all the wheat that was shipped from McKinney; that the weights were correctly taken down on the scale book, and were entered each day in the book which was offered in evidence. Each of these witnesses further testified that the entries made by him in the account book were correct. D. P. Johnson, the agent of plaintiff, testified that the wheat at Farmersville was weighed in same manner as at McKinney; that he entered memoranda of the weights upon a scale book which was copied into an invoice book. It was also shown that the scale books containing the memoranda had been lost or destroyed. The Supreme Court held under this state of facts that so much of the account from the books introduced as pertained to the wheat shipped from McKinney was admissible. In justification of such holding the court said: "The witnesses as to these transactions testified of their own personal knowledge. They swore, in substance, that they weighed the wheat or saw it weighed, and that the weights were correctly set down in the scale book, and correctly entered in the account book from the scale book. Such entries as were not made by the one were made by the other, and each testified that the entries made by him were correct." But, as to the items of the account which related to the Farmersville consignments, the court held the testimony and book offered were inadmissible. In support of this ruling the court said: "It is apparent that neither the plaintiff nor Harrison, who made these entries, had any personal knowledge of the correctness of these items. They were made from copies from the invoice book sent to them by the Farmersville agent, and it may be true that this was done in due course of business. The invoice entries were made from the stubs. The agent, Johnson, was sworn in the case, and did not testify that he weighed the wheat correctly, or that the weights were correctly entered on the stubs, or correctly copied into the invoices. He testified he weighed the wheat, and that the course of business was to make the entries on the stubs, and from them to make the invoices, and to send copies daily to his principal at McKinney. As to the transactions by him the books at McKinney contained the fourth entry, and cannot in our opinion in any sense be deemed the book of original entries. Plaintiff and Harrison, who made the entries in the account book from the copies of the invoice sent, did not know of the correctness of these copies, and their

correctness was not otherwise proved." *Telegraph Co. v. Christensen*, 78 S. W. 744. So, too, in the present case the entries in the register, which the witness was permitted to read to the jury, and which to all intents and purposes, was an introduction of the book itself in evidence, were taken from memorandums made and furnished the witness by other persons and of the correctness of which the witness had no personal knowledge, nor was the correctness of said memoranda otherwise proved. This memoranda was in the possession of the witness Tatem, and it does not appear that the testimony of the conductors as to its correctness could not be obtained. So far as the record shows to the contrary, these conductors were still in the employ of the defendant, and their attendance upon the trial or their testimony by deposition could have been procured. *Railway Co. v. McLeod*, 115 S. W. 85. We conclude the evidence was inadmissible, hurtful to defendant, and constitutes reversible error. The passing of some one of plaintiff in error's trains near defendant in error's house or Tisdal's house, which was first discovered to be on fire, at a time so near the occurrence of the fire that it might reasonably be inferred that said building ignited from sparks emitted from the engine drawing such train, was an important issue in the case. The engineer of the McKinney passenger train testified that the train left Greenville on the morning of the fire a little late, probably 15 or 20 minutes, which testimony was favorable to plaintiff as tending to establish her theory as to when said train passed. The record evidence admitted over her objections tended to rebut this testimony of the engineer, and show that said train left Greenville so long before the fire that it was improbable that fire was set to the house by sparks from its engine. The case is distinguishable in the facts from *Railway Co. v. Williams*, 38 Tex. Civ. App. 405, 86 S. W. 38, cited by defendant in error, and the court's ruling in admitting the testimony discussed cannot in our opinion be sustained by authority of that case.

The second assignment of error is that "the court erred in permitting the witness M. E. Tatem, who was the operator and station keeper of the defendant company at its west yards in Greenville, Tex., on the date of the fire in question, to read to the jury and use to refresh his memory the record purporting to give the time of the arrival and departure of freight trains at the west yards in Greenville, Tex., when it appeared from the testimony of such witness that he himself had not made the record, and that he was unable to say that the record was made in his presence, but that the record was made by the trainmen handling such trains." In answer to the question, "How many freight trains have you on your register, passing through there [the west yards at Greenville],

on June 19, 1906, say from 8 to 12 o'clock in the morning?" the witness Tatem was permitted to read to and in the hearing of the jury the following entries in said register: "Engine No. 552 freight, arrived at the west yard at 6:40 a. m. and departed at 8 o'clock south, extra south bound. The next freight train arrived at 9:10 a. m. and departed at 10:25 extra, and the north-bound extra, engine No. 409, arrived at 8:50 a. m. and departed at 9:50 a. m.; that is what they call the Dallas Division main line. Now there was a Shreveport train No. 644, engine No. 924, made up and departed at 9:25 a. m. and that is all the freight trains." It is undisputed that these entries were made by the respective conductors of the trains therein referred to, and not by the witness Tatem; and the evidence as to the correctness of said entries is insufficient to warrant their admission in evidence. Tatem, the only witness that testified upon the subject, says: "All registrations on this register of June 19, 1906, were made by conductors handling trains passing through the yards, with the exception of passenger trains. From 8 to 12 o'clock on the morning of June 19, 1906, I had about four freight trains. The freight train registers are in the conductor's handwriting, which show when he went out. \* \* \* It is my duty to see that he registers. It is not required of me that I stand over him, and see that the information is accurate and correct. I was in the office at the time these freight trains registered. I have no definite recollection of seeing him register. I know for the simple reason that I had no particular duties to call me outside and it would be supposed I was there. \* \* \* When I am busy at my work when the registry is made, I do not see who makes it. I could not say that I was busy on the morning those registers were made. If I did not see this registration made for that particular train at that time, I have no definite recollection that will warrant me in saying that they were made correctly or incorrectly."

The evidence here complained of is doubtless more objectionable than that complained of in the first assignment. There is absolutely no evidence to verify the correctness of the entries allowed to be read to the jury. They were not made by the witness testifying, and he was unable to say of his own knowledge that they were correct. Neither of the conductors who made them was called as a witness, although so far as the contrary appears they each were still in the employ of the defendant and their testimony obtainable. As will be noted, the witness Tatem was not only unable to testify that the entries showed the correct time when the respective trains to which they related passed through the yards at Greenville, but his testimony is uncertain and indefinite as to whether he saw or knows that the conductors in charge of said trains actually made said entries. He

stated, in effect, that he was not required to stand over the conductor when registering and see that the entry made by him was accurate and correct, that he had various duties to perform in his office, and that when he was busy at work he did not see who made the entry. From his own testimony it is probable that, if he was in the office when the entries were made in the register, he did not see and know who made them; and he says, if he did not see the registry made, he had no definite recollection that would warrant him in saying whether they were correctly or incorrectly made. We think it is very clear that the objection to this testimony should have been sustained and said testimony excluded. The fact that the plaintiff's attorney caused the witness to repeat and re-read the testimony on cross-examination does not preclude him from complaining of the admission of said testimony in the first instance by the defendant over his objection. The case does not, in our opinion, fall within the rule that, if improper evidence is admitted without objection and the same or similar evidence is afterwards admitted over objections, the party injured thereby waives the right to complain.

By the third assignment plaintiff in error contends that the trial court erred in permitting the witness T. W. Barnett, train dispatcher of the defendant, to testify as to the time his train sheets showed that certain trains passed the west yards at Greenville, Tex., on the date of the fire in question, when it appeared that he made the entries on said sheets at Denison, Tex., on telegraphic information communicated to him by the respective telegraph operators at the towns of Greenville and Celeste, Tex. We are of the opinion there was no error in the admission of this evidence. It seems to be well established by the decisions of many courts of high standing that upon an issue as to whether a train was at or near a certain place on a railway company's line of road, at a certain time, the record of the train dispatcher as to the movements of trains, called a "train sheet," made up from telegraphic reports transmitted to him from stations along the line where the witness who made such record is produced and testifies that the record offered was made by him in the regular course of business, and that its entries were correctly made, nothing appearing to show that the record since made has been altered, is receivable as evidence of the facts it recites. The reasons for this apparent broadening of the rule relative to the admission of merchants' books of original entry are given and the subject exhaustively discussed in the case of *L. & N. Ry. Co. v. Daniel*, 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1190, and supported by several cases cited in the opinion of the court and collated in a note published in connection therewith.

For the errors indicated, the judgment of the court below is reversed, and the cause remanded.

#### On Motion for Rehearing.

In its motion for rehearing the defendant in error contends that we erred in holding in our original opinion that the fact that plaintiff in error caused the witness Tateman to repeat and re-read on cross-examination the testimony given by him, for the admission of which the cause was reversed and remanded, does not preclude her from complaining of the admission of said testimony, although it was admitted over her objection on direct examination, and in support of its contention cites the following cases: *Eastham et al. v. Hunter et al.*, 98 Tex. 560, 86 S. W. 323; *Gammel Statesman Pub. Co. v. Monfort*, 81 S. W. 1029; *Sullivan v. Fant*, 110 S. W. 507; *Birkman et al. v. Fahrenthold*, 114 S. W. 428; *Railway Co. v. Broom*, 114 S. W. 655; *Railway Co. v. Pettit*, 117 S. W. 894; *Kingsley v. Schmicker*, 60 S. W. 331; *McDonald v. McCrabb*, 105 S. W. 238. We have been unable to distinguish the case at bar upon the question involved from the above cases, and, upon the authority of those cases, have reached the conclusion that we erred in the ruling made by us and now complained of by defendant in error. The above cases were not cited in defendant in error's brief in reply to plaintiff in error's assignments wherein it was insisted that the case ought to be reversed because of the admission of the evidence objected to, and we decided the question upon the idea that a party does not waive his objection to the admissibility of incompetent evidence by cross-examination of the witness, where he brings out the same and other evidence in relation thereto. The evidence admitted in this case, however, was read from a register, kept at the west yards of defendant in error at Greenville, purporting to show the exact time that its trains passed said yards between the hours of 8 and 12 o'clock in the daytime, and, upon cross-examination of the witness by the plaintiff in error, he was caused to repeat or re-read substantially, if not identically, the same evidence. The cases mentioned above, with the exception possibly of *Eastham v. Hunter*, hold that where this is done—that is, where improper evidence has been admitted over the objections of a party to a suit, and upon cross-examination such party reproduces said evidence—he practically waives his objection to its admissibility, and will not be heard to urge the same on appeal. It follows that we erred in reversing and remanding the case for the reason stated in the original opinion and there being no error disclosed by the other assignments, as heretofore held, and the evidence being sufficient to authorize and sustain the verdict in favor of the defendant in error, its motion for rehearing is granted, and the judgment of the court below is affirmed.

**HARDY OIL CO. et al. v. BURNHAM et al.**  
(Court of Civil Appeals of Texas. Dec. 20, 1900.)

**1. HUSBAND AND WIFE (§ 273\*)—COMMUNITY PROPERTY—DESCENT.**

Where an infant died in 1835, under the law then in force, his share in his mother's estate in community property passed wholly to his surviving father, and not one-half to him and one-half to the surviving brothers and sisters.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1008-1024; Dec. Dig. § 273.\*]

**2. TRESPASS TO TRY TITLE (§ 41\*)—EVIDENCE—SUFFICIENCY.**

In trespass to try title, where certain community property was involved, evidence held to show that the wife was the mother of four children.

[Ed. Note.—For other cases, see Trespass to Try Title, Dec. Dig. § 41.\*]

**3. APPEAL AND ERROR (§ 1152\*) — DISPOSITION OF CAUSE—MODIFICATION.**

Where the court appointed a receiver to take charge of a greater interest in the output of the oil wells on the lands in controversy than plaintiffs in fact had in the land, the error on appeal from the order would not require more than a modification of the order and taxation of costs against plaintiffs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4483-4489; Dec. Dig. § 1152.\*]

**4. VENDOR AND PURCHASER (§ 230\*)—BONA FIDE PURCHASERS—NOTICE.**

Where the grant of land as a headright stated that the grantee was a married man, such statement in the grant was notice to all purchasers from or under him that the land was community property, which was sufficient to put such purchasers on inquiry as to the death of the wife and the existence and rights of her heirs, and affect them with notice of the true facts, which could only be rebutted by showing that such inquiry was prosecuted with reasonable diligence and failed to disclose such facts.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 502; Dec. Dig. § 230.\*]

**5. VENDOR AND PURCHASER (§ 230\*)—BONA FIDE PURCHASERS—CONSTRUCTIVE NOTICE.**

None of the purchasers could rely upon the presumption that his predecessors in the title had made such an inquiry as was required to rebut the presumption of notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 230.\*]

**6. ADVERSE POSSESSION (§ 71\*)—COLOR OF TITLE.**

An unauthorized conveyance by the surviving husband of community property after the death of the wife does not convey title or color of title, and as to such interest the conveyance will not support a defense of limitations of three years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415-429; Dec. Dig. § 71.\*]

**7. TRESPASS TO TRY TITLE (§ 25\*)—DEFENSES—LACHES.**

Where, in 1866, the surviving husband conveyed land constituting community property, and it passed by various conveyances to defendants, trespass to try title, brought in 1908 by the heirs of the deceased wife, was not barred under the doctrine of stale demand.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 30, 31; Dec. Dig. § 25.\*]

**8. RECEIVERS (§ 12\*)—GROUNDS FOR APPOINTMENT.**

Rev. St. art. 1465, provides that a receiver may be appointed in certain cases on the application of any party whose right to or interest in the property is probable. Held that, in order to authorize the appointment of a receiver in an action for the recovery of an interest in real estate before final hearing, the one seeking such relief must show that he will probably succeed in establishing his right.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 18, 19; Dec. Dig. § 12.\*]

**9. ADVERSE POSSESSION (§ 19\*)—ACTUAL POSSESSION—STATUTES.**

Sayles' Ann. Civ. St. 1897, art. 3346, provides that possession of land belonging to another by a person claiming 5,000 acres or more of lands inclosed by a fence in connection therewith shall not be peaceable and adverse possession contemplated by article 3343, unless the land so belonging to another shall be separated by a substantial fence from said lands connected therewith, etc. Held that, in so far as title under the statute of limitation of five years is concerned, the size of the inclosure has nothing to do with the question.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 19.\*]

**10. ADVERSE POSSESSION (§ 22\*)—EXCLUSIVE POSSESSION.**

Pasturing the owner's cattle on land inclosed for that purpose and under his exclusive control is such use and enjoyment as is sufficient under the five years' statute.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 111; Dec. Dig. § 22.\*]

**11. TENANCY IN COMMON (§ 15\*) — ADVERSE POSSESSION.**

A surviving husband conveyed community real estate, and all the subsequent vendees claiming under him dealt with the land without any recognition of rights on the part of the deceased wife's heirs, paying taxes, etc. Held, that the possession of those claiming under the husband was an ouster of the heirs of the wife, and they could not claim to have been in joint possession as tenants in common with those claiming under the husband's conveyance.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.\*]

**12. ADVERSE POSSESSION (§ 31\*) — NOTICE — SUFFICIENCY.**

Those claiming under the husband having been in actual and exclusive possession, it was notice to the heirs of the wife, putting them upon inquiry which would have led to an investigation of the records showing evidence of a chain of title and the payment of taxes, and hence the facts constituted an ouster and notice thereof to the heirs of the wife, notwithstanding their nonresidence and actual ignorance.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 128-133; Dec. Dig. § 31.\*]

**13. RECEIVERS (§ 38\*)—ACTION TO RECOVER REAL ESTATE.**

In trespass to try title, wherein plaintiffs sought the appointment of a receiver, evidence held insufficient to show that plaintiffs would probably succeed upon a final trial.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 38.\*]

**14. RECEIVERS (§ 82\*)—ACTION TO RECOVER INTEREST IN REAL ESTATE—POWERS OF RECEIVER.**

In trespass to try title to recover a certain undivided interest in land on which were oil wells, a receiver was appointed to take charge

of such portion of the output of oil as represented the plaintiffs' interest in the land, and to keep or dispose of such oil. There were many defendants and no showing as to the insolvency of any of them, but many of them were nonresidents. *Held*, that on the execution of a bond, with proper security for the value of such interest of the oil, plaintiffs would need no further protection than the appointment of a receiver as an auditor to keep track of oil extracted and the disposition made of the same.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 82.\*]

Appeal from District Court, Matagorda County; Wells Thompson, Judge.

Action by James Henry Burnham and others against the Hardy Oil Company and others. From an order appointing a receiver to take charge of the real estate involved, defendants appeal. Reversed and remanded.

W. W. King, S. R. Perryman, Gaines & Corbett, Baker, Botts, Parker & Garwood, Lane, Jackson, Kelley & Wolters, and R. A. John, for appellants. Baldwin & Christian, Devlin & Devlin, and Linn, Conger & Austin, for appellees.

REESE, J. This is an appeal from an interlocutory order appointing a receiver, on petition of appellees, of certain land in Matagorda county embracing an oil field upon which appellants were operating. Appellees, sole heirs of Emily Louise Burnham, sued in trespass to try title and for partition, claiming to be owners of  $\frac{21}{96}$  of the Henry Parker league, and alleged that defendants, of whom there was a large number, many of them nonresident corporations, were engaged in taking oil from the land and disposing of the same, and alleged certain facts which it was claimed rendered an injunction and the appointment of a receiver necessary. The petition was presented to the judge of the Twenty-Third judicial district, who set the application down for hearing, and ordered that notice be given to the defendants, which was done. Afterwards the matter came up for hearing at a regular term of the district court of Matagorda county, upon the petition, answers of defendants, and affidavits in support of each. The court appointed a receiver with certain powers, not necessary to be here specially set out, further than to say that he was authorized to take charge of  $\frac{21}{96}$  of the output of the oil field, and to keep or dispose of the same, and to keep a strict account of oil produced. From this order the defendants appeal.

The facts established by the affidavits and record evidence with regard to the title of the respective parties are, briefly, as follows: The Parker league was granted to Henry Parker, as his headright, by the government of Coahuila and Texas on February 5, 1833. Both in the grant and in the application therefor it is stated that Parker was at the time a married man. His wife was Henrietta Parker, who died in 1835. There sur-

vived her her said husband, Henry Parker, and four children, W. E., F. A., Emily Louise, ancestress of appellees, and an infant, never named, who survived the mother only about four or five weeks. F. A. died unmarried and without issue in 1867. Emily Louise married James G. Burnham and died in 1859 intestate, and appellees are her sole heirs. In 1866 Henry Parker, who died in 1869, conveyed to his son W. E. Parker the league of land in controversy. W. E. Parker sold and conveyed it to Vanham in 1899. From Vanham it has passed by various mesne conveyances to the appellants, who are in possession of same, some of them claiming title in fee, and some leasehold interests; most of them being engaged in producing oil, which was discovered on a part of the league in 1908. The suit was filed October 15, 1908, shortly after such discovery. It will be seen that appellees' claim rests upon the fact that the land was community property of Henry Parker and his wife, Henrietta; that upon the death of the said Henrietta her one-half passed to her children; and that the interest of Mrs. Burnham, one of the children, was not affected by the subsequent sale of the entire league by Henry Parker, but now belongs to appellees, her heirs. Appellants claim to be innocent purchasers without notice of the adverse title here asserted, and also set up title under the three, five, and ten years' statutes of limitation and stale demand, supporting such claim by affidavits in opposition to the appointment of a receiver.

The court was in error in holding, as was practically done in the powers given to the receiver, that appellees' interest in the land was  $\frac{21}{96}$  thereof. This error was caused by not giving consideration to the fact that when the unnamed infant child of Henry Parker and wife died, in 1835, under the law then in force, the share of such child in the mother's estate passed wholly to the surviving father, and not, as under our statutes of descent and distribution, one-half to him and one-half to the surviving brothers and sisters. Schmidt, *Civil Law of Mexico*, arts. 1230-1235 et seq.; *Hardy v. Hanson*, 82 Tex. 102, 17 S. W. 924. That this is the law is not denied by appellees, but they seek to avoid the effect of it by the contention that the court was authorized by the evidence to find that upon the death of Mrs. Parker she only left three children, W. E., F. A., and Mrs. Burnham. In the face of the positive statement in the sworn petition, based, in so far as it relates to the family history, as stated in the affidavit upon reliable information and the affidavit of W. E. Parker, one of the children, introduced by appellees in support of their claim, in both of which it is positively stated that Mrs. Parker left four children, and particularly stated that one of them was an infant never named, who sur-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vived the mother only four or five weeks, the mother in fact dying in childbirth, a contrary conclusion, based only upon the statement of one of the plaintiffs, a grandson, born ten years after the death of this child, that there were only three children, this contention cannot be sustained. W. E. Parker, who was six or seven years old when this infant sister was born and died, could not be mistaken, while the grandson, all of whose knowledge of the family history was gained from others many years after these occurrences, might very well be. His informant may very well have forgotten the existence of this unnamed infant whose life was so brief. No other conclusion can be supported by the evidence of appellees than that there were four children, as stated in the petition. Under this finding their interest, if any, would not be more than  $\frac{5}{32}$ , and in no event should the power of the receiver have been extended further than necessary to protect this interest, instead of  $\frac{21}{96}$  claimed by appellees. The first assignment of error, presenting this objection to the decree, must be sustained, but of itself would not require more than a modification of the order, and the taxation of the costs of the appeal against appellees.

Under the assignments of error from 2 to 8, inclusive, and propositions thereunder, objection is made to the order appointing the receiver, that plaintiffs had failed to show probable title to any interest in the land, upon several grounds separately set out.

As we have concluded that the judgment appealed from should be reversed upon the ground set out in the ninth assignment, a full discussion of these assignments from 2 to 8 will be pretermitted. We are constrained to follow the doctrine, which we understand to have been laid down by the Supreme Court in *Hill v. Moore*, 85 Tex. 339, 19 S. W. 162, and to hold that the statements and recitations in the grant to Henry Parker were notice to all purchasers from or under him that the land was community property of himself and a then living wife, and this was sufficient to put such purchasers upon inquiry as to the death of the wife and the existence and rights of her heirs, and affect them with notice of the true facts with regard to such matters, which could only be rebutted by showing that such inquiry was prosecuted with reasonable diligence and failed to disclose these facts. There was no evidence of such inquiry by any of the subsequent purchasers. None of them could rely upon the presumption that his predecessors in the title had made such inquiry as was required to rebut the presumption of notice.

The existence of the outstanding title in Mrs. Parker's heirs was a bar of any claim of appellants that they had title or color of title to the interest claimed by appellees under the three years' statute of limitation. *Veramendi v. Hutchins*, 48 Tex. 531; *Cole v. Grigby*, 89 Tex. 229, 35 S. W. 792; *Thomp-*

*son v. Cragg*, 24 Tex. 582. This would logically follow from the holding that the title to Mrs. Parker's half interest descended at her death to her children, and that there was left to Henry Parker no right to dispose of the same, except upon such conditions as are shown not to have existed in this case.

We will not enter upon any discussion of the question of the nature of the title of Mrs. Parker under the grant, or of the title which descended to appellees, whether legal or equitable. The reports are full of conflicting statements upon this proposition. At all events, so far as this case is concerned, we think that it makes no difference whether it be called legal or equitable. *Edwards v. Brown*, 68 Tex. 331, 4 S. W. 380, 5 S. W. 87; *Wiess v. Goodhue*, 98 Tex. 280, 83 S. W. 178. If it be an equitable title, with the result that appellees would have the burden of showing notice to the purchasers of the legal title, under the deed from Henry Parker, such burden was fully met by the recitals in the grant. Indeed, in *Hill v. Moore*, supra, it was held that it was fully met by the naked fact that the grant was for a league of land, which in that case was held to affect the purchaser from the husband with notice that the land was community, of the death of Mrs. Parker, of the existence of children of the marriage, and of every other fact necessary to protect appellees against appellants' claim, in the absence of evidence showing that such inquiry as a prudent man ought to have made had failed to develop the facts as they are shown to have existed. The distinction that appellants seek to make between that case and the one presented here, arising from the fact that in the present case there was much greater lapse of time between the date of the grant and the deed from Henry Parker conveying the entire league, but adds force to that in case in its application to this, in that the great lapse of such time in the present case only increased the probability of Mrs. Parker's death between the issuance of the grant in 1833 and the conveyance by Henry Parker in 1866, and called for more diligent inquiry and greater caution on the part of purchasers under that title.

In so far as the defense of stale demand is concerned, we think that question as here presented is foreclosed by the following authorities: *Duren v. Railway Co.*, 86 Tex. 291, 24 S. W. 258; *Land Co. v. Hyland*, 8 Tex. Civ. App. 601, 28 S. W. 211; *Schleicher v. Gutbrod*, 34 S. W. 657; *Mason v. Bender*, 97 S. W. 720; *Tinsley v. Magnolia Park Co.*, 59 S. W. 630; *Lumber Co. v. Pinckard*, 4 Tex. Civ. App. 671, 23 S. W. 720; *Owen v. N. Y. & Tex. Land Co.*, 11 Tex. Civ. App. 284, 32 S. W. 189; *Lochridge v. Corbett*, 31 Tex. Civ. App. 682, 73 S. W. 96; *Betzer v. Goff*, 35 Tex. Civ. App. 408, 80 S. W. 671; *Lyster v. Leighton*, 36 Tex. Civ. App. 62, 81 S. W. 1033; and many others.

We have carefully examined the aforesaid

assignments of error and the various propositions thereunder, and they are severally overruled.

The ninth assignment presents the objection that, under the evidence as presented at the hearing upon the defense of limitation under the statute of five years, it did not appear that appellees had probable title, and that therefore on this ground the court erred in appointing a receiver.

Under all the authorities upon this question, both reported cases and statements of the law in text-writers, it seems to be essential to the proper exercise of the power to appoint a receiver in actions for the recovery of real estate, or an interest therein such as the present one, before final hearing, that the persons seeking such relief must show that they will probably succeed in establishing their right upon a final trial. It is stated in *High on Receivers* that "the relief will be granted only when there is a strong probability of recovery." Such relief is limited, according to *Beach on Receivers*, to cases where "the plaintiff's right is so clear that there is reasonable possibility of his success." *High on Receivers*, §§ 556, 557, p. 543; section 558, p. 545; *Beach on Receivers*, p. 481; *Cofer v. Echerson*, 6 Iowa, 502; *Chicago, etc., v. U. S. Pet. Co.*, 57 Pa. 83.

That this is the law, as applicable to this case, does not seem to be denied by appellees. If we refer to our statute on the subject of the appointment of receivers, this seems to be recognized as the rule. Section 1, art. 1465, Rev. St. 1895. Independently of the evidence introduced by appellants in support of their plea of title under the statute of limitation of five years, it is, we think, not to be disputed, under the principles of law herein stated, that appellees showed at least a probable title to the interest claimed by them, such as to authorize, in connection with the other facts pleaded and proven, the appointment of a receiver, and their case is not rebutted by the showing made by appellants in support of their defenses, except as to that of five years' limitation. We are not deciding an appeal from a final judgment in favor of appellees on their title, and do not desire to go further than is absolutely necessary in passing upon the rights of the parties as involved in this appeal; but the question of the probable title of appellees and their right to recover, as presented by the whole record, is before us and must be decided. It is essential to the proper determination of this appeal.

We have examined very carefully the affidavits presented by appellants, of which there are quite a number, all tending to show, or showing with positiveness, the possession for five years before suit filed of the league of land by appellants and their predecessors in title under deeds duly recorded, of the entire league, accompanied by payment of taxes; in short, such possession as will bar appellees' right. If the rebut-

ting affidavits had contradicted the possession as it is set up by appellants, we would not disturb the conclusion of the trial court upon such contradictory statements. But we do not think the statements of appellants' witnesses are in fact contradicted, upon the essential facts, by those of appellees' witnesses, whose statements are directed to actual settlement upon and inclosure of the Parker league or a part thereof to itself, and they do not deny the inclosure of the league in a large pasture (of probably 30,000 acres) under the exclusive control of appellants and their predecessors in title, and used by them for pasturing their cattle. The whole case as presented by the record leaves little doubt that it was not thought necessary by appellees, nor by the learned trial judge, to rebut the case of appellants resting upon such possession. The hearing was had January 5, 1909. At that time the learned trial judge and the appellants may very well have been under the impression that the act of 1891 (*Laws 1891*, p. 77, c. 57; article 3346, *Sayles' Ann. Civ. St.* 1897) applied to the claim of limitation resting upon five years' possession, as was in fact stated by the court in *Flack v. Bremen*, 45 Tex. Civ. App. 473, 101 S. W. 540, in which writ of error was refused, and by the Court of Civil Appeals of the Fourth District in *Kent v. Cecil*, 25 S. W. 715, and probably in other cases. The case of *Dunn v. Taylor* was decided by the Supreme Court on November 11, 1908, and did not appear in the published volumes of the *Southwestern Reporter* until after the hearing in this case, and we are led to believe that the hearing was had without regard to the law, as laid down in that case, that, in so far as title under the statute of limitation of five years is concerned, it is not affected by the fact that the defendants' possession is held by inclosure of the lands claimed, along with others, in an inclosure of any size; the size of the inclosure having nothing to do with the question. *Dunn v. Taylor*, 113 S. W. 285. In the act of 1891 there were certain exceptions having relation to cultivation or inclosure to itself of part of the tract held under inclosure of 5,000 acres or more, and the affidavits of appellees' witnesses, upon this point, seem to be particularly directed to the matter of showing that there was no such cultivation or separate inclosure of the Parker league as would bring it under the exceptions of the statute and not to a rebuttal of appellants' showing of the inclosure of the Parker league in a pasture of more than 5,000 acres, along with other lands, all under the exclusive control of appellants' vendors and used for pasturage of their cattle.

Eliminating the exception in the statute as to inclosure of 5,000 acres, which has no application, it cannot be said from the case made out that appellees' right to recover is probable, in view of the defense of five years' adverse possession under the statute.

The statement of appellees' witnesses that the whole country, including the Parker league, was an open range, is not inconsistent with the fact that the league was inclosed in a 30,000-acre pasture, with no fences separating the Parker league from the balance of the land.

The case is not analogous to one of inclosed land upon which the claimant pastures his cattle. Pasturing the owner's cattle upon land inclosed for that purpose and under his exclusive control is such use and enjoyment of it as would be sufficient under the five years' statute.

Nor do we think that the appellants can be held to have been in joint possession with appellees as tenants in common, so as to prevent the running of the statute, notwithstanding the rather extraordinary statement of W. E. Parker that he did not hold or claim in opposition to the claim of Mrs. Burnham. Henry Parker conveyed to him the whole league; he, in turn, sold and conveyed the whole league to Vanham and all the subsequent vendees in appellants' chain of title dealt with the whole league, without the slightest recognition of Mrs. Burnham's title or that of appellees. They paid taxes on the entire league, and not until the discovery of oil on the land in 1906 was there a whisper of appellees' claim. The possession of appellants was an ouster of appellees of which the various deeds, payment of taxes, and actual possession afforded ample notice. Their claim of the entire league was open and notorious.

Appellants were in actual and exclusive possession by their inclosure of the land. By this, of which appellees must take notice, they were put upon inquiry as to appellants' right or title. Such inquiry necessarily would have led to an investigation of the records which furnished indubitable evidence of their title under a chain of recorded deeds each conveying the entire league, and prosecution of the inquiry would have necessarily led to the knowledge that they were paying taxes on the whole league. This evidence was undisputed and constituted ouster and notice thereof to appellees, notwithstanding their nonresidence and actual ignorance; and even if, under this evidence, it be an issue to be submitted to the jury, as contended by appellees, this was not in itself sufficient to show probable right in them. If it were only necessary for appellees to raise an issue as to their right, the whole doctrine that they must show probable title falls to the ground, and, without speculating as to what a jury might find if the issue were submitted to them, it is sufficient for the court to say that the evidence on the issue throws so much doubt upon its ultimate determination that it cannot be said that appellees' right, in so far

as it depends upon this issue, is probable. *Parker v. Newberry*, 83 Tex. 431, 18 S. W. 815; *Church v. Waggoner*, 78 Tex. 208, 14 S. W. 581; *Stubblefield v. Hanson*, 94 S. W. 406.

But for the objection set out in the ninth assignment of error, which must be sustained, we think that the facts pleaded and shown authorized the appointment of a receiver; but we are not inclined to agree that it was necessary to the protection of appellees' rights, in any event, that such receiver should have had the extensive powers conferred by the court's order. There was no showing as to the insolvency of any of the defendants, but it does appear that there are a great many of them, corporations and others, many nonresidents of the state, holding and claiming various interests. We can readily see how, even if none of them are insolvent, appellees would be greatly embarrassed in the prosecution of their rights to the oil taken if they succeed in establishing their title. We are inclined to think, however, that if appellants execute a bond, as they offered to do, in a sufficient amount and with proper security, for the value of  $\frac{5}{8}$  of the oil, appellees will need nothing further for their protection than the appointment of a receiver, as an auditor, to keep track of all oil that is extracted, and the disposition that is made of the same, to the end that upon final trial there may be accurate and unquestioned evidence of the amount of appellees' claim for such oil against each defendant. Such receiver, or auditor, should, of course, be given such powers as would be necessary or proper to enable him to do this.

The appellants' case under the five years' statute of limitation was not met by appellees' evidence. It may be that this was because of an excusable misapprehension of the law, as it is now settled in *Dunn v. Taylor*, supra. For this reason we will remand the cause. If appellants' case is not rebutted by other and additional evidence, we think the application for receiver should be refused. If it is so rebutted, in the judgment of the trial court, we are of the opinion that a receiver should be appointed with such limited powers as above suggested, provided appellants execute the bond as offered by them. Otherwise it would be proper to empower the receiver to take charge of  $\frac{5}{8}$  of the output, under appropriate instructions as in the order appealed from. The authority of such receiver, however, should go no further than is necessary for the protection of the rights, if any, of appellees.

Other assignments of error are overruled. The judgment is reversed, and the cause remanded.

Reversed and remanded.

**SAN ANTONIO & A. P. RY. CO. v. POLKA et al.**

(Court of Civil Appeals of Texas. Nov. 24, 1909. Rehearing Denied Jan. 13, 1910.)

**1. RELEASE (§ 58\*)—MENTAL CAPACITY—QUESTION FOR JURY.**

In an action for a servant's death, in which defendant pleaded a release of all claim for damages executed by decedent, evidence held not to raise the issue of decedent's want of mental capacity to understand the nature and effect of his acts when he executed the release.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 112; Dec. Dig. § 58.\*]

**2. RELEASE (§ 16\*)—PERSONAL INJURIES—MISTAKE AS TO EXTENT—EFFECT.**

A release of all claim for damages which the releasor shall or may have sustained by reason of personal injuries on a certain date while in defendant's employment, executed voluntarily and with the same knowledge and means of knowledge of the extent of his injuries which defendant had, cannot be avoided because the parties were mistaken as to the extent of the injuries, which were graver than believed.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 31; Dec. Dig. § 16.\*]

Appeal from District Court, De Witt County; James C. Wilson, Judge.

Action by Helen Polka and another against the San Antonio & Aransas Pass Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed, and judgment rendered for defendant.

Proctor, Vandenberg & Crain, for appellant.

**McMEANS, J.** This suit was brought by Helen Polka for herself and as next friend for Helen B. Polka, the minor child of herself and her deceased husband, Fred P. Polka, to recover of the San Antonio & Aransas Pass Railway Company damages growing out of the death of said Fred P. Polka, alleged to have resulted from injuries received by him while in the employment of the railway company. Subsequently to the institution of the suit, plaintiff, Helen Polka, was married to J. B. Heffernan who thereafter made himself a party plaintiff. A trial before a jury resulted in a verdict and judgment in favor of plaintiffs, Helen Heffernan, formerly Helen Polka, and her said minor child, for \$5,000, which was by the verdict and judgment apportioned between them. A motion for new trial presented by defendant was overruled, hence this appeal.

In defense of plaintiffs' suit the defendant pleaded and proved the following release executed by the said Fred P. Polka: "Know all men by these presents: That I, F. Polka, for and in consideration of the sum of forty-five and no/100 dollars to me in hand paid by the San Antonio & Aransas Pass Railway Company, of the state of Texas, have remised, released and forever discharged, and by these presents do for myself, my heirs, executors, administrators and assigns, remise, release

and forever discharge the said San Antonio & Aransas Pass Railway Company, its successors and assigns of and from all and all manner of action or actions, cause or causes of actions, suits, debts, dues, sums of money, claims and demands whatsoever, which I ever had or now have, or which I or my heirs, executors, administrators or assigns can, shall or may have by reason of any damage or personal injury sustained by me on or about 25th September at or near Yoakum, or for any injuries received or sustained by me at any time or place for which this railway company might, under any circumstances be liable; this being intended as a full settlement and compromise of any and all differences or claims which I have or might have against said company at this date, or by reason of any matter, cause or thing whatsoever. In testimony whereof, I have hereunto set my hand and seal on this the 16th of October, 1905.

[Signed] F. Polka.

"Witnesses:

"G. B. Goodloe,

"G. S. McElory.

"Received, October 16, 1905, of San Antonio & Aransas Pass Railway Company, forty-five and no/100 dollars, in full of the above account.

[Signed] F. Polka.

"Witnesses:

"G. B. Goodloe,

"G. S. McElory."

Appellees, without denying the execution of the release, attacked the binding force of the same upon three grounds, viz.: (1) The mental incapacity of Polka at the time he executed this release to know and understand what he was doing or to comprehend the nature and legal effect of the release; (2) that he was induced to execute the release by false and fraudulent representations made to him by certain named agents of appellant to the effect that he was not seriously injured, and that he would be able to go back to work; and (3) that the release was executed under a mutual mistake upon the part of Polka and the agents of appellant as to the gravity and extent of his injury. There was no evidence of any fraudulent representations upon the part of the agents of appellant in procuring Polka to sign the release, and that issue was not submitted by the court to the jury. The court, however, submitted the other grounds pleaded by appellees to avoid the release, viz., want of mental capacity and mutual mistake.

Appellant's first assignment of error is as follows: "The court erred in refusing special charge No. 1, requested by defendant, said special charge being as follows: 'You are instructed that it appearing from the uncontradicted evidence that the deceased, Fred P. Polka, prior to his death, voluntarily executed a written release whereby he fully and completely, for a valuable consideration, released defendant from any and all liability upon or by reason of the causes of action

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

† Writ of error denied by Supreme Court.

sued upon in this suit, which said release has been read in evidence to you, and it further appearing that it was the intention of the said Polka, by the execution of said written release, to fully release all causes of action in this cause asserted, and it further appearing from the evidence that at the time of the execution of said release, the said Polka was in full possession of his mental faculties, and fully realized and knew what he was doing when he signed said release, and appreciated the effect of his act in signing said release, and it further appearing from the evidence that the said Polka was not induced to execute said release by reason of any fraud or misrepresentation of any of defendant's agents charged therewith by plaintiff herein, and it further appearing that there was no mistake whatever in the execution of said release, that said release, under the evidence, is a valid and binding release upon the plaintiffs herein, and you will therefore return a verdict for the defendant.' Because it appears from the uncontradicted evidence that the deceased Fred P. Polka, prior to his death voluntarily executed the written release, whereby he fully and completely, for a valuable consideration, released defendant from any and all liability upon or by reason of the causes of action sued upon in this suit, which said release was pleaded by defendant as a defense of this cause, and was introduced in evidence, and because further, it appears from the uncontradicted evidence that at the time of the execution of said release, the said Fred P. Polka was in full possession of his mental faculties, and fully realized and knew what he was doing when he signed said release, and appreciated the effect of his act in signing same, and it further appears from the evidence that the said Fred P. Polka was not induced to execute said release by reason of any fraud or misrepresentation of any of defendant's agents charged therewith by plaintiff herein, and further that there was no mistake whatever in the execution of said release."

By its second assignment appellant contends, in substance, that the verdict and judgment are contrary to the law and the evidence, because from the undisputed evidence it appears that said Polka, prior to his death, and for a valuable consideration paid to him by appellant, compromised and settled all claims and causes of action which are asserted by appellees in this suit, which settlement was evidenced by the said written release which was voluntarily executed by Polka without any fraudulent representations upon the part of appellant's agents inducing him to do so; that he had full knowledge of the nature and character of his injuries, and had every opportunity to ascertain the nature and extent of same, and that he at said time was in full possession of his mental faculties, knew what he was doing, and realized the effect of his act in execut-

ing the release. The only testimony offered to prove Polka's want of mental capacity was substantially as follows: The appellee, Helen Heffernan, testified: "I have testified on direct examination that I was in Yoakum with Fred Polka after he was hurt. I was with him at Yoakum two weeks and then went to San Antonio. I saw him after he went to San Antonio; I spent the day there with him; then I saw him when he came back to Cuero. I noticed a difference in the mental condition of my husband, Fred P. Polka, before and after he received the injury of the 25th of September, 1905. The difference I noticed after the injury was the loss of pride, the loss of self-respect, notice of the child, and all such things around the house. Before the injury he took very good care of himself, and after the injury he never took care how he went around, how he looked, or anything else. Before the injury he was never satisfied unless the child was where he was, and after the injury he did not care to have anything to do with it. Before the injury he treated me all right; as a husband he was all right; he was affectionate towards me; but after the injury he was not affectionate at all, he did not care when I would come in the room. At times, after the injury, he would call me, and when I would get into the room and ask him what he wanted, he would say that he never called me. He complained to me that his head continually hurt him, and that he had a knot in the forehead above the nose; he complained of a knot right here above the nose (indicating) on his forehead, the middle of his forehead. He complained of seeing everything double. He was unconscious in Yoakum from the effects of the blow for four days. When he came to himself he got up right away. When I went to Yoakum, after the accident, I had the baby up there with me. In Yoakum, half of the time Fred Polka would not let me bring the baby in the room at all. I did not take the baby with me to San Antonio. When I went to San Antonio to spend the day with him he treated me all right so far. When I spent the day with him in San Antonio he was not as affectionate to me as he had been prior to his injury. His treatment of me when I spent the day with him in San Antonio was not just the same as it had been prior to the injury. I saw Dr. Graves on the day I was in San Antonio. I saw Dr. Graves and Fred Polka together once that day. I saw Dr. Graves at the hospital. I have testified that Fred Polka would call me in the room, and when I got there, he would tell me he did not call me; this occurred at Yoakum before he went to San Antonio."

William Burt testified that he saw Fred Polka the day he returned from San Antonio and had a conversation with him with reference to the condition of Polka's vision; that Polka said if he looked at an object long it

appeared to be double; that Polka said to him, "When you walked up I knew you when I flashed my eyes on you, and I can look at you a little, and you look like two of you." That he turned toward a horse across the street and said, "I can glance at that horse and tell what color he is, and if I look at him a few seconds it looks like there are two horses there."

Alex Polka testified that he saw Fred Polka after his return from San Antonio and asked him how he felt; that Fred Polka replied that he was not feeling good, that he still had pain in his head and a dull headache all the time; that Fred did not say anything about his eyes; that witness noticed his eye was still bloodshot and blue around it. It was further shown that Fred Polka was hurt on September 25, 1905, by being struck on the forehead by a rebounding bar of steel; that the outer and inner plates of the skull were fractured and that he was rendered unconscious by the blow and remained in that condition, according to the testimony of the physician who attended him, nine hours, or as testified by Mrs. Polka, four days. He was treated by a physician at Yoakum for about twelve days and was then sent to the Santa Rosa Hospital at San Antonio, where nearly all the sick and injured employes of appellant are treated. He executed the release pleaded by appellant October 16, 1905; returned from San Antonio to Cuero November 10, and died November 15, 1905.

On the issue of mutual mistake the following evidence was adduced. Walter Napier, claim agent for appellant, testified that being informed that a couple of employes of appellant who were in the hospital wanted to go home, he went out to the hospital and saw Mr. Polka, "told him my business and that I understood he wanted to go home, and that he wanted to talk settlement. I asked him what he wanted to do. I knew very little about his injuries other than what I had heard. I did not take time to look into the papers other than to get a mere insight into them. Mr. Polka said he did know, and he said, 'What do you propose to do?' I said, 'Well, that is up to you. Tell me what you think you ought to have in the matter and I will talk to you about it,' and he said 'I think I ought to have full time.' I then said, 'How are we to arrive at your disability; I do not know whether you are yet able to work or not, and I am willing to allow you full time, provided we can arrive at your disability.' He said he did not know, and I said, 'The only way I know is to leave it to your physician who is attending you;' and he said, 'Very well, that is satisfactory to me.'"

The witness further testified to meeting Polka by agreement at the office of the physician, and that after an examination of Polka by the physician the following conversa-

tion took place: "I said, 'Doctor, Mr. Polka and I are trying to agree on a settlement in this matter, and we have agreed to be governed as to his disability by what you have to say in the matter;' and the doctor said, 'Mr. Polka is all right. I see nothing further about Mr. Polka or why he should have any further treatment,' and I said, 'Very well; Mr. Polka, is that satisfactory to you?' and he said 'All right.'" Soon after they left the physician's office the witness asked: "'What do you want to do, Mr. Polka?' and he looked at me and said: 'What do you want to do?' and I said: 'The doctor seems to think that you are all right.' It lacked a few days of being a month, about a week, five or six or seven days, and I said to him, 'I am willing to allow you full time for a month, which would be forty-five dollars.' He was getting \$1.50 per day, and he says, 'Very well.'" The witness then detailed the circumstances attending the payment of the money to Polka and the signing of the release and upon cross-examination testified: "With reference to whether or not, at the time I made the remark to Fred Polka that 'The doctor seems to think you are all right,' I believed that to be a true statement, and that Fred Polka was all right, and whether at the very time I made the settlement with Polka, on the following Monday, I believed that Fred Polka was not materially hurt or injured, I will say this: There was nothing about Mr. Polka's action, or conduct, or conversation to lead me to believe he was not all right. With reference to whether or not I thought he was all right, when I made the settlement, I do not know that I really thought anything about it. We had left it to Dr. Hughes, as to his disability, and we settled it upon that basis—the information we got from Dr. Hughes. I saw no reason to believe otherwise than that Dr. Hughes' statement that he was all right was correct. With reference to whether or not I would have made the settlement with Fred Polka for forty-five dollars, if I could, if I had not believed the statement that he was all right, I do not know whether I would or not; the case did not come up that way. If I had known that Polka was so badly injured that he was going to die, I would not have settled the whole claim with him for forty-five dollars; I certainly would not have taken that advantage of him. I would not take that advantage of any man. With reference to whether or not, at the time I made the settlement with Polka, I thought he was not seriously hurt, I do not know that I thought of it once, other than the conversation that took place between Mr. Polka and I at the hospital. He told me that he was willing to accept time, and I told him it would be satisfactory to me, and we agreed as to how we should arrive at his disability, which was by leaving it to his physician, and the information I got from Dr. Hughes

led me to believe that I might make the settlement."

It was shown that Dr. Hughes was not in the employment of appellant, but that he treated certain of appellant's employes through courtesy to Dr. Graves, the chief surgeon of appellant. Dr. Hughes testified: "I remember the circumstance of a meeting in my office between Mr. Fred Polka and Captain Napier, the claim agent of the railroad company, relative to a settlement. Polka came up in the morning, I think it was, possibly just after noon; I do not remember the time of day he came up, and he asked for Captain Napier; asked if Captain Napier had been there, and I said, 'No'; and he said that he (Napier) was to meet him there, and I said, 'I guess he will show up pretty soon; come in and let's see how you are getting along.' Polka then took the chair, and I looked in his eye and talked to him, and we talked until Captain Napier came in, possibly ten minutes afterwards. When Captain Napier came in, I think he (Napier) asked me what Polka's condition was, and I said 'He seems to be all right and in good shape; he has been begging me for about a week to go home; he says he feels all right, and I do not see any reason why he should not go,' and Captain Napier said to me, 'Well, do you think you can dismiss him now?' and I said, 'I think I can; I do not see any reason why I should not; I cannot find anything more to treat.' To my knowledge there was nothing there to treat; I gave him an honest opinion when I told him he was well. I examined him that day; I looked at his eyes, felt around on his head, and asked if there was any tenderness or soreness, and he said, 'No'; I would not have dismissed him if I had not thought that he was well."

It may be conceded that the evidence is sufficient to justify a finding that Fred Polka's death resulted from the blow on the forehead. We think the evidence wholly insufficient to raise the issue of want of mental capacity of Fred Polka at the time he executed the release to know and understand what he was doing, or to comprehend the nature and legal effect of the release. Can the release be set aside or disregarded on the ground that Polka and appellant's agent who settled with him were mistaken as to the gravity and extent of the injury? We have been unable under the facts of this case to distinguish it from that of *Houston & T. C. R. Co. v. McCarty*, 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 834. In that case the release pleaded in defense was almost identical with that pleaded in this. In that case the injured party appeared to have sustained no other injury than a dislocation of the ankle, and it was shown by the evidence that no other injuries were considered by the parties to the settlement and no other injuries to the person entered into and formed any part of the consideration for the settlement, and that neither the injured person

nor the railway company's agent knew or suspected injury to any other part of the injured man's person, although it was shortly afterwards discovered that he had received injuries which would practically destroy his usefulness for the remainder of his life, and the release was sought to be set aside on the sole ground that both he and the agent of the railway company were mistaken in supposing that he had sustained no other injury than a dislocated ankle. In disposing of the *McCarty* Case, Associate Justice Brown, for the Supreme Court, in language so directly applicable to the facts in the present case that we adopt it as our own, says: "We are unable to see any circumstance in this case to take the release out of the general rule. The appellee, who was plaintiff in the court below, had at least the same knowledge and the same means of obtaining knowledge as the appellant, and if there was no fraud in the transaction, the settlement was binding upon him. That where a party who has a claim against another for personal injuries agrees upon a settlement of his claim, and accepts a sum of money or other thing of value in settlement of such claim, he is, in the absence of fraud or concealment, concluded by the settlement, is a proposition sustained, as we think, by the great weight, if not an unbroken line, of authority. \* \* \*"

After citing *Lumley v. Railway*, 76 Fed. 66, 22 O. C. A. 60, he proceeds: "This case is also clearly to be distinguished from the *Lumley* Case and the other cases on that line. In those cases the contract was neither set aside nor impaired by reason of any mistake of the parties to the release. There, by a rule of construction, the operation of the release is restricted to the particulars mentioned. Here no particular injuries are mentioned. The release is of all damages that have accrued or may accrue to the plaintiff by reason of the accident in which he was injured. Here, then, the terms of the release are not to be mistaken, and the contract is not open to construction. In the face of such an instrument it cannot be said that all the injuries which might be developed as a result of the accident, whether known or unknown, were not in the contemplation of the parties to the instrument, and were not embraced within its terms. In all such cases the damages are ascertainable in a legal sense, but in fact are uncertain in amount. Until the extent of the injuries have been clearly developed, they may be more or less than appearances would indicate, and therefore in every settlement of the character of that under consideration, the parties take the chances of future development—the one of paying more than an adequate compensation for a wrong inflicted and the other of receiving less."

The opinion concludes thus: "Our opinion is that the release embraces all damages resulting from the injuries of the plaintiff, and that it cannot be varied by parol evidence

tending to show that other injuries than to the ankle were not in the contemplation of the parties." See, also, *Quebe v. Railway Co.*, 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734; *Railway Co. v. Williams*, 44 Tex. Civ. App. 163, 99 S. W. 141.

We are of the opinion the assignments should be sustained. As no judgment other than the one in favor of the appellant can be properly rendered under the defenses pleaded and established by the undisputed evidence, it is ordered that the judgment of the court below be reversed, and judgment be here rendered for appellant.

Reversed and rendered.

## ROBERTS v. GALVESTON, H. & S. A. RY. CO.†

(Court of Civil Appeals of Texas. Dec. 22, 1909. Rehearing Denied Jan. 19, 1910.)

### 1. APPEAL AND ERROR (§ 1004\*)—REVIEW—QUESTIONS OF FACT—AMOUNT OF RECOVERY.

Passion, prejudice, or misconduct must appear to have influenced the amount of the verdict before the appellate court will reverse on that ground.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3944; Dec. Dig. § 1004.\*]

### 2. DAMAGES (§ 216\*)—PERSONAL INJURIES—INSTRUCTION.

Where, in an action for injuries, nervousness was one of the chief evidences of plaintiff's injuries, and there was evidence that he had been extremely nervous before the accident, an instruction that plaintiff would not be entitled to recover for any injury or damage, except such as resulted solely from the negligence of defendant, was proper.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 548, 550; Dec. Dig. § 216.\*]

### 3. DAMAGES (§ 33\*)—PERSONAL INJURIES—VALUATION OF CONDITION.

Where plaintiff was nervous or in an enfeebled condition at the time of the accident, neither of such conditions could be used as concurring causes to produce the result of an accident and augment the damages, but the increased illness or feebleness resulting from the negligence would be the proper measure of damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 42; Dec. Dig. § 33.\*]

Appeal from District Court, Bexar County; Arthur W. Seeligson, Judge.

Action by William Roberts against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment in favor of plaintiff, he appeals. Affirmed.

Nat. B. Jones, H. C. Carter, and Perry J. Lewis, for appellant. Baker, Botts, Parker & Garwood, D. C. Bollinger, and W. F. Ezell, for appellee.

FLY, J. This is a suit for damages arising from personal injuries instituted by appellant. He alleged that he had been damaged, through the negligence of appellee, in the sum of \$39,000. The jury gave him a verdict

for \$2,000, and, from a judgment for that sum, he has perfected this appeal.

There are some novel features in this case, as the appellant, who recovered the judgment, is complaining of gross inadequacy of the verdict to compensate him for the damages arising from his injuries, and the appellee contends that he received all that he is entitled to, and that the judgment should be affirmed. We find that, while the evidence of appellant might have justified a larger verdict, there was evidence offered by appellee which tended to show that appellant was not injured to any great extent, and that he recovered full compensation by the verdict of the jury. There was evidence tending to show that there were no external bruises, except on the thumb; that no bones were broken; that appellant had been injured in other wrecks than the one in which he received his last injuries; that before that wreck his general condition was very poor, and that he was suffering from premature old age, and was so nervous that in drinking coffee he would spill it, and would involuntarily rattle his knife and fork against his plate. One physician testified that appellant was possibly 75 years old, and that he advised appellee several years ago that he was too old to be employed as a conductor. Nervousness was one of the chief evidences of appellant's injuries, and the jury was justified in finding that it arose more from old age or former injuries than from those for which he sought to recover damages.

In the case of *San Antonio v. Talerico*, 78 S. W. 28, decided by this court, which is often invoked by appellees when judgments are claimed to be excessive by appellants, it was in effect held that the powers of this court, in connection with verdicts deemed to be too small, were the same as those in connection with verdicts deemed to be too large. Passion, prejudice, or misconduct must appear to have influenced the size of the verdict before this court will exercise its power of reversing a judgment on that ground. As said by Chief Justice James in the case cited: "We sustain verdicts for large sums in this class of cases because juries may believe, in the case before them, the person would have lived to old age. But a jury may take a different view, and may resolve the question otherwise, and, when they do, it is not for us to revise them in a matter so clearly in their province. We cannot say that this verdict is grossly or unreasonably small, which are the only grounds upon which we would be warranted to interfere, and we are not willing to send the case back with such a declaration." In this case appellant was entitled to no damages but those arising from the injuries inflicted on him through the negligence of appellee, and the court did not err in charging the jury that appellant "would not be entitled to recover for any injury or damage ex-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
† Writ of error denied by Supreme Court.

cept such injury or damage which resulted alone and solely from the negligence of the defendant company."

The charge authorized the jury to find for all damages arising from the negligence of appellee, and the law does not authorize a recovery for more than that. The authorities cited by appellant refer to causes that actively concur with the negligent act in producing injuries or death, but no authority can be found that holds that, if a man is nervous, and his nervousness is merely increased, the negligent party should be held liable for the entire nervousness. Justice would demand, and the law responds to it, that the negligent party should be held liable for the damages resulting from his acts, and not for injuries resulting from prior causes. If there had been a chain of causes leading to the result, with which that of appellee actively concurred, appellant might have cause to complain of the charge. But there was only one act of negligence, and that the act of appellee, and the only question was how much did that negligent act injure appellant, and to ascertain the amount it became necessary to inquire into the physical condition of appellant at the time of the accident. If he was sick, or nervous, or in an enfeebled condition at the time, neither of such conditions could be used as concurring causes to produce the result of the accident and augment the damages, but the increased sickness or nervousness, or feebleness resulting from the negligence, would be the proper measure of damages. The authorities fully sustain the charge. *Railway v. McMannewitz*, 70 Tex. 73, 8 S. W. 66; *Railway v. Johnson*, 75 Tex. 158, 12 S. W. 482; *Railway v. Johnson*, 100 Tex. 237, 97 S. W. 1039. It may be that the charge was not as ample as it might have been, but if that be true appellant should have put forth efforts to correct it in that respect.

Appellant, who seemed to know very little about his age, admitted that he was married in 1870 and that he was at least 22 years old at that time, and all the testimony was to the effect that he was not young, and much of it that he was quite old, and the court could well assume that he was an old man. The uncontroverted evidence also showed that appellant was quite nervous before he was injured. Appellant testified: "With reference to whether I had that tremulous condition before I was injured, I will say that I have been some nervous a long time, but it is worse since the injury." On November 22, 1906, about one year before appellant was injured, he applied for his certificate of exemption from poll tax, and swore that he was then 62 years old. We do not think the charge could have misled a jury of average intelligence. It was fully justified by the facts.

The judgment is affirmed.

MISSOURI & N. A. RY. CO. v. BRATTON  
et ux.

(Supreme Court of Arkansas. Dec. 13, 1909.)

1. APPEAL AND ERROR (§ 1052\*)—ADMISSION OF EVIDENCE—PREJUDICE.

Where, in an action against a railroad company for the value of land appropriated for a right of way and for injuries to other land, the evidence justified a recovery exceeding the amount of the verdict, defendant was not prejudiced by the admission of evidence as to expected water damage.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4175; Dec. Dig. § 1052.\*]

2. EMINENT DOMAIN (§ 98\*)—APPROPRIATION OF LAND—PERMANENT DAMAGES.

Where, in an action for the value of land taken for a railroad right of way and for damages to adjoining land, the railroad at the time of suit brought was completed across plaintiff's land, damages by obstruction of water courses prior to the action were recoverable therein.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 98.\*] 3

Appeal from Circuit Court, Van Buren County; B. B. Hudgins, Judge.

Action by Ambrose Bratton and wife against the Missouri & North Arkansas Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. B. Smith, J. Merrick Moore, and H. M. Trieber, for appellant. William Gilmore and Rose, Hemingway, Cantrell & Loughborough, for appellees.

BATTLE, J. This was an action brought by the owner of property entered upon and appropriated by the appellant, for a right of way, for damages for such appropriation.

The amended complaint, filed August 12, 1907, is as follows:

"\* \* \* The defendant is a corporation organized and doing business in the state of Arkansas.

"That the plaintiff is the owner of the north half of the northwest fourth, section 13 in township 13 north, range 14 west, in Van Buren county, Arkansas.

"That the defendant constructed a railroad over said land, and in so doing located it dangerously near to the buildings and well on the land; appropriated about five and three-fourths acres of the same to their own use as right of way; destroyed his private road leading to the land, and forced plaintiff to use a much poorer road and to climb a part of the mountain to reach said road, which climb was not required by his former road; constructed a fill from the railroad bed (in the wagon road) across a low swag where the water formerly passed around in high-water season; and so constructed the grade of the railroad bed that the water cannot find an outlet around his cultivated land when the Red river is at high stages as it formerly did, but will throw a damaging current over part of his cultivated

land, and will undoubtedly cause the destruction of between five and fifteen acres thereof. That by blocking said outlet for high water the whole force of the current of Red river which crosses the land will be directed against the bank of the portion of elevated land near the river where plaintiff's buildings are located, and is likely to undermine said buildings and destroy more of his land. That in making the elevated grade for roadbed it caused deep cuts to be made near the buildings and so made the excavations that there is no outlet for the water, and said excavations retain stagnant water at all seasons, which water renders the habitation unsanitary and dangerous to health.

"That in constructing said railroad the defendant located it so as to enter the southwest corner of his field and follow the highest part of the land and pass out about the middle of the north side of the field, and so curve about that it leaves him two irregular, inconvenient shaped fields, requiring short turning in the middle of the former field; and that the defendant located only one crossing over the railroad, which crossing is near the middle of the field, and requires a roadway over and along more land to go and return from work, and is an unending annoyance and injury to the tiller of the land.

"That plaintiff states further that the land is almost all river bottom land and is very productive, and is also very easily affected by water currents, and that he had about 40 acres in cultivation, and that he is damaged as follows: By land taken in right of way, \$400; by injury to balance of land by cutting into irregular shapes and inconvenient fields, \$600; by inconvenience in crossing, \$200; by danger of fire to buildings and other property, and annoyance of trains, \$150; by damages from overflow and changing course of river at high-water stages, \$500; by damages from taking former roadway and change of road, \$250; injury from stagnant water near buildings, \$200; interest on the money since injury done, \$175."

The action came on for trial, in the Van Buren circuit court, and Ambrose Bratton, the plaintiff, testified in his own behalf, that the defendant constructed its railway across his land, and appropriated for its right of way more than five acres of land, which was worth \$100 an acre; and built it through a field on the land, consisting of 50 acres, and so divided the field as to leave it in an inconvenient shape to cultivate and thereby impaired its value in the sum of \$650, and made it inconvenient and difficult to cross the railroad from one part of the field to the other and thereby damaged him in the sum of \$150; and constructed its railroad track within 100 feet of his barn, and a little further from his residence, and brought them within range of sparks and cinders escaping from passing engines and endangered stock on his premises and by such proximity im-

paired the value of his farm in the sum of \$200. (For the purpose of explanation we say here that the land in question is on Little Red river and that is the river referred to in the testimony of plaintiff.)

Plaintiff further testified, in part, in response to interrogations, as follows:

"[Q. Now, state whether or not there is any damage or probable damage the water will have on the land there?

"A. Just like I stated the other day, the river has a square turn that comes from the west, due east, and runs squarely against the bank. It is low, and next to the mountain where the wagon road comes it runs and makes a sharp turn, and the force of the water for two hundred yards comes square against that bank. At a high time it runs over there before the road was put there. I saw it three feet or more deep where the roadbed is now. There were two big white oaks there that had the ground set with roots that kept the ground from washing. As soon as the roots rot it will cut that and keep cutting it on the wagon road, and it will run over the foot of the wagon road where they have built that dump and cut it out just like a snowball. That will run it into the ditch next to the railroad where the borrow pits are. The water will go right through there.

"Q. Is there any part of your land that has been subject to back water?

"A. Five acres there that gets water at a high time. The water will run onto it as soon as the water gets high. Some of it will run around. If that dump stands there it will force all of that water around on my land.

"Q. How many acres of that is there?

"A. Five, and maybe six.

"Q. Now what do you estimate the probable damage will be for the flowing of that water over your land?

"A. Five hundred dollars.

"Q. In case that dump they have built there does withstand this water and turn it, is there any other effect that is apparent that you see by the turning of this water?

"A. It will keep cutting out that bank there against my barn and knock it out into the river.

"Q. Do you mean for your estimate to amount to \$500 from the effect of the water?

"A. Of course. On July 31, three years ago, it was three feet deep around there. It was all over the field, and the current run around there. They have filled it in over this way to try to prevent that. If it stands it will throw it around here, and if it don't stand it will throw that through the field and make a river where them borrow pits are. That is the reason I say it would be worth \$500.

"Q. What effect will it have on those five acres there?

"A. It will cause it to wash. The force of the river will turn the current and throw it against the bank.

"Q. In the matter of turning the river will it have any other effect on the bank at the turn?

"A. It will eat out this bank here by the barn; it isn't but about thirty feet from the bank.

"Q. Now, then, how does this land drain in particular?

"A. This part of it will drain back to this low land.

"Q. How wide is that road?

"A. About seven feet on top.

"Q. What kind of material is it?

"A. Sand; all loose sand.

"Q. The force of the river when it gets there is it strong enough to stand the force of the river?

"A. No, sir."

One witness, Thomas, testified that the land appropriated for right of way was worth \$100 an acre; that the farm of plaintiff was damaged by the shape the railroad left it \$500, and by the difficult and inconvenient crossing of the railroad track, in the field as located, \$150, and by the proximity of the railroad track to barn and residence, \$130.

Much other testimony than that stated was adduced.

The court instructed the jury over the objection of the defendant as follows:

"In assessing the damages to the land in controversy you will consider all the evidence in the case, and determine the value of the land taken, the injury to the remaining land by inconvenient shape of fields for cultivation, the lessening of value by closing of natural outlets for water at high-water season, if any, danger of fire to buildings, if any, annoyance of trains operating, if any, inconvenience of private crossing because of its location, if any, damage by reason of the changed condition of plaintiff's private road, if any, damage by reason of stagnant pools, if any, and interest on same since the taking of said land at the rate of six per cent. per annum."

And instructed them at request of the defendant as follows:

"The jury are instructed that in determining the damages to be assessed in favor of the plaintiff, you will first consider what the fair market value of the land actually taken by the railroad company was at the time the defendant entered upon the land and begun to construct its road, about two years ago; and, second, the damage, if any, sustained to the adjoining land of the plaintiff by reason of the construction of the road across it. In determining the fair market value of the land actually taken you will be governed by the price at which you believe the land would have sold on the market in the ordinary course of sale at the time the defendant entered upon the land as above stated, if the

owner desired to sell it and there was a purchaser who desired to buy it. In determining the market value of the land you are warranted in considering in connection with all the other evidence in the case the location of the land, its productive qualities, and its rental value. You are instructed that you cannot consider any damages caused to the plaintiff's property by the probability of overflow caused by the construction of defendant's roadbed or the wagon road dump on plaintiff's land, if you believe that such overflows could not occur except through an unusual or unprecedented condition or rise in the stream."

The jury returned a verdict in favor of the plaintiff for \$1,230.

The defendant moved for a new trial, because the court erred in allowing plaintiff to introduce in evidence the questions and answers to them set out in this opinion and inclosed in brackets; and because the court erred in giving the instructions asked for by the plaintiff.

The motion was overruled; judgment was rendered according to this verdict; and the defendant appealed.

No exceptions to the questions and answers mentioned in the motion for a new trial were reserved in the bill of exceptions. The defendant objected to a part of them, but before the court ruled upon his objection withdrew it until later, saying it would reserve its right therein. But it never renewed it unless it be in the instruction given at its request, which seems to apply. Without this testimony the damage done by the appropriation of land, by the division of the farm into two parts of inconvenient shape, by the crossing of the railroad track, and by the proximity of the railroad track to residence and barn, was shown by the undisputed evidence, at the least estimate to exceed the amount of the verdict. So appellant does not have any cause to complain on this account—the admission of the testimony in question.

The objection to the instructions objected to is to these words, "the lessening of value by closing of natural outlets for water at high-water season, if any." This objection is not tenable. The railroad in this case was completed across appellee's land at the time this action was commenced. According to decisions of this court damages caused by such obstructions before the bringing of an action for damages on account of the appropriation of land for the building of a railway are recoverable in such action. *Springfield & Memphis Railroad v. Rhea*, 44 Ark. 262; *Springfield & Memphis Railroad Co. v. Henry*, 44 Ark. 360; *Bentonville Railway Co. v. Baker*, 45 Ark. 253; *Newgass v. Railway Company*, 54 Ark. 145, 15 S. W. 188; *St. L. I. M. & S. Ry. Co. v. Anderson*, 62 Ark. 360, 35 S. W. 791.

Judgment affirmed.

**FORTE et al. v. CHAMBERLAIN.**

(Supreme Court of Arkansas. Jan. 3, 1910.)

**INSURANCE (§ 70\*)—INSURANCE COMPANIES—RECEIVER—ACTIONS BY RECEIVER.**

Kirby's Dig. § 950, authorizes any creditor or stockholder of an insolvent corporation to institute proceedings in chancery for winding up the corporation, whereupon the court shall take charge of all assets and distribute them, etc. Acts 1905, p. 489, provides that before any mutual fire insurance company shall do business it shall file an indemnity bond with sureties, conditioned for the payment of all claims under any policy issued on property in Arkansas, and if any company shall not reserve 50 per cent. of its premium for the payment of losses, the State Auditor shall sue on the bond for the benefit of the policy holders to recover a sum sufficient to increase the reserve to such 50 per cent. Held that, where a mutual fire insurance company was placed in the hands of a receiver because of insolvency and there had never been any improper use of the reserve fund, the receiver might not maintain an action to restrain policy holders from suing on the bond on the ground that claims against defendant for losses were in excess of the total assets of the company; the liability of the sureties not being assets of the company which passed to the receiver, and he not being entitled to sue on the bond.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 70.\*]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Action by Horace Chamberlain as receiver of the Commercial Fire Insurance Company against H. W. Forte and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Carmichael, Brooks & Powers, for appellants. T. N. Robertson and Horace Chamberlain, for appellee.

**McCULLOCH, C. J.** The Commercial Fire Insurance Company, a mutual fire insurance corporation, was by order of the Pulaski chancery court, at the instance of certain creditors and stockholders, on allegations of insolvency, placed in the hands of a receiver to wind up its assets and affairs, and appellee was appointed as such receiver. Authority for the proceeding is found in the following statute: "Any creditor or stockholder of any insolvent corporation may institute proceedings in the chancery court for the winding up of the affairs of such corporations, and upon such application the court shall take charge of all the assets of such corporation and distribute them equally among the creditors after paying the wages and salaries due laborers and employees." Section 950, Kirby's Dig. The corporation had given, and prosecuted its business as an insurance company under, certain bonds required by the act of the General Assembly approved April 24, 1905 (Acts 1905, p. 489) entitled "An act to regulate mutual fire insurance companies." Section 4 of that act provides that "before any such company or association shall do business in this state, it

shall file in the office of the Auditor of State a qualified indemnity bond with three or more sureties or with a surety or trust company authorized to do business in this state, to be approved by the Auditor, in the sum of fifteen thousand dollars, to be conditioned for the prompt payment of all claims arising and accruing to any person or persons during the term of said bond by virtue of any policy issued by any such company or association upon any property in Arkansas, whenever the same shall become due, and shall faithfully comply with and perform all and singular the duties and obligations imposed upon them by the laws of the state." In the same clause it is further provided that any such company or association may upon giving an additional bond in the sum of \$10,000, conditioned as aforesaid, issue nonassessable policies. Section 6 of the act contains the following provision: "Any company or association organized and operating under this act shall reserve not less than fifty per centum of its premium for the payment of losses and the benefit of its policyholders, and such reserve shall not be used for any other purpose; should it come to the knowledge of the Auditor of State that any company or association is not complying with this provision, it shall be the duty of the Auditor of State to institute suit on the bond mentioned in section 4 of this act, in the name of the state for the benefit of the policyholders of such company or association, against the obligors of said bond in any court having jurisdiction thereof, and liability of said obligors on such bonds shall be in a sum sufficient to increase said reserve to an amount equal to fifty per centum of the premiums received, not to exceed, however, the sum of fifteen thousand dollars." It is therefore seen that, according to the terms of the statute liability on the bond is for losses sustained by policy holders on property in Arkansas, and also for a sum sufficient to replace any deficit in the reserve of 50 per cent. of the premiums caused by the unauthorized use of such reserve for other purpose than the payment of losses, the action on the last-named liability to be instituted by the Auditor of State.

Appellants were policy holders on property in Arkansas, and sustained a loss before the insolvency proceedings were instituted, and they instituted an action at law against said corporation and the sureties on one of said bonds to recover the amount of their said loss. The receiver filed a petition in chancery court praying that appellants be restrained from prosecuting their action against the sureties on said bond, and the court overruled their demurrer to the petition, and rendered a decree perpetually restraining them from prosecuting said action.

The petition of the receiver sets forth all

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the foregoing facts, and in addition it is alleged therein "that the only assets of any appreciable value of the defendant company is the liability of the sureties on the above-mentioned bond, and that the total amount of claims against defendant for losses accruing under policies issued by it, and filed in this cause by intervention, is far in excess of the total assets of said defendant." It is not claimed that any part of the required reserve of fifty per cent. was ever used for any other purposes than the payment of losses, or that there exists any liability on the bonds on that account. The decision of the case turns on the question whether the liability of the sureties on the statutory bonds to holders of policies on property in Arkansas for losses is an asset of the insolvent corporation which passes to the receiver, and whether the receiver can maintain an action on the bonds to enforce such liability. The language of the statute hereinbefore quoted answers both questions against the contention of appellees. The liability on the bonds is to a class of policy holders as creditors, and is in no sense an asset of the corporation. The corporation is principal in the bonds and could never, under any circumstances, maintain any action thereon, either for itself, its stockholders or any creditor, not even the special class of creditors for whose benefit the bonds were given. It is true that the receiver for an insolvent corporation is the representative of the creditors and stockholders of the corporation as well as the corporation itself, but only to the extent of the assets of the corporation, and not for the enforcement of collateral liabilities to the creditors. *Jones v. Harris*, 117 S. W. 1077; *Bailey v. O'Neal*, 122 S. W. 503. "While the receiver of an insolvent corporation," says Mr. High, "is thus treated as the representative of both creditors and shareholders, so far as any beneficial interest is concerned, yet, for the purpose of determining the nature and extent of his title, he is regarded as representing only the corporate body itself, and not its creditors or shareholders, being vested by law with the estate of the corporation, and deriving his own title under and through it. For purposes of litigation, therefore, he takes only the rights of the corporation, such as could be asserted in its own name, and upon that basis only can he litigate for the benefit of either shareholder or creditors except when acts have been done in fraud of the rights of the latter, but which are valid as against the corporation itself, in which case he holds adversely to the corporation." *High on Receivers*, § 315.

There is a distinction between this case and *Jones v. Harris*, supra, where the receiver and the president of an insolvent banking corporation sought to enjoin creditors from enforcing the statutory liability of the president and secretary on account of their failure to file the annual statement required by statute. There, the liability of those of-

ficers to creditors was an unlimited one, whilst in the present case the liability is limited to the amount of the bond. But this distinction does not operate to the advantage of the receiver in his assertion of the right to enforce liability on the bond for the benefit of creditors. Where the liability is limited, as in the present case, to a certain amount and to a certain class of creditors, the sureties on the bond, or those creditors who are entitled to share in the amount to be recovered on the bond, might insist that the liability be enforced in a court of equity where a multiplicity of suits could be avoided, and the amount to be recovered could be distributed among those entitled to share. *Hornor v. Henning*, 98 U. S. 228, 23 L. Ed. 879. But this is of no concern to the receiver, who in no event can enforce the liability nor be a necessary party to the suit to enforce it. In *Bailey v. O'Neal*, supra, we held that an action against the directors of an insolvent corporation for intentional neglect to perform the duties required of them by statute could be maintained by creditors of the corporation. It was insisted by the defendants in that case that the action could be maintained only by the receiver of the corporation.

The only decision of this court which would appear to be in any degree against the conclusion now expressed is in the case of *Corn v. Skillern*, 75 Ark. 148, 87 S. W. 142, where, under a statute prescribing that, "if the capital stock of any such corporation shall be withdrawn and refunded to the stockholders before the payment of all the debts of the corporation for which such stock would have been liable, the stockholders of such corporation shall be liable to any creditor of such corporation, in an action founded on this statute, to the amount of the sum refunded to them respectively" (*Kirby's Dig.* § 861), a receiver was permitted to sue for capital improperly withdrawn by stockholders. The effect of that decision was to hold the capital wrongfully withdrawn to be assets of the corporation. The distinction between the two classes of cases is quite clear. *High on Receivers*, §§ 315, 320, 321; *Minnesota Thresher M. Co. v. Langdon*, 44 Minn. 37, 46 N. W. 310; *Minneapolis Baseball Co. v. City Bank*, 66 Minn. 441, 69 N. W. 331, 38 L. R. A. 415. The decision in *Corn v. Skillern*, supra, has no controlling force in the present case, for here the liability of the sureties on the bond is purely collateral, and, as has already been stated, in no sense an asset of the corporation. The conclusion we reach is in accord with the weight of authority. *Runner v. Dwiggin*, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645; *Colton v. Mayer*, 90 Md. 711, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. Rep. 456; *Jacobson v. Allen* (C. C.) 12 Fed. 454; *Farnsworth v. Wood*, 91 N. Y. 308; *Atty. Gen. v. Atl. Mut. L. Ins. Co.*, 100 N. Y. 279, 3 N. E. 193; *Wincock v. Turpin*, 96 Ill. 135; *Young v. Stevenson*, 180 Ill. 608, 54 N. E.

562, 72 Am. St. Rep. 236; Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 69 N. W. 331, 38 L. R. A. 415; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825; Parker v. Carolina Savings Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

The Supreme Court of Indiana, in *Runner v. Dwiggins*, supra, states the correct rule, we think, as follows: "Neither a receiver, an assignee in bankruptcy, nor an assignee under a voluntary general assignment for the benefit of creditors, each of whom represents creditors as well as the insolvent, acquires any right to enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent." Precisely the same language was used by Judge Wallace in his opinion in *Jacobson v. Allen*, supra.

In *Minneapolis Baseball Co. v. City Bank*, supra, the court said: "The right of the receiver, representing the creditors, to recover the capital so given away rests upon the same basis as does his right to recover any other property disposed of by the corporation in fraud of creditors. But there is no analogy between such an action by the receiver to reclaim assets at one time belonging to the corporation, which it has fraudulently transferred, and an action to enforce the individual or double liability of the stockholder for the debts of the corporation. Such liability sustains the relation of surety for the debts of the corporation; hence, from its very nature, it is not, and never can be, an asset of the corporation."

Learned counsel for appellee rely mainly upon *B. & A. R. Co. v. Mercantile Trust & Dep. Co.*, 82 Md. 535, 34 Atl. 778, which is claimed to be an analogous one in favor of their contention as to the right of the receiver to sue on a collateral obligation for the benefit of creditors. That case is, however, totally different from this. There, the company had, whether as a voluntary act or in compliance with a statutory requirement the court found it necessary to determine, placed in the hands of the Treasurer of State guaranty funds for the benefit of policy holders, and a court of equity ordered the State Treasurer to surrender these funds to the receiver for distribution among the creditors. The funds in question, though deposited as a guaranty fund to creditors, were nevertheless an asset of the corporation, and were properly placed in the hands of the receiver for distribution among the creditors found to be entitled thereto. The ground of that decision is that the deposit was an asset of the corporation and a trust fund for the benefit of creditors, and therefore the proper subject of equitable control and distribution. No analogy exists between that case and the present one.

As we have already mentioned there is no allegation of any improper use of any of the

reserve of 50 per cent. of the premiums, so as to confer a right of action on the bonds in that regard. But if that were alleged, and if it be conceded that the receiver succeeds to the right of action conferred by statute upon the Auditor of State for the recovery of a sum sufficient to restore the reserve, still that would not give the receiver the right to recover and distribute the full amount of the bonds. He could only recover the sum necessary to restore the improperly depleted reserve. We conclude, therefore, that the decree of the chancellor is erroneous, so it is reversed and the petition of the receiver is dismissed.

#### INDUSTRIAL MUT. INDEMNITY CO. v. ARMSTRONG.

(Supreme Court of Arkansas. Jan. 3, 1910.)

##### 1. APPEAL AND ERROR (§ 295\*)—RESERVATION OF QUESTION BELOW — MOTION FOR NEW TRIAL.

As the error in making a judgment include the penalty and attorney's fee appeared in the judgment itself, motion for new trial was unnecessary to bring it to the attention of the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1704; Dec. Dig. § 295.\*]

##### 2. INSURANCE (§ 666\*)—ACTIONS—RECOVERY OF PENALTY AND ATTORNEY'S FEES.

Where plaintiff in an action against an insurance company did not recover the full amount demanded, it was error to add a penalty and attorney's fees to the judgment.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 666.\*]

Appeal from Circuit Court, Garland County; W. H. Evans, Judge.

Action by Bettie Armstrong against the Industrial Mutual Indemnity Company. From a judgment for plaintiff, defendant appeals. Reversed, and judgment rendered.

Appellee sued appellant in justice court on certain accident insurance policies. In her complaint she asked for judgment for \$70 and interest, also \$10 per week during continuance of disability, and for 12 per cent. penalty and attorney's fees. She obtained judgment in the justice court. And on appeal by appellant to the circuit court, appellee again obtained judgment in the sum of \$30, and also 12 per cent. penalties and \$15 for an attorney's fee. Appellant moved to modify this judgment by eliminating the amount recovered as penalty and attorney's fee. The court overruled the motion and judgment was entered for the \$30 and for the penalty and attorney's fee. Appellant appeals from that part of the judgment for the penalty and attorney's fee. The amount demanded of the company was \$70 and \$10 per week during the continuance of her disability. The jury returned a verdict for \$30.

Jas. E. Hogue and Calom T. Cotham, for appellant. R. G. Davies, for appellee.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

WOOD, J. (after stating the facts as above). The court erred in rendering judgment for the penalty and attorney's fee. The error appeared in the judgment. A motion for new trial was therefore unnecessary to bring it to the attention of this court. *Gates v. School District*, 57 Ark. 370, 21 S. W. 1060, 38 Am. St. Rep. 249; *Norman v. Fife*, 61 Ark. 33, 31 S. W. 740.

The question here involved is ruled by the decision of this court in the recent case of *Pacific Mutual Life Ins. Co. v. Carter*, 123 S. W. 384. The judgment for penalty and attorney's fee is reversed, judgment is entered here for appellee, in the sum of \$30, and appellee will pay the costs of this appeal.

### KING v. BLACK.

(Supreme Court of Arkansas. Dec. 13, 1909.)

#### 1. APPEAL AND ERROR (§ 1002\*)—REVIEW—CONFLICTING EVIDENCE.

Where the jury under proper instructions passes upon conflicting evidence, their verdict is conclusive.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3935; Dec. Dig. § 1002.\*]

#### 2. APPEAL AND ERROR (§ 289\*)—PRESENTATION OF GROUNDS OF REVIEW—MOTIONS FOR NEW TRIAL.

Error in excluding evidence cannot be considered where the exclusion is not made a ground of motion for new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1691; Dec. Dig. § 289.\*]

#### 3. APPEAL AND ERROR (§ 690\*)—RECORD—TRANSCRIPT.

Error in giving an instruction will not be considered where the transcript does not show that it was given.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2928, 2930; Dec. Dig. § 690.\*]

#### 4. REPLEVIN (§ 91\*)—TRIAL—INSTRUCTIONS.

In replevin to recover a mule, where it was shown that he was sold by plaintiff upon the condition that the title remain in him until the purchase price was paid, and plaintiff's right to recover was denied only upon the ground that the purchase price had been paid, the question of payment was in issue in the case, and it was not error to instruct that, if there was anything due on the mule, the verdict must be for plaintiff.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 354, 356; Dec. Dig. § 91.\*]

Appeal from Circuit Court, Lafayette County; Jacob M. Carter, Judge.

Action by Dick Black against Daniel Warren, in which P. L. King interpleaded, and, on the death of Daniel Warren pending the suit, was appointed administrator ad litem for him. From a judgment for plaintiff, King appealed. Affirmed.

D. L. King, for appellant. Warren & Smith, for appellee.

HART, J. Dick Black brought suit in replevin in a justice of the peace court against Daniel Warren to recover possession of an

iron gray mule, valued at \$90. The plaintiff gave bond as required by the statute, and the sheriff took charge of the mule. Thereupon the defendant gave a cross-bond, and regained possession of the mule. D. L. King interpleaded for the mule. A trial was had, which resulted in a verdict and judgment for the interpleader. The plaintiff appealed to the circuit court. In the circuit court the death of Daniel Warren was suggested and admitted. D. L. King was appointed administrator ad litem, and the suit revised in his name as such administrator.

The trial in the circuit court resulted in a verdict for the plaintiff in the sum of \$50. From the judgment rendered on the verdict an appeal has been taken to this court. The principal contention of appellant is that the verdict is not supported by the evidence. The undisputed facts show that Dick Black sold the mule in controversy to Daniel Warren with the understanding that the title was not to pass to Warren until he had paid for it. The sale was made in January, 1904, and during that year Warren traded at the store of Black. Some time in the fall Warren delivered to Black five bales of cotton. The testimony of appellant tends to show that the cotton was received by Black as payment in full both of his account and of the purchase price of the mule. The testimony of appellee tends to show that the cotton was delivered to him to be held for a raise in price, and that, when sold, the proceeds were to be applied first to the payment of Warren's store account; that the five bales of cotton were small, and that, when sold, they were hardly sufficient to pay the store account of Warren; that it was agreed that the proceeds of the cotton should be applied to the payment of the store account; that Warren was given permission to retain the possession of the mule for another year. D. L. King claimed the possession of the mule by virtue of a mortgage executed to him by Warren. The jury under proper instructions of the court have passed upon this conflict in the evidence, and their verdict is conclusive upon us.

Counsel for appellants also rely for a reversal upon the failure of the court to allow Abbie Warren, the widow of Daniel Warren, deceased, to testify, but he did not embody his objection to the ruling of the court in his motion for a new trial, and under the settled rules of the court it cannot be considered on appeal. Error in excluding evidence is waived by failure to make the exclusion a ground of motion for new trial. *St. L. & So. Ry. Co. v. Deshong*, 63 Ark. 443, 39 S. W. 260; *Ince v. State*, 77 Ark. 418, 88 S. W. 818; *Gibbs v. Dickson*, 33 Ark. 107.

One of the appellant's grounds for a new trial is "because the court erred in giving instruction requested by the plaintiff, that,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

if there was anything due on the mule, they must find for the plaintiff." The objection is not well taken because the transcript does not show that any instruction was given at the request of the plaintiff. Besides, there was no error in it. The undisputed evidence shows that the mule was sold by Black to Warren with the distinct understanding that the title should remain in the vendor until the purchase price was paid; and that the only ground upon which plaintiff's right of recovery was sought to be defeated was that Warren had paid for the mule by delivering to Black certain bales of cotton. The question as to the payment of the purchase price of the mule was the only disputed issue of fact; hence there was no error in giving the instruction. *Faist v. Waldo*, 57 Ark. 270, 21 S. W. 436; *Black v. Roberson*, 87 Ark. 641, 112 S. W. 402.

We find no error in the record, and the judgment will be affirmed.

#### SCHOOL DIST. NO. 4 v. SCHOOL DIST. NO. 84.

(Supreme Court of Arkansas. Jan. 3, 1910.)

##### 1. SCHOOLS AND SCHOOL DISTRICTS (§ 102\*)—PUBLIC SCHOOLS—TAXATION—STATUTES.

Where a county court, as empowered by Kirby's Dig. §§ 7639-7644, transferred the children and school tax of J. from one district to another, this did not effect a transfer of the land of J., since this would amount to a change in the boundaries of the districts, a thing accomplished by an entirely different proceeding provided for by Kirby's Dig. §§ 7540-7544, so that the school tax on the property of a railroad which subsequently acquired a right of way and built its road across the land of J. belonged to the district in which the land was physically located, and an order of the county court transferring such tax to the other district would be void.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 102.\*]

##### 2. SCHOOLS AND SCHOOL DISTRICTS (§ 107\*)—TAXES—INJUNCTION.

Equity may restrain the illegal collection of school taxes under such void order, since, if the tax was paid over and spent, the district to which it properly belonged would be remediless.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 253; Dec. Dig. § 107.\*]

##### 3. TAXATION (§ 145\*)—LIABILITY OF PERSONS AND PROPERTY—RAILROADS—RIGHT OF WAY AND TRACTS.

Although a railroad company acquires only an easement over land, the fee remaining in the original owner, the two property rights are separate and distinct, and are separately taxed.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 252; Dec. Dig. § 145.\*]

Appeal from Boone Chancery Court; T. H. Humphreys, Chancellor.

Suit by School District No. 84 against School District No. 4. From a decree for plaintiff, defendant appeals. Affirmed.

J. W. Story, for appellant. Guy L. Trimble, for appellee.

**McCULLOCH, C. J.** This is a controversy between two school districts of Boone county, No. 84 and No. 4, over the district school tax assessed against the St. Louis, Iron Mountain Railway Company on its roadbed and right of way located within the territorial boundaries of the first-mentioned district. J. C. Jones resided within the bounds of District No. 84, and owned a tract of land therein. During the year 1898, he obtained an order of the county court for educational purposes transferring his children and district school tax to District No. 4, which was an adjoining district. Subsequently the railway company constructed its railroad through district No. 84, and over and through Jones' land, after having condemned and paid for a right of way over the land. In 1908 the county court made an order reciting the former order transferring Jones' children and school tax to District No. 4, and directed that the school tax assessed in District No. 84 against the railroad property be changed to the other district and paid over to the use of the other district. District No. 84 instituted the present action in the chancery court to restrain the enforcement of the order of the county court and the consequent diversion of the school tax belonging to that district. The court rendered a decree in favor of plaintiff, and defendant appealed.

The effect of the first order of the county court was merely to transfer the children of Jones and his district school tax to an adjoining district for educational purposes. Kirby's Dig. §§ 7639-7644. The order did not have the effect of transferring the land owned by Jones from one district to another, nor of changing the boundary lines of the district so as to exclude it from the old district and include it in the new. A totally different method of procedure is provided by statute in case of proposed changes in the boundaries of school districts. Kirby's Dig. §§ 7540, 7544. Any change in the ownership of the property taxed released the school tax levied thereon from the further operation of the court order transferring Jones' children and school taxes to another district, and left it free to be assessed in the school district wherein it was situated. Though the railway company acquired only an easement over the land, the fee remaining in the original owner, the property rights of the railway company were separate and distinct from the owner of the fee, and are separately taxed. The assessment for taxation of the property rights of the railway company in School District No. 84 was not affected by the prior transfer of Jones' school tax, levied on the land out of which the railway company's easement was carved. It follows therefore, that the school tax of the railway company was properly assessed in District No. 84, and the order of the county court

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

changing it to the other district was void.

We are also of the opinion that a court of equity had jurisdiction to restrain the illegal diversion of the school tax. If the tax should, pursuant to the void order of the county court, be paid over to the credit of the other district and spent, the district to which it properly belonged would be remediless. The remedy at law is not complete, and a court of equity should interfere to give appropriate relief.

The decree is affirmed.

## ST. LOUIS SOUTHWESTERN RY. CO. v. BURDG.

(Supreme Court of Arkansas. Jan. 3, 1910.)

### 1. MASTER AND SERVANT (§ 279\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—ACTIONS—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an action for injuries to a railroad car carpenter from the act of a fellow servant in allowing a brake plate to fall upon him, evidence held to sustain a finding that the fellow servant was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 979; Dec. Dig. § 279.\*]

### 2. MASTER AND SERVANT (§ 281\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—ACTIONS—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an action for injuries to a railroad car carpenter from the act of a fellow servant in allowing a brake plate to fall upon him, evidence held to sustain a finding that he was not negligent himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 987; Dec. Dig. § 281.\*]

### 3. MASTER AND SERVANT (§ 291\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for injuries to a railroad car carpenter, the court properly instructed that, as plaintiff alleged he was injured by the negligence of a fellow workman in permitting a brake plate to fall upon him, in order to recover, he must prove by a preponderance of the evidence that his injury was caused by the negligence of the fellow workman in the manner alleged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1136, 1137; Dec. Dig. § 291.\*]

### 4. MASTER AND SERVANT (§ 296\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for injuries to a railroad car carpenter, alleged to have been caused by the negligence of a fellow servant, the court properly instructed that it was the duty of an employe to exercise ordinary care in the performance of his work; and, if his failure to do so contributed in any degree to an injury to himself, he cannot recover therefor, even though the master or fellow servant were negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180, 1181; Dec. Dig. § 296.\*]

### 5. MASTER AND SERVANT (§ 296\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for injuries to a railroad car carpenter alleged to have been caused by the negligence of a fellow servant in allowing a brake plate to fall upon him, it was proper to

instruct that if a preponderance of the evidence showed that plaintiff, in assisting his fellow worker to take from the car the iron brake plate, did not exercise ordinary prudence and care under the circumstances, and his want of care contributed to his injury, then the verdict should be for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1181; Dec. Dig. § 296.\*]

### 6. MASTER AND SERVANT (§ 229\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS—"CONTRIBUTORY NEGLIGENCE."

In an action for injuries to a railroad car carpenter, an instruction defining contributory negligence as the want of ordinary care on the part of the party injured, or the want of such care as an ordinarily prudent person would have exercised under similar circumstances, was proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 674, 683; Dec. Dig. § 229.\*]

### 7. MASTER AND SERVANT (§ 216\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—FELLOW SERVANTS—COMMON LAW.

Under the common law, a master was not responsible for injuries to a servant caused by the negligence of a fellow servant; this being considered one of the risks incident to the service, and assumed by the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 567; Dec. Dig. § 216.\*]

### 8. MASTER AND SERVANT (§ 216\*)—FELLOW SERVANT RULE—ASSUMPTION OF RISK.

Under Acts March 8, 1907 (Acts 1907, p. 162) § 1, making railroads liable for injury to servants, caused by negligence of fellow servants, the same as if the negligence was the act of the master, a servant of a railroad company does not assume the risk of injury from the negligence of a fellow servant, since it cannot be said that he assumes the risk of injury from negligent acts of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 567; Dec. Dig. § 216.\*]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by John M. C. Burdg against the St. Louis Southwestern Railway Company. Judgment for plaintiff and defendant appeals. Affirmed.

S. H. West and Bridges, Wooldridge & Gantt, for appellant.

FRAUENTHAL, J. J. M. C. Burdg, the plaintiff below, instituted this suit against the St. Louis Southwestern Railway Company to recover damages for injuries which he alleged that he received while in the employment of the defendant as a car carpenter. On October 24, 1907, plaintiff was in the employ of the defendant as a car carpenter, and was engaged in the duty of taking a brake rod off of a box car for the purpose of repairing the car. Another employe of the defendant was at the time engaged at work on the top of the car in loosening a heavy iron brake plate which incased the brake rod. The plaintiff was on the ground, and in the performance of his work was lifting the brake rod out of a socket so as to lower it, when, as plaintiff alleged, the employe on the top of the car negligently and carelessly

suffered and permitted the brake plate to drop or slide down the brake rod from the top of the car upon the plaintiff's right hand, and thereby breaking, wounding, and permanently disabling his hand. The defendant admitted the employment of the plaintiff, but denied all other allegations of the complaint, and pleaded contributory negligence and assumed risk on the part of the plaintiff as a defense to his recovery. The evidence on the part of the plaintiff tended to prove that the end of the box car had been knocked out, and that the plaintiff and his fellow servant were engaged in removing the brake rod. This rod was incased in the brake plate at the top of the car, and this plate was fastened to the car with screws; and, when the plate was entirely loosened, it would slide down the rod. The employé on top of the car had loosened the plate from the car by removing the screws, and was holding the plate against the side of the car, while the plaintiff on the ground took hold of the lower end of the brake rod and was raising it out of the socket. The employé on the top of the car let the iron plate drop or slide down on the plaintiff while he was thus raising the rod. He gave no warning of letting the plate drop, and at the time the plaintiff was looking down while engaged in the duty of raising the rod, and did not see the plate as it fell. From the facts and circumstances detailed we are of the opinion that the evidence is sufficient to sustain a finding that the fellow servant was negligent in permitting or causing the brake plate to fall upon the plaintiff, and that at the time the plaintiff was in the exercise of due care.

The court amongst other instructions gave to the jury the following: "The fact that the plaintiff was injured is not, within itself, sufficient to enable him to recover; but he must prove that his injury was caused by the negligence of some employé of defendant company. There is no presumption of negligence against defendant in this case and the plaintiff, before he is entitled to recover, must prove by a preponderance of the evidence that his injury was caused by the negligence of his fellow workman, and that but for such negligence his injuries would not have occurred." And at the request of the defendant the court gave the following instructions: "(9) It is alleged in the complaint that plaintiff was injured by the carelessness and negligence of his fellow workman in permitting an iron brake plate to drop and fall upon plaintiff, so plaintiff must prove by a preponderance of the evidence that his injury was caused by the negligence of his fellow workman in permitting said iron brake plate to fall and injure plaintiff; and, if he fails to do this, then he is not entitled to recover, and your verdict should be for the defendant. (10) It is the duty of an employé to exercise ordinary and usual care in the performance of his work; and, if he did not do so, and want of care con-

tributed, in any degree, to the injury to himself, then he is guilty of contributory negligence, and cannot recover in such case even though the master or a fellow servant were negligent in causing the alleged injury. If you find from a preponderance of the evidence that plaintiff in assisting his fellow worker to take from the car the iron brake plate, and in doing so he did not exercise what was ordinary prudence and care under the circumstances, and that his want of care contributed to the happening of plaintiff's alleged injury, then your verdict should be for the defendant. (11) Contributory negligence is the want of ordinary care on the part of the party injured; that is to say, the want of such care as an ordinary prudent person would have exercised under same or similar circumstances." The defendant requested the court to give the following instruction, which was refused: "(2) You are instructed, as a matter of law, that an employé, when he enters the service of an employer, impliedly agrees that he will assume all risks which are ordinarily and naturally incident to the particular service in which he engages; and, if you believe from the evidence that the injury to plaintiff was only the result of one of the risks ordinarily incident to the work in which plaintiff was engaged, and not otherwise, then he cannot recover in this case, and your verdict should be for the defendant." The jury returned a verdict in favor of the plaintiff for \$200. The defendant prosecutes this appeal.

It is contended that the court erred in refusing to give the above instruction No. 2 at the request of the defendant, which relates to the assumption of risk by the plaintiff while engaged in this employment. The plaintiff alleged in his complaint that the sole cause of the injury was the negligent act of the fellow servant in permitting or causing the brake plate to fall on him. The testimony upon both sides was directed to this issue, and there was no testimony showing that the injury occurred from any other cause. The fellow servant permitted or caused the plate to drop, which injured the plaintiff. And the sole issue was whether or not the fellow servant was negligent in this act. There was no evidence indicating that the injury was caused by any other act or cause, or from any risk or peril, that was incident to the work in which plaintiff was engaged other than this negligence of the fellow servant. The instruction was therefore not applicable to the facts and evidence adduced upon the trial of this case, and the sole issue involved in the case, unless as a matter of law the plaintiff assumed the risk and peril consequent upon the failure of the fellow servant to properly perform his duty. If under the law the plaintiff did not assume the risk of the negligence of his fellow servant, then under the pleading and testimony in this case said instruction was abstract. According to the common law the master is

not responsible for the injuries of the servant caused by the negligence of a fellow servant. This has been a well-recognized principle of the law, and the reason that was and is generally assigned for this doctrine is that the negligence of the fellow servant is one of the risks that is incident to the service, and is assumed by the servant when he enters the employment. It was considered that by taking the employment the servant impliedly agreed and contracted to assume the risks ordinarily incident thereto, and that the negligence of the fellow servant was one of these risks.

But by the act of the General Assembly of March 8, 1907 (Acts 1907, p. 162), it was provided that a railroad company should be held responsible for injuries to a servant caused by the negligence of a fellow servant. That act is as follows: "Section 1. That hereafter all railroad companies operating within this state, whether incorporated or not, and all corporations of every kind and character, and every company, whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employes, such agents, servants or employes, being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employe or servant, resulting from the careless omission of duty or negligence of such employer, or which may result from carelessness, omission of duty or negligence of any other agent, servant or employe of the said employer, in the same manner and to the same extent, as if carelessness, omission of duty or negligence causing the injury or death was that of the employer." Acts 1907, p. 162. This statute abolishes the above common-law doctrine, which held that the servant assumed the risk of danger caused by the negligence of a fellow servant. As is said in the case of *St. L., I. M. & S. Ry. Co. v. Ledford*, 119 S. W. 1123, this statute "prevents as to certain classes of employers the application of the doctrine which treats a danger created by negligence of a fellow servant as one of the ordinary risks of the service assumed by the servant." By virtue of this statute the negligent act of the fellow servant is, as far as the rights of the injured servant are concerned, the same as if it was the negligent act of the master. *Ozan Lumber Co. v. Bidle*, 87 Ark. 587, 113 S. W. 796; *Aluminum Co. of N. A. v. Ramsey*, 89 Ark. 523, 117 S. W. 568; *Ozan Lumber Co. v. Bryan*, 119 S. W. 73. Now it has been uniformly held that the servant in entering the employ of the master does not assume the risks of the dangers or perils that arise from, or which are consequent upon, the negligence of the master. He has a right to assume that the master has exercised due care and diligence, and to act upon the presumption that the

master has and will exercise that care for his protection. *Choctaw, O. & G. R. R. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837; *Southern Cotton Oil Co. v. Spott*, 77 Ark. 463, 92 S. W. 249; *Choctaw, O. & G. R. R. Co. v. Craig*, 79 Ark. 53, 95 S. W. 168; *Pettus v. Kerr*, 87 Ark. 398, 112 S. W. 886; *St. L., I. M. & So. Ry. Co. v. Harmon*, 85 Ark. 503, 109 S. W. 295; *St. L., I. M. & So. Ry. Co. v. Birch*, 89 Ark. 243, 117 S. W. 243. By virtue of the above act of March 8, 1907, the master is made "responsible to a servant who while exercising due care for his own safety is injured by the negligent act of a fellow servant, the same as if the negligence was that of the master." The servant has therefore the right to presume that his fellow servant will exercise due care and diligence, and he does not assume the risk of danger or peril caused by the negligence of the fellow servant. It follows that the court did not err in refusing to give said instruction No. 2 asked for by the defendant.

We have examined the instructions given on the part of the plaintiff and all other instructions requested by the defendant, and find no reversible error in the rulings of the court thereon. As stated above, we think that there was sufficient evidence to warrant the jury in finding that the plaintiff at the time of the injury was in the exercise of due care and diligence, and that the injury received by him was solely due to the negligence of the fellow servant.

The judgment is affirmed.

## ST. LOUIS SOUTHWESTERN RY. CO. v. JACKSON.

(Supreme Court of Arkansas. Jan. 3, 1910.)

### 1. APPEAL AND ERROR (§ 966\*)—DISCRETION OF TRIAL COURT—REVIEW.

A motion for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed unless manifestly abused.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3837; Dec. Dig. § 966.\*]

### 2. CONTINUANCE (§ 29\*)—GROUNDS—SURPRISE.

Where the exact date of the injury to a passenger was fixed by the evidence, and the carrier had at the trial as witnesses another passenger and the trainmen and had prepared its defense with knowledge that the injury complained of was received on that date, the refusal to grant a continuance to the carrier on the ground of surprise, because the complaint alleged that the injury occurred on a different date, was proper.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. § 95; Dec. Dig. § 29.\*]

### 3. EVIDENCE (§ 471\*)—STATEMENT OF FACT.

The testimony of one who had been a passenger on freight trains a great number of times, and who was familiar with the ordinary jerks incident to travel on such train, that the impact of the cars on the backing of a particular freight train made a violent jar, and that the ordinary jerks were not as much as the shock

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on that occasion, was admissible as a statement of a fact, and was not objectionable as an expression of opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2151; Dec. Dig. § 471.\*]

**4. EVIDENCE (§ 127\*)—PERSONAL INJURIES—EXCLAMATIONS OF PAIN.**

Expressions of pain uttered by a passenger injured by a violent jerk of the train while alighting, made immediately on alighting, are admissible as illustrative of the character and extent of the injury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377-382; Dec. Dig. § 127.\*]

**5. DAMAGES (§ 173\*)—PERSONAL INJURIES—EVIDENCE—ADMISSIBILITY.**

One suing for a personal injury may testify as to the amount he had earned in the management of other laborers, on it appearing that the injury rendered him unfit to perform the duties of managing other laborers.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492; Dec. Dig. § 173.\*]

**6. DAMAGES (§ 130\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.**

A passenger on a freight train was injured by the sudden jerk of the train, which threw him forward for 12 or 14 feet and against the front end of the caboose. His back and ankle were injured. He was compelled to use crutches for six or seven weeks and was unable to perform any labor for a number of months. At the time of the trial, seven months after the accident, he still suffered great pain in his back and ankle. *Held*, that a verdict for \$750 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 857; Dec. Dig. § 130.\*]

**7. CARRIERS (§ 321\*)—INJURY TO PASSENGERS—ISSUES.**

Where, in an action for injury to a passenger on a freight train, the sole issue was whether or not there was an unusual jar of the train at the time the passenger attempted to alight, and whether or not he was thrown forward and down in the caboose and thereby injured, an instruction that, if the train stopped a sufficient time to have permitted the passenger by the use of ordinary care to alight before the jar occurred, there could be no recovery, was properly refused.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1335, 1336; Dec. Dig. § 321.\*]

**8. CARRIERS (§ 280\*)—PASSENGERS—OBLIGATION OF CARRIER.**

A passenger riding in the caboose of a freight train assumes the ordinary risks incident to travel on such trains; but the carrier owes him the duty of exercising the highest degree of care consistent with the practicable operation of such trains.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1098; Dec. Dig. § 280.\*]

**9. CARRIERS (§ 320\*)—PASSENGERS—OBLIGATION OF CARRIER.**

Whether a carrier failed to exercise proper care for the protection of a passenger on a freight train *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1315; Dec. Dig. § 320.\*]

Appeal from Circuit Court, Woodruff County; Hance N. Hutton, Judge.

Action by Zolley Jackson against the St. Louis Southwestern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

S. H. West and J. G. Hawthorne, for appellant. H. M. Woods, for appellee.

**FRAUENTHAL, J.** This was an action instituted by Zolley Jackson, the plaintiff below, against the St. Louis Southwestern Railway Company, to recover damages for personal injuries alleged to have been sustained while he was a passenger on one of defendant's trains. In August, 1908, the plaintiff paid his fare and became a passenger on one of defendant's local freight trains from Fair Oaks to Brinkley. The evidence on behalf of the plaintiff tended to prove that, when the train arrived at Brinkley and stopped at the place where passengers are accustomed to alight from such trains, there were several passengers on the caboose with the plaintiff, who prepared to leave the train. The plaintiff arose from his seat, and at that moment the train made a sudden backward movement with a violent impact of the cars, and with such force that it threw the plaintiff forward for a distance of 12 or 14 feet and against the front end of the caboose. The sudden jerk threw him against the car with such force that it injured him severely in the back and wrenched his ankle. Immediately on leaving the train he stated that he was badly hurt, and on the same day had to be assisted in returning to his home. He had his ankle examined and applications of liniment placed thereon at a drug store on the same day, and later he secured the services of a physician. He was compelled to use crutches for six weeks or two months and was unable to perform any labor for a number of months thereafter; and at the time of the trial, about seven months after the injury, he still suffered great pain in his back and ankle therefrom, and was unable to do a day's work. Upon the trial of the cause the jury returned a verdict in favor of the plaintiff for \$750; and, from the judgment rendered thereon, the defendant prosecutes this appeal.

It is urged by the defendant that the lower court erred in refusing to grant a continuance of the trial of the case. Upon the trial of the case the plaintiff introduced as a witness J. L. Stair, who testified that he was a passenger upon the freight train at the time that the plaintiff was injured. He testified further that the injury occurred about the 17th day of August, 1908; that he was not positive as to the exact day of the month, but it was about August 17th, and on Friday. It was alleged in the complaint that the injury occurred on August 17, 1908. When the witness testified that it was about the 17th of August, and not positively as to the exact day of the alleged injury, the defendant asked that the case be taken from the jury and continued, because it was taken by surprise; that, relying on the allegation in the complaint as to the time of the injury, it had subpoenaed as witnesses, its employes and Miss Julia

Julien, who were on the freight train on August 17th; and that it had subpoenaed no persons who were on said train on another date. The court overruled the motion to continue the case. We do not think that there was any error in this ruling of the court.

A motion for a continuance is ordinarily addressed to the sound discretion of the trial court, and that discretion will not be controlled by this court unless it has been manifestly abused. In the case of *Watts v. Cohn*, 40 Ark. 114, Mr. Justice Smith, speaking for the court, said: "Questions as to the trial or continuance of causes rest so much in the sound discretion of the trial court that it must be a very capricious exercise of power or a very flagrant case of injustice that the appellate court will interpose to correct." *Magruder v. Snapp*, 9 Ark. 108; *Hunter v. Gaines*, 19 Ark. 92; *Wilde v. Hart*, 24 Ark. 599; *Supreme Lodge K. of P. v. Robbins*, 70 Ark. 364, 67 S. W. 758.

The only object that the defendant in the case at bar could have had in asking for a continuance was to procure witnesses who were on the train at the time of the injury, whether it was on the 17th day or some other day of August. At the trial of the case it had subpoenaed and introduced as a witness Miss Julia Julien, who testified that she was a passenger on defendant's freight train to Brinkley on a certain Friday in said month of August, and that the following Monday was the 17th day of August; and, while she testified that she did not see any person injured on the train on that day when she was a passenger, she also testified that several passengers were on the train, and amongst them a colored man. The other witnesses of defendant who testified at the trial of the case were a brakeman and conductor. The brakeman stated that he and the conductor were on the train on the same day in August on which Miss Julia Julien was a passenger. Now the plaintiff, who is a colored man, stated that the day upon which he was injured was the only day that he was ever a passenger on defendant's freight train, and that the young lady, Miss Julia Julien, was a passenger on that train. The witness J. L. Stair testified that Miss Julia Julien was a passenger on the train at the time that the plaintiff was injured. So that the exact date of the injury was definitely fixed, and the defendant had at the trial as witnesses this young lady and its employes who were on the train at the time, and had prepared its defense with the knowledge that this was the occasion upon which the plaintiff alleged that he was injured. There was therefore no mistake made by either party as to the exact date upon which it was claimed that the injury occurred. The defendant could not have been prejudiced by the refusal to grant a continuance. The exact day of the month upon which the alleged injury occurred was not material under these circumstances. C. H.

*Smith Tie & Timber Co. v. Weatherford*, 121 S. W. 943.

In the course of his testimony, the witness J. L. Stair stated that the impact of the cars upon the backing of the train made a "violent jar," that he had been a passenger on defendant's freight trains a great number of times, that he was familiar with the ordinary jerks and jars incident to travel on such trains, and that the "ordinary shocks were not as much" as the shock on this occasion. The defendant objected to this testimony of the witness upon the ground that it was the expression of the opinion of the witness. But we do not think that this objection is tenable. The witness was describing the force of the jar or shock, and in the use of the word "violent" he only expressed the idea of the degree of force with which the impact of the cars was made. He had been a passenger on freight trains a great number of times and was familiar with the ordinary and usual jerks and jars of such trains. In describing the force of this jar or jerk it was competent for him to compare it with those with which he was familiar, and it was also competent by this testimony to show that it was an unusually hard impact of the cars and an extraordinary jar and shock.

In the case of *St. Louis, I. M. & S. R. Co. v. Richardson*, 87 Ark. 101, 112 S. W. 212, the following language of a witness relative to the shock or jar on such a train was quoted with approval as to its competency: "Hawley testified that he was in the habit of riding on local freights, and that it was the heaviest jolt he ever got on a car." *St. L., I. M. & S. Ry. Co. v. Brown*, 62 Ark. 259, 35 S. W. 225; *Little Rock Traction Co. v. Hicks*, 79 Ark. 248, 96 S. W. 385.

The defendant urges that the lower court committed an error in permitting the witness Stair to testify as to certain statements made by plaintiff. The witness testified that the plaintiff immediately on getting off the train complained of the injury and said he was "hurt, and hurt bad." It is contended that this testimony was not admissible because it was not a part of the *res gestae*. The testimony thus complained of was not a narration of how the injury happened, but only an expression of pain made at the time of the suffering and as an undesigned incident of it. The testimony of the witness as to the statement of the plaintiff of pain was in effect a description of the injury or wound on the person of the plaintiff. The expression of pain thus used by the plaintiff at the time was illustrative of the character and extent of the injury; and the witness, in testifying as to the exclamation of the plaintiff, was describing the condition of the plaintiff, just as if he had testified to the fact that the plaintiff limped, or staggered, or fell down, or otherwise gave physical evidence of the suffering from or condition of the injury.

It was therefore testimony relative to the injury itself, and directly describing its nature and extent, and it was not a declaration of its cause or of the occurrence which produced its result. The testimony of the witness as to the words of pain emanating from the plaintiff was in effect the description by the witness of verbal acts which was competent like testimony as to any other relevant fact. What weight should be given to such declarations and what credit were matters for the jury to pass on. *Travelers' Insurance Co. v. Moseley*, 75 U. S. 397, 19 L. Ed. 437; *Gray v. McLaughlin*, 26 Iowa, 279; *Kennard v. Burton*, 25 Me. 39, 43 Am. Dec. 249; *Matte-son v. N. Y. C. R. R. Co.*, 35 N. Y. 487, 91 Am. Dec. 67.

We are also of the opinion that no error was committed by the lower court in permitting the plaintiff to testify as to the amount he earned by the personal labor of himself and in the management of other laborers. This testimony showed the value of his earning capacity and was therefore a proper element of his damage, if by the injury he was unable to perform the labor or the duties of managing the other laborers. It is also urged by the defendant in this connection that the verdict is excessive. We have carefully examined the testimony of the plaintiff and the physician who attended him. The plaintiff has suffered pain for at least seven months from the injury, and at times has suffered intensely, and in all probability will suffer pain therefrom for some future time. This, in connection with the loss of his time and labor and his decreased ability to labor for some time in the future, convinces us that the verdict is not excessive.

The defendant requested the court to instruct the jury, in substance, that, if the train stopped at the station a sufficient length of time to have permitted the plaintiff by the use of ordinary care and diligence to have left the train before the jar that caused the injury occurred, the plaintiff cannot recover. But there is no testimony in the case upon which the instruction can be based. The plaintiff and his witness testified that, immediately upon the train having stopped, the passengers prepared to leave the train, and the plaintiff arose from his seat for that purpose. The witnesses on the part of the defendant testified that there was no jar or shock, and that no one was thrown down in the caboose, and that no one was injured. The sole question for the jury to determine under the evidence was whether or not there was an unusual jar or jolt of the train, and whether or not the plaintiff was thrown forward and down in the caboose and thereby injured. That was the issue, and no evidence was adduced as to any other issue. The instruction was therefore abstract and was correctly refused.

In the case at bar the defendant accepted

passengers on its local freight train and undertook their carriage on that character of train. The passenger riding in the caboose of a freight train assumes the ordinary risks and inconveniences that are incident to the travel on such trains. But the railway company owes to the passenger on its freight train the duty to exercise the highest degree of care consistent with the practicable operation of such train to protect the passenger from injury. Falling in exercising that care, the railroad company is guilty of negligence, and, if that negligence is the proximate cause of the injury complained of, it is liable for the damages consequent on such injury. In the case at bar the plaintiff was riding in the caboose of a freight train as a passenger. He was thrown to the floor and severely injured by a sudden jar or jerk of unusual violence. From that testimony it became a question of fact for the jury to determine whether or not the railroad company did exercise that high degree of care which it owed to the plaintiff to protect him from injury, or whether it was guilty of negligence in causing the injury. *Rodgers v. C. O. & G. R. Co.*, 76 Ark. 520, 89 S. W. 468, 1 L. R. A. (N. S.) 1145, 113 Am. St. Rep. 102; *Pas-ley v. St. L., I. M. & S. R. Co.*, 83 Ark. 22, 102 S. W. 387; *St. L., I. M. & S. R. Co. v. Richardson*, 87 Ark. 101, 112 S. W. 212; *St. L., I. M. & S. R. Co. v. Brabbzson*, 87 Ark. 109, 112 S. W. 222; *Ark. Central R. Co. v. Janson*, 119 S. W. 649.

The court instructed the jury in accordance with the above principles of law applicable to the facts of this case, and the verdict returned by the jury was warranted by the evidence.

The judgment is affirmed.

#### LEWIS et al. v. BUFORD.

(Supreme Court of Arkansas. Nov. 29, 1909.  
Rehearing Denied Jan. 17, 1910.)

#### 1. PARTNERSHIP (§ 68\*)—PARTNERSHIP PROPERTY.

Land purchased with partnership funds and necessary for use in carrying on the partnership business, and which was used exclusively therein, was partnership property.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 101, 106½; Dec. Dig. § 68.\*]

#### 2. PARTNERSHIP (§ 181\*)—CREDITORS OF PARTNER—RIGHTS AS TO PARTNER'S INTEREST.

Under Kirby's Dig. § 3244, providing that, upon execution being returned that levy was made upon property in which the debtor was a partner and which was claimed by other partners, the execution creditors may, by equitable proceedings, subject the debtor's interest to the satisfaction of the execution, a judgment creditor of a partner could only subject to the payment of his claim the balance due such partner after the payment of the amount due the other partner, resulting from having overdrawn the debtor partner's share of the partnership funds,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

after such amount had been ascertained and set apart.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 316; Dec. Dig. § 181.\*]

Wood, J., dissenting.

Appeal from Polk Chancery Court; James D. Shaver, Chancellor.

Action by J. B. Buford against J. A. Lewis and others. From a judgment in part for plaintiff, defendants appeal. Reversed in part and remanded for further proceedings, and affirmed in part.

W. Prickett and Pipkin, Martin & McPhetridge, for appellants. Richard M. Mann, for appellee.

HART, J. In 1907 J. B. Buford instituted suit in the Little River chancery court against appellant J. A. Lewis and one W. A. Carroll, alleging that they were partners, to recover the amount alleged to be due on a promissory note for \$1,000. The chancellor found that there was no partnership, and a decree was entered against Carroll alone. Buford appealed, and this court held that the evidence showed that a partnership existed between Carroll and Lewis. The decree was therefore reversed, with directions to also enter a decree against Lewis. The case is reported in 87 Ark. 412, 112 S. W. 963, under the style of Buford v. Lewis. The opinion was delivered on October 5, 1908. A decree was entered in the Little River chancery court on the 18th day of November, 1908, in conformity with the directions of this court, and on the same day a certified copy of the decree was filed in the office of the clerk of Polk county, in which county Lewis resided.

The complaint in the present case as filed in the Polk chancery court against J. A. Lewis, Mary F. Lewis, and A. C. Briggs, after reciting the above-mentioned facts, alleges: That the above-mentioned decree is unpaid, and that both Carroll and Lewis are insolvent. That on the 3d day of November, 1908, the defendant J. A. Lewis, who was then insolvent, conveyed by warranty deed to his wife, Mary F. Lewis, the following described property in Polk county, Ark.: Lot 5 in block 50 in the city of Mena; and the undivided one-half interest in the N. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of section 8, township 2 S., range 30 W., containing ten acres; also, equity of redemption in and to an undivided one-third interest in lot 5, block 7, in Eureka addition to the city of Mena. That on the 10th day of November, 1908, he conveyed by mortgage to A. C. Briggs, his partner in business, his interest in certain personal property of the firm; and that on the same day he also conveyed to his said wife certain shares of stock in a mercantile business. That said transfer and conveyance were made with the fraudulent intent to cheat, hinder, and delay plaintiff in the col-

lection of his debt against the defendant J. A. Lewis. The defendants J. A. Lewis, Mary F. Lewis, and A. C. Briggs filed separate answers. The defendant J. A. Lewis admitted making the conveyances, but stated that they were executed in good faith for valuable consideration, and denied that they were made for the purpose of defeating the plaintiff in the collection of his debt.

The defendant Mary F. Lewis, in her answer, stated that she knows nothing of the matters set up in plaintiff's complaint, and averred that the transfer and conveyances to her were made for the purpose of reimbursing her for certain sums received by her from her father's estate and which her husband held in trust for her.

A. C. Briggs, for his separate answer to the complaint of the plaintiff, J. B. Buford, states: "(1) That of his personal knowledge nothing in regard to any transactions between his codefendant, Jas. A. Lewis, and J. B. Buford. That he owes the plaintiff nothing, and is in no way liable for any claim or judgment on the part of said plaintiff against his codefendant, J. A. Lewis. (2) That he and the defendant Lewis entered into a co-partnership in the meat business at Mena, in May, 1903, and have remained in said business from that date until the present time, and that during the conduct of said business his codefendant, Lewis, has, by reason of advances made to him by this defendant, become heavily indebted to him; all of said indebtedness and all of said advances having been made to the said Lewis by him out of the proceeds of said partnership. (3) That the amount of the indebtedness existing and due to this defendant by his codefendant, as above set forth, amounts to \$1,452, and that the only security that he has for the same is a chattel mortgage for \$500, leaving his codefendant indebted to him as above set forth in the sum of \$952, for which said sum he has no security. (4) That heretofore, to wit, on the ——— day of November, 1908, his codefendant, J. A. Lewis, conveyed to his wife the following described property situated at Mena, Polk county, Ark., and of the nominal value of \$——: Lot 5, block 50, in the city of Mena; one-half interest in N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , section 8, township 2 S., range 30 W., containing 10 acres. This defendant adopting so much of the answer of his codefendant, J. A. Lewis, heretofore filed in this cause, as may be applicable to any issue tendered by your pleadings and affecting the interest of this defendant. Wherefore, the premises considered, the defendant prays: That if the court, for any reason, should find that the conveyance of his codefendant, J. A. Lewis, to Mary F. Lewis, his wife, is void or voidable, that he prays that the property so attempted to be conveyed to her be by appropriate decree of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the court vested in him in satisfaction or part satisfaction of the indebtedness existing in his favor, and against his codefendant, J. A. Lewis, and that he be discharged from further day in the court, and recover all of his costs in and about this suit laid out and expended, and for such other general and special legal relief as he may be entitled to under the proof in the case."

The chancellor found that the conveyances of Lewis to his wife were fraudulent, and a decree was entered subjecting said property to the payment of plaintiff's claims. The chancellor further found that the mortgage to the defendant Briggs was valid, and the cause was dismissed as to him. The defendants have appealed.

Counsel for defendants in their brief say: "So much of said decree as holds the transfer or sale of the real estate to Mrs. Lewis void and for fraud is passed without comment for the purpose of this appeal. The conclusion reached by the honorable chancellor we believe to have been correct, but not for the reasons assigned in the decree. The conveyance was void for the reason that Lewis had no power nor right in the subject-matter of the conveyance. Hence it will only be necessary for us to consider the decree of the chancellor in so far as it affects the rights and equities of the defendant Briggs.

The record shows that the partnership between the defendants J. A. Lewis and A. O. Briggs was formed in May, 1903, for the purpose of running a meat market in the city of Mena, Ark., and that it has continued since that time. They were equal partners. Briggs worked in the shop cutting and selling meats, and Lewis attended to the buying, bookwork, and collecting. The deed to lot 5 in block 50 in the city of Mena was made to J. A. Lewis and A. O. Briggs. The consideration was \$700, which was paid out of the partnership funds. The lot had a house on it, which was rented about one year after the purchase. They then moved their meat market into it, and have used it for that purpose ever since. The 10-acre tract was purchased for use as a slaughterhouse and pasture for cattle, and has been used for that purpose in connection with their meat shop since its purchase. The consideration was \$475, which was paid out of the funds of the partnership. The property has not increased in value since its purchase, and the firm has but little assets except the property in controversy. In the case of *Ferguson v. Hanauer*, 56 Ark. 179, 19 S. W. 749, the court said: "It may be stated as settled at this time that when land is purchased by partners for the use of the firm and with its funds, and there is no agreement or design that it shall be held for their separate use, it will be treated in equity as vested in them in their firm capacity, whether the title is in all the partners as tenants in common, or in less than all." In the present case the partners were running a butcher shop, or meat

market, and the lands purchased were necessary for their use in carrying on their business. The real estate was purchased with partnership funds. It was used exclusively in carrying on the partnership business, and it was their evident intention to purchase it as partnership property. Hence we hold that it was partnership property.

The testimony shows that the defendant J. A. Lewis had overdrawn his share of the partnership funds to the amount of at least \$1,500. The defendant Briggs, in his answer, prays that, if the court should find the conveyance of J. A. Lewis to his wife of the partnership real estate to be void, the property should be appropriated to the satisfaction of his claim. In short, he asks for the enforcement of what is known as a "partner's lien." In the case of *Summers v. Heard*, 66 Ark. 550, 50 S. W. 78, 51 S. W. 1057, it was held (quoting syllabus): "One who enters into a partnership with another thereby acquires an equity to compel the application of the firm's assets to the payment of debts of the firm, and to have the surplus thereafter remaining applied to a debt due to himself or partnership account and to an adjustment of balances and cross-demands between his copartner and himself, and, upon a dissolution of the partnership, to have his proportionate share of the assets remaining on hand." The court said: "In recognition and enforcement of such rights and equities, the statutes of this state provide that, when the property of a partnership is levied upon to satisfy an execution against one of the partners, the officer shall not, by virtue of his levy, deprive the partners of the possession of the property levied upon, except for the purpose of making an inventory thereof, and having the same appraised," and that "upon the execution being returned by the officer that he had levied the same upon the property in which the debtor was \* \* \* partner, and that the same was claimed by the other \* \* \* partners, the execution creditor may proceed by equitable proceedings to subject to the satisfaction of his execution the interest of the debtor so levied upon." See *Kirby's Dig. § 3244*. The rule applies in the present case. Briggs was not liable for the individual debt of J. A. Lewis. Lewis was indebted to him by reason of having overdrawn his share of the partnership funds. Lewis' interest in the assets of his firm was his half of the surplus, after the payment of the debts of the firm, including the amount due Briggs. The balance due Lewis, if any, was all that Buford could subject to the payment of his claim; and this could not be done before it was ascertained and set apart. *Summers v. Heard*, supra. See, also, *Bates on Partnership*, vol. 2, §§ 20-822; *George on Partnership*, pp. 179-181.

Therefore the court should have granted the prayer of Briggs, and should have ascertained and settled his equities in the assets

of the firm before subjecting the interest of the defendant J. A. Lewis to the payment of the claim of the plaintiff.

The decree, in so far as it affects the rights and equities of the defendant Briggs in the partnership assets, is reversed, and the cause remanded for further proceedings in accordance with this opinion, and the decree in other respects is affirmed.

WOOD, J., dissents.

**ST. LOUIS, I. M. & S. RY. CO. v. DALLAS.**  
(Supreme Court of Arkansas. Jan. 8, 1910.)

**1. CARRIERS (§ 366\*)—EJECTION OF INTOXICATED PASSENGER—LIABILITY.**

If the trainmen knew a passenger was so intoxicated as to be unable to avoid dangers from passing trains, when ejected, and the place where he was ejected was dangerous to one in his condition, the carrier was liable if injury resulted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1454; Dec. Dig. § 366.\*]

**2. CARRIERS (§ 370\*)—EJECTION OF PASSENGER—CONTRIBUTORY NEGLIGENCE.**

If a passenger was not so intoxicated that he was unable to understand the dangers to which he was exposed at the place he was ejected, he could not recover for injuries occurring after he was put off, caused by his failure to exercise due care for his safety.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1450; Dec. Dig. § 370.\*]

**3. CARRIERS (§ 381\*)—EJECTION OF PASSENGER—INJURIES—SUFFICIENCY OF EVIDENCE.**

In an action for injuries to a passenger by being run over by another train after he was ejected from defendant's train, evidence held sufficient to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1473-1482; Dec. Dig. § 381.\*]

**4. EVIDENCE (§ 215\*)—ADMISSIONS AGAINST INTEREST—ADMISSIBILITY.**

Statements made by a party against his interest are competent as original testimony, so that in a personal injury action a written statement signed by plaintiff and claimed to have been made by him prior to the action, giving the circumstances of his injury, was admissible, though plaintiff, while admitting his signature, denied having said the things contained therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 754; Dec. Dig. § 215.\*]

**5. APPEAL AND ERROR (§ 215\*)—OBJECTIONS—INSTRUCTIONS—MISLEADING INSTRUCTIONS.**

Instructions, which, though somewhat ambiguous and misleading, could have been cured by a specific objection thereto, which was not made, would not be ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1309; Dec. Dig. § 215.\*]

**6. DAMAGES (§ 163\*)—NECESSITY OF PROOF OF DAMAGES—PAIN AND SUFFERING.**

The jury must be governed by the evidence in awarding damages for pain and suffering.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 454; Dec. Dig. § 163.\*]

Appeal from Circuit Court, Hot Springs County; W. H. Evans, Judge.

Action by Fred Dallas against the St. Louis, Iron Mountain & Southern Railway

Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Fred Dallas brought suit against the St. Louis, Iron Mountain & Southern Railway Company, for injuries alleged to have been received by him in being wrongfully ejected from one of its passenger trains, and in being left in an unconscious condition near the tracks of its line of railway, whereby his leg was cut off by another of defendant's trains which passed shortly afterwards. Fred Dallas, the plaintiff, testified, substantially, as follows: On September 29, 1907, about 2 o'clock p. m., he took defendant passenger No. 806 at El Dorado for Camden, Ark. When the train reached Camden, he concluded to go to Malvern, Ark., and paid his passage to that place. The train auditor, upon receipt of his fare, put the usual check in his hat. When plaintiff boarded the train, he was sober; but he began drinking whisky on the way, and he became drunk. When the train stopped at Walco, a station about two miles south of Malvern, he started out to look around. When he reached the steps, some one (he thinks was one of the train crew) pushed him from the steps of the coach. He says he fell backwards and did not remember anything more until the next morning. When he recovered consciousness, he found that his leg had been cut off, but says that he does not remember any of the attendant circumstances. Other passengers on train No. 806, on the day in question, testify that they saw one of the train crew shove the plaintiff from the steps of the coach. One witness said that, when the plaintiff fell, the brakeman kicked him out of the way. Other witnesses testified that they saw him lying within eight or ten feet of the track, and that he was unconscious. Others say that he was unconscious, but was some distance farther away. The train crew were witnesses for the defendant, and deny that the plaintiff was kicked or shoved off of the steps of the train, and that they knew he was drunk, or was left lying near the track in an unconscious condition. The train stopped at Walco about 8 o'clock p. m., which at that season of the year was shortly after dark. The train proceeded to Malvern, about 2 miles distant, and, while there, defendant's passenger train, No. 223, south bound, passed it. When it arrived at Walco, two or three passengers got off, and the train started up. Just then, other passengers came out of the coach, and the train was again stopped to discharge them. It had moved up about 30 feet. When it made the second stop, a cry of distress was heard from the rear of the train. An investigation was made, and plaintiff was found under the rear trucks under the rear coach, with the wheels resting on his legs. He was released as quickly as possible, placed on a

cot, and carried to Malvern, where his leg was amputated. Walco is a station 2 miles south of Malvern established for the benefit of a lumber mill and its employes. There was a trial by jury, and a verdict for the plaintiff. The defendant has appealed from the judgment rendered upon the verdict.

Kinsworthy & Rhoton, Bridges, Wooldridge & Gant, and Jas. H. Stevenson, for appellant. H. B. Means and J. C. Ross, for appellee.

HART, J. (after stating the facts as above).

1. It is earnestly insisted by counsel for defendant that there is not sufficient evidence to support the verdict. The duty of the carrier to a drunk passenger and its liability for the neglect of it is stated by Mr. Hutchinson as follows: "And this rule is true whether the attendant danger arises from the natural infirmity of the person or was self-imposed. Thus, if a person on a train is so intoxicated as to render him unconscious of danger and unable to appreciate his position, surrounding and perils and his duty to avoid them, or he does not possess the power of locomotion, and is put off the train by a conductor on account of his misconduct, and the place where he is put off and left is dangerous to one in his condition, and these facts are known to the conductor, he would be guilty of recklessness and wanton negligence, rendering the company in whose employment he is liable for damages resulting from his negligence, although the person ejected and injured might have been legally ejected, in a proper manner and at a proper place." 2 Hutch. Carr. § 1083, p. 1260. Upon like principles, the law would not justify a conductor in putting off a passenger at a time and place and under conditions and circumstances which would expose him unnecessarily to great peril of life or bodily harm, and this, too, whether the danger arose from the natural infirmity of the person or was self-imposed. If the conductor did not know of the infirmity of the person, and the peril attending the ejection, there would be no liability arising from the exercise of the right and performance of the duty. It is the fact of notice or knowledge of the danger on the part of the conductor under such circumstances that constitutes the act culpable or willful wrong.

If the deceased was intoxicated to the degree that he was unconscious of danger, could not grasp his position and surroundings, and his duty to avoid danger from passing trains, or did not possess the power of locomotion, and the place where he was put off and left was dangerous to one in his condition, and these facts were known to the conductor, the conductor would be guilty of such negligence as to render the defendant liable for damages, resulting from such misconduct. Where intoxication, which did not take away consciousness, and the power to consider and un-

derstand the danger to which he was exposed, or deprive him of physical capacity to take care of himself, and to avoid danger, would not relieve him of the responsibility of exercising due care, after he was put off the train, and, if he was killed in consequence of such negligence of duty on his part, the plaintiff cannot recover. The killing under the circumstances would be the result of his own negligence, which proximately contributed to it. *Johnson v. Louisville R. R. Co.*, 104 Ala. 241, 16 South. 75, 53 Am. St. Rep. 39.

In the case of *Black v. New York, New Haven & Hartford Railway Company*, 193 Mass. 448, 79 N. E. 797, 7 L. R. A. (N. S.) 148, the court held: "Where the plaintiff's negligence or wrongdoing had placed his person or property in a dangerous situation which is beyond his immediate control, and the defendant, having full knowledge of the dangerous situation, and full opportunity, by the exercise of reasonable care, to avoid any injury, nevertheless causes an injury, he is liable for the injury, as the plaintiff's former negligence is only remotely connected with the accident, while the defendant's conduct is the sole, direct, and proximate cause of it."

The reason of the rule is that the law subordinates personal rights to the preservation of life. The rule is firmly established, but the application of it sometimes gives rise to difficult questions. In the case at bar, the defendant's theory of the case was that plaintiff was injured while trying to board its south-bound train when in motion; but the jury might have found that the plaintiff was shoved from one of defendant's passenger trains by its employes, and was left lying close to the track in an unconscious condition, that with knowledge of his helpless condition, and of the further fact that it was dark, and that there was no one there to render him assistance, they left him near the track exposed to the dangers of a train which would necessarily pass in a short time, and that as a result thereof the plaintiff was injured. Hence we conclude that there was sufficient evidence to support the verdict of the jury.

2. The claim agent of the defendant testified that on the 21st day of October, 1907, the plaintiff gave a statement of the facts and circumstances of his injury; that said statement was in writing and signed by the plaintiff. Plaintiff admitted his signature to the statement, but denied having said of the matters contained in it. Defendant offered to introduce the statement in evidence and assigns as error the action of the court in excluding it. The court should have admitted the statement in evidence. The rule in *St. Louis, Iron Mountain & Southern Ry. Co. v. Faisst*, 68 Ark. 592, 61 S. W. 374, invoked by counsel for plaintiff, is not applicable, for plaintiff sustained two relations to this suit; he was both plaintiff and witness. As said in the case of *Collins v. Mack*, 31 Ark., at page 694: "The acts and declarations of a

party to a suit, when they afford any presumption against him, may be proven by the opposing party." It is a well-recognized rule of evidence that any statements which may have been made by a party to a suit against his interest, touching material facts, are competent as original testimony. *Black v. Epstein*, 221 Mo. 286, 120 S. W. 755; *Louisville & N. R. Co. et al. v. Onan's Adm'r*, 110 S. W. 382, 33 Ky. Law Rep. 462.

3. Counsel for defendant also insist that the court erred in giving instruction No. 7 at the instance of the plaintiff. The instruction is to some extent ambiguous and misleading, in this, that it might be inferred from it that the jury should render a verdict for any amount they deemed right for the pain and suffering regardless of the evidence. But the defect could have been cured by a specific objection. For that reason we would not reverse the case for this alleged error; but, inasmuch as the case must be reversed for the error already indicated, we deem it proper to caution the court in regard to the form of the instruction. While, as we have said, it is difficult to fix a measure of damages for pain and suffering for the reason that none would be an acceptable inducement to suffer it, yet, in determining the amount of compensation for it, the jury must be governed by the evidence in the case. See *Aluminum Company of North America v. Ramsey*, 89 Ark. 522, 117 S. W. 568; *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. 624; *Railway Co. v. Dobbins*, 60 Ark. 485, 30 S. W. 887, 31 S. W. 147; *St. L., I. M. & So. Ry. Co. v. Cantrell*, 37 Ark. 522, 40 Am. Rep. 105; *Barlow v. Lowder*, 35 Ark. 496.

For the error in excluding the written statement of plaintiff from the jury, the judgment will be reversed, and the cause remanded for a new trial.

### WILEY v. STATE.

(Supreme Court of Arkansas. Dec. 13, 1909.)

#### 1. LARCENY (§ 60\*)—EVIDENCE—IDENTIFICATION OF STOLEN GOODS.

On a trial for the larceny of merchandise, evidence held to justify a finding that the merchandise found in the possession of accused and a third person jointly indicted with him was the property of prosecutor.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 156-158; Dec. Dig. § 60.\*]

#### 2. CRIMINAL LAW (§ 1159\*)—VERDICT—CONCLUSIVENESS.

Where there is any substantial evidence to sustain it, a verdict of guilty will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

#### 3. LARCENY (§ 64\*)—RECENT POSSESSION OF STOLEN PROPERTY—EFFECT.

The unexplained possession of property recently stolen affords presumptive evidence of guilt, and if, in connection with other facts, it induces a belief beyond a reasonable doubt of the

guilt of accused, it is sufficient to warrant a conviction.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 170-178; Dec. Dig. § 64.\*]

#### 4. LARCENY (§ 64\*)—RECENT POSSESSION OF STOLEN PROPERTY—EFFECT.

The question whether the possession of stolen property is recent does not depend wholly on the lapse of time, but the actions of accused and the nature of his claim to the property on his subsequently making a claim of title, and all the circumstances must be considered in determining whether the possession is recent or so remote that it may not be considered.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 170-178; Dec. Dig. § 64.\*]

#### 5. LARCENY (§ 64\*)—RECENT POSSESSION OF STOLEN PROPERTY—EFFECT.

Merchandise stolen May 1st was found in possession of accused on July 23d, when his premises were searched. Subsequently he made a distinct assertion of title to it, claiming to have acquired possession before the alleged larceny. Held, that the possession by accused was not too remote to deprive it of its probative effect as a fact from which an inference of guilt could be drawn in connection with the other circumstances and the false claim of the acquisition of the property by accused.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 170-178; Dec. Dig. § 64.\*]

#### 6. CRIMINAL LAW (§§ 423, 427\*)—DECLARATIONS OF CONSPIRATORS—ADMISSIBILITY.

Before evidence of the acts or declarations of an alleged conspirator is admissible, the conspiracy must be shown by other evidence, and the acts or declarations must relate to what was done or said while the conspiracy continued.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 989-1001, 1012-1017; Dec. Dig. §§ 423, 427.\*]

#### 7. CRIMINAL LAW (§§ 424, 427\*)—DECLARATIONS OF CONSPIRATORS—ADMISSIBILITY.

The fact that the several portions of merchandise stolen from a store at the same time were found in possession of accused and a third person jointly indicted for the larceny was competent to establish a conspiracy to commit the offense, and to implicate accused and the third person in the commission thereof, and proof that portions of the merchandise were found in the possession of the third person was admissible, though any declaration of the third person made at the time of the finding of the property in his possession would not be admissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1002-1010, 1012-1017; Dec. Dig. §§ 424, 427.\*]

#### 8. LARCENY (§ 45\*)—EVIDENCE—ADMISSIBILITY.

The fact that the several portions of merchandise stolen from a store at the same time were found in possession of accused and a third person jointly indicted with him is admissible as a circumstance to identify the property, though the separate portions were found at different places.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 135; Dec. Dig. § 45.\*]

Appeal from Circuit Court, Franklin County; Jephtha Evans, Judge.

Will Wiley was convicted of larceny, and he appeals. Affirmed.

Sam R. Chew, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

**FRAUENTHAL, J.** The defendant, Will Wiley, and one Tom Trotter, Jr., were jointly indicted by the grand jury of Franklin county and charged with the crimes of burglary and grand larceny. In the first count of the indictment these parties were charged with burglarizing the storehouse of L. J. Stockton, and in the second count they were charged with taking, stealing, and carrying therefrom a lot of goods and merchandise, the property of said Stockton. The goods and merchandise alleged to have been stolen consisted of a lot of calico, lawn, gingham, percale, chambray, ribbon, elastic, shirts, hose, slippers, scissors, tobacco, etc., and each item of the goods is set forth in the indictment, together with the value thereof. There was a severance of the trial of the two parties, and the defendant Wiley was in this case placed upon separate trial. The defendant was acquitted of the charge of burglary, but was convicted upon the count of the indictment charging him with grand larceny, and his punishment was fixed at one year's imprisonment in the penitentiary. From this conviction the defendant presents this appeal.

The evidence adduced upon the trial of the case tended to establish the following facts: L. J. Stockton was the owner of and was conducting a small mercantile business in a country storehouse situated at the forks of two public roads in Franklin county. On the night of Saturday, May 1, 1909, the storehouse was broken into by an entry being made through a window, and the goods and merchandise set out in the indictment were taken therefrom and stolen. The burglary and larceny were discovered by Stockton on the evening of the following day, and he and his daughter, who was assisting him in attending to the business, made a list of the goods that had been taken from the store on said night. On May 1, 1909, the defendant and said Tom Trotter, Jr., were living and working upon a bottom farm about four miles from the storehouse, and at that time they lived about 150 yards from each other. They were close friends, and about one year and a half or two years prior to this time they lived near each other in Oklahoma. Trotter returned from Oklahoma to Franklin county in December, 1908, and the defendant at an earlier date during that year. Some time after May 1, 1909, these parties moved from the bottom land, and in July, 1909, lived about one mile apart and nearer the locality in which the storehouse was situated. On July 23, 1909, under and by virtue of a search warrant, certain officers and L. J. Stockton went to the house of said Trotter, and there searched for the goods and merchandise alleged to have been stolen. They found in Trotter's house a lot of new calico, lawn, chambray, and other goods which were identified by Stockton as goods that were in his stock, and that were taken therefrom on May 1, 1909. These goods were found in the bottom of a trunk, and were covered with other goods that were not new and some

bedclothes. The officers then proceeded in company with Stockton and went to the house of defendant, Wiley. In this house they found also a lot of goods and merchandise which Stockton identified as owned by him, and as having been in his stock and taken therefrom on said May 1st. These goods were found in a clothespress upon which were piled other goods that were not new, and also quilts. Amongst the property taken from Stockton's store were three large scissors which had the mark or brand thereon of "Empress." A pair of scissors similar to these was found at the house of Trotter and one pair of scissors also similar to these was found at the house of the defendant, and Stockton identified these scissors as his property which were taken from his house on the night of May 1st. While the goods were being identified and claimed by Stockton and taken possession of by the officers, the defendant made no explanation of how he obtained them; but on his trial he said the reason that he made no explanation at that time was that he did not care to do so because he knew where he had gotten them, and could show his innocence. While the defendant was living on the bottom land there was located near his home a cave or hole in a bluff; and a short time after the storehouse of Stockton was burglarized a young boy saw the defendant and his wife at this place in the bluff with two sacks, and under circumstances indicating that he was hiding property in this cave or hole in the bluff. The defendant claimed in explanation of this that he was only at the time hunting a mule. The defendant introduced the evidence of his relatives and himself by which he endeavored to prove that the goods found in his possession were purchased from time to time from merchants, and he introduced evidence showing that other merchants at the towns in Franklin county kept in their stocks of merchandise for sale goods similar to those alleged to have been stolen. He introduced Tom Trotter, Jr., as a witness, who claimed to have purchased the goods found in his possession from merchants principally in Ft. Smith and Oklahoma.

We do not think it necessary to further detail the facts and circumstances adduced in the evidence in this case. The above presents sufficiently the character of the case that was made out against the defendant, and the questions that are presented upon this appeal for determination. The chief question of fact involved in the case is whether or not the goods and merchandise that were found in the possession of Trotter and the defendant were the property of L. J. Stockton, and the goods which he claimed were stolen from the storehouse; for, if they were the property of Stockton, then the explanation of the defendant of how he obtained them must necessarily have been fabricated and false; and this, taken in connection with the other facts and circumstances adduced

in evidence, is, we think, sufficient evidence to sustain the verdict of the jury.

It is earnestly urged by able counsel for the defendant that there is not sufficient evidence to sustain the finding that these goods and merchandise found in the possession of the defendant and Trotter were the property of L. J. Stockton. These goods and merchandise were presented in evidence, and Mr. Stockton and his daughter, in the presence of the jury, picked out and identified the goods as his property and as the goods which were taken from his store. The defendant and his witnesses testified that he had the property some time before the date of the burglary. These witnesses appeared before the jury, who were the exclusive judges of their credibility and also the judges of what weight to give to the testimony of Stockton and his daughter. This, therefore, was peculiarly a question of fact, which was especially a matter within their province to determine. As to that question of fact, we are of the opinion that there was some evidence to sustain the finding of the jury; and this court has uniformly held that, where there is any evidence of a substantial character to sustain the finding of the jury as to a question of fact, it will not be disturbed. *Hubbard v. State*, 10 Ark. 378; *Chitwood v. State*, 18 Ark. 453; *Dixon v. State*, 22 Ark. 213; *Harris v. State*, 31 Ark. 196; *Holt v. State*, 47 Ark. 196, 1 S. W. 61; *Williams v. State*, 50 Ark. 511, 9 S. W. 5; *Gunter v. State*, 79 Ark. 432, 96 S. W. 181, 116 Am. St. Rep. 85.

It thus being determined that these goods and merchandise were the property of L. J. Stockton and the goods which were stolen, the possession of them by the defendant was a fact from which his complicity in the larceny might be inferred. The possession of property recently stolen and unexplained affords presumptive evidence of guilt. Such possession is a circumstance which may be proved and taken into consideration by the jury, and, if in connection with the other facts and circumstances proved in the case it induces in the minds of the jury a belief beyond a reasonable doubt of the guilt of the defendant, it becomes sufficient to warrant a conviction. *Rapalje on Larceny and Kindred Offenses*, § 162; *Boykin v. State*, 34 Ark. 443; *Shepherd v. State*, 44 Ark. 39; *Denmark v. State*, 58 Ark. 576, 25 S. W. 867; *Gunter v. State*, 79 Ark. 433, 96 S. W. 181, 116 Am. St. Rep. 85; *Douglass v. State*, 121 S. W. 923. The question as to whether or not the possession of stolen property is recent does not depend wholly upon the lapse of time. The nature of the property alleged to have been stolen, the actions of the defendant and the nature of his claim thereto, if he subsequently makes an assertion of title, and all the circumstances surrounding the particular case, should be taken into consideration in determining whether the possession of the property was at the time after it was recently stolen, or whether it was so re-

mote that it should not be considered that it was recently stolen. 8 Ency. of Evidence, 101; *State v. Miller*, 45 Minn. 521, 48 N. W. 401; *Commonwealth v. Montgomery*, 11 Metc. (Mass.) 534, 45 Am. Dec. 227. In the case at bar the merchandise was stolen and secreted, and some time after it was discovered in the possession of the defendant he made a distinct assertion of title to it. Subsequently he claimed to have acquired possession of the property at a time long before the date when they were alleged to have been stolen from Stockton, the owner. He could not have obtained them therefore innocently from any other person. It then became a question of fact for the jury to determine as to whether or not his claim of title was made honestly and in good faith, or whether it was false and fabricated; for, if the claim made by him that he acquired and was in possession of the property prior to the date that it is alleged that it was stolen from Stockton was false and based on fabricated testimony, then the inference of his guilt was strengthened. The possession of the property by defendant under the circumstances of this case was not too remote therefore from the date that they were alleged to have been stolen to deprive it of its probative effect as a fact from which an inference of the guilt of the defendant could be drawn by the jury. This inference, taken in connection with the other circumstances in the case and the false and fabricated claim of the acquisition of the property by the defendant, is sufficient, we think, to sustain the verdict of conviction.

It is urged by counsel for defendant that the court erred in permitting evidence to be introduced that part of the alleged stolen goods were found at the house of Trotter. It is contended that such evidence could only be admissible on the ground that it was in the nature of the declaration, act, and conduct of a co-conspirator. It is urged that there is no testimony showing any combination or conspiracy between the defendant and Trotter to commit this alleged crime; and inasmuch as the acts and conduct of Trotter occurred and the possession of the goods were discovered at Trotter's house in the absence of the defendant and long after the criminal enterprise, if any, was ended, the testimony was not admissible. It is well settled that, before evidence of the acts, declarations, or conduct of an alleged conspirator can be introduced, the conspiracy must first be shown by evidence aliunde, and must be done or made while the conspiracy continues. The general rule of law is that, when the deed is done and the criminal enterprise is ended, the criminating conduct or declaration of one conspirator is inadmissible against his co-conspirator. *Rapalje on Larceny and Kindred Offenses*, 732; 12 Cyc. 439; *Clinton v. Estes*, 20 Ark. 216; *Rowland v. State*, 45 Ark. 132; *Polk v. State*, 45 Ark. 165; *Foster v. State*, 45 Ark. 328; *Vaughan v. State*, 57

Ark. 1, 20 S. W. 588; *Gill v. State*, 59 Ark. 422, 27 S. W. 598.

But this rule does not apply when the possession of the goods that were stolen at the same time are found in the possession of such party. The fact that each of the parties is found to possess portions of the stolen goods which were taken at the same time is itself competent to establish a conspiracy and to implicate each in the commission of the crime. The fact that the several portions of goods made in the aggregate the amount of goods that it is proved were taken would be a circumstance to identify the goods, although the separate portions were found at different places; and such evidence would also be competent for that purpose. In the case of *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817, it was held that the rule that the acts, conduct, and declarations of one co-conspirator after the consummation of the conspiracy are inadmissible as evidence against another conspirator cannot be extended to exclude the evidence of the subsequent finding of the fruits of the crime in the possession of one of the conspirators. In the case of *Fisher v. State*, 73 Ga. 595, freight cars had been broken in and entered and goods stolen therefrom. The defendant in that case and several other parties were jointly indicted charged with the commission of the crime, and the defendant was placed upon his separate trial. In that case the court held that the fact that the same class of goods missed from the broken and rifled cars were found in the possession of each of the parties was clearly competent not only to establish a conspiracy, but to implicate the defendant in the guilt of his associates. *Rapalje on Larceny and Kindred Offenses*, p. 733; 12 Cyc. 444. In the case at bar a lot of merchandise was taken from the storehouse of Stockton upon one occasion. A part of these stolen goods was found in the possession of Trotter and a part thereof was found in the possession of the defendant. That was a fact that was competent to go to the jury to show that the two had acted together in securing these goods, and that the defendant was implicated in thus securing them. At the time this testimony was introduced, the court, upon objection being made thereto, stated that any declaration or action of Trotter would not be admitted, and that the only testimony that was admissible was as to the fact that these goods were found in the possession of Trotter. And that was the extent of the testimony admitted relative to any act or conduct of Trotter, and there was no testimony as to any declaration that was made by him. We think that the testimony thus admitted was relevant and competent.

We have carefully examined the instructions that were given by the court, and we

find that they fully and correctly presented the law that was applicable to the facts of this case. It was peculiarly the province of the jury under these instructions to determine from the facts and circumstances adduced in evidence as to whether or not the defendant was guilty of the charges preferred in the indictment.

They found from the facts and circumstances that he was guilty and convicted him of grand larceny. We cannot say that there is no substantial evidence to sustain that verdict; and therefore the verdict should not be disturbed.

The judgment is affirmed.

#### AMERICAN INS. CO. et al. v. McGEHEE LIQUOR CO.

(Supreme Court of Arkansas. Dec. 20, 1909.)

##### 1. PAYMENT (§ 17\*)—PAYMENT BY DRAFT—MODE AND SUFFICIENCY.

Where property insured was destroyed by fire, the delivery to the insured of drafts for the amount of the loss by the insurance company's adjuster would not constitute payment of the loss, unless the insured agreed to receive them as such.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 70-77; Dec. Dig. § 17.\*]

##### 2. PAYMENT (§ 17\*)—PAYMENT BY DRAFT.

Where insured property was destroyed, and the insurance company's adjuster gave the insured drafts on the company for the amount of the loss, which were not paid, the insured was entitled to sue and recover thereon.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 70-77; Dec. Dig. § 17.\*]

##### 3. PAYMENT (§ 53\*)—EFFECT—DRAFT—RESCISSI-ON.

Where insured property was destroyed, and the insurance company's adjuster gave the insured drafts on the company for the amount of the loss, the insured cannot recover on the policy without at the trial producing and surrendering, or offering to surrender, the drafts for cancellation.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 141; Dec. Dig. § 53.\*]

Appeal from Circuit Court, Pulaski County; Jno. W. Blackwood, Judge.

Action by the McGehee Liquor Company, a copartnership, against the American Insurance Company and others. Judgment for plaintiff, and defendants appeal. Reversed in part and affirmed in part.

C. P. Harnwell, for appellants. Abner McGehee, Jr., for appellee.

BATTLE, J. On the 15th day of July, 1908, Joe F. Jones and J. H. Davis, partners doing business under the firm name and style of McGehee Liquor Company, brought an action against the American Insurance Company, a corporation organized under the laws of Arkansas and doing business at Little Rock, in this state, and against John B. Driver and A. B. Poe, on two drafts for \$500 each, drawn by E. Miles, adjuster, on the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

defendant the insurance company, payable to the order of the plaintiffs, dated the 23d day of March, 1908, one due 60 days after date, and the other 90 days after date, both accepted by the defendant the American Insurance Company on the 28th day of March, 1908, and indorsed in blank by the defendants John B. Driver and A. B. Poe. Plaintiffs alleged that both drafts had been protested for nonpayment, and due notice to the indorsers had been given, and asked for judgment against the defendants for the amount of the two drafts, and for interest on the same from maturity until paid, and for costs of this action.

Defendants demurred to the complaint because it did not state facts sufficient to constitute a cause of action.

Plaintiffs amended their complaint by making W. B. Calhoun, Charles S. Driver, J. T. Hughes, E. P. Liston, J. M. Long, and G. A. Kimberly defendants to this action, and by alleging that the American Insurance Company were required to give two bonds in the sum of \$10,000 each to the state of Arkansas, conditioned that the said company would promptly pay all claims arising and accruing to any person by virtue of any policy issued by said company during the term of the bond, which was to be filed with, and approved by, the auditor of the state; that the American Insurance Company on the 28th day of February, 1907, executed, acknowledged, and delivered bond of \$10,000, signed by the defendants A. B. Poe, J. M. Young, G. A. Kimberly, E. Miles, and J. T. Hughes; that it did on the 1st day of May, 1907, execute, acknowledge, and deliver an additional bond of \$10,000, signed by the defendants J. B. Driver, W. B. Calhoun, Charles S. Driver, E. Miles, J. T. Hughes, A. B. Poe, and H. P. Liston; that both of these bonds were given to the state of Arkansas, and conditioned according to the law in such cases made and provided, and were filed with the auditor and approved by him, and were in full force and effect at the time the losses occurred which were evidenced by the drafts sued on; that during the "term" of the bonds the plaintiffs held policies issued by the insurance company, indemnifying them against loss by fire destroying or injuring their stock of merchandise at McGeehe, Ark., which was destroyed by fire on or about the 20th day of November, 1907; that the loss caused thereby was adjusted by an adjuster of the insurance company at \$1,000; and that the drafts were given "as evidence of that indebtedness," and by asking for judgment against the defendants for \$1,000 and interest for 12 per cent. thereon as penalty, and for \$200 for attorney's fee.

Copies of the protests of the drafts and of the bonds were filed as exhibits.

The defendants, the insurance company, J. B. Driver, and A. B. Poe answered, and admitted that plaintiffs suffered a loss by fire as alleged in their complaint, and the same

was adjusted at \$1,000, as evidenced by the drafts sued on, and alleged that the insurance company on the 23d day of March, 1908, "settled" that loss by the drafts, that no demand for payment was made of Driver and Poe, both of whom are solvent, and insist that plaintiffs are not entitled to recover penalty and attorney's fee.

The other defendants answered and made the same allegations and contentions contained in the separate answer of their co-defendants, and, in addition thereto, made other allegations which it is not necessary to mention.

On the 6th day of January, 1909, the defendants having failed to appear, the cause was submitted to the court upon the complaint of the plaintiffs and the drafts sued on; and the court found that the defendants "are justly indebted to the plaintiffs on account of the drafts, which were given in payment of a fire insurance policy in the sum of \$1,000, with interest thereon from the 23d of March, 1908, to date at the rate of 6 per cent. per annum, amounting in all to the sum of \$1,047.35," and rendered judgment against the defendants for that amount, and the statutory penalty of 12 per cent., amounting to \$120, and for \$140 for attorney's fee. Defendants have appealed to this court.

The execution and delivery of the drafts were not payment of the loss incurred by the destruction by fire of property insured in a policy issued by the American Insurance Company against such loss, unless the plaintiff agreed to receive them as payment. *Henry v. Conley*, 48 Ark. 267, 3 S. W. 181; *Pendergrass v. Hellman*, 50 Ark. 261, 7 S. W. 132; *Triplett v. Mansur & Tibbetts Implement Co.*, 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284; *Sharp v. Flemming*, 75 Ark. 556, 88 S. W. 305. There was no such agreement, and the drafts were not paid. The plaintiffs had the right to sue upon them and recover judgment. They could not, however, sue upon and recover upon the policy, the original cause of action, unless in the trial of such action they produced and surrendered or offered to surrender the two drafts for cancellation; the drafts being negotiable instruments. *Brown v. Scott*, 51 Pa. 357; *Mooring v. Mobile Marine Dock & Mutual Insurance Co.*, 27 Ala. 254, 258; *Myatts v. Bell*, 41 Ala. 222, 231; *Brabazon v. Seymour*, 42 Conn. 551, 553; *Bank of Ohio Valley v. Lockwood*, 13 W. Va. 392, 426, 427, 31 Am. Rep. 768; *Morrison v. Smith*, 81 Ill. 221; *Jackson v. Brown*, 102 Ga. 87, 29 S. E. 149, 66 Am. St. Rep. 156; *Price v. Price*, 16 M. & W. 231; 2 *Daniel on Negotiable Instruments* (5th Ed.) § 1272; 22 Am. & Eng. Encyc. of Law (2d Ed.) p. 567, and cases cited.

In *Brown v. Scott*, 51 Pa. 364, Mr. Justice Strong, delivering the opinion of the court, said: "Undoubtedly there is a large class of cases in which it has been asserted that when a negotiable note (in the case at bar the instruments sued on are two negoti-

able drafts) has been given for an antecedent debt, though it may not have extinguished that debt, courts will not suffer the creditor to sue and recover on the original contract, unless the note has been lost or destroyed, or is produced and canceled at the trial. And some of the cases go to the extent that the right to sue for the original consideration is suspended while the note is outstanding in the hands of an assignee or indorser for value. Such is the principle of *Small v. Jones*, 8 Watts [Pa.] 265. To determine rightly how far the principle is applicable, we must regard the reason upon which it is founded. That reason is that, if the creditor might sue on the original cause of action, the debtor would be exposed to two suits, one brought by the creditor and one by the holder of the note, which would be a hardship. The rule then is made for the benefit of the maker of the note, and is irrespective of the payment of the debt."

It follows from the rule as stated that judgment could not lawfully be recovered upon the policy and drafts in one action, it being a prerequisite to a judgment on the former that the latter should be first surrendered; and that the judgment upon the policy and the bonds given to the state of Arkansas was without right. The drafts were a new contract, and limited the right of recovery, and bound only the parties to them.

The judgment of the circuit court against all the defendants, except the insurance company, Driver, and Poe, and as to the penalty of 12 per cent. and attorney's fee, is reversed, and is in all other respects affirmed.

#### BLOOMER et al. v. CONE & CO.

(Supreme Court of Arkansas. Nov. 22, 1909.)

##### 1. APPEAL AND ERROR (§ 586\*)—RECORD—ABSTRACT OF TESTIMONY.

Where the record contained conclusions of appellant as to the effect of testimony, but no abstract of the same, it was fatally defective, as not complying with rule 9 of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2595, 2596; Dec. Dig. § 586.\*]

##### 2. APPEAL AND ERROR (§ 907\*)—PRESUMPTIONS—SUFFICIENCY OF EVIDENCE.

Where a decree recites that the issues were determined on oral and written evidence, which is not brought into the record, it will be presumed that the decree was warranted by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2911; Dec. Dig. § 907.\*]

Appeal from Chicot Chancery Court; Zachariah T. Wood, Chancellor.

Action by Cone & Co. against A. K. Bloomer and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

See, also, 85 Ark. 334, 108 S. W. 221.

Jas. C. Norman, Harry E. Cook, Jno. M. Rose, and Murphy, Coleman & Lewis, for appellants. Bolton & Kirten and R. E. Craig, for appellees.

HART, J. This action was brought in the Chicot chancery court by the plaintiffs, Cone & Co., against the defendants, N. K. and Julia Bloomer, to foreclose a mortgage executed by the latter in favor of the former on certain lands in said Chicot county. This is the second appeal in this case. The former was an appeal from a nunc pro tunc decree of a special chancellor. The decree was reversed and the cause remanded because the chancellor abused his discretion in refusing a continuance for the purpose of allowing plaintiff to procure testimony on the question of whether the decree had ever been granted. The case is reported in 85 Ark. 334, 108 S. W. 221. On remanding the cause the chancellor, on November 6, 1908, after hearing the evidence, found that no final decree had been rendered in the cause, and overruled the motion for a nunc pro tunc decree. On motion of the defendants the cause was continued until January 6, 1909. On January 9, 1909, the chancellor found in favor of plaintiffs for \$1,798.50 the full amount of their debt, and a decree of foreclosure was entered. The defendants have appealed.

It is insisted by counsel for plaintiffs that the decree must be affirmed because the transcript does not contain all the evidence upon which the cause was heard, and because counsel for defendants in preparing their abstract of facts have not complied with rule 9 of the court. The decree of the court of November 6, 1908, upon the motion of defendants for a nunc pro tunc decree, recites that the issues were submitted and determined on oral testimony and upon depositions. The oral testimony is not, by bill of exceptions or otherwise, brought in the record. "Where a record in chancery shows that the case was determined by the chancellor upon oral as well as written testimony, the presumption, where that oral testimony is not preserved, is that the finding of the chancellor is supported by the testimony." *Jones v. Mitchell*, 83 Ark. 77, 102 S. W. 710, and cases cited. Again in the case of *Beecher v. Beecher*, 83 Ark. 424, 104 S. W. 156, it was held: "Where a chancery cause was heard upon written and oral evidence, and the latter is not brought up on appeal, it will be presumed that the oral testimony justified the decree." See, also, *Meeks v. State*, 80 Ark. 579, 98 S. W. 378.

The mortgage sought to be foreclosed is made an exhibit to the complaint. It contains the following: "The sale is on condition that whereas the said N. K. Bloomer is indebted unto the said Cone & Company, in the sum of one thousand dollars, evidenced by note of even date—also an account on

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Cone & Company's books—said note being due 30 days from date and said account being due January 1, 1905." The mortgage bears date of December 5, 1904. The complaint alleges that N. K. Bloomer has made divers payments on the said account, which have been duly credited thereon, and that there remains due and unpaid the sum of \$1,798.50 upon said note and account. The note and account are referred to as exhibits to the complaint. The final decree recites that the cause "is submitted to the court upon the substituted complaint and exhibits and substituted answer, and the depositions heretofore taken and filed in this case, to wit, the depositions of W. T. Cone and George A. Franklin, and the original books of account, and the accounts filed and properly verified, and the notes executed and upon the depositions of N. K. and Julia Bloomer, Lafayette Allums, J. C. Norman, and J. W. Brady." The court found that the defendant N. K. Bloomer was indebted to plaintiffs, W. T. Cone, J. H. Cone, and G. A. Franklin, doing business as Cone & Co., in the sum of \$1,798.50, and that the same was due on the 1st day of January, 1905, and a decree of foreclosure against the lands embraced in the mortgage was entered. Counsel for appellant has not abstracted the testimony. He does set out his conclusions of the effect of the testimony, but this is not a compliance with rule 9 of the court.

In the case of Siloam Springs v. Broyles, 87 Ark. 202, 112 S. W. 219, in which numerous cases of the court applying the rule are cited, the court said: "It is the counsel's duty in the abstract of facts to show that the court was in error, by a succinct statement of the facts themselves, rather than by his opinion of what the facts show." It is urged by counsel for plaintiffs that the abstract of defendants is fatally defective in this respect, and we think his objection well taken. For an illustration of the application of the rule, see Jett v. O. B. Crittendon & Co., 116 S. W. 665. But it is insisted by counsel for defendants that the account of the plaintiffs, duly verified, shows that the decree was erroneous. It is true that what purports to be this account is set out in defendant's abstract, but it nowhere appears in the transcript, and hence cannot be considered on appeal. The decree recites that the cause was heard upon the "original books of account and the accounts filed and properly verified," neither of which is brought in the transcript. "Where the decree appealed from recites that the cause was heard upon the evidence which is not brought up in the transcript, it will be presumed on appeal that the chancellor's decree was warranted by the evidence." Brown v. Nelms, 86 Ark. 369, 112 S. W. 373, and cases cited *supra* on this question.

We find no error in the record, and the decree will be affirmed.

# PETERS v. TOWNSEND et al.

(Supreme Court of Arkansas. Jan. 3, 1910.)

## 1. INSANE PERSONS (§ 94\*)—ACTIONS—VALIDITY OF JUDGMENT.

Const. art. 7, § 34, provides that the probate court shall have exclusive jurisdiction in matters relative to persons of unsound mind and their estate. Kirby's Dig. §§ 6028-6029, provide that the defense of an insane person must be made by his regular guardian or a guardian appointed by the court, and that no judgment can be rendered against him until after a defense by guardian. A judgment having been rendered by default, a motion was made to set it aside on the ground that defendant was insane, and the moving party was appointed guardian ad litem, and he filed an answer and a trial was had resulting in a judgment for plaintiff. *Held*, that the judgment was valid; it not being necessary that there should have been an adjudication by the probate court on the question of mental unsoundness.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 94.\*]

## 2. JUDGMENT (§ 338\*)—EQUITABLE RELIEF.

Kirby's Dig. § 4431, provides that courts may vacate their judgments after expiration of the term for erroneous proceedings against a person of unsound mind, provided that the condition of defendant does not appear on the record. *Held*, that where it appeared in the record that defendant was of unsound mind, and he was defended by a guardian ad litem, a judgment against him would not be set aside on the ground that plaintiff was permitted to testify concerning transactions with defendant; there having been a remedy by appeal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 721; Dec. Dig. § 338.\*]

## 3. INSANE PERSONS (§ 101\*)—ACTION—EXECUTION—PROPERTY SUBJECT.

Kirby's Dig. § 4035, provides that, on judgment against a ward or his guardian as such, the execution shall be against his property only, and not against his guardian. *Held*, that, where an action was defended by a guardian ad litem on the ground that defendant was insane, an execution sale of his property based on the judgment rendered in the action was valid; the sale having taken place prior to an adjudication of insanity by the probate court.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 101.\*]

Appeal from Garland Chancery Court; Alonzo Ceerl, Chancellor.

Action by Abraham Peters, as guardian of Augustus Peters, against Mary E. Townsend and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Wood & Henderson, for appellant. A. J. Murphy, for appellees.

MCCULLOCH, C. J. This is an action instituted in the chancery court of Garland county by Augustus Peters, an insane person, suing by his guardian, to set aside a judgment rendered against him for debt in favor of Mary E. Townsend, and also to set aside a sale of real estate under execution issued pursuant to said judgment. This action is against the judgment creditor and the purchasers at the execution sale. The chancellor sustained a demurrer to the complaint, and the plaintiff appealed.

The facts with reference to the action and judgment in the Garland circuit court are set forth in the complaint in the present action, and are as follows: Mary E. Townsend filed her complaint in said circuit court against Augustus Peters to recover judgment on account for services claimed to have been rendered. Summons was served on the defendant, and, in default of an appearance, judgment was rendered for the amount of the plaintiff's claim. On a subsequent day Abraham Peters, who is the son of Augustus Peters and appears in the present action as guardian of the latter, appeared in the Garland circuit court and filed a motion to set aside the judgment on the ground that the defendant was an insane person. That court sustained the motion and set aside the judgment. The court also made an order appointing Abraham Peters as guardian ad litem of said defendant, and he filed his answer as such, raising an issue upon the allegations of the complaint and pleading the statute of limitations as a bar to the plaintiff's right of recovery. He also pleaded a counterclaim against the account. The case proceeded to trial before a jury, both sides being represented by counsel, which resulted in a verdict and judgment in favor of plaintiff for the sum of \$2,800. No appeal was prosecuted, and execution was issued and real estate sold thereunder. Subsequently Augustus Peters was by the probate court of Garland county adjudged to be insane, and his son Abraham Peters was appointed as his regular guardian, and he instituted the present action. Was the judgment a valid one?

Section 34, art. 7, Const. 1874, provides that probate courts shall have "exclusive original jurisdiction in matters relative to \* \* \* persons of unsound mind and their estates"; but an insane person not under guardianship can sue and be sued the same as a sane person, and the foregoing provision of the Constitution does not exclude the jurisdiction of other courts to hear and determine suits by or against insane persons, whether under guardianship or not. *Jetton & Farris v. Smead*, 29 Ark. 372; *Cox v. Gress*, 51 Ark. 224, 11 S. W. 416; 1 Black on Judgments, § 205; 1 Freeman on Judgments, § 152; 22 Cyc. 1222-1224; *Flock v. Wyatt*, 49 Iowa, 466; *Van Horn v. Hann*, 39 N. J. Law, 207; *Maloney v. Dewey*, 127 Ill. 393, 19 N. E. 848, 11 Am. St. Rep. 131; *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317; *Livingston v. Livingston*, 56 App. Div. 484, 67 N. Y. Supp. 789; *Prentiss v. Cornell*, 31 Hun, 167; *Sanford v. Sanford*, 62 N. Y. 553. The statutes of this state confer ample protection to the rights of insane litigants, either plaintiff or defendant, by requiring the court in which the action by or against such person is pending to see that he is represented by a next friend or guardian. An action by such person must be brought by guardian or next friend, and the defense of such person must be by his regular guardian or a guardian ap-

pointed by the court, and no judgment can be rendered against him until after a defense by guardian. Kirby's Dig. §§ 8028-8029. The statute refers in express words only to persons judicially found to be of unsound mind; but it is not to be doubted that the Legislature intended to give equal protection to persons of unsound mind in actions by or against them, though not judicially declared to be such. The language of the statute warrants that construction.

Chief Justice Cockrill, speaking for the court, in *Cox v. Gress*, supra, so construed the statute, and, after referring to the common-law rule that a lunatic could be sued without the intervention of a guardian or committee, said: "In equity the practice was different. That court would not proceed without the intervention of a guardian to protect the interests of the insane defendant. If he had been judicially ascertained to be insane, his committee or guardian was required to conduct his defense, but if they were hostile in interest to him, or if for any reason it was deemed best for his interest, the court appointed some other person competent to protect his interest as guardian ad litem. It was regarded as error to proceed against him without such guardian. If the insanity of a defendant in a pending suit was suggested, but had not been judicially ascertained, the court gave opportunity for an inquisition to be held, or took the necessary steps to determine the question for itself; and, having ascertained that the defendant was mentally incapable of making his defense, it appointed a guardian ad litem for him and thereafter imposed upon him the restraints of infancy. Our statute regulating proceedings against lunatics adopts substantially the former practice in equity, and makes it applicable to all proceedings. Mansf. Dig. § 4960 et seq. It is therefore incumbent upon the court in every civil case where an insane person is defendant to see to it that he is represented upon the record by a competent guardian, and it is error, as in a proceeding against an infant, to proceed without it."

It is insisted, however, that, under the constitutional provision which confers exclusive jurisdiction on the probate court in matters relating to persons of unsound mind and their estates, the adjudication of unsoundness of mind must be in that court, and, conceding that the jurisdiction of the circuit court to proceed with the action against such person, after adjudication of unsoundness of mind, is not excluded, the latter court must, before proceeding, await an adjudication by the probate court of the question of mental unsoundness. This contention cannot be sustained, and the decision of this court referred to above is directly against it.

It being seen that the jurisdiction of the circuit court to hear and determine an action against an insane person is not excluded by

the constitutional provision hereinbefore quoted, it necessarily follows that that court possesses the power to inquire into the mental condition of a defendant not already judicially found to be of unsound mind for the purpose of ascertaining whether or not his defense must be made by a guardian. The power to hear and determine the case necessarily involved the power to inquire into the mental condition of the defendant, so as to protect his interest in the litigation, and the inquiry as to his mental condition is only for the purpose of that particular case, and extends no further. 22 Cyc. 1233; Denny v. Denny, 8 Allen (Mass.) 311; Plympton v. Hall, 55 Minn. 22, 56 N. W. 351, 21 L. R. A. 675; Isle v. Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513; Abbott v. Hancock, 123 N. C. 99, 31 S. E. 268; Wager v. Wagoner, 53 Neb. 511, 73 N. W. 937; Newcomb v. Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222; Bensieck v. Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422.

The next point relied on to set aside the judgment is that the plaintiff in the original action was permitted by the trial court to testify concerning transactions with the defendant, an insane person. This error could have been corrected by appeal. We are not aware of any principle of equity which would require a court of equity to set aside a judgment of a court of law on account of errors occurring in the trial of the case which could have been corrected by appeal. The statutes of this state provide that circuit courts may vacate their own judgment after the expiration of the term "for erroneous proceedings against an infant, married woman or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings." Kirby's Dig. § 4431. The statute does not, however, apply to this judgment for the reason that the condition of the original defendant appeared in the record. The error, therefore, could have been corrected by appeal. And when the condition of such person appears in the record, and he is properly represented by a guardian, equity will not set aside such judgment for mere errors which could have been presented on appeal.

The most serious question in the case is whether the property of an insane person can be sold on execution to satisfy a judgment against him. The Revised Statutes of 1837 (chapter 78) on the subject of insane persons and their property, which, with certain amendments, remain in force to this day, contain ample authority for the management of such persons and their estates by the courts exercising probate jurisdiction and for the sale of property through the orders of such courts for the payment of debts. The same statute, however, contains a provision that "on judgment against such ward, or his guardian, as such, the execution shall be

against his property only, and in no case against his guardian's estate, unless he shall have rendered himself liable thereto by false pleading or otherwise." Kirby's Dig. § 4035. It appears, therefore, that the Legislature intended not to exclude the right of a judgment debtor to have ordinary process against the property of an insane judgment creditor for the enforcement of his judgment. On the contrary, the statute seems to clearly recognize that right, and to provide no exemptions in favor of the estate of an insane person. But, even in the absence of such clear statutory recognition, the authorities sustain the right of a judgment creditor to resort to ordinary process to enforce his judgment against an insane judgment creditor. 1 Freeman on Execution (3d Ed.); Pollock v. Horn, 13 Wash. 626, 43 Pac. 885, 52 Am. St. Rep. 66; contra, Buckler v. Reese, 100 Ky. 336, 38 S. W. 492.

In the present case the complaint does not allege that the sale under execution occurred subsequent to the judgment of the probate court of the mental unsoundness of the judgment debtor. Therefore we need go no further than to hold that before such adjudication the property of such judgment debtor can be sold under execution.

Judgment affirmed.

#### OKLOLONA MERCANTILE CO. v. GREE- SON et al.

(Supreme Court of Arkansas. Jan. 8, 1910.)

##### 1. VENDOR AND PURCHASER (§ 93\*)—FORFEITURE.

A deed reserving a lien on the timber on the land to secure the purchase-money notes, and providing that, if such notes were not paid when due, the grantor might take immediate possession of the lands and timber and stop further cutting until the past-due obligations were paid in full, did not authorize cancellation of the deed on failure to pay the notes, but only the taking of possession and the stopping of further cutting of the timber.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 153, 154; Dec. Dig. § 93.\*]

##### 2. CANCELLATION OF INSTRUMENTS (§ 25\*)—WHEN AUTHORIZED.

Defendant in possession of land, claiming title through a deed from plaintiff's grantee, could defeat plaintiff's claim to cancellation of the deed by showing title either in himself or in some third person, where the deed did not authorize such cancellation.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 25.\*]

##### 3. CANCELLATION OF INSTRUMENTS (§ 45\*)—BURDEN OF PROOF.

In an action by grantors to cancel a deed and obtain possession of the land, and enjoin the further cutting of timber by defendant who was in possession under a deed from plaintiff's grantees, and who was not alleged to be a trespasser holding without color of title, the burden of proof was on plaintiff.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 45.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Nevada Chancery Court; Jas. D. Shaver, Chancellor.

Action by the Okolona Mercantile Company against M. W. Greeson and others. From the judgment, plaintiff appeals. Affirmed.

On the 10th day of April, 1902, appellants and others sold to the Boyd Hodson Lumber Company the timber on 2,000 acres of land in the counties of Nevada and Pike. The sale was evidenced by a duly executed deed to the timber. The consideration was \$5,500, part of which was to be paid in cash, and part in lumber, and a part, the balance, in money evidenced by promissory notes of \$475 each, payable, respectively, in one, two, three, and five years from date. There was a clause in the deed giving the vendors a lien on the timber sold for the purchase money and power and authority to take immediate possession of said lands, and timber and to "stop further cutting of same until the past-due obligations shall be paid and satisfied in full." On the 16th of July, 1907, appellants brought this suit against M. W. Greeson and others, alleging that the purchase-money notes had not been paid, and that the contract was forfeited because of a failure to comply with the conditions named therein on the part of the grantee, or its assignee, whom it was alleged the defendants claimed to represent.

The prayer was for damages for cutting the timber, for cancellation of the contract of sale, and for an injunction against cutting and removing the timber, and for general relief and costs. The defendant Greeson disclaimed any interest in the suit. The other defendants failed to answer. Ford Jones intervened and claimed ownership of the contract of sale of the timber through mesne conveyance from the original grantee, the Boyd Hodson Lumber Company, setting up the various transfers. In his intervention he conceded that there was a balance due on the purchase money, and alleged his willingness to pay same when the amount thereof was ascertained. He asked for no affirmative relief.

The appellants answered the intervention, and controverted the intervenor's title. The court found: "That, by sundry mesne conveyances, the intervenor, Ford Jones, was the owner and entitled to all the rights and privileges of the Boyd Hodson Lumber Company under the said contract, and that the restraining order herein should be continued until the payment of \$425.69, interest and cost, for which judgment was rendered in favor of the plaintiffs." The court also held that the right to cut the timber from 500 acres of the land had lapsed because under the terms of the timber deed it had not been cut at the rate, or within the time limited, and that the defendant Jones should elect the particular 500 acres to which all rights should cease.

John H. Crawford, for appellant. E. E. Moss and M. W. Greeson, for appellees.

WOOD, J. (after stating the facts as above). There was no right of forfeiture for failure to pay the purchase money when due. The deed provides: "It is further understood and agreed that a lien is reserved on the timber herein sold to secure the payment of the notes above set forth, and if the said notes are not paid when due the parties of the first part shall have the power and authority to take immediate possession of said lands and timber, and to stop further cutting of same until the past due obligations shall be paid and satisfied in full." The right of appellants therefore upon failure to pay the notes when due was not to cancel the deed and have the contract forfeited entirely, but only "to take immediate possession" and "to stop further cutting of timber" until the past-due obligations "were paid and satisfied in full."

The above relief was granted appellants, and it was all they were entitled to under the express terms of the contract. It was wholly immaterial whether the intervenor, Ford, had title by perfect deed from the Boyd Hodson Lumber Company, the grantee, through sundry mesne conveyances. It is therefore unnecessary for us to pass upon that question. If the deed of the Boyd Hodson Lumber Company to its immediate grantee did not convey good title, then the title still remained in the Boyd Hodson Lumber Company. Jones was in possession, claiming title under the Boyd Hodson Lumber Company, and it is not here complaining of his title. If the title was not in Jones, then, before appellants could have the title canceled, they would have to bring the owners of the title before the court. Jones, being in possession, claiming title through deed from the Boyd Hodson Lumber Company, could have defeated appellants' claim for cancellation against him by showing title either in himself or some third person. See *Dickinson v. Thornton*, 65 Ark. 610, 47 S. W. 857.

As to appellants' right of possession and to injunction, the burden was on them. They do not allege or claim that Jones was a trespasser, holding without color of title. Jones is not asking for any affirmative relief.

We find nothing in the pleadings or the proof to take the case out of the operation of the general rule placing the burden of proof in real actions upon the plaintiff. *Dawson v. Parham*, 47 Ark. 215, 217, 218, 1 S. W. 72; *Dickinson v. Thornton*, supra; *Chapman & Dewey Land Co. v. Bigelow*, 77 Ark. 338-347, 92 S. W. 534; *Carpenter v. Jones*, 76 Ark. 163, 88 S. W. 871; *Dowdle v. Wheeler*, 76 Ark. 529, 89 S. W. 1002; *Mallory v. Brade-myer*, 76 Ark. 538, 89 S. W. 551. Jones being in the possession of the land for the purpose of cutting the timber under his claim of title through the Boyd Hodson Lumber Company,

he has the right to retain possession for that purpose after he has paid the purchase money. The contract so specified, and the court so decreed.

Affirmed.

### LOVE et al. v. CAHN.

(Supreme Court of Arkansas. Dec. 20, 1909.)

#### 1. PARTIES (§ 75\*)—DEFECTS—DEMURRER.

A general demurrer to the complaint does not reach the defect of want of proper parties.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 115, 116; Dec. Dig. § 75.\*]

#### 2. APPEAL AND ERROR (§ 1244\*)—SUPERSEDEAS BOND—ACTIONS—PARTIES.

Where, in an action on a supersedeas bond brought by the assignee thereof, the complaint specifically named the obligee as a party defendant, and the obligors in their cross-complaint asked that process issue for the obligee, who appeared and answered, the obligee became a party to the suit, and the obligors could not complain on the ground that the bond was not assignable, and that the obligee was therefore a necessary party.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1244.\*]

#### 3. LIMITATION OF ACTIONS (§ 130\*)—STATUTES—CONSTRUCTION.

Kirby's Dig. § 5083, tolling the statute of limitations for one year where plaintiff suffers a nonsuit, applies only to those causes of action which under the general statute of limitation would be barred before the running of one year from the time of taking the nonsuit, and it does not narrow the period of limitation in which an action may be brought on a claim which is not otherwise barred by the general statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 553-566; Dec. Dig. § 130.\*]

#### 4. ASSIGNMENTS (§ 73\*)—RIGHTS ASSIGNABLE—SUPERSEDEAS BOND.

An assignment of a claim under a supersedeas bond vests in the assignee an equitable right to the claim.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 139-142; Dec. Dig. § 73.\*]

#### 5. ASSIGNMENTS (§ 121\*)—PROPER PARTIES—REAL PARTY IN INTEREST.

Under Kirby's Dig. § 5999, requiring that actions shall be brought in the name of the real party in interest, an assignee of a claim under a supersedeas bond is the real party in interest, and he may sue in his own name for its enforcement.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 200-205; Dec. Dig. § 121.\*]

#### 6. LANDLORD AND TENANT (§ 1\*)—EXISTENCE OF RELATION.

Before the relation of landlord and tenant can arise so as to justify the recovery of rent on the one hand or the presumption on the other that the possession is subordinate to the party having the legal title, there must be both privity of estate and contract.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 1.\*]

#### 7. LANDLORD AND TENANT (§ 10\*)—EXISTENCE OF RELATION.

A decree confirming a mortgage foreclosure sale, which recites that the mortgagor is occupying and has a growing crop on the land, and which orders that he may remain in possession thereof for a year as the tenant of the mort-

gagee who had purchased at the sale, and that he pay rent therefor, does not create the relation of landlord and tenant between the parties, and the possession of the mortgagor after the year is not the possession of the purchaser.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 10.\*]

#### 8. APPEAL AND ERROR (§ 1234\*)—SUPERSEDEAS BOND—LIABILITY.

The liability incurred by the execution of a supersedeas bond is fixed by the legal import of its terms, construed according to the ordinary meaning of the language used and the bond will not be construed to cover a liability occurring before its execution unless its terms make provisions to that effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4761-4777; Dec. Dig. § 1234.\*]

#### 9. APPEAL AND ERROR (§ 485\*)—SUPERSEDEAS BOND.

A supersedeas bond, though not annulling or vacating the judgment appealed from, prevents the further taking of any step thereunder, and leaves matters in the condition in which they were when the supersedeas took effect and until the questions involved in the appeal are finally disposed of by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2264-2274; Dec. Dig. § 485.\*]

#### 10. APPEAL AND ERROR (§ 1234\*)—SUPERSEDEAS BOND—LIABILITY.

A mortgagor appealed from a decree in mortgage foreclosure directing that he remain in possession of the land for 1901 as the tenant of the mortgagee, who had purchased at the sale, and that he pay rent therefor and surrender possession on January 1, 1902, without executing a supersedeas bond. In 1903, nearly two years after the perfecting of the appeal, he executed a supersedeas bond conditioned on the payment of all rents of which the purchaser was kept out of by reason of the appeal. Held, that the bond covered the rent of the land for 1902, and liability under it continued until the cause was disposed of by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4761-4777; Dec. Dig. § 1234.\*]

Appeal from Chicot Chancery Court; Zachariah T. Wood, Chancellor.

Action by Udy Cahn against Henry Love and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This was an action originally instituted in the Chicot circuit court by the appellee, Udy Cahn, against the appellants to recover upon a supersedeas bond executed by them in connection with an appeal to the Supreme Court taken from the decree and proceedings of the Chicot chancery court rendered in a cause wherein J. Kaufman was plaintiff and Henry and Mattie Love, his wife, were defendants. Upon said appeal the decree was affirmed and finally disposed of by this court on March 7, 1904; and the opinion rendered thereon is reported under the style of Love v. Kaufman, 72 Ark. 265, 80 S. W. 884.

On September 10, 1900, the Chicot chancery court in said cause rendered a decree in favor of J. Kaufman and against Henry Love for the recovery of \$1,126.04, and the foreclosure of a mortgage on certain land in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Chicot county, which had been executed to secure said indebtedness. The said land was sold by a commission under and by authority of said decree to said J. Kaufman for \$1,100; and that sale was duly confirmed on June 3, 1901, and a deed duly executed by the commission to said Kaufman for said land in pursuance thereof. In said decree of confirmation the chancery court made also the following order: "And it further appearing that the defendant, Henry Love, is occupying and has a growing crop on the improved portion of said land, it is further ordered that he remain in possession of said land for and during the year 1901, as the tenant of said J. Kaufman, and that he pay the said J. Kaufman the sum of five dollars per acre rent therefor, and that he surrender possession of said premises to the said J. Kaufman on the first day of January, 1902." During 1901 Henry Love made said payment for the possession of said land under said order for the year of 1901 to Kaufman; but the court in the trial of the case at bar found that he did not surrender thereafter the possession of the land to Kaufman; and we think that there is sufficient evidence to sustain that finding. On September 9, 1901, Henry Love duly prosecuted and perfected in the Supreme Court an appeal from the said decree and proceedings of said chancery court, but without supersedeas bond at that time. Subsequently, on May 4, 1903, a supersedeas bond was executed and filed in the Supreme Court in said cause; and it is alleged in the complaint that a supersedeas was duly issued therein, which allegation was not denied. The supersedeas bond was executed by the appellants, Henry Love and Baldy Vinson, and was to the effect that the appellants would perform all the requirements and conditions named in section 1218 of Kirby's Digest, providing for the execution of such bond. At the same time said Vinson, who was the attorney of said Love, believing he had the authority to do so, signed the name of E. A. Bolton, his associate attorney in said case, to said bond as such associate attorney.

In his complaint in the case at bar the appellee alleged that during the pending of said appeal, and by reason of the stay of proceedings secured by said supersedeas, said Love retained possession of and kept said Kaufman out of the rents of said land for the years of 1902, 1903, 1904, and 1905, aggregating \$1,440, and did also damage said land by committing waste to the amount of \$200. He further alleged that said Kaufman did in 1906, by writing duly executed, transfer and assign to him all the claim and right to action growing out of the liability of appellants on said supersedeas bond; and he sought a recovery for the amount of said rents and damages. In said complaint said Kaufman is also made a party defendant, but no process was issued for him.

The appellants filed a general demurrer to the complaint, which being overruled, they filed an answer, in which they denied that Love refused to surrender the possession of the land to Kaufman on January 1, 1902; and they claimed that any possession that he held thereafter was as tenant of Kaufman. They also denied the transfer of the claim upon which this action is based by Kaufman to appellee. They made the answer a cross-complaint, and, amongst other things, made certain allegations upon which they based a prayer for affirmative relief against Kaufman, and they asked that process issue for him. They also asked that the cause be transferred to the chancery court which was done. At the trial of the cause Kaufman filed an answer in the case and also appeared as a witness. In his pleading and in his deposition he stated that he had transferred and assigned the claim upon which this action is based to the appellee as alleged in the complaint.

Upon the disputed questions of fact the court found that Love did not surrender the possession of the land to Kaufman on January 1, 1902, nor at any time thereafter, but upon his threatening to take possession, Love perfected his appeal from said decree and secured the supersedeas thereof; that the claim and right to action upon which this suit is based was duly transferred and assigned by said Kaufman to appellee; that said Bolton, who was one of the defendants, did not execute said bond; that by the execution of the bond sued on all proceedings under the decree and orders of the chancery court in said cause, wherein Kaufman was plaintiff and Love was defendant, were stayed pending said appeal to the Supreme Court; and that said Love retained possession of the land, and Kaufman was deprived of the rents thereof; that the said decree was affirmed on March 7, 1904, when the liability on the supersedeas bond ceased. It found that the evidence did not show that any waste was committed on said land after said affirmance of the decree. It found that appellee was entitled to recover on said bond for the value of the rents of the years of 1902 and 1903, which it found to be \$360 for each year. It entered a decree dismissing the complaint as to said Bolton, and in favor of appellee and against appellants, Love and Vinson, for the said value of the rents for the years of 1902 and 1903. It denied any recovery for rents for any other years and for any alleged waste. No appeal was taken from that portion of the decree dismissing the complaint as to defendant Bolton. The other parties, plaintiff and defendants to the suit below, appeal from said decree.

Baldy Vinson and B. F. Merritt, for appellants. W. G. Street, for appellee.

FRAUENTHAL, J. (after stating the facts as above). 1. Before considering the ques-

tions involving the rights upon the one hand, and the liabilities of the parties on the other hand, in this case, we will determine the objection urged by the appellants to the pleadings. It is contended that the claim or right of action growing out of the liabilities accruing upon the alleged breach of supersedeas bond is not assignable, and that therefore the said Kaufman who was the obligee in said bond was a proper party to this suit. The appellants in the court below did not file a demurrer on the ground that there was a defect of parties, but only filed a general demurrer. A general demurrer does not reach the defect of the want of proper parties. *Eagle v. Beard*, 33 Ark. 497; *Chrisman v. Jones*, 34 Ark. 73; *Less v. English*, 75 Ark. 288, 87 S. W. 447. But furthermore, in this case, Kaufman was actually made a party to the suit. In the complaint he was specifically named as a party defendant, and in their cross-complaint the appellants asked that process issue for him, and asked for affirmative relief against him. While no process was issued for him, he did file an answer and thus did enter his appearance in the case, and thereby was made a party thereto as effectively as if he had been duly served with process of summons. And even though it should be considered that the claim sued on was not assignable so as to conclude the rights of Kaufman, and on that account he was a proper party, this defect was remedied by thus making him a party after the action was begun. And the court did not abuse its discretion by permitting him to enter his appearance and file his pleading in the case. *Boles v. Jessup*, 57 Ark. 469, 21 S. W. 880. If he was a necessary party, he thus actually became a party to the suit; and any claim or right that he may have in the cause of action is concluded by the decree of the court, against which, therefore, the appellants are thus fully protected. But it is urged further by appellants that Kaufman had at one time instituted suit upon this claim and thereafter did suffer a nonsuit; that his answer in this case was not filed, and his entry of appearance in the cause was not made until more than one year after said order of nonsuit; that any right of action on the claim was therefore barred as to him; and that on this account he could not be made a party, and the cause of action must fail. But the statute (Kirby's Dig. § 5083) which tolls the statute of limitation for one year where the plaintiff suffers a nonsuit does not narrow the period of limitation in which an action may be brought upon a claim which is not otherwise barred by the general statute of limitation applicable to such claim. This provision of the statute only applies to those causes of action which, under the general statute of limitation applicable to such cause of action, would otherwise be barred before the running of one year from the time of taking such nonsuit. The statute, instead of shortening the period of limitation, really extends the

period provided by the general statute of limitation applicable to the cause of action.

It follows, therefore, that any right or interest that Kaufman may have had in the claim sued on was not barred at the time of the filing of his answer in this case. It follows, also, from this that the further contention made by appellants that the claim sued on was not assigned or transferred by Kaufman to the appellee, Cahn, cannot be sustained; for Kaufman is a party to this suit and is concluded by the decree. If the appellants owe the claim sued on, they cannot be injuriously affected by the decree which finds that Cahn and not Kaufman is the true owner thereof.

But we are further of the opinion that Kaufman did transfer and assign this claim to appellee prior to the institution of this suit and that he had not disposed of it prior to said assignment. Kaufman had been conducting a mercantile business at Coriolsa, Ark., and the claim herein sued on grew out of that business. He transferred to appellee by written instrument all assets and claims of that business and all "rights of action" in the state of Arkansas owed by him, and also conveyed to appellee the lands from which these rents issued. In his answer he stated, and in his deposition he testified that he had transferred and assigned the claim herein sued on to appellee. By this transfer Cahn became the equitable assignee of this claim. By section 5999 of Kirby's Digest it is provided that actions shall be brought in the name of the real party in interest; and under that statute we are of the opinion that appellee had a right to sue in his own name for the enforcement of this claim. *Heartman v. Franks*, 36 Ark. 501; *Caldwell v. Meshew*, 44 Ark. 564; *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62; *Maloney v. State*, 121 S. W. 728; 4 Cyc. 97.

2. It is contended by the appellants that Love was in effect a tenant of Kaufman for all the years he had possession of the land after 1901, and that Kaufman was not therefore kept out of the rents thereof for those years. They base this contention on that portion of the decree which provided that Love should retain possession of the land until January 1, 1902, and should remain in possession of the land during 1901 as tenant of Kaufman; and that his possession of the land after 1901 was that of a tenant of Kaufman holding over. But this provision of the order of the court was only made for the proper securing to Love the possession of the land and postponing the possession of Kaufman. Instead of making Love give a bond for the payment of the use and occupation of the land, or of appointing a receiver of the land, the court permitted Love to retain its possession and provided a character of lien for the security of the payment for its use and occupation. There was no relation of landlord and tenant created by this order between these parties. They did not make any agreement to

that effect. To create the relation of landlord and tenant there must be a valid contract between the parties. There must be both a privity of estate and contract before that relation can arise, so as to justify the recovery of rents on the one hand or the presumption on the other hand that the possession is subordinate to and the actual possession of the party having the legal title. 24 Cyc. 877; *Tucker v. Byers*, 57 Ark. 215, 21 S. W. 227. This order of court was not a contract, either express or implied, between the parties, and it did not create the relation of landlord and tenant between them; so that it can be said that the possession of Love was the possession of Kaufman subsequent to January 1, 1902. The chancery court found that Love refused to surrender the possession of the land after that date and held in opposition to the rights and claim of Kaufman; and we think there is sufficient evidence to sustain that finding. We are of opinion, therefore, that Kaufman was not in possession of said land through Love as his tenant, but was kept out of the possession and rents of the land.

3. And we are of the opinion that Kaufman was kept out of said rents by reason of said appeal. By the execution of said supersedeas bond the appellants contracted to pay all rents or damages to the property during the pending of the appeal, of which the appellee is kept out of possession "by reason of the appeal." The liability incurred by the execution of the bond is fixed by the legal import of its terms, and these should be construed according to the ordinary and reasonable meaning of the language employed. 1 Encyclopedia of Pleading & Practice, 1015; 5 Cyc. 752. The bond should not be held to cover a liability occurring before its execution unless its terms make provisions to that effect. But in this case the bond expressly provides for the payment of "all rents of which the appellee is kept out of by reason of the appeal." By virtue of the appeal having been taken to the Supreme Court the case was wholly and absolutely removed to that court. Upon the execution of the supersedeas bond and the issuance of the supersedeas all the proceedings in the chancery court were wholly suspended and stayed. *Elliott on Appellate Procedure*, § 541; 2 Cyc. 908; *Harri-son v. Trader*, 29 Ark. 85; *Miller v. Nuck-olls*, 76 Ark. 485, 89 S. W. 88, 113 Am. St. Rep. 101. While the supersedeas does not annul or vacate the judgment or decree appealed from, it does prevent the further taking of any step thereunder, and leaves the matters in the condition in which they were when the supersedeas took effect and until the questions involved in the appeal are final-

ly disposed of by the appellate court. 20 Cyc. 1240. The supersedeas stayed the enforcement of the right of Kaufman to the possession of the land, and it also stayed the enforcement of the recovery for its use and occupation. Under the evidence and finding of the chancellor Love had the possession of the land for the year of 1902 and kept Kaufman out of the rents thereof for that year. Kaufman could thereafter have instituted suit or taken legal steps to have recovered for the use or rent of the land for that year. But on May 4, 1903, the supersedeas bond was executed and the supersedeas issued, and Kaufman was thereby stayed from the enforcement of a recovery for the use or rent for that year. It will not do to say that he could have attempted to collect the amount for the use or rent of the land before that date; he had a right also to do this after that date, and he was kept from doing this after that date by reason of the appeal and supersedeas. Giving to the terms of the bond its full and reasonable effect it covered the rent of the land for 1902. *Wilson v. King*, 59 Ark. 32, 26 S. W. 18, 23 L. R. A. 802; *United States Fidelity & G. Co. v. Fultz*, 76 Ark. 410, 89 S. W. 93; 2 Cyc. 909. The liability under the bond continued only until the cause was determined and disposed of by the appellate court. 20 Ency. P. & P. 1245; 20 Cyc. 909; *Elliott on Appellate Procedure*, § 394.

It follows, therefore, that the appellants were also liable under said bond for the rents of the land for the year of 1903 and until March 7, 1904, when the said appeal was finally disposed of by the Supreme Court. The chancellor found that no damage accrued by reason of the failure to rent the land from January 1, 1904, to March, 1904, when said appeal was disposed of. The property consists of farm land that is rented not by the month, but by the year, and probably under the evidence it could have been as readily rented in March for said year as in January. At least there is no evidence showing any damage on this account, and we cannot say that the finding of the chancellor in this respect is erroneous. There is no evidence showing that any waste was committed on the land during the pending of the appeal. Any alleged waste may, under the testimony, have been done after March, 1904, and after the liability under the bond had ceased. This was the finding of the chancellor; and in this conclusion we find no error.

After a full examination of the pleading and testimony in this case, we do not find that the chancellor has made any error, either in the findings of fact made by him, or in the conclusions of law at which he arrived.

The decree is accordingly affirmed.

## SHINN v. STATE.

(Supreme Court of Arkansas. Jan. 3, 1910.)

## 1. CRIMINAL LAW (§ 603\*)—CONTINUANCE—ABSENT WITNESSES—MOTION.

A motion for continuance for absence of witnesses should give their names, allege the specific facts expected to be proved by them, and show their residence, in addition to diligence to secure their presence, that the court may see whether their attendance is necessary, and whether it is possible to secure it for the next term.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1349-1360; Dec. Dig. § 603.\*]

## 2. INDICTMENT AND INFORMATION (§ 11\*)—RETURN INTO COURT BY GRAND JURY.

Return of the indictment into court by the grand jury is essential to jurisdiction of the court.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 62; Dec. Dig. § 11.\*]

## 3. INDICTMENT AND INFORMATION (§ 11\*)—RETURN INTO COURT—INDORSEMENT.

An indorsement on an indictment, "filed in open court this \* \* \* day," is insufficient to show its return into court by the grand jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 74; Dec. Dig. § 11.\*]

## 4. CRIMINAL LAW (§ 1032\*)—RECORD—OBJECTION NOT MADE BELOW.

Though the record should show return of the indictment into court by the grand jury, yet as jurisdiction depends on the fact of the return, and not of the record, objection that the record does not show such fact cannot be made for the first time on appeal, as, if made below by motion, as it properly should be, the record could have been furnished; Kirby's Dig. § 1233, providing that a judgment cannot be reversed for an error, which can be corrected on motion in the trial court, till the motion is there made and denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2627, 2628, 2642-2653; Dec. Dig. § 1032.\*]

Appeal from Circuit Court, Madison County; J. S. Maples, Judge.

E. F. Shinn appeals from a conviction. Affirmed.

Fancher & Johnson, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

WOOD, J. The appellant was convicted of the crime of libel. The indictment charged that appellant being the publisher of a newspaper "unlawfully, maliciously, and falsely did publish as true the following false, libelous and defamatory article in words as follows: 'We notice that the boddler, Claud Fuller, of Eureka Springs, is bobbing up again as a prospective candidate for the Arkansas Legislature. No doubt Claudie would like to work his graft on the people again, but the voters of Madison and Carroll counties are 'onto' his game, and will vote for him to remain at home and work his rabbit's foot on Eureka.'" The allegations further were that "said article as published aforesaid by

the said E. F. Shinn, publisher as aforesaid, of and concerning the said Claud Fuller, as aforesaid, calling him by the name, 'The Boddler,' and by stating that 'No doubt Claudie would like to work his graft on the people again,' and thereby charging him with being a boddler and grafting, is false and defamatory and libelous on the said Claud Fuller, and impeaches the honesty, veracity, and reputation of said Claud Fuller, and thereby exposes him to public hatred, contempt, and ridicule against the peace and dignity of the state of Arkansas." The indictment was signed "D. B. Horsley, Prosecuting Attorney, Fourth Judicial Circuit of Arkansas," and was indorsed: "No. 3. Libel. State of Arkansas vs. E. B. Shinn. A true bill. R. E. L. Graham, foreman of the grand jury. Filed in open court this the eighth day of September, A. D. 1909. S. G. Parsley, Clerk."

Appellant in a motion for continuance set up substantially that if the cause was continued he would be able to procure the attendance of witnesses at the next term of the court who would furnish evidence of the truth of some or all of the charges made by him against Fuller in his paper, but he names only one witness whose attendance he expected to procure, to wit, one C. M. Barnes. The motion, however, does not set up the particular facts that he expected Barnes to establish. The motion states that: "He can prove by Barnes the truthfulness of some of the charges." The motion states that appellant "thought that Barnes resided at Eureka Springs, Ark.," and that appellant had a subpoena issued directed to the sheriff of Carroll county, but that such subpoena had been returned "Not served," for the reason that Barnes was not to be found in Carroll county. The motion does not allege where Barnes resided; does not show that he was within the jurisdiction of the court. Appellant's motion was not sufficient to warrant a continuance on account of the absence of the witness Barnes. He may have been a nonresident for aught the motion reveals to the contrary. It was not enough for appellant to allege due diligence. He should have stated the facts, and have left the court to conclude whether he was diligent. He should have given the names of his witnesses, alleged the specific facts he expected to prove by them, and should have shown where they resided, so that the court might see whether their attendance was necessary, and whether it was possible to procure same by the next term. Error cannot be predicated upon the overruling of a motion that was so indefinite as the one under consideration. *Pickett v. State*, 71 Ark. 62, 70 S. W. 1041; *Allison v. State*, 74 Ark. 444, 86 S. W. 409; *Clampett v. State*, 121 S. W. 934. The court did not abuse its discretion in overruling the motion for continuance. *Golden v. State*, 19 Ark. 590; *Stillwell v. Badgett*, 22 Ark. 164; *Edmonds*

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

v. State, 34 Ark. 720; Watts v. Cohn, 40 Ark. 114.

The record does not show, in specific terms, that the indictment was returned or brought into court by the grand jury. It is essential of course to the jurisdiction of the court that the grand jury should return the indictment into court, and the record is the only memoranda of that fact. Therefore, where the objection is seasonably made, if the fact does not exist, or if the record fails to show such fact, a conviction cannot be sustained; and the indorsement "filed in open court this the eighth day of September, A. D. 1909" is not sufficient to show the return into court by the grand jury. Green v. State, 19 Ark. 178; McKenzie v. State, 24 Ark. 637; Chancellor v. State, 33 Ark. 815; Holcomb v. State, 31 Ark. 427; Felker v. State, 54 Ark. 492, 16 S. W. 663.

But it must be remembered that it is the fact itself of the return of the indictment by the grand jury that gives the court jurisdiction, and not the recording of such fact by the clerk. If the grand jury presents the indictment, the court has jurisdiction whether the clerk records the fact or not. Therefore, where appellant's objection goes only to the failure of the clerk to preserve the memorial (and not to the failure of the grand jury to return the indictment), in order to avail himself of such objection he must first move the trial court to set aside the indictment, because of the failure of the clerk to preserve the evidence of its return into court by the grand jury. The statute provides: "That an indictment not found and presented as required by law, can be set aside on motion." Section 2279, Kirby's Dig. It also provides that: "A judgment or final order shall not be reversed for an error, which can be corrected on motion in the inferior courts, until such motion has been made there and overruled." Section 1233, Kirby's Dig. "Defects of this kind," says the court in State v. Brandon, 28 Ark. 411, "can only be reached on a motion to set aside the indictment, which motion should be made before filing a demurrer." And in Robinson v. State, 33 Ark. 183, in passing upon a similar question we said: "Had the attention of the court below been directed to the form of entry by a motion to set aside or quash the indictment, or by motion in arrest of judgment, no doubt the court would have ordered the informality to be cured by a nunc pro tunc entry." See, also, Felker v. State, 54 Ark. 492, 16 S. W. 663, where it is held that the proper practice in such cases by those who would question the genuineness of the indictment is to move the trial court to set it aside.

Appellant does not contend that the grand jury did not actually return the indictment against him into court. His only objection is that the record of the circuit court fails to register the fact. Had he made such ob-

jection to the trial court doubtless such record would have been readily furnished. Having failed to make it there, he must be held to have waived it. He must not be permitted to raise it here for the first time. See *Fenalty v. State*, 12 Ark. 630; *Brown v. State*, 13 Ark. 96; *Dixon v. State*, 29 Ark. 165; *State v. Johnson*, 33 Ark. 174; *Wright v. State*, 42 Ark. 94; *State v. Agnew*, 52 Ark. 275, 12 S. W. 563; *McFall v. State*, 73 Ark. 327, 84 S. W. 479; *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900; *Mears v. State*, 84 Ark. 136, 104 S. W. 1095.

The facts set forth in a statement agreed upon by the state and the appellant, and in the other evidence, were sufficient here to sustain the verdict of the jury. No specific objection was saved at the trial to any of the court's declarations of law. The assignment of error in the motion for new trial as to the giving of instructions is general. We find no reversible error in the charge of the court. The judgment must therefore be affirmed.

#### SMITH et al. v. BOSWELL.

(Supreme Court of Arkansas. Nov. 22, 1909.)

##### 1. WILLS (§ 52\*)—CONTESTS—MENTAL INCOMPETENCY—BURDEN OF PROOF.

One contesting the probate of a will has the burden of proving the incompetency of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101-110; Dec. Dig. § 52.\*]

##### 2. WILLS (§ 163\*)—CONTESTS—UNDUE INFLUENCE—BURDEN OF PROOF.

One contesting a will has the burden of proving undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.\*]

##### 3. WILLS (§ 384\*)—HARMLESS ERROR—ERRONEOUS RULINGS ON BURDEN OF PROOF.

Where in a will contest contestant and contestee adduced voluminous evidence on the issue of the execution of the will, contestant was not prejudiced by the ruling that he had the burden of proof, for he thereby obtained the right to open and close the argument before the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 858; Dec. Dig. § 384.\*]

##### 4. WILLS (§ 155\*)—UNDUE INFLUENCE—ACTS OF KINDNESS.

Proof of relations of friendship and affection between testator and devisee, and of kindly offices and proper conduct on the part of the latter, does not show undue influence, as it is natural for a person whose will is not improperly controlled to favor his best friends, and the influence of husband over wife, or of wife over husband, or of parents over children, or of children over parents, is legitimate so long as the same does not extend to positive dictation and control.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 380; Dec. Dig. § 155.\*]

##### 5. EVIDENCE (§ 501\*)—OPINION EVIDENCE—FACTS FORMING BASIS—MENTAL CONDITION.

A witness, who in a will contest on the ground of undue influence did not testify to any facts proving that the chief beneficiary could control testatrix, her mother, except by affection or in any manner which was not legitimate, could not testify as to his opinion as to whether

testatrix was mentally able of resisting a command of the chief beneficiary to convey to her a considerable portion of the estate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2297; Dec. Dig. § 501.\*]

**6. WILLS (§ 302\*)—EXECUTION—"UNIMPEACHABLE EVIDENCE."**

The evidence is unimpeachable within Kirby's Dig. § 8012, subd. 5, providing for the probate of a will written in the handwriting of testator on the unimpeachable evidence of disinterested witnesses to the handwriting and signature of testator, where there is no evidence reflecting on the character or testimony of the witnesses testifying to the handwriting and signature of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 706; Dec. Dig. § 302.\*]

**7. TRIAL (§ 129\*)—IMPROPER ARGUMENT OF COUNSEL—RIGHT TO COMPLAIN.**

A party cannot complain of the remarks of the counsel of the adverse party elicited by the improper remarks of his own counsel.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 310; Dec. Dig. § 129.\*]

Appeal from Circuit Court, Pope County; Hugh L. Baoham, Judge.

Proceedings by Robert L. Smith and others against Mrs. Mattie Boswell to contest the probate of the will of Cyrena Smith, deceased. From a judgment admitting the will to probate, contestants appeal. Affirmed.

U. L. Meade and Jeff Davis, for appellants. Brooks, Hays & Martin, for appellee.

**BATTLE, J.** On the 27th day of February, 1907, there was filed before the clerk of the probate court of Pope county the following paper writing:

"February the 18th, 1907.

"My last will and testament.

"I will to my daughter Mattie Boswell all my household goods and kitchen furniture.

"I will to my son Bob one dollar.

"I will to my sister Lou Zachary two hundred dollars (200.00); I also will to Victory Roe one dollar.

"I will to Charlie Jones one dollar, Grace Jones one dollar, Florence Barton one dollar, Mack Jones one dollar, and Travis Jones one dollar. And all my real estate is deeded to Mattie Boswell, and I want a nice monument put to my grave when I am gone to rest. And I will all my money and notes, have I any left, to my daughter Mattie Boswell.

"Cyrena Smith."

Annexed to it was the following affidavit and certificate:

"Proof of Will.

"State of Arkansas, County of Pope.

"Personally appeared before me, A. D. Shinn, clerk of the county and probate courts of Pope county, Arkansas, Edgar Shinn, Alva A. Tucker, and R. L. Harkey, three disinterested citizens of the state of Arkansas to me well known, who being duly sworn say: That they are acquainted with the

handwriting and signature of Cyrena Smith, deceased, have examined this writing purporting to be the last will and testament of said Cyrena Smith, deceased, and that said instrument is in her genuine handwriting and her signature thereto is her genuine signature.

"[Signed]

Edgar Shinn,  
"Alva A. Tucker,  
"R. L. Harkey.

"Subscribed and sworn to before me this 27th day of February, 1907.

"A. D. Shinn, Probate Clerk."

"State of Arkansas, County of Pope.

"I, A. D. Shinn, clerk of the county court and ex-officio clerk of the probate court within and for the aforesaid county and state do hereby certify that the above and foregoing last will and testament was admitted to probate before me in vacation as and for the last will and testament of Cyrena Smith, deceased.

"Witness my hand and official seal as such clerk, this 27th day of February, 1907.

"[Seal] A. D. Shinn, Clerk."

On the 6th day of May, 1907, Robert L. Smith and others filed in the Pope probate court what they called a response as follows:

"In the Probate Court, Pope County, Ark. Robert L. Smith, Victoria Rowe, Charlie Jones, Florence Barton and Mack Jones, Jr., and Grace Jones, Travis Jones, minors, by their father and next friend, J. M. Jones, contestants, v. Mrs. Mattie Boswell and (R. N.) Boswell, contestes.

"Response of Contestants.

"Comes the above-named contestants and state that they have an interest in the estate of Cyrena Smith, deceased, and that Robert L. Smith is the son of said deceased, and that Victoria Rowe is the only heir and next of kin to Hazle Brown, now deceased, who was one of the children and heirs of the said Cyrena Smith, and that Charlie Jones, Florence Barton, Mack Jones, Jr., and Grace Jones, and Travis Jones are the only children of Maggie M. Jones, now deceased, and that Maggie M. Jones was one of the children and heirs of the said Cyrena Smith, deceased. And for the grounds of contest to the pretended will filed in this court on the — day —, 1907, and probated by the clerk of this court in vacation, on the — day of —, 1907, would respectfully state:

"(1) That said pretended will is not in the proper handwriting of Cyrena Smith, nor neither the body of the instrument nor the signature thereto, and is therefore not the last will and testament of the said Cyrena Smith.

"(2) That if said proposed will and signature thereto was written by the said Cyrena

Smith, she was induced to do so by the undue and improper influence of Mrs. Mattie Boswell and her husband Van Boswell, and others, to that extent as to render said proposed will void.

"(3) That if said proposed will was written and executed by the said Cyrena Smith, it was done when she did not possess sufficient reason and mental capacity to dispose of her estate by will or otherwise, and, hence, said will is void.

"(4) That at the time said will was written, if written at all, by the said Cyrena Smith, she did not possess sufficient mind and reason and mental capacity to understand and comprehend the extent and magnitude of her estate, and the just and equitable distribution of said bounty between her children, and the children of her deceased daughters, to that extent as to render a testamentary document void.

"(5) Wherefore, premises seen, contestants pray this honorable court for an order revoking the action of the clerk of this court, in vacation, admitting said instrument of writing to probate, as of and for the last will and testament of said Cyrena Smith, deceased.

"And for the further order refusing to allow said instrument to be probated as the last will and testament of the said Cyrena Smith, and for all their cost.

"U. L. Meade and Jeff Davis,  
Attorneys for Contestants."

The contestees filed a reply, denying all the allegations in the so-called response.

The probate court sitting as a jury heard all the testimony adduced by the parties and found that the document purporting to be the last will and testament of Cyrena Smith, deceased, and probated in common form before the clerk of the probate court on the 27th day of February, 1907, is such last will and testament, in her handwriting, both body and signature; and that at the time of writing it she was of sound mind and disposing memory, capable of executing it, and did execute it without the undue influence of any one; and approved and confirmed the action of the clerk in admitting it to probate.

Contestants appealed to the Pope circuit court. Upon their motion the name of R. N. Boswell was stricken from their pleading as a contestee. A jury was impaneled to try the issues and the court decided that the burden of proof "in the whole case" rested upon the contestants. After hearing all the evidence adduced by all the parties the jury were required to answer the following interrogatories propounded to them:

"(1) Is the entire will in controversy and its signature in the proper handwriting of Cyrena Smith, deceased?

"Answer.

"(2) Did she possess sufficient mental and physical capacity to make a will?

"Answer.

"(3) Was the will executed under undue influence as defined by the court in the instructions given?

"Answer."

The jury answered the first two interrogatories in the affirmative and the last in the negative; and returned a verdict in favor of the contestee and the will. Judgment was rendered accordingly, and contestants appealed.

The first error complained of is the ruling of the court as to the burden of proof. As to the insanity of the testatrix and her incompetency to make a will the ruling of the court is correct; the burden of proof was upon the contestants. *McCullough v. Campbell*, 49 Ark. 367, 5 S. W. 590; *McDaniel v. Crosby*, 19 Ark. 533; *Bims v. Collier*, 69 Ark. 245, 62 S. W. 593; *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405. The ruling was also correct as to undue influence; the burden was upon the contestants to prove that the will was procured by undue influence. *Guthrie v. Price*, 23 Ark. 396; *Jenkins v. Tobin*, 31 Ark. 306, 309; *Page on Wills*, § 405; *Gardner on Wills*, p. 179, § 61; 3 *Elliott on Evidence*, § 2693. As to the execution of the will both parties adduced voluminous evidence, and appellants were not prejudiced by the ruling of the court, if it be assumed that it was incorrect, but on the contrary was benefited by having the opening and closing of the argument before the jury.

Minnie Brown testified in the trial that the mental and physical condition of Cyrena Smith, the testatrix, during the years she "stayed" with R. L. Smith, her son, was weak; complained of her heart all the time; was nervous, easy to cry, hysterical, have seen her sit on the floor and cry; absent-minded; would forget the day of the week; have seen Mrs. Boswell, the contestee, in company with her; she had a great deal of influence over Mrs. Smith, her mother; her mother did everything Mrs. Boswell wanted her to do, except she went to St. Louis to visit an invalid grandson when Mrs. Boswell did not want her to go; her great desire was to please Mrs. Boswell. After making this statement the appellants then asked her: "Knowing as you did the mental and physical condition of Mrs. Smith at the time she lived with Bob Smith, and just prior to her death, and her mental capacity and the mental capacity of Mrs. Mattie Boswell, and the influence she had over Mrs. Smith, I will ask you if in your judgment, was or was not, Mrs. Smith mentally and physically able and capable of resisting or refusing a request or command of Mrs. Boswell to convey to her her estate or a considerable portion thereof?" Upon objection of appellee the court refused to permit witness to answer the question. It (court)

did not err in so doing. "Proof of relations of friendship and affection between the testator and devisee, and of kindly offices and proper conduct on the part of the latter, does not establish undue influence, as it is natural for a person whose will is not improperly controlled to favor his best friends. The influence of the husband over the wife, that of the wife over the husband, of the parents over the children and of the children over the parents, are legitimate, so long as they do not extend to positive dictation and control over the mind of the testator." 3 Elliott on Evidence, § 2696, and cases cited.

In McCullough v. Campbell, 49 Ark. 367, 5 S. W. 590, this court said: "As we understand the rule, the fraud and undue influence which is required to avoid a will must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property, and the influence must be specifically directed toward the object of procuring a will in favor of particular parties. It is not sufficient that the testator was influenced by the beneficiary in the ordinary affairs of life or that he was surrounded by them and in confidential relation with them at the time of its execution." See Sanger v. McDonald, 87 Ark. 243, 112 S. W. 365.

The question was improper. The witness did not testify to any facts that tended to prove that Mrs. Boswell could control her mother in any manner, except by affection, or in any manner which was not perfectly legitimate.

Similar questions were asked other witnesses, which the court would not permit them to answer. For the reason given above the court did not err in so doing.

In seven requests appellants, in effect, in various ways, asked the court to instruct the jury, that they must not find the instrument of writing in contest to be the last will and testament of Cyrena Smith, unless it be "established by the unimpeachable evidence of at least three disinterested witnesses, that the entire body of said instrument, including the signature thereto, is in the handwriting of the said Cyrena Smith." The court properly refused to grant them. It is true that a statute provides, "when the entire body of the will and the signature thereto shall be written in the proper handwriting of the testator or testatrix, such will may be es-

tablished by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature of the testator or testatrix, notwithstanding there may be no attesting witness to such will." Kirby's Dig. § 8012, subd. 5. But this court held in *Arendt v. Arendt*, 80 Ark. 204, 96 S. W. 982, that the evidence is unimpeachable within the meaning of the statute when there is no evidence reflecting on the character or testimony of the witness so testifying. This ruling controls in this case.

The instructions given by the court as to the execution of the will, and to mental capacity and undue influence, were full, complete, and, construed together, substantially correct, and fairly submitted to the jury the issues in that respect.

Appellants complain of language used by an attorney of appellee while addressing the jury. It was as follows:

"Now this will was made in May, 1906. Mr. Meade, one of the counsel for the opposing side of this case, was the very lawyer that drew that instrument. Why don't he come here and testify as to the mental condition of Cyrena Smith? Why don't he testify to the condition of her mind? He can tell you about it, and he can testify."

"This was said by Mr. Brooks, an attorney of appellee, in replying to the argument of Mr. Meade, who had just preceded him in arguing the case to the jury, and who said:

"There is more of U. L. Meade in this case than anything else. I know more about these transactions and more about the condition of Cyrena Smith, than any other living being. She called on me to write her first will in 1899 and I went and wrote it for her.

"In that will she failed to give the little children of Mack Jones anything. Again, in the spring of 1906 she sent for me to write her second will, and I prepared it and had her execute it, and in that will she failed to give the little children of J. M. Jones anything. But it is not proper for me to testify about these things."

Appellants objected to the remark of appellee's attorney, and the court excluded them from the jury. These remarks were elicited by the improper remarks of the attorney of appellants, and they, therefore, had no right to complain. *Pratt v. State*, 75 Ark. 350, 87 S. W. 651; *Choctaw, Oklahoma & Gulf Railway Co. v. Doughty*, 77 Ark. 1, 91 S. W. 768.

The evidence was sufficient to sustain the verdict of the jury.

Judgment affirmed.

**J. S. MINOR & SONS v. PARAGON  
PLASTER CO.†**

(Court of Appeals of Kentucky. Jan. 11, 1910.)

**1. PLEADING (§ 369\*) — ELECTION BETWEEN  
PLEADINGS.**

Where, in an action for the price of goods sold, defendant filed an answer simply traversing the allegations of the petition, and thereafter filed an amended answer admitting the contract, but seeking to recover damages by way of counterclaim for delay in delivery of the goods, defendant was properly required to elect between the answers, under Civ. Code Prac. § 113, providing that, if a party file a pleading containing statements inconsistent with those of a pleading previously filed by him, he shall be required to elect.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1201; Dec. Dig. § 369.\*]

**2. APPEAL AND ERROR (§ 1064\*)—REVIEW—  
HARMLESS ERROR—INSTRUCTIONS.**

Where it is apparent on appeal that the jury would have found for plaintiff, as it did, if a certain instruction had not been given, though it was erroneous, it was not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064.\*]

**3. SALES (§ 359\*)—ACTION FOR PRICE—EVI-  
DENCE.**

In an action for the price of brick sold for the construction of a building, evidence held to show that, while there was some delay in the construction of the building, it was not due to any fault of plaintiff in delivering the brick, and that no complaint on account of delay was made until after the commencement of the action.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 359.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.  
"Not to be officially reported."

Action by the Paragon Plaster Company against J. S. Minor & Sons. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Morton K. Yonts and Walter S. Mendel, for appellants. Morton V. Joyes, William Jarvis, and Andrew M. Sea, Jr., for appellee.

**HOBSON, J.** This suit was brought on February 7, 1907, by the Paragon Plaster Company against J. S. Minor & Sons. It was alleged in the petition that from July 13, 1906, to September 1, 1906, at the defendants' special instance and request, the plaintiff sold and delivered to them 266,000 sand lime brick, for which the defendants promised to pay the sum of \$1,650.12; that the price was reasonable, and was due on September 1, 1906, but was in no part paid. An itemized statement of the account was filed with the petition. On March 9th the defendants filed a general demurrer to the petition, and, this having been overruled, on April 6th they filed an answer, which was simply a traverse of the allegations of the petition. In other words, it was denied in the answer that from July 13, 1906, to September 1, 1906, or at any other time, the plaintiff sold or delivered to the defendants 266,000 sand lime brick, or any other quantity of lime brick, for which they agreed to pay the sum of \$1,650.12, or

any other sum, or that the price charged was reasonable. The plaintiff thereupon took depositions to prove up its claim. On February 18, 1908, the case was assigned for trial on March 23d. On that date it was reassigned to June 23d. On June 26th it was continued for the defendants and assigned for trial on October 5, 1908. On October 7th the defendants tendered an amended answer and counterclaim. Over the objection of the plaintiff the court allowed the amended answer to be filed. In this amended answer it was pleaded that on or about July 6, 1906, the Paragon Plaster Company entered into a contract with the defendants by which it sold and agreed to deliver to them at Waterloo, N. Y., within 30 days thereafter, about 800,000 brick; that it was advised at the time of the making of the contract that it was of the utmost importance to the defendants that the brick should be delivered within the time designated, for the reason that they were then engaged in constructing at that place a large building and were required to construct it within a given time, and that the plaintiff undertook to deliver the brick within the time required, but failed to do so, and that by reason of the delay in getting the brick the defendants were delayed in putting up the building; that some of the brick were not delivered until about September 1, 1906, and that by reason of the delay in getting the brick the defendants sustained a loss of \$2,000. This was pleaded as a counterclaim. The plaintiff thereupon entered a motion that the defendants be required to elect whether they would stand upon their original answer or the amended answer. The court required them to elect, and under protest they elected to rely upon the amended answer. A reply was filed to this by the plaintiff, controverting its allegations, and the case came on for trial on February 11, 1909. On the trial the defendants amended their answer, alleging that the contract referred to was made on or about April 1, 1906, and that the brick were to be delivered within the period of 40 days from and after April 1st. The plaintiff then filed an amended reply, stating that the defendants had received and paid for the brick delivered up to July 13, 1906, without objection, and had thereby waived any claim for damages up to that time. This was taken as controverted of record. The case was heard before a jury, who returned a verdict for the plaintiff for the amount sued for, and the defendants appeal.

The first question made on the appeal is that the court erred in requiring the defendants to elect between their amended and original answer. By section 113 of the Civil Code of Practice it is provided that, if a party file a pleading which contains statements inconsistent with those of a pleading previously filed by him, he shall be required to elect

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied March 9, 1910.

which of them shall be stricken from his pleading. The denials of the original answer were wholly inconsistent with the allegations of the amended answer. Under the allegations of the amended answer it was true that the plaintiffs had sold and delivered the brick to the defendants, and this fact was denied in the original answer. The court, therefore, properly required the defendants to elect which allegation they should stand upon. It is earnestly insisted that the evidence shows that the brick were not sold at the price charged; but the defendants might have set this fact up in their amended answer, or by an amendment to it after they had elected to stand upon it alone. In view of all the evidence, we do not see that the defendants' substantial rights were at all prejudiced in this matter.

On the trial of the case the court, among other things, gave the jury this instruction: "I further instruct you, gentlemen, that it appears in this case that on July 13, 1906, there was a payment by the defendants, J. S. Minor & Sons, to the plaintiff, Paragon Plaster Company, for all brick that had been furnished up to that time, and any damage that resulted, if any, from delay in delivering the brick, if there was such delay on such contract, as I have submitted to you in Instruction No. 1, then to the extent of any such damage, if any, that had accrued up to the 13th day of July, 1906, you will not reckon or hold the plaintiff liable for to Minor, because I instruct you as a matter of law that that was a waiver of any damage that may have accrued to them up to that date July 13, 1906." It is said in the brief for appellants that the court gave the instruction upon the authority of the case of *Lucile Mining Company v. Fairbanks*, 87 S. W. 1121, 27 Ky. Law Rep. 1100. In that case the judgment of the circuit court was affirmed by an equal division of this court, but the difference of opinion between the members of this court was not so much as to principle of law as to the application of the law to the facts, and that case is not authority here. Whether the instruction given by the court was proper, or not, under the facts here shown, we do not deem it necessary to determine, for the reason that the jury found against the defendants as to the delay after July 13th, and the case for the defendants was no stronger as to the delay before July 13th than it was as to the delay after that date. The jury evidently would have found for the plaintiff, just as it did, if instruction 2 had not been given.

The proof was overwhelmingly in favor of the plaintiff on the merits of the case. A great many letters passed between the plaintiff and the defendants before July 13th, while the building was going up, and in none of these letters was any complaint made by the defendants of damages sustained on account of the delay in furnishing the brick. In

these letters the plaintiff was pressing for its money, and various excuses were given for nonpayment by the defendants; but nothing was said of any damages from delay in furnishing the brick. The check for the amount then due was finally sent, with the hope that it would prove satisfactory. So far as the correspondence shows, things moved on amicably after this until the end. On September 21, 1906, the defendants, in answer to a letter asking money, wrote the following: "Paragon Plaster Company, Syracuse, N. Y.—Gents: We find in checking up your bills that you have made a mistake in bill dated August 8, '06. You have 23,000, and it should be 11,500. You also have charged us \$8.75 f. o. b. here, when you made us a price of \$6.87 f. o. b. boat or \$6.25 f. o. b. cars your city, and you have charged us \$6.87 straight. You will please mail us a correct statement to Atlantic City, N. J., and we will send you check at once. Hope to hear from you at once. Remain, Yours truly, J. S. Minor & Sons." Again, on October 20th, they wrote the following: "Paragon Plaster Company, Syracuse, N. Y.—Dear Sirs: In reply to your favor of the 18th will say we received a bill a few days ago for \$1,650.84. We have sent this bill to Atlantic City to have them checked up and O. K. Whatever amount we owe you will be paid without any unnecessary delay. Respectfully yours, J. S. Minor & Sons." Again, on November 2d they wrote the following: "Paragon Plaster Company, Syracuse, N. Y.—Gents: Referring to your last letter, will say when you send us a correct bill we will send you check for same. We bought the brick \$6.87 f. o. b. boat and \$6.25 f. o. b. cars Syracuse. You also made us a price of \$8.30 delivered. Now these are the prices you made us, and if you want your money send us a bill for that amount and we will remit at once. Yours truly, J. S. Minor & Sons."

The plaintiff's officers testified that the first they heard of any complaint for damages on account of delay in furnishing brick was when the amended answer was filed, 18 months after this suit was brought. While the proof shows that there was some delay in the construction of the building, taken as a whole it leaves the mind in great doubt as to whether this was justly due to any fault of the plaintiff, and under all the proof we cannot see how the jury could well have reached any other conclusion than they did. The letters which we have quoted are as competent upon the delay before July 13th as upon the delay after that time, and we cannot conceive how a jury which found for the plaintiff as to the delay after July 13th could have found differently as to the delay before that date. We therefore conclude that the defendants were not prejudiced by the instruction, and that on the whole case the judgment is right.

Judgment affirmed.

WHITT et al. v. MADDIX et al.

(Court of Appeals of Kentucky. Jan. 5, 1910.)

**MECHANICS' LIENS (§ 107\*)—STATUTES—CONSTRUCTION.**

Under Ky. St. § 2463 (Russell's St. § 2383), providing that any person who performs labor in the erection of any building, by contract with or by the written consent of the owner, contractor, or subcontractor, shall have a lien, persons who performed labor on a house, under a contract with a subcontractor and with the knowledge and consent of the owner, who promised to retain a sufficient amount from the sum due the contractor to pay them, are entitled to a lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 139; Dec. Dig. § 107.\*]

Appeal from Circuit Court, Carter County.  
"Not to be officially reported."

Action by C. C. Maddix and another against W. B. Whitt and another. From a personal judgment against one of defendants, and a judgment awarding plaintiffs a mechanic's lien, defendants appeal. Appeal from personal judgment dismissed, and judgment for mechanic's lien affirmed.

H. L. Woods, for appellants.

**BARKER, J.** The appellant W. B. Whitt, is the owner of a lot of land in Olive Hill, Ky. In order to improve this lot he entered into a contract with W. R. Moreland to erect a number of small houses thereon at a fixed price for each. Moreland subsequently contracted with J. B. Denues to do the carpenter's work on one of the buildings, called in the record "No. 5," for \$100, Moreland to furnish all necessary materials. Denues transferred this contract to appellees, C. C. Maddix and Willis Johnson, who also agreed to do the work for \$100. The appellees worked a while upon this contract and then quit, because, as they claimed, Moreland failed to furnish the material necessary to complete the building. Within the statutory period of six months they filed a verified statement in the county clerk's office, as provided in section 2463, Ky. St. (section 2387, Russell's St.), in order to perfect their lien as subcontractors, and within the year next following the filing of the account instituted this action in order to enforce their lien against the building upon which they had labored and the lot upon which it stands. The contractor, Moreland, resisted the action for a personal judgment against him (1) on the ground that he had no contract with appellees, and (2) because they had not done the work in accordance with the contract which he had with J. B. Denues; but upon final hearing the court rendered a personal judgment against him for \$80, and reserved for further consideration the question of the right of appellees to a mechanic's lien on appellant Whitt's house and lot. Afterwards he entered a judgment awarding appellees a mechanic's lien on the house and lot in

question, and from these respective judgments Whitt and Moreland have appealed.

So far as Moreland is concerned, his appeal from the personal judgment against him for \$80 must be dismissed for want of jurisdiction in this court to entertain it. As to the right of appellees to a mechanic's lien against the house and lot of appellant Whitt, we are of opinion that the trial court correctly decided in favor of appellees. The statute giving the lien is as follows:

"Sec. 2463. A person who performs labor or furnishes materials in the erection, altering or repairing a house, building or other structure, or for any fixture or machinery therein, or for the excavation of cellars, cisterns, vaults, wells, or for the improvement, in any manner, of real estate by contract with, or by the written consent of, the owner, contractor, subcontractor, architect or authorized agent, shall have a lien thereon, and upon the land upon which said improvements shall have been made or on any interest such owner has in the same, to secure the amount thereof with costs; and said lien on the land or improvements shall be superior to any mortgage or incumbrance created subsequent to the beginning of the labor or the furnishing of the materials; and said lien, if asserted as hereinafter provided, shall relate back and take effect from the time of the commencement of the labor or the furnishing of the materials. \* \* \*

It is clear that appellees are within the language of the statute above quoted. The record shows, without contradiction, that Whitt knew they were working upon his house, and promised them to retain sufficient money out of that which would be due Moreland to pay them for their work. It also shows that, after they filed their notice of lien and instituted this action to enforce their lien, Whitt paid over to Moreland more money than was sufficient to pay appellees' claim. Moreland was the original contractor. He sublet to Denues. Denues transferred to appellees, who did the work. They are, therefore, clearly within the very language, as well as the spirit, of the statute; the intent of the statute being to protect the interests of those who labor or who furnish material to a contractor or a subcontractor for the benefit of the owner of the building and lot. The case of *Hightower v. Bailey*, 108 Ky. 198, 56 S. W. 147, 22 Ky. Law Rep. 88, 49 L. R. A. 255, 94 Am. St. Rep. 350, is not apposite to the question at bar. In that case it was held that, where one materialman furnished another materialman with lumber to go into a house, the second materialman did not have a lien because he was not within the language of the statute. But in the case at bar appellees fall within the very terms of the law which creates the lien. They did work for the benefit of the owner under a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

contract with the subcontractor, Denues. We are therefore of opinion, as said before, that the court correctly held that appellees were entitled to a lien for the labor they had performed.

We do not find it necessary to enter into a discussion of the conflict between the parties as to whether or not appellees rightfully quit the contract because Moreland refused or failed to furnish the material necessary to complete the work. That question was settled by the chancellor's deciding in favor of appellees, and rendering a personal judgment against Moreland for \$80, which we have no jurisdiction to review. So far as appellant Whitt is concerned, the record shows that he saw the material that was going into the building, and while he said to appellees that it was not in accordance with the agreement between him and Moreland, yet he would accept it, and he did accept it, and paid Moreland in full for the building.

The appeal of W. R. Moreland from the personal judgment against him is dismissed. The judgment awarding appellees a mechanic's lien against the house and lot belonging to appellant Whitt is affirmed.

KEARNS' GUARDIAN et al. v. ANDERSON  
et al†

(Court of Appeals of Kentucky. Jan. 7, 1910.)

HUSBAND AND WIFE (§ 179\*) — DEED — CONSTRUCTION—ESTATE CONVEYED.

A deed by a wife and her husband of her land to a trustee for the sole use of the wife, and to be by him conveyed to her for her sole use, with power to dispose of by will, and on the failure of the trustee to make the conveyance, or of the wife to dispose of the property by will, the same to be held by the trustee for the benefit of the husband on his surviving the wife, and after his death the land to be sold and the proceeds divided between third persons, executed when Ky. St. § 4827, permitting a married woman to dispose of her estate by will only, where the estate was secured to her separate use by deed, etc., was in force, gave her title for her sole use, with power to make a will, and, on the trustee reconveying the property to her for her sole use with power to make a will, she acquired the fee, and could convey the property to the exclusion of the third persons.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 179.\*]

Appeal from Circuit Court, Harrison County.

"Not to be officially reported."

Action by Willie Kearns' guardian and others against Susan W. Anderson and others. From a judgment sustaining a demurrer to the petition, plaintiffs appeal. Affirmed.

M. C. Swinford and W. W. Van Deren, for appellants. Daniel Durbin and Harry Bailey, for appellees.

CARROLL, J. On the 28th of February, 1884, Frances McClure and her husband, Samuel McClure, conveyed a tract of land

in Harrison county, owned by her in fee, to Everet Allen, trustee, "to be held in trust by the said trustee for the sole and separate use of Frances McClure, and to be by him conveyed to her for her sole and separate use, with power in her to will or dispose of the same as to her may seem best; and in the event of the failure of said trustee to make said deed, or of the said Frances McClure to dispose of the same by a valid will, then said property is to be held by said trustee for the use and benefit of Samuel McClure for and during his life, in the event he survives his wife, and after the death of said Samuel McClure and of said Frances McClure, his wife, without a valid will, then said land is to be held by said trustee, and is to be sold by him or his successors in office, to be appointed by the judge of the Harrison county court, and the proceeds divided as follows, to wit: Ann Kearns, a child adopted by Frances McClure, shall have one-half of said fund, and if she dies before said sale is made, without a child or children, then said one-half shall go to Anna, Kate, and Fannie Anderson, children of the said Frances McClure's sister, Lucinda Anderson, to whom the other half will be paid in any event." At the same time the trustee reconveyed the land to Mrs. McClure; the deed made by him reciting that the property was conveyed to her "for her sole and separate use, with power in her by will to dispose of the same as to her may seem best." After this McClure died, and his widow married A. J. Pool, and in 1902 Mrs. Pool, formerly McClure, and her husband, A. J. Pool, conveyed the land to James D. Anderson, in consideration of \$1,000 and the further consideration that the grantors were to occupy the property and have the proceeds thereof during their life. Some time after this A. J. Pool and Mrs. Pool died. This controversy as to ownership of the land is between Willie Kearns, a daughter of Ann Kearns, and Anna, Kate, and Fannie Anderson, mentioned in the deed from McClure and wife to Allen, trustee, on the one side, and the heirs of James D. Anderson, deceased, to whom Mrs. Pool, formerly McClure, and her husband, conveyed the land, on the other, and originated in a suit brought by Willie Kearns and the Andersons to have the land adjudged to belong to them. The lower court held that Mrs. McClure took under the deed of the trustee to her a fee-simple title in the land, and therefore she had the right to dispose of it, and divest the Kearns and Andersons of any interest they might have if she had died intestate the owner of the land, and sustained a demurrer to the petition. The contention made for the Kearns and Anderson people is that Mrs. McClure had only a life estate in the land, with power to dispose of it by will, and, having failed to dispose of it in this way

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
† Rehearing denied March 4, 1910.

upon her death, it passed under the trust deed to them.

Under the statute in force when the trust deed was made, a married woman did not have the power to dispose of her estate by will, unless the estate was secured to her separate use by deed or devise, or in the exercise of a written power to make a will. Ky. St. § 4827. And it seems that the chief purpose the parties had in view in conveying the land to a trustee, so that it might be reconveyed to Mrs. McClure, was to invest her with the right to dispose of it by will. In the conveyance to the trustee it is provided that in the event the trustee fails to reconvey to her, or she fails to dispose of the same by a valid will, the property is to be held by the trustee for the persons mentioned in the deed. But, when the trustee reconveyed the property to her, the provision for these persons was nullified by the conveyance, as one of the contingencies upon which they had an interest was the failure of the trustee to reconvey the property. The estate in remainder for the benefit of Samuel McClure for life, and after his death to the Kearns and Andersons, was dependent solely upon the failure of the trustee to reconvey. His reconveyance immediately divested them of all interest in the land, and invested Mrs. McClure with the title.

We are confirmed in our conclusion that the purpose of this conveyance was simply to invest Mrs. McClure with the power to make a will by the language of the deed made by the trustee to her. In this deed there is no mention made of any life estate or remainder interest. The conveyance has no conditions or limitations attached to it. It gave her the title for her sole and separate use, with power in her by will to dispose of it as she pleased. If it had been intended by the parties to create a life estate in Mrs. McClure, or for the benefit of Samuel McClure, or to provide a remainder for the Kearns and Andersons, it is manifest that some language indicating this purpose would have been used in the deed made by the trustee. The deed made by the trustee, when read in connection with the deed to him, as it should be, expresses in simple terms the intention of the parties, and correctly interprets the meaning of the deed made to him—illustrating that the only purpose of it was to enable Mrs. McClure to dispose of the property by will. The contention that the trustee, after reconveying the property, held any interest in it for the benefit of Samuel McClure, or the Kearns or Andersons, is not sustained by the reading of the deeds. When the trustee reconveyed the property, he divested himself of all interest in it, and thereafter Mrs. McClure held it entirely free from the trust. If the trustee had failed to make a deed, then the property would have been held by him to carry

out the trust mentioned in the deed. According to this construction, the title of Mrs. McClure is to be measured by the provisions of the deed made by the trustee to her, and under this deed the absolute power of disposition by will was given to Mrs. McClure. The absolute right of disposition, although limited in the instrument to the power to dispose of it by will, carried with it the fee, and consequently James D. Anderson became invested with a good title to the land, so far as his grantors were concerned. *Becker v. Roth*, 115 S. W. 763.

This view of the case makes it unnecessary to consider the questions raised as to the competency of Mrs. McClure to make the deed to James Anderson and of the insufficiency of the description in the deed to him. The only question before us on this record is the proper construction of the deeds, and the judgment in this case will not bar any other action that may be brought for the purpose of contesting on the other grounds mentioned the validity of the deed to Anderson.

Wherefore the judgment of the lower court is affirmed.

#### THOMPSON v. McPHERSON et al.

(Court of Appeals of Kentucky. Dec. 17, 1909.)

##### 1. JUDGMENT (§ 732\*)—RES JUDICATA.

Where, in a suit between M. and T., the latter, asserting a right to use water from a well on the ground of an easement by adverse user, and also on the ground of dedication of the well to public use by a former owner, had judgment, which was affirmed on the ground of adverse user, the Court of Appeals expressly stating that it did not decide the question of a dedication, that question is open between such parties, on T. thereafter becoming owner of the land on which was the well, and M. asserting right to use it on the ground of its having been so dedicated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1260; Dec. Dig. § 732.\*]

##### 2. DEDICATION (§ 1\*)—FORM.

No particular words are necessary to dedicate a well or other easement to public uses.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 12; Dec. Dig. § 1.\*]

##### 3. DEDICATION (§ 1\*)—PAROL DEDICATION.

Dedication of a well to public use may be by parol.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 12; Dec. Dig. § 1.\*]

##### 4. DEDICATION (§ 44\*)—EVIDENCE.

Evidence, in a suit involving right to use a well, held to show a dedication of it to public use.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. § 44.\*]

Appeal from Circuit Court, Metcalfe County.

"Not to be officially reported."

Suit by C. W. Thompson against G. W. McPherson and others for injunction. Judgment for defendants, and complainant appeals. Affirmed.

W. L. Porter, Porter & Sandidge, McQuown & Beckham, John W. Compton, and E. B. Beauchamp, for appellant. J. W. Kinnard, Baird & Richardson, and Carroll & Middleton, for appellees.

BARKER, J. This is the second appearance of this case in this court. The opinion on the first appeal will be found in 89 S. W. 195, 28 Ky. Law Rep. 266. The action was originally instituted for the purpose of selling a tract of land in Metcalfe county, Ky., because of its indivisibility and for a division of the proceeds of sale among several joint owners. Incidentally there was a conflict between McPherson and Thompson as to the right of the latter to use the water from a sulphur well which was situated upon the property to be sold for division. Thompson claimed the right to use the water upon two grounds: First, by an easement acquired by adverse user under a claim of right for more than 15 years prior to the institution of the action; and, second, because the well in question had been dedicated to public use by its original discoverer and owner, Ezekiel Neal, and under this dedication the public had used the water from the well for more than 50 years next before the institution of the action. There were other issues in the case as to other parties, which are not necessary to be noticed here. Thompson, who was the defendant in the suit as originally brought, obtained a judgment at the hands of the circuit court establishing his right to the use of the water, and from that judgment McPherson appealed. The judgment was affirmed by this court on the ground that the evidence showed that Thompson had an easement in the use of the water from the sulphur well by more than 15 years' adverse user under a claim of right. But we did not pass upon the question, which was in the record, as to whether or not the well had originally been dedicated to the use of the public by Ezekiel Neal. On that subject we said: "Without determining whether there was a dedication of the well to the public by Ezekiel Neal, \* \* \* we think the judgment giving appellee, Thompson, the easement, can be sustained upon the ground that it had been claimed and enjoyed by him and his vendors as a matter of right and by adverse claim and user for at least 25 years before the appellant's action was instituted." This left the question of dedication to the public undecided. When the case returned to the circuit court, the property was sold as a whole and purchased by C. W. Thompson, who was appellee on the first appeal. His purchase having been approved by the court, a deed was made conveying the property to him, and thereupon he filed this suit in equity against the appellees, setting up his ownership of the en-

tire tract of land upon which the well was situated, and seeking to enjoin the appellees (defendants below) from using the water from the well. The appellee McPherson defended on the ground that the well had been dedicated to the public by its original owner and discoverer, Ezekiel Neal, and that he, as part of the public, had a right to use the water. A trial of the case resulted in the chancellor's ascertaining that the well in question had been dedicated to the public, and that McPherson, as a part of the public, had a right to use it without the permission of the owner of the land.

Appellant, on this appeal, contends, first, that the question of dedication to the public by Ezekiel Neal is *res adjudicata*, and that we must, for the purposes of this case, consider that question as settled adversely to the public. This may be disposed of by saying that this court, on the first appeal, deliberately declined to pass upon that question, and affirmed the judgment in favor of Thompson on the ground that he had shown a right to the easement in himself by adverse user for the statutory period. That question having thus been left open, it was competent for the defendants to show their right to the use of the well under dedication to the public by the original owner.

We do not think there is the slightest doubt that Ezekiel Neal, who owned the land at the time, and who dug the well, dedicated it to public use, and that the public continued using it from the time of the dedication to the present, under a claim of right; indeed, Thompson, himself, who was defendant in the first case, defended his right to the use of the water by alleging in his pleading and testifying in his deposition that the well had been dedicated to the public by Ezekiel Neal. Independently of this, however, the weight of the evidence overwhelmingly establishes the fact of the dedication. Two of the persons who owned the land between the time of the dedication and the institution of this action testified that, while they owned it, they knew of and recognized the right of the public to the free use of the water. These witnesses were Mrs. Wade and a Mr. Gorman. Other witnesses testified to hearing the declarations of Ezekiel Neal that he had dedicated the well to the use of the public; indeed, there are not two sides to this question. The rule is well established that no particular words are necessary to dedicate a well, a highway, or other easement to public use, and that the dedication may be by parol. This being true, the question is one wholly of fact, and we have no hesitancy in saying that we think the chancellor was right in his conclusion that the use of the well is public property.

Judgment affirmed.

**QUISENBERRY v. RUCKER et al.**

(Court of Appeals of Kentucky. Jan. 11, 1910.)

**1. SALES (§ 214\*)—TRANSFER OF TITLE.**

Where defendant agreed to sell his crop of tobacco to plaintiff, to be weighed and delivered to the latter at his warehouse after it had been stripped in winter order by defendant, title did not pass until the tobacco had been stripped and delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 571; Dec. Dig. § 214.\*]

**2. SALES (§ 399\*)—REMEDY OF BUYER—SPECIFIC ATTACHMENT.**

Civ. Code Prac. § 249, authorizes a specific attachment in an action to enforce a mortgage or lien on personal property, or for the recovery of such property, or where plaintiff has a future estate or interest therein for the security of his rights. Plaintiff purchased defendant's crop of tobacco, the same to be weighed and delivered to plaintiff at his warehouse after it had been stripped in winter order by defendant. Defendant failed to prepare or deliver the tobacco, and plaintiff obtained a specific attachment upon the same. *Held*, that he was not entitled to a specific attachment; his remedy being an action for damages, in which action he might have a general attachment and levy it on the tobacco.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1140; Dec. Dig. § 399.\*]

"Not to be officially reported."

Action by J. T. Quisenberry against Thomas Rucker and another, in which plaintiff obtained an attachment, and, a motion to discharge the same having been sustained, plaintiff moves before the Court of Appeals for reinstatement of the attachment. Motion overruled.

J. Smith Hays, for plaintiff. C. F. Spencer, for defendants.

**HOBSON, J.** J. T. Quisenberry brought this suit in the Clarke circuit court. He alleged in his petition that in October, 1909, the defendants entered into a written contract with him by which they sold him for 11¼ cents a pound their crop of tobacco, to be weighed and delivered to the plaintiff at his warehouse in Winchester, Ky., after it had been stripped in winter order by the defendants, the delivery to be made as soon as it could be so stripped, and he agreed to pay them the price of the tobacco on delivery; that the tobacco is now worth 15¼ cents a pound, and there are 6,000 pounds of it; that the defendants are insolvent, and refuse to carry out their contract; that he is ready, willing, and able to receive, weigh, and pay for 6,000 pounds of tobacco at 11¼ cents a pound, but that the defendants, in violation of their contract, refused to prepare or deliver the tobacco to him, and are about to sell it to another; that, when mixed with other tobacco, this tobacco cannot be identified; that it is worth 4 cents a pound more than he agreed to pay for it, and he can realize a clear profit of \$240 on his purchase; that, unless prevented by the court, the tobacco will be sold, concealed, and removed from the state; and that he ought to recover of the

defendants the tobacco, which is of value \$915. On this petition he obtained a specific attachment, under section 249 of the Civil Code of Practice, which was levied upon the tobacco. The defendants appeared in the action, and moved the court to discharge the attachment on the face of the papers. The court sustained the motion, and the plaintiff has entered this motion before me, as judge of the Court of Appeals, to reinstate the attachment.

The plaintiff merely entered into a contract with the defendants to buy their tobacco. They were to put it into winter order, strip it, and deliver it at his warehouse. All this had to be done before the title could pass, and therefore the tobacco remained their property; and his only right of action against them is for the breach of this contract. *Tingle v. Kelly*, 92 S. W. 303, 29 Ky. Law Rep. 24; *Thompson v. Brannin*, 94 Ky. 490, 21 S. W. 1057, 15 Ky. Law Rep. 38. The plaintiff has no property in the tobacco. He has only a contract to purchase it at a certain price upon the defendants doing certain things. His remedy for the breach of the contract is an action for damages. The fact that they are insolvent does not change his right of action. Under the allegations of his petition, he has been damaged \$240 by the breach of the contract, and to secure this demand he can take out a general attachment and levy it on the tobacco. A specific attachment can only be granted in the cases provided by the statute. Section 249 of the Code authorizes a specific attachment in an action to enforce a mortgage or lien upon personal property, or for the recovery, partition, or sale of such property. Manifestly this case does not fall within any of these provisions. The only other provision of the statute is in these words: "Or by the plaintiff having a future estate or interest therein for the security of his rights." The plaintiff here has no future estate or interest in the tobacco within the meaning of this statute. He has simply made a contract for its purchase in the future after certain things have been done by the defendants. The statute was not designed to apply to a case like this, and the circuit court properly discharged the attachment.

The motion to reinstate it is overruled. All the members of the court concur.

**CHESAPEAKE & O. RY. CO. v. LAVIN.**

(Court of Appeals of Kentucky. Jan. 6, 1910.)

**1. CARRIERS (§ 174\*)—DELIVERY OF GOODS TO CONSIGNEE—AUTHORITY TO FORWARD FROM "DESTINATION."**

The "destination" of goods is the place of delivery, and a carrier has no right, without authority from the consignee, to deliver them to another for him; but if it is the custom for the carrier to forward goods by boat from their des-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tionation on its line, and the consignee knew this when he ordered goods shipped, and the owner of a boat has previously received goods for him from the carrier and delivered them, the carrier is authorized to deliver the goods to such owner for transportation by boat to the consignee.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 747, 757; Dec. Dig. § 174.\*

For other definitions, see *Words and Phrases*, vol. 3, p. 2080.]

**2 CARRIERS (§ 135\*)—DAMAGES TO GOODS—CREDITING PROCEEDS OF SALE.**

In allowing damages to a consignee of goods, the carrier should be credited with the amount realized from a sale of the goods for the benefit of the consignee's creditors.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 557, 558; Dec. Dig. § 135.\*]

Appeal from Circuit Court, Floyd County.

"To be officially reported."

Action by J. P. Lavin against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Walter S. Harkins, Worthington, Cochran & Browning, F. T. D. Wallace, and Joseph D. Harkins, for appellant. May & May, for appellee.

**SETTLE, J.** This is an appeal from a judgment for \$643.65, recovered by appellee against appellant in the court below upon a claim for damages of that amount on account of the alleged conversion or destruction, by the appellant or its agents, of a box of merchandise which had been shipped over its railroad to appellee from Knoxville, Tenn. The box of merchandise, consisting of men's and boys' clothing, was purchased by appellee of Claiborne, Tate & Cowan, of Knoxville, and shipped to him from that city over a line of railroad under the control of the Louisville & Nashville Railroad Company, to Winchester, Ky., and from that city over appellant's line of railroad to the village of Whitehouse, the point of destination.

Appellee was a country merchant, his residence and store at that time being at Dwale, a post office situated in Floyd county, upon the Big Sandy river, about 30 miles from Whitehouse. There is no railroad from Whitehouse to Dwale, and, the public roads between those points being mountainous and practically impassable for wagons, the only way of transporting merchandise or other freight from one of these points to the other is by the boats running the Big Sandy river; both small steamboats and "pushboats" being used for that purpose. The pushboat is a flat boat operated by poles in the hands of experienced boatmen. The Big Sandy river is a swift, though rather shallow, mountain stream, subject to sudden rise and fall. Much of the time its depth is not sufficient for the running of steamboats, but is always sufficient for the operation of pushboats. It often happens, however, that a sudden rise in the river will stop the running of push-

boats up stream, as in such case the unusual force of the current resulting from the increase in the volume of water becomes too great for the boats to be propelled against it by pushing. When the pushboats are caught by these rises, they make a landing and tie up until the river runs down to such a stage as will enable them to proceed; but if while one of the pushboats is tied up, a steamboat passes going to the same point of destination, it is the custom for the freight of the pushboat to be transferred to the steamboat for further transportation and delivery to the consignees, by which arrangement, without additional cost, a quicker delivery of such freight would result than would be accomplished by the pushboat.

It appears from the record, and is conceded by the parties, that Whitehouse was the place where appellant, as common carrier, was to deliver, and appellee was to receive, the box of goods in question, and after reaching Whitehouse the goods had to be transported to appellee's store, at Dwale, by boat. It is appellee's contention, and such was his testimony on the trial: That appellant's only duty was to safely carry the goods to Whitehouse and there deliver them to him, or upon his written order to whomsoever he might constitute his agent to receive them; that appellant did not deliver the goods to him or to another upon his order or hold them until he could go or send for them, but, instead, delivered the goods, without his knowledge or consent, to one G. Wells, to be transported by his pushboat to appellee's store at Dwale; and that Wells, or a steamboat to which he transferred the goods, suffered them to fall into the Big Sandy river and remain in the water several hours, thereby so injuring the goods as to render them unsalable and utterly worthless. Appellee also contends, and to this effect he likewise testified on the trial, that he owned a pushboat which he in his own business operated upon the Big Sandy river, and by means of which it was his purpose to transport the goods in question from Whitehouse to his store at Dwale, that Wells had never transported goods for him by boat or otherwise, and had never been authorized by him to do so.

Appellant, by answer, supported by the testimony of its Whitehouse station agent, and Wells, interposed the defense: That Wells, who operates for hire pushboats on Big Sandy river, was engaged as a common carrier in transporting merchandise and other freight from Whitehouse to Dwale and other points up the river; that Wells had on two or three previous occasions carried upon his boats goods from Whitehouse to Dwale for appellee; and that it was the custom of merchants and others residing at Dwale and other places up the Big Sandy river to employ Wells and other boatmen to receive for them

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

at Whitehouse and transport to them upon pushboats to points up the river, merchandise and other freight shipped over appellant's railroad and consigned to them at Whitehouse, which custom had prevailed among merchants and others on Big Sandy river above Whitehouse for 15 or 20 years. Appellant's testimony further tends to prove: That the box of clothing shipped to appellee, after reaching Whitehouse, remained in its freight depot eight days, and, though appellee had due notice of the time of its arrival at Whitehouse, he failed to call for it in person or send his boat for it; that at that time there were as many as 200 merchants and others residing and doing business upon and contiguous to Big Sandy river whose goods and freight were shipped to and received at Whitehouse and from there carried by steam or pushboats to the consignees; that, in order to accommodate these merchants and shippers and prevent a congestion of freight at its Whitehouse station, it was indispensably necessary for appellant to follow the custom of delivering to boatmen goods and freight to be carried up the river by both steam and push boats; that, after holding appellee's box of goods eight days, appellant's agent, in pursuance of the custom referred to, and because of the previous taking by Wells of goods for appellee, turned the box of goods over to Wells at his solicitation and took his receipt therefor, upon his undertaking as a common carrier to transport them by boat to Dwale and there deliver them to appellee; that Wells thereupon placed the box of goods with other freight upon his pushboat and started with it to Dwale; but that while proceeding on the way there came such a freshet or rise in the waters of the Big Sandy river that Wells was forced to land and tie up the boat, and while awaiting the subsidence of the high water a small steamboat, known as the "Sea Gull," with a lighter in tow, came along, and in pursuance of the well-known custom obtaining among the boatmen on the river and their patrons, and in order to insure a safer and quicker delivery to appellee of the box of goods, Wells made an arrangement with the captain of the Sea Gull to take the box of goods and deliver them to appellee at Dwale. The box was then transferred to the lighter attached to the Sea Gull, and soon thereafter, in a collision between the Sea Gull and the Dr. York, another steamboat plying the river, the lighter was capsized, and appellee's box of goods thrown into the river, where it remained about three hours, and was then recovered by the crew of the Sea Gull and soon thereafter delivered at appellee's store at Dwale.

Upon the foregoing facts the jury returned a verdict in favor of appellee for the amount claimed in the petition. Appellant complains that the jury were not properly instructed, and that this error of the court entitled it to a new trial.

As Whitehouse was the destination of the

box of goods shipped appellee, that was the place of delivery, and appellant had no right without authority, express or implied, from appellee, to deliver them to another person for him. If, however, it was the custom for appellant to forward goods consigned to Whitehouse to appellee, by boat passing on the river, and appellee knew this when he ordered the goods shipped, and Wells was one of the persons who had previously received goods for him from appellant at Whitehouse and delivered them to him at his store, appellant was, in that event, authorized to deliver the goods to Wells for transportation by boat to appellee at Dwale.

The instructions given by the trial court do not sufficiently conform to this view of the law, and in the form given they were prejudicial to the substantial rights of appellant. Upon a retrial of the case the jury should be instructed as follows:

No. 1. The court instructs the jury that if they believe from the evidence plaintiff bought from Claiborne, Tate & Cowan the box of clothing mentioned in the petition, and the same was shipped and consigned to plaintiff at Whitehouse, Ky., and that the defendant received same for shipment and delivery to the plaintiff at Whitehouse, Ky., and further believe from the evidence that defendant after receiving said box of clothing failed to deliver it to the plaintiff at Whitehouse, or there delivered it to another person without authority, express or implied, as set out in instruction No. 2, from plaintiff so to do, they should find for plaintiff the value of the box of clothing as set out in the petition, to wit, \$643.65.

No. 2. If, however, the jury should believe from the evidence it was the custom for the defendant to forward goods consigned to Whitehouse to plaintiff by boat passing on the river to Dwale, and plaintiff knew this, when he ordered the goods shipped, or if they believed from the evidence that there had been previous deliveries from the defendant to Green Wells, for transportation by his line of boats to Dwale, goods consigned to Whitehouse to plaintiff, and plaintiff had received the same from Wells without objection to defendant of their being delivered to Wells for him, they should, in either of these events, find for the defendant; provided they further believe from the evidence that the goods were delivered to Wells at Whitehouse by the defendant as previous consignments had been delivered for transportation by boat to plaintiff.

It is insisted in the brief of counsel for appellant that the box of clothing was not rendered wholly unsalable by their falling in the river, and that the clothing was in fact sold for the benefit of appellee's creditors in a proceeding growing out of his insolvency, at which sale they brought nearly \$400. No proof of such sale of the goods is furnished by the record. If, upon another trial of the case, it should be shown by

proof that the goods were thus disposed of, the jury should be instructed that, if they find that appellee is entitled to recover as claimed in the petition, appellant should in that event be allowed by them credit for the amount realized for the goods at such sale.

As no objection was made by appellant in the court below, and none is now urged, as to the right of appellee to proceed against it by cross-petition in an action brought against him by Claiborne, Tate & Cowan, for the value of the goods in controversy, we have deemed it improper to consider or pass upon that matter.

For the reasons given, the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

# CHESAPEAKE & O. RY. CO. et al. v. BRASHEAR'S ADM'X.

(Court of Appeals of Kentucky. Jan. 11, 1910.)

## 1. EVIDENCE (§ 147\*) — MATERIALITY — NEGATIVE EVIDENCE.

Negative evidence is admissible to disprove the sounding of the whistle on a railroad train approaching a crossing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 435-437; Dec. Dig. § 147.\*]

## 2. RAILROADS (§ 350\*) — CROSSING ACCIDENT — SIGNALS — QUESTION FOR JURY.

The weight of testimony of witnesses, who were in a position to have heard the whistle of an approaching train, that it was not sounded, is for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1161; Dec. Dig. § 350.\*]

## 3. APPEAL AND ERROR (§ 1006\*) — REVIEW — QUESTIONS OF FACT — SUCCESSIVE VERDICTS.

Where there is evidence, though unsatisfactory, to sustain the third verdict of a jury, it will not be disturbed as against the weight of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3933; Dec. Dig. § 1006.\*]

## 4. RAILROADS (§ 347\*) — ACCIDENTS AT CROSSING — CONTRIBUTORY NEGLIGENCE — EVIDENCE.

Evidence that the train causing the injury was running at a high rate of speed, or faster than usual, is admissible on the question of whether the person injured was guilty of such contributory negligence as would defeat a recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1134-1137; Dec. Dig. § 347.\*]

Appeal from Circuit Court, Montgomery County.

"Not to be officially reported."

Action by the administratrix of James Brashear against the Chesapeake & Ohio Railway Company and others. Plaintiff had judgment, and defendants appeal. Affirmed.

Shelby & Shelby and Lewis Apperson, for appellants. Charles D. Grubbs and Robt. H. Winn, for appellee.

CARROLL, J. In this action by the administratrix of James Brashear to recover damages for his death, the jury awarded her

\$8,750. This judgment we are asked to reverse on four grounds: First, that it is flagrantly against the evidence; second, for error of the court in giving and refusing instructions; third, for error in the admission of evidence; and, fourth, because the amount assessed as damages is excessive.

There have been three trials in the lower court. On the first trial the jury returned a verdict in favor of appellee for \$9,000, but it was set aside by the lower court upon the motion of appellant. On the second trial a verdict for \$10,000 was returned, and also set aside by the lower court. It seems to be conceded that the testimony on each trial was substantially the same. Briefly, the facts are as follows: Brashear was a veterinary surgeon 37 years of age and had a good practice. In company with a Mr. Hadden, he was returning to Mt. Sterling in a buggy, and received the injuries that resulted in his death at a point where the road upon which he was traveling crosses at grade the tracks of the appellant company. The accident happened at noon in July, and the train that struck deceased was the regular passenger train on its way east, running about 45 miles per hour. The only negligence complained of was the failure of the persons in charge of the engine to give the statutory signals as the train approached the crossing. The public road upon which Brashear and Hadden were driving crosses the railroad at an angle of about 45 degrees, and for a distance of several hundred feet before reaching the crossing a traveler on the highway could see an approaching train after the train had reached a point some 1,600 feet from the crossing, except that near the track the view of a train would be partially at least obstructed by a board fence and tall weeds that were growing on the bank of a cut made by the railroad as it approached this public road crossing. Dr. Brashear was driving in a slow trot, and Hadden testifies that after crossing Hickson bridge, which is about 600 feet from the railroad, the doctor looked up to see if a train was coming, and, not seeing any, they continued to drive on, and when they reached a point about 130 feet from the crossing he also looked and saw no train. Asked what precautions, if any, Dr. Brashear took to discover the presence of a train, he said that they were expecting the train, and that the doctor, as they approached the railroad track, slowed up his horse and looked for a train but did not see any or know of its approach until the horse was in the act of stepping upon the track, when it was then too late to avoid a collision. He explained the failure to see the train by the fact that the fence and high weeds growing on the bank of the cut obstructed the view.

The evidence as to whether or not the statutory signals were given is very conflict-

ing, but the weight of the direct—or, rather, what may be called the affirmative—evidence is to the effect that the signals were given, although several witnesses who were so located that they could have heard the whistle sounded and the bell ringing testify that they did not hear either. We have in more than one case held that evidence of this character is competent, and that the value of it is for the jury. *L. & N. R. Co. v. O'Nan*, 119 S. W. 1192; *C. & O. Ry. Co. v. Nipp*, 123 Ky. 49, 100 S. W. 246, 30 Ky. Law Rep. 1131.

Upon the question of the contributory negligence of Brashear in failing to exercise ordinary care to discover the approach of the train, the evidence is also conflicting, and it may be said that upon this point it strongly supports the theory that, if Brashear had exercised that degree of care that a traveler should exercise to ascertain the approach of a train at a place where the road he is traveling crosses the railroad at grade, he should have seen the train that struck him in time to have avoided the collision.

But we are not prepared to say that the evidence entitled the company to a peremptory instruction, directing the jury to find for it. There is wide difference between a case in which there is no evidence to support the verdict, and a case in which the verdict is against the weight of the evidence. We might with much propriety say that the verdict in this case is against the weight of the evidence, and yet, notwithstanding this fact, that there was sufficient evidence to authorize its submission to the jury. We have not deemed it important to recite the evidence, as to do so would serve no useful purpose. There was some evidence that Brashear was exercising ordinary care for his safety, and some evidence that the signals were not given. Upon this evidence, slight and unsatisfactory as it may be, the jury had a right to find a verdict for the plaintiff; and, under the rule laid down in *L. & N. R. Co. v. Daniels*, 115 S. W. 804, 1198, we do not feel at liberty to disturb it upon the ground that it is against the weight of the evidence.

The instructions are also complained of, but the criticism is more technical than substantial. They submitted the law in language that has been approved in many cases. It is true that instructions given in similar cases are often worded somewhat differently, as it is seldom that trial judges use exactly the same language. But the mere fact that an instruction may be verbally different from one we have approved will not be sufficient to condemn it, if upon the whole it expresses the law.

The evidence objected to as incompetent consisted in the statement of two or three witnesses that the train was running at a high rate of speed and faster than usual. The speed of the train was not submitted for the consideration of the jury as an item of negligence; but in cases like this we think it

permissible for the plaintiff to introduce evidence as to the speed of the train, as this may throw some light upon the question of whether or not the person injured was guilty of such contributory negligence as would defeat a recovery upon his part. As said in *Hummer v. L. & N. R. Co.*, reported in 128 Ky. 486, but cited by counsel as being in 108 S. W. 885, 32 Ky. Law Rep. 1315: "The proper speed of the train may be taken into consideration by the jury with the other facts shown by the evidence in determining whether the traveler used ordinary care in going upon the track as he did."

In *L. & N. R. Co. v. O'Nan*, 110 S. W. 380, 33 Ky. Law Rep. 462, it was said that evidence of the speed of the train should have been excluded; but this was not one of the grounds upon which that case was reversed. It was only in reference to the rather peculiar facts of that case that the court was led to comment upon this character of evidence as incompetent.

Generally speaking, and in the case before us, we can see no objection to evidence in this class of cases as to the speed of the train; but when evidence as to the speed of the train is admitted, not in support of a ground of negligence complained of, but as a fact that may throw some light upon the question whether or not the injured party was guilty of contributory negligence, it would be better practice to admonish the jury that they must not consider the evidence as tending to establish that the company was guilty of neglect. The failure, however, to so admonish the jury in this case, is not of sufficient importance to authorize a reversal. The speed of the train was entirely eliminated from the consideration of the jury by the instructions which confined the issue to the single inquiry whether or not the statutory signals were given. In view of these instructions, the jury could not, in making up their verdict, have given any weight to the speed of the train, or have considered the speed of the train in arriving at the conclusion that the company was negligent in failing to give the statutory signals. It is manifest that the jury found that the statutory signals were not given, or else they could not have returned a verdict against the company.

Upon the point that the verdict is excessive, we do not deem it necessary to comment. Clearly it was not. The truth is that the only substantial ground relied upon for reversal is that the verdict is flagrantly against the evidence. And, if we were considering the first verdict returned in the case, we might be disposed to agree with counsel upon this point.

A careful consideration of the record satisfies us that there is no error that would warrant us in reversing the case.

Wherefore the judgment is affirmed.

## UNITED STATES FIDELITY &amp; GUARANTY CO. v. HERZIG.

(Court of Appeals of Kentucky. Jan. 7, 1910.)

## 1. EXCEPTIONS, BILL OF (§ 43\*)—FILING—TIME.

Where a bill of exceptions was not filed within the time allowed, and the time was not extended, it cannot be considered.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 72½; Dec. Dig. § 43.\*]

## 2. APPEAL AND ERROR (§ 490\*)—SUPERSEDEAS.

Where a judgment holding an injunction improperly granted was superseded, the supersedeas suspends the judgment, and no action can be brought on the injunction bond while the judgment is so superseded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2264–2274; Dec. Dig. § 490.\*]

Appeal from Circuit Court, Laurel County.  
“Not to be officially reported.”

Action by A. Herzig against the United States Fidelity & Guaranty Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. L. Brown, Eli H. Brown, Jr., and Brown & Nuckols, for appellant. Sam C. Harding and Greene, Van Winkle & Schoolfield, for appellee.

HOBSON, J. M. A. Miller brought a suit in the Laurel circuit court to enjoin A. Herzig, Cy Jones, and Green Jones from cutting the timber on a certain tract of land which she claimed that she owned. An injunction was obtained, and she executed bond with the United States Fidelity & Guaranty Company as provided by law. On the trial of the action in the circuit court her petition was dismissed and the injunction was dissolved. She prosecuted an appeal to this court without supersedeas. Thereupon Cy Jones and Green Jones, who claimed the timber on a certain part of the tract, brought an action on the injunction bond to recover the damages which they had sustained by reason of the injunction; and A. Herzig, who claimed the timber on another part of the tract, brought a similar action on the injunction bond to recover the damages which he had sustained by reason of the injunction. When these suits were brought, M. A. Miller executed a supersedeas bond and took out a supersedeas from the clerk of this court. The defendant then amended its answer in the suits on the injunction bond pleading the supersedeas in bar of the further prosecution of those actions until the termination of the appeal. The court sustained a demurrer to this pleading in both cases. The suit brought by Cy and Green Jones came on for trial, resulting in a judgment in favor of Jones in the sum of \$425. The defendant prosecuted an appeal from that judgment to this court. Reversing the judgment, and holding that the amended answer setting up the supersedeas was good, this court said: “In *Gardner v. Continental*

Insurance Co. [101 S. W. 911], 31 Ky. Law Rep. 69, it was held by this court that a supersedeas suspends the judgment, but does not annul it or undo what is already done. It has no retroactive effect; whatever is done under the judgment while it is superseded is done without authority from the judgment, as it is then powerless. Other authorities are collected in that opinion. See, also: *Durham v. Strait*, 119 Ky. 222 [83 S. W. 581, 26 Ky. Law Rep. 1147]; 2 Cyc. 910. In *Johnson v. Williams*, 82 Ky. 45, it was held that, after the judgment was superseded, the plaintiff could not bring an action upon the judgment and take out an attachment against the defendant's property. As the judgment had not been superseded at the time this action was brought, it was properly instituted; but the subsequent supersedeas took away from the judgment all efficacy while the supersedeas remained in force, and the action should have been continued until the appeal was determined in this court, or the supersedeas was discharged. As the supersedeas does not undo what has been done, where it is given pending an action, it does not operate to abate the action, for this might seriously prejudice the plaintiff where he had obtained a lien by his action, or where he had the parties before the court and might be unable, in a second action, to get his process served. But the condition of the bond is that the surety will pay the defendant such damages as he may sustain by reason of the injunction, if it is finally decided that the injunction ought not to have been granted. When the judgment dissolving the injunction is superseded, it has not been finally determined that the injunction ought not to have been granted, for that is the question to be determined on the appeal.” *United States Fidelity & Guaranty Co. v. Jones*, 111 S. W. 298, 33 Ky. Law Rep. 737.

While that case was pending in this court, the suit of A. Herzig on the injunction bond came on for trial, and a recovery was had in favor of the plaintiff in the sum of \$540. An appeal was prayed, and time was given until the second day of the next term to file a bill of exceptions. The bill of exceptions, however, was not filed until the seventh day of the term, and as it was not filed within the time allowed, and the time had not been extended, it cannot be considered on the appeal. But although the evidence heard on the trial is not before us, the judgment must be reversed because the pleadings do not warrant it. As was held in the *Jones Case*, the defendant in the injunction suit has no cause of action upon the injunction bond until it is finally decided that the injunction was improperly granted. At the time this case was tried it had not been finally decided that the injunction was improperly granted. It is true a judgment to that effect had been rendered in the circuit court; but that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment had been superseded. A supersedeas suspends the judgment, and it cannot be relied on as authority for any action so long as it is superseded. There being no judgment in force determining that the injunction was improperly granted, the plaintiff in this case at the time of the trial had no cause of action on the injunction bond. After the trial of this case, this court decided the original action brought by M. A. Miller to enjoin the cutting of the timber, and held that she owned the land, reversing the judgment of the circuit court, and directing that the injunction should be perpetuated.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

### CARLEY v. OFFUTT & BLACKBURN.

(Court of Appeals of Kentucky. Jan. 6, 1910.)

#### 1. WAREHOUSEMEN (§ 24\*)—DUTY TO PROTECT STORED PROPERTY.

Warehousemen are not insurers, and are only bound to use ordinary care to protect property committed to them.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 48; Dec. Dig. § 24.\*]

#### 2. WAREHOUSEMEN (§ 8\*)—DUTY TO RECEIVE INFECTED GRAIN.

Warehousemen cannot be compelled to receive into their elevator wheat infected with weevil, and when their elevator becomes so infected they may close it for disinfection, whether they are public or private warehousemen, and to such end may require all wheat to be removed by the owners after reasonable notice to do so; and, an owner of wheat having failed to remove it after such notice, the warehousemen may remove it, and add the reasonable cost of doing so to their storage charges, and are not required to keep the elevator open indefinitely for such person after all grain except his has been removed.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 8.\*]

#### 3. WAREHOUSEMEN (§ 24\*)—NEGLECT OF STORED PROPERTY—LIABILITY.

Ky. St. § 4794 (Russell's St. § 2563), providing that any warehouseman guilty of neglect, the effect of which is to depreciate property stored in a warehouse under his control, shall be held responsible as at common law, only contemplates a liability for neglect in dealing with grain deposited.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 24.\*]

#### 4. WAREHOUSEMEN (§ 8\*)—CONSTRUCTION OF STATUTE.

The provision of Ky. St. § 4794 (Russell's St. § 2563), requiring notice in a daily newspaper upon a warehouseman's discovery that grain in his elevator is becoming out of condition, only applies to grain that is not stored in a separate bin; the purpose of the advertisement being to reach the owners of the grain, and the owner of grain stored in a separate bin being known to the warehouseman.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 8.\*]

Appeal from Circuit Court, Scott County.

"To be officially reported."

Action by Offutt & Blackburn against William J. Carley. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. S. Kelley and Samuel M. Wilson, for appellant. B. M. Lee, for appellees.

HOBSON, J. Offutt & Blackburn own and operate a wheat elevator at Georgetown. William J. Carley owns and operates a flour mill there. On July 20, 1906, he stored with them 5,400 bushels of wheat in a special bin, by which it was kept separate from other wheat, and then executed to him the following writing:

"Georgetown, Ky., July 20, 1906.

"Received in store from William Carley fifty-four hundred bushels wheat, in special bin, which we will deliver to said William Carley, or order, upon presentation of this receipt properly indorsed, on payment of charges. This property is held for the owner in store at his risk as to fire or depreciation from that cause.

"5,400 bushels. Offutt & Blackburn.

"Agreed rate of charges: One month or fraction thereof, 1 ¢; 3 months, per month per bushel, 1 ¢; after 3 months or fraction thereof, per mo., ½ ¢."

They had in the elevator a large quantity of wheat of their own. In the early spring of 1907 they discovered weevil in some of their wheat. The usual way of getting weevil out of wheat is to run it through a fan and blow them out; but when this is done they get into the building and are liable to get into other wheat in it. So Offutt & Blackburn at once notified Carley that they had discovered weevil in their wheat, and requested him to take his wheat out of the elevator before it became infected. It was customary to move all the wheat in the elevator at stated times, and they desired to give him the opportunity to take his wheat out before it was moved again, so that there would be less danger of loss. He had the same trouble at his mill. It was a bad year for weevil, and he declined to take the wheat out, insisting that they should keep it, as wheat was then down and he could not sell it for the price he asked. A month or so after this they found that the weevil had gotten into his wheat and so notified him. He then requested them to bring him a sample of his wheat, which was done, and after he looked at the sample he still refused to take his wheat out, saying it was not hurt much. They did the best they could with the wheat, and, he still refusing to move it, they finally ran it out into a warehouse, and brought this suit against him, asking the court to make the proper orders for their protection. An agreement was then made by which the wheat was sold, and the rights of the parties were to be litigated in the action. There was a loss of something over \$2,000 on the wheat; and by his answer, which he made a counterclaim, Carley sought to hold Offutt & Blackburn liable for the injury done to the wheat by the weevil.

There was some conflict in the testimony on the final trial. The evidence for Carley tended to show that Offutt & Blackburn did not give him notice of the condition of the wheat, and that they did not exercise ordinary care in taking care of it; but the weight of the evidence shows the facts as above stated. The court instructed the jury in substance: (1) That they should find for the plaintiffs the amount of storage due them under the contract, and if it was necessary to remove the wheat from the elevator, and they gave Carley notice to remove his wheat, and he refused to remove it in a reasonable time, the jury should also allow Offutt & Blackburn the reasonable expenses they incurred in removing the wheat; (2) that if Offutt & Blackburn negligently stored or handled the wheat, so that it became infected with weevil, they should find for Carley on his counterclaim the difference between the market value of the wheat as delivered to them and as injured by the weevil; (3) that they should offset their findings under 1 and 2, and find a verdict for the party who was entitled to the difference; (4) that the plaintiffs were bound to use such care as an ordinarily careful and prudent person engaged in the business of warehouseman would use under the circumstances, and that the failure to use such care was negligence. Under these instructions the jury found for Offutt & Blackburn, and Carley appeals.

It is insisted for appellant that Offutt & Blackburn were public warehousemen; that as such they were bound to receive all grain that was tendered them, and that, if Carley had taken his wheat out of the elevator, he could have required them immediately to receive it back; and that therefore he was under no obligation to take the wheat out of the elevator when notified to do so. It is insisted for Offutt & Blackburn that they were private warehousemen; that by the written contract they agreed to put Carley's wheat in a special bin and keep it at so much a month, and that therefore they could terminate the arrangement at any time on a month's notice. We do not find it necessary to determine whether Offutt & Blackburn were public or private warehousemen. In either event they were not insurers. They were only bound to use ordinary care to protect the property committed to them. They were not responsible for an injury to the property which could not be guarded against by ordinary care. *Macklin v. Frazier*, 9 Bush, 3; 30 Am. & Eng. Encyc. 46, and cases cited; *American Brewing Ass'n v. Talbot*, 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538. Thus it has been held that, if the contents of barrels stored in a warehouse has been diminished by leakage, the warehouseman is not liable, unless it is shown that the loss was due to his negligence (*Tanassig v. Bode*, 134 Cal. 260, 66 Pac. 259, 54 L. R. A. 774, 86 Am. St. Rep. 250), and that he is not liable for injury from rats, when he has taken the

proper precautions to prevent it (*Taylor v. Secrist*, 2 Disney, 299).

Carley's wheat was not mixed with other wheat in the elevator. It was kept separate. When it was discovered that weevil had made its appearance in the elevator, it was incumbent on the owners to use ordinary care to eradicate the trouble and to prevent its being communicated to Carley's wheat; but when he allowed his wheat to remain in the elevator after they had used all the precautions they could and had notified him of the trouble, thus giving him an opportunity to remove his wheat from the danger, he cannot complain unless they after this failed to use such care for its protection as may be expected of a person of ordinary prudence under the circumstances. If he had then withdrawn his wheat from the elevator, the proof is clear that he would have sustained no substantial loss. The loss which followed was due to his refusal to remove his wheat, insisting that he had the right to allow it to remain and require Offutt & Blackburn to furnish him as good wheat when demanded as he had put in the elevator. The written contract which they made with him simply bound them to keep the wheat in store in a special bin and deliver it to him on demand. The law added to the written contract the implied undertaking that they would use ordinary care in keeping it, and deliver it to him in such a condition as it would be if kept with ordinary care. The law did not make them insurers that the wheat would remain in the condition in which it was delivered to them, or that no weevil or other vermin would get into it. There is no question in this case about a limitation of their common-law liability. Their common-law liability was simply to use ordinary care in keeping the wheat. If Carley had withdrawn his wheat from the elevator after it became infected with weevil and before it was injured, he could not have required them to receive it back from him, for he could not have required them to receive into the elevator infected wheat; and when their elevator became infected with weevil, they had the right to close it, whether they were public or private warehousemen, so as to disinfect it, for in its infected condition it was not fit to be used for the purpose for which it was intended. To this end they had the right to require all wheat in it to be removed by the owners after reasonable notice to do so, and when Carley failed to remove his wheat they had the right to remove it and add the reasonable cost of doing so to their storage charges. They could not properly put other wheat into it when thus infected; and when all the wheat except his was removed, Carley could not require them to keep the elevator open for him indefinitely. The common law attaches no such liability to a warehouseman's contract. Like other contracts for an indefinite time, the contract of a ware-

houseman may be terminated by him on reasonable notice, and a public warehouseman, no less than a private one, may close his warehouse to all.

Section 4794, Ky. St. (Russell's St. § 2563), only contemplates a liability for neglect on the part of the warehousemen in cases like this. Among other things that section provides: "Any warehouseman, guilty of any act of neglect the effect of which is to depreciate property stored in a warehouse under his control, shall be held responsible as at common law." The previous part of the section, as to notice in a daily paper if the grain becomes out of condition, only applies to grain that is not stored in a separate bin. The purpose of the advertisement is to reach the owners of the grain; but when the grain is stored in a separate bin, and the owner is known, as in this case, this part of the section has no application.

There was no substantial error in the admission of evidence, the case was fairly submitted to the jury by the instructions, and the great weight of the testimony sustains their verdict. On the whole case, we see no reason for disturbing the judgment.

Judgment affirmed.

#### MONEY, Superintendent of Schools, v. BEARD & MARSHALL.

(Court of Appeals of Kentucky. Dec. 17, 1909.)

##### 1. DISTRICT AND PROSECUTING ATTORNEYS (§ 5\*)—COMPENSATION—ADDITIONAL COMPENSATION—RIGHT—PROSECUTING ACTIONS FOR COUNTY.

Ky. St. § 127 (Russell's St. § 4750), requires a county attorney to attend to the prosecution of all cases in his county in which the commonwealth or county is interested, and, when required, to institute and conduct all actions in which the county is interested, and requires him to attend the circuit courts, and aid the commonwealth's attorney in all prosecutions therein, and in the absence of a commonwealth's attorney to attend to all commonwealth business. Const. § 161, provides that the compensation of county officers shall not be changed during their term of office. A county school superintendent contracted with the county attorney and another attorney to sue a publishing company for breach of a bond, given under sections 4424, 4423, Ky. St. 1903, as a condition precedent to the adoption of its publications in the county schools; the contract providing that the attorneys should receive one-half of the recovery as compensation for their services. A recovery was had, but the county attorney's term of office had expired when the suit was prosecuted on appeal. *Held*, that the county attorney was bound to prosecute civil actions in which the county was interested, as well as criminal actions on behalf of the commonwealth, without additional compensation, and the contract for compensation was unenforceable so far as his services were performed while he was county attorney, but that he was entitled to reasonable remuneration for services after his term expired.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.\*]

##### 2. SCHOOLS AND SCHOOL DISTRICTS (§ 48\*)—OFFICERS—AUTHORITY OF COUNTY SUPERINTENDENT—EMPLOYMENT OF COUNSEL.

The county superintendent could, in the exercise of reasonable discretion, employ additional counsel to assist the county attorney in prosecuting the action, if their services were reasonably necessary, and pay them a reasonable fee therefor.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 107; Dec. Dig. § 48.\*]

Appeal from Circuit Court, Shelby County.

"To be officially reported."

Action by G. M. Money, Superintendent of Schools, against Beard & Marshall. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

Chas. H. Morris and Pickett & Barrickman, for appellant. Gilbert & Gilbert, J. C. Beckham & Son, P. J. Beard, and Beard & Marshall, for appellees.

BARKER, J. R. A. Burton, a former superintendent of the common schools of Shelby county, entered into a written contract with Beard & Marshall, a firm of lawyers, by which he agreed to pay them as a fee a sum equal to 50 per cent. of whatever sums might be collected by two contemplated lawsuits on the two separate bonds that had been executed by certain book publishers as required by section 4424, Ky. St. 1903. This section provides, among other things, as follows: "Whenever any publisher or person selling text-books, who desires to have his text-books adopted in the common schools in any county in this state, shall file in the office of the Superintendent of Public Instruction a sample of each of the text-books intended for adoption, together with the lowest retail list price at which the same shall be sold to the patrons and pupils of any county in which the same may be adopted, and shall execute bond before the ex officio members of the State Board of Education in the sum of ten thousand dollars, with good security resident in this state, it shall be the duty of the said Board of Education to accept and file said bond in the office of the Superintendent of Public Instruction," etc. By section 4423, it is provided, among other things: "It shall be the duty of the county superintendent to make and keep a record of the adoption of text-books, and to see that the adopted list of text-books is established and maintained in all the public schools in the county; and it shall be the further duty of the county superintendent to file and keep in his office the copy of the bond of any publisher or person selling text-books before the ex officio members of the State Board of Education, and forwarded to him by the Superintendent of Public Instruction; and when any of the books named in said bond shall be adopted for use in his county, and there

is a breach of, or a failure to comply with, any of the provisions of the bond in his county by the parties executing the same, he shall bring suit in the circuit court of his county for a forfeiture of said bond, and any money recovered thereon, after paying the cost of proceedings, shall be covered into the school fund of the county."

The agreement between the superintendent and the attorneys is as follows: "This agreement, made this January 10, 1904, by and between R. A. Burton, superintendent of common schools of Shelby county, Kentucky, of the first part, and Beard & Marshall, attorneys at law, of Shelby county, of the second part, witnesseth: That said first party has this day employed second party to prosecute a suit in the Shelby circuit court and Court of Appeals against Maynard-Merrill Company and Ginn & Company on their respective bonds executed by them to the commonwealth of Kentucky to recover damages for the violation of the terms of their bond; and said second parties are to perform all of said services as attorneys in bringing and prosecuting said suit, or have same done, and are to receive as attorneys aforesaid a sum equal to 50% of whatever sum may be finally recovered in each case, and this sum shall be in full for all their services. They are to charge nothing if nothing is recovered. [Signed] R. A. Burton, Supt. Common Schools, Shelby County. Beard & Marshall."

Under this contract the attorneys named therein brought two suits in the name of the commonwealth, one against Ginn & Co. and the other against the Maynard-Merrill Company, to recover the penalty of \$10,000 for alleged breaches of the bonds entered into by them with the commonwealth. The suit against the Maynard-Merrill Company was unsuccessful, but in the case of *Commonwealth v. Ginn & Co.*, a judgment was recovered for the sum of \$10,000, with interest and costs added, and this sum the attorneys collected. They paid over to the commonwealth one-half of the amount collected and retained 50 per cent. as their fee under the contract. In the meantime R. A. Burton's term of office as superintendent expired, and he was succeeded by the appellant, G. M. Money, who refused to recognize the validity of the contract made by his predecessor, and instituted this action to recover from the attorneys the money retained by them as a fee for their services. At the time the contract was entered into it is admitted that C. C. Marshall was holding the office of county attorney of Shelby county; that pending the litigation his term of office expired, and he was succeeded by George Pickett, who in part represents the appellant in this action. During the time the case was being prosecuted through the Court of Appeals, it is conceded that Marshall was not county attorney. The ques-

tion arising upon the record under these circumstances is whether the written contract under which the appellees hold one-half the sum collected on the judgment from Ginn & Co. is or is not void.

We are of opinion that it was the duty of C. C. Marshall as county attorney to prosecute the action against Ginn & Co. without any additional remuneration to his regular salary as county attorney; and, this being true, it was not competent for the superintendent of county schools to make the contract with him which is involved herein. Section 127, Ky. St. (Russell's St. § 4750), defines the duties of county attorneys in this commonwealth as follows: "He shall attend to the prosecution of all cases in his county in which the commonwealth or the county is interested; and, when so directed by the county or fiscal court, institute or defend, and conduct actions, motions and proceedings of every description, before any of the courts of this commonwealth in which the county is interested, and shall in no instance take a fee or act as counsel in any case in opposition to the interests of the county. He shall also attend the circuit courts held in his county, and aid the commonwealth's attorney in all prosecutions therein, and in the absence of an acting commonwealth's attorney, he shall attend to all commonwealth's business in said courts."

It is said in the briefs for appellees that the above section of the statutes relates alone to criminal cases in which the commonwealth is interested; but this is not correct. It will be observed that the first part of the section provides that he (county attorney) shall attend to the prosecution of all cases in his county in which the commonwealth or the county is interested; and by the latter part, it is provided that he shall also attend the circuit courts held in his county and aid the commonwealth's attorney in all prosecutions therein, etc. Clearly the first part of the section applies to civil as well as criminal matters; and the fact that the language is that "he shall attend to the prosecution of all cases in his county in which the commonwealth or the county is interested" of itself shows that civil matters are intended, as the county as such is not interested in criminal matters. The question we have here arose in the case of *Coulter, Auditor, v. Denny*, 67 S. W. 65, 23 Ky. Law Rep. 1619. In that case a county attorney had been employed by the Attorney General to assist an Auditor's agent in a fiscal matter, and afterwards sought by mandamus to require the Auditor to issue a warrant for his pay for this service. Upon appeal we held that, under section 127, Ky. St., it was the duty of the county attorney to attend to this matter because the state was interested in it. In the opinion it is said: "As it was the duty of the Auditor's agent to institute the proceeding against Cecil, and the duty of the county attorney of that county

to have prosecuted it, it follows that it was not the duty of the Attorney General under section 118 to represent the commonwealth in the Boyle county court, nor was it one of the actions which he was authorized to institute and employ an attorney to assist in its prosecution under section 114."

In the case of *D. C. Heath & Co. v. Commonwealth*, 129 Ky. 835, 113 S. W. 69, a county superintendent of schools instituted an action similar to the one involved here, and obtained a judgment for the sum of \$10,000. Afterwards he compromised the judgment for \$2,200, and took the note of the publishers in payment of the compromise. A subsequent superintendent filed suit to collect the whole judgment, and among other defenses the defendants pleaded the compromise and also the pendency of a suit on the note for \$2,200. After the action to enforce the full amount of the judgment had progressed to some extent, the superintendent undertook to dismiss it over the objection of the county attorney, and the circuit judge sustained the county attorney against the superintendent, with the result that the state recovered the full judgment of \$10,000. In the opinion delivered in that case we held that the commonwealth was the real party in interest, and that the superintendent was only a nominal party, and that the county attorney had a right to enforce the judgment and to resist the attempts of the superintendent to dismiss the case. The opinion, therefore, settles conclusively that in an action such as the one we are discussing the commonwealth is the real party in interest, and it is the duty of the county attorney to prosecute such actions; and, this being true, he cannot, under section 161 of the Constitution, receive additional salary for discharging the duties imposed upon him by the statute.

It results, therefore, that the written contract by which the county attorney was employed in the action against Ginn & Co. was void. But it does not follow that the other attorneys employed were not entitled to pay for their services, although the county attorney could not be paid for his. We think the superintendent, in the exercise of a reasonable judgment, had the right to employ additional counsel, if their services were necessary under the exigencies of the case, and to pay them a reasonable fee for their services. Undoubtedly the record shows that the counsel other than the county attorney rendered able and valuable assistance in the prosecution of the case, and the state received the benefit of their labor. They should, therefore, be paid whatever is reasonable for these services. We are also of opinion that C. C. Marshall is entitled to remuneration for his services rendered after his term of office as county attorney expired.

For these reasons, the judgment of the

lower court, upholding the validity of the contract between the superintendent and the attorneys, is reversed, with directions that, when the case returns to the circuit court, the pleadings be amended so as to properly present the issues indicated in this opinion.

**COMMONWEALTH, for Use of WADE'S ADM'R, v. BEAUCHAMP et al.**

(Court of Appeals of Kentucky. Jan. 20, 1910.)

**COUNTIES (§ 192\*)—FISCAL COURT—ORDERING LEVY OF TAX—REPEALING ORDER.**

The fiscal court of a county in ordering the levy of a tax to pay a judgment of a bank against the county acts in a legislative capacity, rather than a judicial capacity, and so may, at a subsequent term, repeal such order, where no rights have become vested by virtue of such order; as is the case where the bank having also recovered judgment for the amount of the debt of the county to it, against a tax collector for his failure to collect a tax previously levied to pay the bank, such collector paid the judgment but not till after such repeal of such order, and therefore not in reliance on its validity.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 305; Dec. Dig. § 192.\*]

Appeal from Circuit Court, Taylor County.  
"To be officially reported."

Action by the Commonwealth, for the use of D. S. Wade's administrator, against H. N. Beauchamp and others. Judgment for defendants. Plaintiff appeals. Affirmed.

W. M. Jackson, James Garnett, and W. W. Jones, for appellant. B. A. Rice, for appellees.

CLAY, C. The Bank of Columbia obtained a judgment in the Taylor circuit court against the county of Taylor for the sum of \$4,000, and interest at the rate of 6 per cent. per annum from the 29th day of March, 1894, until paid. Afterwards it moved the fiscal court to make a levy to pay the judgment. This the fiscal court declined to do. Thereupon the bank instituted an action against the members of that court to compel them to make the levy. The court below refused to require the fiscal court to make the levy prayed for. From that judgment the bank prosecuted an appeal to this court. The judgment was reversed, with directions to the lower court to require the members of the fiscal court to make the levy. *Bank of Columbia v. Taylor County*, 112 Ky. 243, 65 S. W. 451, 23 Ky. Law Rep. 1483. Upon the return of the case judgment was entered in pursuance to the mandate.

On April 3, 1903, the fiscal court made a levy of 60 cents on each \$100 in value of all property subject to taxation in the county, and appointed W. B. Trotter to collect the same. Trotter failed to qualify and assume the duties of the office. At that time, and for several years prior thereto, there was no sheriff in Taylor county. The office being vacant, the duties were performed from time to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

time by collectors appointed for that purpose. On January 13, 1902, D. S. Wade was appointed collector of both state and county taxes. He accepted the appointment and qualified by taking the oath of office and executing the bonds required by law, with J. N. Turner and Henry R. Turner as his sureties on both bonds. After the levy of the tax by the fiscal court, the bank notified the collector, D. S. Wade, thereof, and demanded that he proceed at once to collect the tax and pay it over in satisfaction of the judgment. This he failed and refused to do, and no part of the levy was ever collected, or paid to the bank. The bank then instituted an action against the collector on his bond, for the purpose of recovering judgment against him and his sureties for the payment of its debt, interest, and costs. The court below decided in favor of Wade and his sureties. On appeal to this court the action was revived in the name of Wade's administrator, Wade being then dead, and the judgment was reversed and cause remanded with directions to enter judgment against Wade's administrator and his sureties in favor of the bank. *Commonwealth, for Use, etc., v. Wade's Adm'r*, 128 Ky. 791, 104 S. W. 965, 31 Ky. Law Rep. 1185.

On April 11, 1908, the fiscal court of Taylor county levied a tax of 20 cents on each \$100 of taxable property in the county for the purpose of paying a portion of the judgment in favor of the bank. H. N. Beauchamp was appointed tax collector for the county on August 28, 1908. He accepted the appointment and qualified by executing bond on September 10, 1908. He proceeded immediately to collect the tax, and succeeded in collecting about \$500. On October 8, 1908, the fiscal court entered an order setting aside the order of April 11, 1908, levying the 20 cents' tax. In this order H. N. Beauchamp was directed to take no further steps towards the collection of the tax and to pay back to those from whom he had made collections the amounts received from them. On October 19, 1908, Wade's administrator paid to the bank a portion of its judgment. On November 28, 1908, he paid the balance of the judgment. On March 12, 1909, he obtained an assignment of the judgment from the bank. After payment of the judgment, Wade's administrator demanded of Beauchamp that he proceed to collect the tax levied by the order of April 11, 1908. This he refused to do. Thereupon the commonwealth, for the use of Wade's administrator, instituted this action against Beauchamp and his sureties for the purpose of recovering judgment against them on the ground of Beauchamp's failure to perform his duties. Among other defenses which it will be unnecessary to set up, Beauchamp pleaded that the order of April 11, 1908, was set aside and rescinded by the order of October 8, 1908, and that he was thereby absolved from any

further duty in the matter. At the same time he made Taylor county a party defendant and by proper pleading asked judgment over against it in case he was required to pay Wade's administrator. The judgment below was in favor of Beauchamp and his sureties. From that judgment this appeal is prosecuted.

The only question which we deem it necessary to consider is the power of the fiscal court, at a subsequent term, to set aside and rescind the order of April 11, 1908, levying the 20 cents' tax. It is true that this court has decided that, where the county or fiscal court passes upon the merits of a claim and adjudge it to be valid, it has no power at a subsequent term to reverse its action. *Prebels v. Chism*, 5 T. B. Mon. 158; *Lexington & Harrodsburg Turnpike Road Co. v. McMurry*, 6 B. Mon. 214. The reason for this rule is that, in passing upon the validity of a claim, such court acts in a judicial capacity. But where the county or fiscal court does not act in a judicial capacity, as in a case of an appropriation of money to build bridges, its action may be rescinded at a subsequent term of the court (*Crittenden County Court v. Shanks*, 88 Ky. 475, 11 S. W. 468, 11 Ky. Law Rep. 8), unless individual rights have become involved. The act of appropriating money after it has been levied and collected differs in no respect from an order levying a tax for the purpose of raising money. In each case the court does not act judicially, but rather in a legislative capacity. Furthermore, it has been held that the Legislature of the state has the right to repeal any act in which taxes have been imposed. Having a right to impose a burden, it has a right to remove it. And we see no good reason why a fiscal court, which is authorized by the Legislature to levy taxes for county purposes, has not the same right to repeal an order levying a tax in cases where no rights have become vested by virtue of such order. It is apparent from the record that Wade's administrator incurred no liability on the faith of the validity of the order of April 11, 1908, levying the tax in question. That order was set aside on October 8, 1908. At that time Wade's administrator had paid no part of the bank's judgment. The first payment on the bank's judgment was made on October 19, 1908, while the second payment was made on November 28, 1908. Prior to each of these dates the order levying the tax had been set aside. Payment, then, was not made on the faith of that order. That being the case, we conclude that Beauchamp and his surety were absolved from all liability by the order of October 8, 1908, setting aside the levy in question. This view of the case renders it unnecessary to pass upon any of the questions between appellant and Taylor county.

Judgment affirmed.

**CITY OF PADUCAH v. COMMONWEALTH.**

(Court of Appeals of Kentucky. Jan. 19, 1910.)

**1. TAXATION (§ 245\*) — EXEMPTION — CEMETERIES.**

The cemetery of a city expending the moneys realized from the sale of unsold lots and the income from rentals in maintaining the cemetery is exempt from taxation by the state under Const. § 170, exempting from taxation places of burial not held for profit.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 415; Dec. Dig. § 245.\*]

**2. TAXATION (§ 217\*) — EXEMPTION — MARKET PLACES.**

The market place and stalls therein owned and maintained by a city where gardeners and fresh meat vendors may display their goods for sale, under regulations prescribed by the city, at a rental charge for their use for the payment of the expense of maintenance, are exempt from taxation by the state under Const. § 170, exempting from taxation public property used for public purposes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 356; Dec. Dig. § 217.\*]

Nunn and Carroll, JJ., dissenting in part.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by the Commonwealth by Holland L. Anderson, revenue agent for the commonwealth, against the City of Paducah. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Jas. Campbell, Jr., and Greene, Van Winkle & Schoolfield, for appellant. Frank A. Lucas, for the Commonwealth.

**LASSING, J.** This appeal involves the right of the commonwealth to tax the wharf, market house, and two public cemeteries owned by the city of Paducah.

This question, in so far as the wharf property is concerned, has recently been fully considered by this court in the case of Commonwealth v. City of Louisville, 119 S. W. 160, and it was there held that the wharf was not subject to taxation. As we still adhere to the conclusion reached in that opinion, we dismiss this branch of the litigation from further consideration.

The right of the commonwealth to assess for taxation public cemeteries, or the unsold portions thereof and the funds accumulated from the sale of lots therein, was considered by this court in the cases of Negley v. City of Henderson, 55 S. W. 554, 21 Ky. Law Rep. 1394, and Commonwealth v. Lexington Cemetery Co., 114 Ky. 165, 70 S. W. 280, 24 Ky. Law Rep. 924. In the former case it was held that the unsold lots in the cemetery were not exempt from taxation, but this opinion was rested upon the ground "that the averments of the petition do not show that the lot in question is exempt from taxation because of the absence of an averment that it is not held for profit," and section 170 of

the Constitution only exempts places of burial not held for private or corporate profit. Undoubtedly, under the state of case presented by the pleadings, that case could not have been decided otherwise. In the case of the Commonwealth v. Lexington Cemetery Co. there was involved the right of the commonwealth to assess a fund which had accumulated in the hands of the cemetery company from the sale of lots, amounting to some \$30,000 or \$40,000. This, the court held, was subject to taxation, although in that opinion it is expressly stated that the place of burial is exempt from taxation. In other words, the court there decided that the constitutional provision did not exempt from taxation a fund which had been accumulated by the cemetery company, although the income therefrom may have been used in the maintenance and adornment of the cemetery.

In the case under consideration it is shown that all of the money realized from the sale of such lots as have been sold, and the total income from the rentals received from the new cemetery, are expended upon the cemetery grounds. There is no fund on hand, and the city realizes no profit therefrom. It is clear that the only purpose of the city in owning these cemeteries at all is to furnish to such of its citizens as are able to pay therefor a suitable burial lot at a nominal cost, and to furnish to such as are not able to pay therefor burial lots free of cost. It exercises a general supervision over these cemeteries, and sees that they are properly kept, and that no nuisance is committed thereon. As lots are sold off, they become the property of their respective purchasers, though at all times under the supervision and control of the city, and the city continues to look after and care for and improve its walks and ways and otherwise adds to its beauty and adornment. It is this feature that makes the public ownership of burying grounds especially attractive, for, if this duty devolved upon the individual owners of the lots therein, the grounds would soon become neglected, and, as owners died or moved from the immediate locality, there would be left no one having any direct interest in the care of the cemetery, and it would soon become grown up in underbrush, briars, and weeds, a place more fitting for the abode of vermin and reptiles than a resting place for our dead. In earlier times there were no public cemeteries other than the potters' fields, where the city's pauper dead were buried. All who were able were buried in private burying grounds. So long as the owners of these grounds lived they were usually cared for and kept up, but as years rolled by frequently they were neglected and went rapidly to decay, and private burying grounds frequently became so unsightly as to be looked upon as almost public nuisances. In cast-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing about for some remedy the municipal ownership of burying places was adopted, and it has proven most desirable and advantageous. The private cemetery to-day is the exception to the rule, for most people prefer that those near and dear to them in life should, in death, have their resting place chosen where it will always be looked after and properly cared for. The growth and development of the municipal cemetery has kept pace with the advancement, mental, moral, and social, of our people. It is common knowledge that the cities throughout the country, and especially the larger cities, have built up and maintained at an enormous expense their burying grounds, and these in many instances are so beautified by landscape gardening, the growth of shade trees, shrubbery, and flowers, and the building of walks and drives, that they have come to be looked upon as among the attractive features of the city. This policy on the part of our cities and towns should be encouraged by the government, and every step taken by our municipalities looking toward the betterment, physically, mentally, socially, and morally, of our people should meet with the governmental stamp of approval. Our people need to be taught that life has an aim higher than the mere accumulation of wealth, and the government owes a duty to her citizens over and above that of levying and collecting taxes. The framers of the Constitution, recognizing that there should be a reasonable limitation upon the taxing power of the state over cemeteries, provided, among other things, that burial places not held for profit should be exempt from taxation.

Clearly these cemeteries are not taxable, unless the manner in which they are governed by the city takes them out of the exempted class. As lots are sold, the money is collected by the city, and all of it is expended upon the grounds, in their policing, keeping, and care. Upon this feature of their management much stress is laid. It is true that the city receives the money therefor. And for this reason, it is urged, the property is held for profit, and that, even though no profit remains to the city after the expenses incurred by it in the management and care of the cemetery, this fact does not exempt the property from taxation. Section 170 of the Constitution expressly exempts places of burial from taxation where they are not held for profit. Since the city derives no profit from these cemeteries, but uses all of the income derived therefrom and more in their maintenance, we are unable to see how it can be claimed that they are held for profit. The question is much simplified if we will look at it from another standpoint. Suppose, instead of selling the lots to individuals at from \$25 to 50 per lot, according to location, size, etc., and spending this money in caring for and beautifying the cemetery, the city would say to one desiring to purchase a lot, "You may have a lot, valued at from \$25 to

\$50, provided you will do from \$25 to \$50 worth of work, according to the value of the lot selected by you, upon the cemetery grounds." Here the city would be receiving no money whatever, and yet the result, so far as the cemetery is concerned, would be the same. The citizen would become the owner of the lot, and the value thereof, as agreed upon between the city and the prospective purchaser, would be expended upon the cemetery grounds. This is in effect what the city does indirectly. What it may do indirectly without subjecting the property to taxation it may do directly.

The pleadings in the case under consideration take it beyond the rule announced in the Henderson Case, *supra*, and there is no allegation or proof which would bring this case within either the letter or the spirit of the Lexington Case. We are of opinion that neither of the cemeteries should be taxed.

The only remaining question is: Should the market place and house be taxed? The market place is essential to the material welfare of the citizens. It furnishes a place where the gardeners and fresh meat vendors may display their goods for inspection and sale under such reasonable regulations as the city authorities may prescribe. As an incident to the proper conduct of a market place, we invariably find the market house or stalls, where, upon stated days of the week, the great bulk of the vegetables, fruit, and fresh meats upon which the inhabitants of the city live are publicly exposed for inspection and sale. If any are found to be unfit for use, they are promptly condemned, and their vendor suitably punished. The public health is thereby protected and promoted. The handling of this great quantity of vegetable and animal matter necessarily creates and leaves upon the market place much waste and decayed material. This has to be removed and the street and space kept in a clean and sanitary condition, necessarily entailing upon the city a considerable expense. This expense, or rather extra expense, is met by the imposition of a rental charge for the use of the market place and stalls, and until it is shown that the city is renting its market as a revenue producer rather than as a means of carrying out and enforcing one of its police powers, to wit, the protection of its people against the sale of stale or impure food stuffs, it must be regarded as falling within both the spirit and the letter of section 170 of the Constitution, and its use declared to be a purely public one. The market place is intended for the use of the local or nearby gardeners, butchers, etc., just as the public wharfs are for the foreign or distant tradesmen. The maintenance of each is for the public good, and neither is kept for profit. The fact that those who use them are required to pay a nominal charge therefor does not justify the conclusion that they are held for profit. The statute authorizes the city to

have a market place. This carries with it necessarily the building of a house or stalls, and it is but right and fair to the citizens that those who derive a personal benefit from the use of this public property should be made to bear the burden assumed by the city in establishing and maintaining it.

We are of opinion that the market place, house, and stalls are held and maintained for a purely public purpose, and the collection of the charges made against those who use them is but an incident to, rather than an evidence of the purposes for which they are maintained. This being so, the property should not be taxed. Wherefore, the whole court sitting, the judgment is reversed and cause remanded for proceedings consistent herewith.

Judges NUNN and CARROLL dissent from so much of this opinion as holds that the wharf property and market house are exempt from taxation.

### COMMONWEALTH v. WOLFFORD.

(Court of Appeals of Kentucky. Jan. 20, 1910.)

#### FALSE PERSONATION (§ 4\*) — INDICTMENT — SUFFICIENCY—FALSE IMPERSONATION OF OFFICER.

Ky. St. c. 36, subd. 2, § 1212 (Russell's St. § 3479), makes any person pretending to act under any civil authority who shall without warrant of law collect any sum under the pretense of a tax or shall under any such pretense demand any property, etc., guilty of a felony. The indictment charged that accused unlawfully, and pretending to do so as a deputy sheriff and without warrant of law, collected from another a sum, pretending that it was a tax for a certain year when such person had not been assessed. *Held*, that the indictment was bad for not alleging that accused was not a deputy sheriff when he collected the money, a mere false representation that the money collected was a tax not constituting an offense under the statute.

[Ed. Note.—For other cases, see False Personation, Cent. Dig. § 2; Dec. Dig. § 4.\*]

Appeal from Circuit Court, Carter County.  
"To be officially reported."

G. W. E. Wolford was indicted for unlawfully collecting money as taxes under pretense of acting as an official, and, from a judgment sustaining a demurrer to the indictment, the Commonwealth appeals. Affirmed.

James Breathitt, Atty. Gen., Theo. B. Blakey and Tom B. McGregor, Asst. Atty. Gen., and John W. Waugh, for the Commonwealth. Theobald & Theobald, for appellee.

SETTLE, J. The following indictment was returned against the appellee, G. W. E. Wolford, by the grand jury of Carter county: "We, the grand jury of Carter county, in the name and by the authority of the commonwealth of Kentucky, accuse G. W. E. Wolford of the crime of unlawfully collecting and obtaining money without due process of law,

committed as follows: The said defendant on the 7th day of June, 1909, in the county and circuit aforesaid, did unlawfully, and pretending to do so under and by the authority as deputy for H. W. McGlone, sheriff of Carter county, Kentucky, and without the warrant of law, collect of Chs. Davis, a sum of money, to-wit: \$1.00, pretending and representing that the same was a tax due the state of Kentucky and Carter county, for the year 1907, when the said Chs. Davis had not been assessed in the said county for state and county taxes for the said year. Against the peace and dignity of the commonwealth of Kentucky." Appellee entered a demurrer to the indictment, which was sustained by the circuit court, and the commonwealth, being dissatisfied with that ruling, has appealed.

We are advised by the brief of appellee's counsel that the judgment sustaining the demurrer was based on the ground that the indictment did not accuse appellee of a public offense. While it is not specifically charged in the indictment that appellee at the time of the commission of the alleged offense was deputy sheriff, neither is it alleged that he was not. It is, however, admitted by his counsel that he was a deputy sheriff, and admitted by the demurrer that he did in fact collect the dollar from Davis as a poll tax, and that Davis had not been assessed for such tax. The indictment was evidently found under section 1212, Ky. St. (Russell's St. § 3479), which provides: "If any person pretending to act under any civil or military authority of this state, or the United States shall, without due warrant of law, collect of any person in this commonwealth any sum of money under the pretense of fine, tax, duty or contribution, or as being due by the judgment of any pretended court not theretofore authorized by law, or shall under any such pretense, demand and receive from another any species of property, or the promissory note of such other for the payment of any such money or the delivery of such property, the person or persons so offending, the counsellors, aiders and abettors, shall be guilty of felony, and shall be confined in the penitentiary not less than one year, nor more than ten years." The section, supra, is a part of subdivision 11, c. 36, Ky. St., the various other sections of which, together with those of subdivision 10, same chapter, define, and provide punishment for, numerous felonies, such as embezzlement, felonious misappropriation of money or other property, obtaining money or property by false pretenses, falsely personating another, and the like. Section 1212, however, was obviously intended to apply to a class other than the offenders included by the other sections of subdivisions 10, 11, c. 36, Ky. St., namely, persons, not officers, who may commit any of the wrongful acts denounced therein, by falsely representing themselves to be officers, or, to employ the language of the section, by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"pretending to act under any civil or military authority of this state or the United States," and consequently "without due warrant of law."

The gravamen of the offense denounced by this section is the wrongdoer's usurpation of official authority, or pretense of acting in an official capacity and with pretended civil or military authority, in illegally collecting money or obtaining property, as condemned by the statute. Unlawfully, or without due warrant of law, collecting money or obtaining property is not a crime that may be punished under the common law or any statute of this state. But if one collect money or obtain property by pretended official authority when, in fact, he is not an officer and is without such official authority, he commits a felony, and upon proof of his guilt may be punished under the statute in question. If Davis, the person from whom appellee is charged to have collected the \$1 under the pretense that he owed it as a tax, was not liable therefor, or it had not been assessed against him for the year 1907, the act of appellee in collecting it of him was illegal, although he was at the time a deputy sheriff and as such authorized to collect taxes; but the illegality of the transaction did not constitute it a crime under the section, *supra*, nor would it have been so if appellant at the time of collecting the money had represented to Davis that he had authority as deputy sheriff to collect it and in that capacity required him to pay it, for appellee was then deputy sheriff and his claim to that office was not a false or pretended one. If, however, appellee collected of Davis the money under these circumstances, he was guilty of a misdemeanor, for which he might have been indicted and punished under section 4067, Ky. St. (Russell's St. § 5959), which provides: "No sheriff shall receive or receipt for any taxes until a copy of the assessor's books, as approved by the Board of Supervisors, has been delivered to him by the county clerk, or the list filed in the county clerk's office has been certified to him by the said clerk. For a violation of this section the sheriff shall be fined one hundred dollars for each offense." It will be observed that the indictment in setting out the particular acts constituting the alleged crime charged against appellee alleges, in substance, that he did unlawfully and by pretending to act under and by the authority as deputy for H. W. McGlone, sheriff of Carter county, Ky., without due warrant of law, collect of Davis \$1, pretending that the same was a tax, etc. This language does not state an offense under the statute, for it does not charge that appellee was not a deputy for McGlone, sheriff of Carter county, or that his claim of authority as such

was a pretense. If he was at the time deputy sheriff, his act of collecting the money under a claim of authority as such officer, though done under the pretense that Davis owed it as a tax, did not constitute the offense denounced by section 1212, Ky. St. But, if he was not at the time deputy sheriff, the collection of the money under the pretense that he was deputy sheriff and acting as such was a violation of the section, *supra*. However, even in the latter event, the circuit court could not have done otherwise than hold the indictment bad on demurrer, as it fails to allege that appellee was not then a deputy sheriff, and we take it for granted could not truthfully have done so. As previously indicated, in order to commit an offense under the statute in question, the act must have been done by the accused without authority, civil or military, emanating from this state or the United States, but which authority he pretended to have, and by virtue of such pretense did some of the things denounced by the statute.

It is, however, insisted for the commonwealth that if appellee, as charged in the indictment, pretended or falsely represented to Davis that the money he collected of him was a tax for the year 1907, and Davis had not been assessed for the tax, such pretense or false representation made him guilty under section 1212, although he was at the time a deputy sheriff. This contention we regard unsound, for the words of the section "or shall under any such pretense demand and receive from another any species of property," refer, as do the words "under the pretense of fine, tax, duty or contribution, or as being due by the judgment of any pretended court," to and must be coupled with the pretense previously mentioned therein of acting under civil or military authority of the state or United States.

In our opinion the section, *supra*, can only be violated by a person other than an officer; and whatever act denounced therein such person may wrongfully commit must be bottomed upon and result from the pretense of acting under the civil or military authority of this state or of the United States, when, in fact, he does not possess such authority. Whether for the acts attributed to him by the indictment appellee could be indicted under section 1208, Ky. St., for obtaining money under false pretenses, we need not decide.

Our duty goes no further than to determine whether he is charged in the indictment before us with the offense denounced by section 1212, Ky. St., and as it is our conclusion that he is not, and such was the conclusion of the circuit court, the judgment of that court is affirmed.

**DOCKINS et al. v. VASS et al.†**  
(Court of Appeals of Kentucky. Jan. 6, 1910.)

**1. WILLS (§ 682\*)—CONSTRUCTION—ESTATE CONVEYED.**

Where a will gave testator's estate to his four year old son, and provided that the son should remain with the executor and his wife till he became of age, that they should provide for him out of the proceeds of the estate, and that the executor should be trustee for the infant, and as such should hold all the testator's property and pay out for his education and such demands as were necessary for his comfort, and, if he died before becoming of age, the estate should go to others named, and it appeared that testator's family were consumptive, that the boy was not strong and would probably contract the disease, and did so, dying at 19, the executor might encroach on the principal of the estate, and any expenditures for the boy's comfort should be paid before remaindermen were entitled to anything under the will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 682.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 219\*)—CLAIMS AGAINST ESTATE—SERVICES TO DECEDENT.**

It was proper to allow an executor's claim against the estate for nursing and caring for the testator and his wife up to the time of their death, where the services were reasonably worth the sum charged.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 760; Dec. Dig. § 219.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 105\*)—MANAGEMENT OF ESTATE—LOSS OF DEPOSIT IN BANK.**

Where it was not shown that an executor did not exercise ordinary prudence in depositing funds of the estate, he was properly credited with the amount of a deposit lost through failure of the bank.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 399; Dec. Dig. § 105.\*]

**4. EXECUTORS AND ADMINISTRATORS (§ 117\*)—MANAGEMENT OF ESTATE—WASTE—CUTTING TIMBER.**

Where timber on a decedent's estate was such as to require cutting and the proceeds were used for the benefit of a trust estate created by the will, the executor is not chargeable with waste.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 469; Dec. Dig. § 117.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 131\*)—MANAGEMENT OF ESTATE—REAL PROPERTY—LEASE.**

Where an executor was given a discretion as to renting land, he was not liable for renting it at \$100 to \$150 per year, though he might possibly have been able to rent it at \$200 to \$350 per year.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 542; Dec. Dig. § 131.\*]

**6. TRUSTS (§ 187\*)—CLAIMS AGAINST ESTATE—SERVICES.**

Even if an executor and trustee on an intermediate accounting agreed that the beneficiary should not be charged any board, an allowance of \$500 for care and attention given the beneficiary by the executor and his wife during his last illness, when for eight months he was in the final stages of consumption, was proper.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 187.\*]

Appeal from Circuit Court, Butler County.  
"Not to be officially reported."

Action by Thomas Vass, as executor, and others against Margaret F. Dockins and others. From the judgment, defendants appeal. Affirmed.

Browder & Browder, for appellants. M. H. Thatcher and W. A. Helm, for appellees.

CLAY, C. On October 9, 1893, Robert A. Sweatt, a resident of Butler county, Ky., died, leaving an infant son four years of age. For a year prior to his death he lived with appellee Thomas A. Vass. A few days before his death he made a will. That portion of the will affecting the questions herein involved is as follows:

"Third. It is further my will that all my property that I have at the time of my death, both real and personal, or that I may have an interest in, is to go to my son, Freddie Sweatt.

"Fourth. It is further my will that my son, Freddie, shall remain in the care and custody of his uncle and aunt, Thos. Vass, and his wife, Josie Vass, until he reaches the age of twenty-one years of age and that they provide for him all necessities to his comfort and education out of the proceeds of my estate.

"Fifth. I empower my executor who I will hereafter name with full power to sell such personal property as he may think best, and to rent or lease my real estate to the best advantage that will produce the best results he thinks best.

"Sixth. It is further my will that Thos. Vass, who I name as my executor be and he is hereby appointed by me to hold in trust for my son, Freddie Sweatt, all my property and to pay out for his education and such demands as is necessary for his comfort.

"Seventh. And in the event that my son, Freddie Sweatt, dies before he reaches the age of twenty-one years and leaves no child or children as his legal heirs then one thousand dollars out of the proceeds of my estate is to go to Mrs. Josephine and Thos. Vass, her husband, and their heirs, and the remainder of my estate is to be legally divided between my sister, Margaret F. Dockins, and my niece, Mary Davenport, and at their death this property shall descend to their heirs, and should Mary Davenport die and leave no heir, then the portion that would be due her by division is to go to the heirs of J. B. and Margaret F. Dockins.

"Eighth. And I hereby appoint Thos. Vass executor of this will. Given under my hand and seal this September 25th, 1893."

On November 13, 1893, Thomas Vass qualified as executor. He never formally qualified as trustee for the infant child, Freddie Sweatt. The latter lived with Thomas Vass and wife for a period of about 15½ years.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied January 28, 1910.

When he died he was 19 years of age. He was never married, and left no children.

Appellee Vass from time to time made settlements in the Butler county court. Some were styled "Executor settlements," and others "Guardian settlements." Robert A. Sweatt left certain personal property and also a farm, consisting of something over 200 acres. This farm at the time of the institution of this action was worth about \$4,500. Appellee Vass and Margaret F. Dockins and her husband agreed on a sale of the land to some party by the name of Hatcher. Being in doubt as to the interest that Mary Davenport took under the will, this action was filed for the purpose of having the will construed and for judgment directing how the money should be distributed. In this action appellee asked judgment for the \$1,000 legacy devised in the will, judgment for \$408.14 alleged excess of expenditure over the income, judgment for \$51, being amount lost by him in the failure of the Potter Bank at Bowling Green, judgment for \$2,060 for taking care of the infant, Freddie Sweatt, for 15½ years, also judgment for costs, attorney's fees, etc. To this action Margaret F. Dockins, John B. Dockins, her husband, Mary Davenport, and John W. Davenport, her husband, were made parties defendant. They answered, denying the material allegations of the petition, and charging Vass with having committed waste. By answer and counterclaim they sought judgment over against him for the difference between what the farm was actually rented for and what it should have been rented for by the exercise of common business judgment. It is also charged that in one of his settlements Vass was given credit for the payment of \$176.17 on a voucher, when as a matter of fact he paid only \$76.17. It is further charged that appellee was wrongfully given credit for the sum of \$300 for an alleged board bill due him for boarding and waiting on Robert A. Sweatt, the decedent. It is also further charged that appellee was wrongfully allowed the sum of \$40 for renting the boy's land, and that he was also wrongfully allowed the sum of \$200 as compensation for board for the boy up to February 10, 1897. There is also an allegation to the effect that the waste complained of consisted in cutting timber from the land of the value of \$166. There is another charge to the effect that he was given credit for \$80, for which no voucher was properly presented. It is claimed that all of said expenditures were improperly allowed and approved.

Considerable proof was taken upon the issues involved and the case was then submitted. The circuit court upheld all attacked credits in the various settlements, with the exception of one of \$100 and, instead of allowing Vass the sum of \$2,060 for taking care of the boy, the court gave judgment for \$500. Vass was also given judgment for \$408.14, excess of expenditures over income, and for \$51, the amount lost in the failure of

the Potter Bank at Bowling Green. In addition to the above items, appellee was allowed judgment for \$85, the cost of a monument erected to the decedent, and also for the \$1,000 bequeathed to him and his wife in the will in controversy; also for his costs, including an attorney's fee of \$75. From this judgment Margaret F. Dockins and others appeal.

Before discussing the propriety of the judgment with respect to the various items, it is necessary to determine the character of the estate devised to the infant, Freddie Sweatt. Upon the solution of that question depends the right of the executor to be allowed anything in excess of the income of the estate.

It is argued by appellants that, as the will gave the executor power to sell only the personal estate and to rent or lease the real estate, he had no power to incur any debts in excess of the income from the real estate; that the interest which Freddie Sweatt had in the land was simply a defeasible fee; that it was therefore the duty of the executor to preserve the real estate intact for the benefit of those who were to take it upon the happening of the contingency set forth in the will. In the fourth clause of the will it is provided that Freddie Sweatt should remain with Thomas Vass and his wife until he reached the age of twenty-one years, and that they should provide for him all necessities to his comfort and education out of the proceeds of the estate. By the sixth clause it is provided that Thomas Vass should be trustee for Freddie Sweatt, and as such should hold all the testator's property and pay out for his education and such demands as were necessary for his comfort. The evidence in the case further shows that the testator's family were consumptive. The boy was not strong at the time of the testator's death, and there was every probability that he would develop that disease. As a matter of fact, he did contract consumption at an early age, and died from it before reaching his maturity. When we consider the boy's condition in the light of the family tendency and the language employed by the testator in the will in question, it is manifest that his main purpose was to provide for the comfort and education of his only son. Whatever part of the estate the boy had a right to use for his comfort and education the appellee, as his trustee, had a right to use for the same purpose. Appellee, as trustee, held all the testator's property for the benefit of the son. He was authorized to pay out of all his property such sums as were necessary for the boy's education and comfort. The estate devised to Margaret F. Dockins and Mary Davenport was only that which remained after the boy's education and comforts had been provided for. That being the case, appellee was authorized to encroach upon the principal of the estate, and any expenditures

which he properly made for the purpose of carrying out the provisions of the will in respect to the boy's education and comfort should be paid before either Mrs. Vass and appellee, or Margaret F. Dockins and Mary Davenport are entitled to receive anything under the will.

The only question remaining for discussion is the propriety of the judgment with reference to the particular items involved. It appears that the testator and the boy lived with appellee for about a year prior to the former's death. During that time he was nursed and cared for by appellee and his wife. The claim for these services, amounting to \$300, was filed by appellee against himself as executor. It is contended by appellants that this item was not properly proven, and should not have been allowed. The evidence, however, shows that the services were performed, and that they were reasonably worth the sum charged. We therefore conclude that the court did not err in refusing to charge appellee said sum.

The court did not err in regard to the allowance of \$51 growing out of the failure of the Potter Bank. This sum was received and deposited by appellee for the benefit of the boy, and there is nothing in the record to show that he did not exercise ordinary prudence in selecting the depository. The fact that the bank subsequently failed is not sufficient of itself to show negligence on the part of the executor in selecting it as the depository.

On the question of waste, the evidence shows that the timber was such as to require cutting, and the proceeds thereof were used for the benefit of the trust estate. That being the case, appellee is not properly chargeable with the sum involved.

As to the counterclaim for the difference between the rent actually received and that which could have been realized by ordinary business judgment, the evidence for the appellee is to the effect that the sum actually received was all that could be gotten by renting it for such purposes as would not impair the value of the land. On the contrary, there is considerable evidence to the effect that the appellee could have rented the land at from \$200 to \$350 per year, whereas he received from \$100 to \$150 per year. Appellee was given a discretion in regard to renting the land. He was authorized to rent it so as to produce the best results for the estate. While it is true that he might perhaps have realized more money, it is by no means certain that the interest of the estate itself would have been best subserved by that method of renting it. By adopting that method the value of the estate might have been impaired to a greater extent than it was.

But it is insisted that appellee upon his settlement as executor had in his hands the sum of \$908.51, and that the income from this sum and from the farm was sufficient to support a young boy. It appears, however, that the sum which he had in his hands as executor was immediately paid out on claims properly allowed and that no part of the cash was left; thus making it necessary to support the boy out of the proceeds of the farm alone. A careful reading of the record leads to the conclusion that Thomas Vass was a careful, conscientious, business man. He realized the importance of the trust committed to his hands, and we are satisfied that in everything he did he acted as he thought best for the boy and the estate which he had in charge. Without specifying the particular items, we think it proper to say that appellants did not show, except in one instance, that the sums allowed appellee in his various settlements were not proper charges against the estate. As to the incorrectness of that particular charge, appellee testified that he brought the papers to the county court, and trusted to him to make the proper settlements. The mistake was doubtless made by the court.

We come next to a consideration of the allowance of \$500. It is earnestly insisted by appellants that appellee agreed, when a certain settlement was made in the year 1897, not to make any further charges for boarding the boy. We think a careful reading of the voucher does not show any agreement on the part of appellee not to charge board from February 10, 1897. It is simply a statement that he made no charge for board up to March 12, 1898, the date of the next settlement. He explains his action in this regard by saying that there was not sufficient income from the estate at that time to justify the payment of board, and he therefore made no charge during that period. However that may be, the evidence shows that during his last illness Freddie Sweatt needed constant care and attention. For the last eight months of his life, he was in the final stages of consumption. During that time the appellee and his wife nursed and took care of him. The evidence shows that the sum of \$500, allowed appellee, is no more than would be proper compensation for such care and attention. That being the case, the sum of \$500 was properly allowed for these services, without regard to whether or not appellee had agreed not to charge the boy any further board after February 10, 1897.

Upon the whole case, we conclude that the trial court by his judgment did substantial justice between the parties to this action. The judgment should therefore be affirmed, and it is so ordered.

**CHESAPEAKE & O. RY. CO. v. MARCUM.**  
(Court of Appeals of Kentucky. Jan. 11, 1910.)

**1. MASTER AND SERVANT (§ 279\*)—ACTION FOR INJURIES—EVIDENCE.**

In an action against a railroad company for injuries to a servant while acting under the charge of a foreman, the evidence held to show that the foreman, from the effects of whisky, had become reckless, and was in a condition to take risks which under ordinary circumstances he would not have taken.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 279.\*]

**2. MASTER AND SERVANT (§ 287\*)—INJURIES TO SERVANT — ACTIONS — QUESTIONS FOR JURY.**

In an action against a railroad company for injuries to an employé who was acting under the direction of a foreman, the evidence held to make the question of the gross negligence of the foreman one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1051-1067; Dec. Dig. § 287.\*]

**3. MASTER AND SERVANT (§ 177\*)—INJURIES TO SERVANT—GROSS NEGLIGENCE OF FOREMAN.**

A railroad company directed plaintiff, an employé, to assist in taking some supplies needed for the repair of the railroad from a point where they were kept to a point on the road where they were needed, and furnished a hand car and placed it in charge of a section foreman. Plaintiff was injured by the car being thrown from the track, the accident resulting as he claimed from the negligence of the foreman in failing to apply the brakes to the car. It was not claimed that the hand car or any of its parts was in any manner defective, or not reasonably safe, or that the track was not reasonably safe. Held, that the company would only be liable for the gross negligence of the foreman, and that such negligence would be the failure to exercise slight care.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 177.\*]

**4. MASTER AND SERVANT (§§ 101, 102\*)—INJURIES TO SERVANT—CARE AS TO PLACE FOR WORK.**

It is the duty of a master to furnish the servant with a reasonably safe place, material, and appliances in and with which to perform his labor, and he is liable for ordinary negligence in failing to perform this duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 122, 135, 171, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

**5. MASTER AND SERVANT (§ 103\*)—INJURIES TO SERVANT—DELEGATION OF DUTY.**

The duty of the master to furnish the servant with a reasonably safe place, material, and appliances in and with which to work cannot be delegated to an agent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.\*]

**6. APPEAL AND ERROR (§ 928\*)—REVIEW—PRESUMPTIONS.**

Where there is nothing in the record to show which party offered an instruction that was given, it will be presumed that it was prepared and given by the court without the request of either party.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 928.\*]

Appeal from Circuit Court, Lawrence County.

"To be officially reported."

Action by David Marcum against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Worthington, Cochran & Browning, F. T. D. Wallace, and M. C. Kirk, for appellant. John W. Woods and Clyde L. Miller, for appellee.

NUNN, C. J. This appeal is from a judgment of the Lawrence circuit court for the sum of \$983 damages, resulting from an injury received by appellee on account of the derailment of a hand car belonging to appellant. The hand car was in charge of one Blankinship, appellant's foreman, section boss. On April 7, 1907, appellee, together with a number of others, went to a station by the name of Fullers, Lawrence county, Ky., near which there was a large slip on the railroad right of way. About 3 o'clock in the afternoon, appellant's superintendent, Hughes, directed Tom Blankinship, one of appellant's section foremen, to take a hand car and two or three men to aid him, and go to Louisa, and get some dynamite and caps and Dan Blankinship, another of appellant's foremen, and return to the slip. Appellee was one of the men selected by Tom Blankinship to aid him, the other two were Ben Blankinship and one Brown. They went to Louisa, obtained the supplies mentioned, started on their return and stopped for Dan Blankinship at his home in the suburb nearest the slip. When they arrived at that point it was raining, and they remained there about ten minutes, until it stopped raining, and again started on their return to the slip with Dan Blankinship. They traveled only a short distance when they noticed a very angry looking cloud coming in their direction; and the wind began to blow from behind them, increasing to such a velocity that it moved the car along at the rate of 12 miles an hour of its own force, and, according to all the witnesses, the car was gaining rapidly in momentum. At this time, Dan Blankinship, who had been using one of the levers to propel the car, and who was an old section foreman, asked Tom Blankinship, his brother, who was the foreman in charge of the car and the brakes thereon, to "rubber the brakes"—in other words, to check or stop the car—and about the same time appellee made a like request. Tom Blankinship answered, "Let her roll. You fellers are scared." They made a second request in a moment or two, with like results. Very soon after this Tom Blankinship did attempt to check the speed of the car by the use of the brakes, but failed to accomplish his purpose, and jumped from the car, which left only appellee and Ben Blankinship on the car, Dan Blankinship and Brown having jumped immediately before Tom Blankinship.

By this time the hand car had reached a curve in the track, which fact coupled with the force of the wind may have caused it to leave the track, and it was found about 40 feet below on the side of the mountain. It is shown without contradiction that appellee was on the upper side of the car next to the embankment and between the handles of the levers on the car; being thus situated, he could not escape from the car as the others did without very great danger to his person. When the car left the track, appellee was thrown into a ditch, severely hurt, and rendered unconscious. The amount of the judgment is small, if appellee was entitled to recover anything for his injuries.

Appellant contends that the court should have given a peremptory instruction to the jury to find for it, for the reason that his injuries resulted from the storm or cyclone, an act of God, which no human agency could have reasonably anticipated and provided against. If this were true, as a matter of course, a peremptory instruction should have been given. Appellee's position is that, conceding the storm caused the car to be thrown from the track, appellant's servant, Tom Blankinship, was guilty of gross negligence in not stopping the car when the angry looking storm was approaching and at the time when his brother and appellee called his attention to it and requested him to stop car. All the witnesses agree, including Tom Blankinship, that the car could have been stopped at that time if the brakes had been applied. And all the witnesses but one gave it as their opinion that Tom Blankinship could have stopped the car when requested the second time, if he had immediately used the brakes. Dan Blankinship testified that he did not request Tom to stop the car on account of the storm alone, but because the wind was moving the car at such a rate that he was afraid to remain on it until it reached the curve just ahead of them. Tom Blankinship, the foreman, testified that he had taken four or five drinks while in Louisa, but was not drunk. The reasonable conclusion to be drawn from the evidence is that he, from the effects of the whisky, had become reckless and fearless, and was in a state of mind to take risks which, under ordinary circumstances, he would not have taken. In volume 1, Thompson's Commentaries on the Law of Negligence, § 73, in discussing the question of negligence of a defendant concurring with the act of God, it is said: "Upon the same principle, if the negligence of the defendant concurs with the act of God, or with any other vis major, in producing a catastrophe, the defendant will be liable, provided he might have foreseen the catastrophe and provided against it, notwithstanding the vis major, by the exercise of that degree of care which the law places upon him, under the circumstances of the case." In our opinion, there was some evidence of gross negligence on the part of Tom Blankinship who was in

charge and control of the car, and it was a question for the jury.

The court's instructions to the jury were without fault, except in one particular. They placed a higher degree of care upon appellant's foreman in charge of the car than the law authorized. They made appellant liable for the ordinary negligence of its foreman when, under the facts of the case at bar, it was only liable for the gross negligence of its foreman in charge. If appellee did not receive his injuries as the result of the gross negligence of Tom Blankinship, appellant is not liable to him in damages. The rule has long been established in this state that it is the duty of the master, or employer, to furnish the servant, or employé, a reasonably safe place, material, and appliances in and with which to perform his labor. This duty devolves upon the master, and he cannot delegate it to an agent so as to relieve himself from this legal duty, and he is liable for ordinary negligence in failing to perform this duty. This principle is so well established that we deem it unnecessary to cite authorities sustaining it; it does not, however, apply to the case at bar. It is not charged nor intimated in the petition, nor shown by the testimony, that the master failed to furnish a reasonably safe track upon which to operate the hand car, nor is it alleged or proved that the hand car or any of its parts were in any manner defective or not reasonably safe. The whole of appellee's case depends upon the question as to whether or not Tom Blankinship, appellant's foreman, on the occasion mentioned was guilty of gross negligence in the management and operation of the hand car. On another trial, if the testimony is in substance the same, the court will omit instructions Nos. 1 and 2 defining ordinary care and negligence, and give in lieu of No. 3 the following: Gross negligence is the absence of slight care.

We find that by the latter part of instruction No. 4 the court told the jury that if they believed "Thomas Blankinship, by failing and refusing to stop said hand car and allow plaintiff to leave it, when he, said foreman, could have stopped it, and when he knew, or by the exercise of ordinary care could have known, that by reason of the storm it was dangerous not to do so, they will find for plaintiff, and unless they so believe they will find for defendant."

We further find that in the latter part of instruction No. 5, the court told the jury that if they believed from the evidence, "that the injury complained of was caused by an unusual wind storm or cyclone, which the defendant could not have anticipated and reasonably guarded against, and the injury prevented by the use of ordinary care, they will find that said injury, if any, was caused by 'act of God,' and will find for the defendant."

It will be noticed that the foregoing instructions permitted appellee, a servant of appellant, to recover for the failure of appel-

lant's section foreman to exercise "ordinary care." That this is not the law has been too long settled in this state to need citation of authority. Appellant is only liable to appellee in this case for injuries resulting by reason of the failure of its section foreman, Tom Blankinship, to exercise slight care in the discharge of his duties. Therefore the use of the word "ordinary" in the instructions above referred to is reversible error, and on another trial, instead of this word, the court should use the word "slight." See *L. & N. R. R. Co. v. Foard*, 104 Ky. 456, 47 S. W. 342, 20 Ky. Law Rep. 646.

Appellee's counsel contend that instruction No. 5 was offered by appellant's counsel. The record does not sustain this statement; it is silent upon the subject. There is nothing in the record showing who offered it, therefore the presumption is that it was prepared and given by the court without the request of either party. The error consists in the fact that the court based the right of appellee's recovery upon ordinary negligence, when it should have been based upon gross negligence.

For this reason, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

#### CHILDERS et al. v. BALES.

(Court of Appeals of Kentucky. Jan. 12, 1910.)

##### 1. FRAUDULENT CONVEYANCES (§ 24\*)—VALIDITY—VALIDITY AS AGAINST EXISTING CREDITORS.

Under Ky. St. § 1907 (Russell's St. § 2100), making every conveyance by a debtor, without valuable consideration void as to existing liabilities, a conveyance made to a third person for a consideration paid by the debtor is fraudulent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 45; Dec. Dig. § 24.\*]

##### 2. FRAUDULENT CONVEYANCES (§ 276\*) — RIGHT OF ACTION—DEFENSES—EXEMPTIONS—BURDEN OF PROOF.

Where a conveyance is made to a third person for a consideration paid by a debtor, a creditor seeking to set aside the conveyance need not show that the money paid was not exempt; that being a matter of defense.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 808; Dec. Dig. § 276.\*]

##### 3. FRAUDULENT CONVEYANCES (§ 299\*)—ACTIONS—SUFFICIENCY OF EVIDENCE—EXEMPTIONS.

Testimony given five or six years after property was conveyed to another in consideration of money paid by a debtor, in an action by creditors to set the conveyance aside, that the debtor had no property above his exemption at the time he testified, did not show that the money paid for the conveyance was exempt; the testimony not relating to the debtor's property when the conveyance was made.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 876, 881; Dec. Dig. § 299.\*]

##### 4. INFANTS (§ 102\*)—ACTIONS—REPRESENTATION BY GUARDIAN.

Where an answer was filed for an infant defendant some three months before the case

was submitted denying the allegations of the complaint, and the answer of the guardian ad litem, alleging that he had examined the record, and could not make any defense other than that made, was filed before judgment, a contention that the case was prematurely submitted as to the infant defendant was untenable.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 296-300; Dec. Dig. § 102.\*]

##### 5. LIMITATION OF ACTIONS (§ 180\*)—PLEADINGS—NECESSITY—DEMURRER.

A statute of limitations must be pleaded and cannot be raised by demurrer, so that the fact that a petition to set aside a fraudulent conveyance showed that the suit was brought within five years after its execution and did not allege that plaintiff could not, by ordinary diligence, have ascertained the fraud within five years, was not ground for demurrer.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 670; Dec. Dig. § 180.\*]

Appeal from Circuit Court, Pike County.  
"Not to be officially reported."

Action by T. S. Bales against Alvin Childers and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. E. Childers, for appellants. Robert L. Miller, for appellee.

CLAY, C. Appellee, T. S. Bales, as successor of the firm of Pinson, Bales & Smith, instituted this action against appellant Wm. Childers upon a judgment for \$126.40, upon which an execution was issued and returned, "No property found." By amended petition appellee attacked a conveyance made to Alvin Childers of a small tract of land by J. S. Ratliff and wife on March 27, 1903. The consideration for this conveyance was \$100, which was paid by appellant William Childers. The amended petition charged that this conveyance was made with the fraudulent intent to cheat, hinder, and delay the creditors of said William Childers. Various attachments were issued and sustained. The trial court entered judgment directing that the conveyance to Alvin Childers be set aside. The validity of the latter portion of the judgment is attacked on this appeal.

Section 1907, Ky. St. (Russell's St. § 2100), is as follows: "Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate, without valuable consideration therefor, shall be void as to all of his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, nor as to purchasers with notice of the voluntary alienation or charge; and though it be adjudged to be void as to a prior creditor, it shall not therefore be deemed to be void as to such subsequent creditors or purchasers." In interpreting this statute this court has held that a conveyance by a debtor without valid consideration is void as to all his then existing liabilities, and passes no title whatever to the grantee. *Yankey v. Sweeney*, 85 Ky. 55, 2 S. W. 559. The rule is the same where

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the conveyance is to one person and the consideration is paid to another. *Allen v. Russell*, 78 Ky. 105; *Adams v. O'Rear*, 80 Ky. 129; *Bank v. Rose*, 113 Ky. 946, 69 S. W. 967, 24 Ky. Law Rep. 732.

Applying the rule laid down in the above cases, the record shows that the judgment sued upon was obtained in the year 1894, and was unpaid. Therefore the debt in favor of appellee existed at the time of the conveyance to Alvin Childers. As the money was paid by William Childers and there was no consideration for the conveyance, the conveyance was void as to William Childers' liabilities existing at the time of the conveyance. All that was necessary to be shown was that the debt existed and that the conveyance was voluntary. It was not incumbent upon the creditor to show that the money paid for the land was not exempt. This was a matter of defense. There was testimony to the effect that William Childers at the time that he testified had no property over and above his exemptions. He testified, however, about five years after the conveyance in question. The testimony so given was doubtless true, but it did not show that the money paid for the property in question was exempt at the time the conveyance was made. So far as the conveyance in question is concerned, proof upon the question of exemption should have been directed to William Childers' financial condition at that time. As this was not done, there is no proof tending to show that the money with which the property was purchased was exempt.

There is no merit in the contention of the infant appellant that the case was prematurely submitted so far as he was concerned. An answer was filed for him some three months prior to the submission denying the allegations of the amended petition, and the answer of the guardian ad litem, to the effect that he examined the record in the case and was unable to make any defense other than that already made, was filed before judgment.

It is next insisted that the demurrer to the amended petition should have been sustained for the reason that it appeared in the petition that the attack upon the conveyance was made after the expiration of five years from its execution, and that the attacking creditor did not allege that he could not by ordinary diligence have ascertained the fraud within five years from the execution of the conveyance. In support of this position appellants rely upon the case of *Brown v. Brown*, 91 Ky. 639, 11 S. W. 4, 12 Ky. Law Rep. 280. An examination of that case, however, and the cases of *Cavanaugh v. Britt*, 90 Ky. 275, 13 S. W. 922, 12 Ky. Law Rep. 204, and *Woods v. James*, etc., 87 Ky. 517, 9 S. W. 513, 10 Ky. Law Rep. 531, which apparently sustain appellants' contention, will

show that the court did not expressly decide that such allegations should be made in the petition. This is clearly pointed out in the cases of *Swinebroad*, etc., *v. Wood*, etc., 123 Ky. 664, 97 S. W. 25, 29 Ky. Law Rep. 1202, and *Yager's Adm'r v. Bank of Kentucky*, etc., 125 Ky. 177, 100 S. W. 848, 30 Ky. Law Rep. 1287, where it is held that when in an action for relief on the ground of fraud or mistake the defendant relies upon the five years' statute of limitation, and shows that the fraud or mistake was perpetrated or made more than five years before the action was instituted, the plea must prevail, unless it is avoided by a replication showing that the action was brought within five years after the discovery, and that he could not, by reasonable diligence, have discovered the same sooner. The rule is that, in order for a party to avail himself of the statute of limitations, it must be pleaded. The question of limitation cannot be raised by demurrer.

Judgment affirmed.

#### JOHN MUNROE & CO. v. ADAMO.†

(Court of Appeals of Kentucky. Jan. 5, 1910.)

##### 1. SET-OFF AND COUNTERCLAIM (§ 46\*)—SUBJECT-MATTER — CLAIM BY UNDISCLOSED PRINCIPAL.

Where a purchaser has notice that the seller is the mere agent of another and the title to the property is in the other, the purchaser is not entitled to set off against him a debt due from the agent.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. § 103; Dec. Dig. § 46.\*]

##### 2. SET-OFF AND COUNTERCLAIM (§ 46\*)—SUBJECT-MATTER — CLAIM BY UNDISCLOSED PRINCIPAL.

Where a corporation, the name of which indicated it to be an importer, had possession of goods which it from time to time consigned to defendant, the fact that invoices for several consignments contained a notation that it was payable to a firm engaged in the banking business in the city where the seller resided was not notice to the purchaser that the seller was a mere agent for the banker, and that the banker had title to the goods, so as to prevent the purchaser, in an action for the price, from setting off a claim against the importer.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. § 103; Dec. Dig. § 46.\*]

##### 3. PRINCIPAL AND AGENT (§ 190\*)—ACTION—EVIDENCE—SUFFICIENCY.

In an action by an undisclosed principal for the price of goods sold by his agent, where the purchaser sought to set off a claim against the agent, evidence held sufficient to show that the claim sought to be set off existed at the time when the sale was completed.

[Ed. Note.—For other cases, see *Principal and Agent*, Dec. Dig. § 190.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"To be officially reported."

Action by Henry Munroe and others, doing business as John Munroe & Co., against

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied March 9, 1910.

Rosa Adamo. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Dodd & Dodd, for appellants. O'Neal & O'Neal, Gustav A. Ellerkamp, and N. A. Cooper, for appellee.

CLAY, C. Henry Munroe, Frederic De Reiset, and others, partners trading and doing business under the firm of John Munroe & Co., instituted this action against Rosa Adamo to recover judgment for the sum of \$1,324.60, the purchase price of 1,089 boxes of macaroni sold and delivered to her. Rosa Adamo, in her answer, offered to confess judgment for \$490, and pleaded a set-off against the balance of the claim. Her offer to confess judgment was accepted. The case was submitted to the court on the law and the facts, and judgment rendered in favor of Rosa Adamo. From that judgment this appeal is prosecuted.

The facts of this case are as follows: On March 7, 1907, the Merchants' National Importing Company, of New York, N. Y., entered into a contract with Rosa Adamo, by the terms of which she was appointed sole agent for the sale of certain brands of macaroni in Louisville, Ky.; Rosa Adamo at the same time binding herself, during the life of the contract, which was one year, not to handle any other brands of macaroni except those so furnished. It was further agreed between the contracting parties that Rosa Adamo was to take 20 shares of the preferred, and 40 shares of the common, stock of the Merchants' National Importing Company. The par value of the preferred stock was \$100 per share. Appellee was to receive the common stock as a bonus. As such stockholder, appellee was to receive, in addition to the guaranteed dividends on the preferred stock and the dividends which might be declared on the common stock, a rebate of 1 cent per box, deductible monthly or quarterly, on all purchases made by her of the Merchants' National Importing Company. It was further agreed that, in the event the contract was not renewed at the expiration of one year, the company was to refund, on 30 days' notice in writing, the amount paid by appellee for the stock plus the earned dividends on the same. In the contract the Merchants' National Importing Company confirmed certain sales that were made to appellee, and directed that further orders be sent sufficiently in advance to enable it to lodge the same with its agent in Naples. The terms of payment were to be net cash payable in New York exchange on receipt of bill and bill of lading covering each separate shipment.

Under the terms of the foregoing contract the Merchants' National Importing Company made 14 consignments of macaroni to appellee. In each case the macaroni was shipped as the property of the Merchants' National Importing Company. There was only one

brand of goods so shipped, and the Merchants' National Importing Company claimed to have exclusive control of those goods in the United States, and stamped this claim upon every box in which the goods were shipped. The bill of lading in each instance showed that the Merchants' National Importing Company was the consignor, and the invoices were made out in its name. In the case of the last three shipments, there was stamped upon the invoice: "The above invoice is payable to John Munroe & Company, 30 Pine St., New York, N. Y., in New York funds." Notwithstanding the above directions, appellee made payment on the first two of the last three consignments direct to the Merchants' National Importing Company, of New York. Such payments were accepted without complaint or further direction in the matter. The invoice accompanying the last consignment, the payment of which is in controversy in this case, had the same notice stamped on it. Appellee is an Italian woman who can neither read nor write. When she received the invoice so stamped, she did not know of its contents. The next day she went to one George Gutig, who, it seems, assisted her in the transaction of her business and wrote her letters. He discovered the notation on the invoice, and thereupon wrote to John Munroe & Co. that appellee had an offset against a part of the claim and was willing to pay only the balance. Prior to this time, however, and before any of the invoices were stamped as set out above, appellee, through George Gutig, wrote to the Merchants' National Importing Company and demanded a return of her money with an offer on her part to surrender the stock. This she had the right to do under the contract.

It further appears from the record that John Munroe & Co. are bankers. In addition to this business, however, they had for several years prior to the time this controversy arose been importers of macaroni. They did not wish to be known as being in this business; therefore they transacted the macaroni business through the Merchants' National Importing Company as their agent. The proof shows that John Munroe & Co. actually owned all the macaroni consigned to appellee, including that in controversy. They, however, permitted the Merchants' National Importing Company to consign the goods as its own. The latter company was their sole sales agent. Furthermore, the Merchants' National Importing Company did not act as agent for any other parties except John Munroe & Co.

The rule of law applicable to a case of this kind is well stated by Lord Mansfield in the early case of *Raybone v. Williams*, 7 T. R. 356, as follows: "Where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the prin-

cial; and though the real principal may appear and bring action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled." In *Mechem on Sales*, vol. 2, § 1451, we find the following statement of the rule: "Interesting questions arise in these cases where the agent at the time acted as the ostensible principal and the fact of the agency or the name of the real principal was undisclosed. May the agent here receive payment, and what will be the effect upon the actual principal, if he does? The answer to these questions depends largely upon whether the agent has been intrusted with the possession of the goods or otherwise clothed with the indicia of ownership thereof. If he has, and if, before the purchaser becomes aware that the assumed principal was merely the agent of another, the purchaser has, in good faith and the exercise of reasonable prudence, made payment to the agent, or has acquired an offset against him, such payment or offset will be operative against the principal." And in the case of *Henderson v. Botts*, 56 Mo. App. 141, we find the following: "An undisclosed principal takes the contract made by his agent, who was supposed to be the sole principal, subject to all the equities against the agent; and, if the agent has no cause of action on the contract, the principal has none." Another statement of the rule is to be found in 31 Cyc. 1601: "The general rule is that a person contracting with an agent in his own name without notice of the agency may set off a debt to him from the agent personally in an action by the principal." The above rule, however, does not apply where the third person has notice that the seller is the mere agent of the principal, and that the title of the property is in the principal. *Hogan v. Shorb*, 24 Wend. (N. Y.) 458.

Applying the doctrine of the foregoing cases to the facts of the case before us, what do we find? In the first place, the Merchants' National Importing Company had possession of the goods in question and had all the indicia of ownership. They were permitted thus to handle the goods by appellants, who did not care to be known as being in the macaroni business. There is not a single circumstance in the case going to show that appellee had notice of the mere agency of the Merchants' National Importing Company, or of the fact that the title to the macaroni was in appellants, unless the words stamped upon the invoices must be construed as notice. In the first place, when the goods were received and the sale was completed, appellee did not even have notice of the notation referred to. She did not ascertain that the invoice contained the notation until the following day. At that time the sale had been completed. But even conceding that she did have notice of the notation, was this notation sufficient to show the agency of the Mer-

chants' National Importing Company, or the fact that the title to the goods was in appellants? In all consignments other than the last three, there was no such notation. On those consignments appellee had made payments direct to the Merchants' National Importing Company. On the two next before the last she also made payment direct to that company, notwithstanding the directions contained in the invoice. Of this fact no complaint was made by the Merchants' National Importing Company. Furthermore, John Munroe & Co. are bankers doing business in the city of New York. Appellee may have concluded that the Merchants' National Importing Company simply desired payment to be made through John Munroe & Co., and that it wished its funds to be deposited with that banking institution. The notation in no wise suggested that the Merchants' National Importing Company was a mere agent. Indeed, the very contract executed by the Merchants' National Importing Company and appellee tends to show that the former was the principal, and that it was importing through its agent in Europe. The notation on the invoice was not sufficient to overcome this statement in the contract itself; it did not state that John Munroe & Co. were the owners of, or had title to, the macaroni; it was simply a direction to pay the amount of the invoice to them. We therefore conclude that, even if appellee had notice of the notation at the time of the delivery of the goods, the notation was not sufficient to apprise her of the agency of the Merchants' National Importing Company, or of the fact that the goods were owned by appellants.

But it is insisted that an offset against a claim for goods sold by an agent for an undisclosed principal, in order to be available, must have existed at the time the sale is completed, and that appellee has failed to bring herself within this rule. It appears that on March 12, 1908, George Gutig did write the Merchants' National Importing Company. He was unable to produce the letter. He swore that he could not find it. He then testified that it contained a demand for the return of the money accompanied by an offer to surrender and cancel the stock. There is in evidence a response to this letter by the Merchants' National Importing Company, written on March 14, 1908, wherein it is said: "Replying to your letter of March 12th, I will look into the matter and see what price I can get for your stock. The general financial situation is such that right at this moment it might be difficult to place it to good advantage. But at any rate I will look into the matter and keep it before me and see what can be done." It is insisted by appellants that this letter shows that the demand for the cancellation of the stock and return of the money was not properly made. The evidence of Gutig, however, shows that it was properly made. He testified without objection to the contents of the letter. If the

letter tended to contradict Gutig, appellants should have produced it, or, having accounted for its loss, have introduced evidence to contradict Gutig. Not having done this, we think the evidence sufficient to justify the conclusion of the court that proper demand for the return of the money and surrender of the stock was made within the time prescribed by the contract, and had been made more than thirty days prior to the time that the goods were delivered to appellee, which was on April 20, 1908. That being the case, we conclude that the right of set-off existed at the time the sale of the macaroni was completed.

Lastly, counsel for appellants contend that the judgment should be reversed because there is a discrepancy between the opinion of the court and the judgment based thereon. The judgment directs that the petition be dismissed, while the opinion says that appellants should recover of appellee certain costs, and that appellee is indebted to appellants in the sum of \$490. The reason for this seeming discrepancy is due to the fact that the lower court in rendering its opinion failed to observe that appellee had paid to appellants the \$490 in question, and that a receipt for the same had been filed with the papers in the case. As the \$490 exceeded the difference between the sum claimed and the amount of the offset, the judgment of the court properly directed that the petition be dismissed.

Judgment affirmed.

#### CENTRAL UNIVERSITY OF KENTUCKY v. COX'S EXECUTOR et al.

(Court of Appeals of Kentucky. Jan. 18, 1910.)

**BILLS AND NOTES (§ 44\*)—CONSTRUCTION OF NOTE—FULFILLMENT OF CONDITIONS.**

The husband of plaintiff's testatrix executed a note for \$1,000 payable at his death, or the death of his wife, if she survived him, if there was enough of his estate then left to pay it. By his will he left all his property, subject to the payment of his debts, to his wife, who survived him. When the wife died, she left an estate of some \$22,000, much of it the identical property left her by her husband, all of which she disposed of by will. *Held*, that the note was a valid claim against the estate of the wife.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 52; Dec. Dig. § 44.\*]

Appeal from Circuit Court, Spencer County.  
"To be officially reported."

Action by Ann B. Cox's executor and others against Sue C. Walker, in which the Central University of Kentucky was made a party defendant. From a judgment for plaintiffs, defendant Central University of Kentucky appeals. Reversed and remanded.

P. J. Beard, for appellant. Burnett & Burnett and Willis & Todd, for appellees.

CLAY, C. On July 30, 1889, Joseph B. Cox, a resident of Spencer county, Ky., executed

and delivered to the curators of Central University of Kentucky the following note: "\$1,000.00. Taylorsville, Kentucky, July 30, 1889. I promise to pay to the curators of the Central University of Kentucky one thousand dollars (\$1,000.00) to be paid at my death, or at the death of my wife, should she survive me and provided there is enough of my estate not disposed of to meet this subscription." Joseph B. Cox died in the year 1894, leaving a last will and testament, which was duly probated in the Spencer county court. The will was executed on November 3, 1891, and is as follows:

"In the name of God, Amen, I, Joseph B. Cox, of Spencer county, Kentucky, do make this my last will and testament as follows, to-wit:

"First—I desire my debts, if any, and funeral expenses paid.

"Second—I give to my wife, Ann B. Cox, all my estate of every kind to be hers forever, to use, manage and dispose of as she thinks proper.

"Third—I appoint my wife, Ann B. Cox, executrix of this will, and desire the court to permit her to execute bond without surety. I desire my nephew, James H. Beauchamp, my wife's nephew, assist her in managing the estate.

"Witness my hand this 3rd of November, 1891.  
Joseph B. Cox."

Ann B. Cox, the sole devisee under the will, thereafter qualified as executrix. She lived until the year 1899, when she died in Spencer county, Ky., leaving a last will and testament which was duly probated in the county court of that county. By her will she directed that all of her just debts and funeral expenses be first paid. After making a number of bequests to various relatives and servants, she directed that the remainder of her estate and silverware should be equally divided between her two nieces, Emma Graham and Sue B. Shore. She also appointed L. W. Ross as executor of her will. Thereafter he duly qualified.

This action was instituted by said L. W. Ross, as executor of Ann B. Cox, and by Sue B. Shore and Emma Graham, against Sue C. Walker, for the purpose of settling the estate under the direction of the court. By amended petition the appellant, Central University of Kentucky, was made a party defendant, and called upon to set up any claim it had against the estate. Thereupon the appellant filed an answer, counterclaim, and cross-petition, setting up the note above referred to. It appears from the answer, counterclaim, and cross-petition of appellant that the latter is the successor of Central University of Kentucky and of Centre College, and is therefore entitled to sue upon the obligation in question. It is also charged that Joseph B. Cox owned property at the time of his death that was reasonably worth

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied March 4, 1910.

\$22,000; that he devised his entire estate to his wife, Ann B. Cox, subject to the payment of his debts; that the estate owned by Ann B. Cox at the time of her death consisted of the estate that had been devised to her by her husband, Joseph B. Cox; that the realty which she devised was the same realty devised to her by her husband; and that the bank stock coming into the hands of her executor was the same bank stock that was owned by Joseph B. Cox in his lifetime and devised to her in his will. It is further charged that both at the death of Joseph B. Cox and at the death of Ann B. Cox there was enough and more than enough of the estate of Joseph B. Cox not disposed of to meet, pay off, and discharge the obligation of \$1,000 and its accrued interest. The answer, counterclaim, and cross-petition concludes with a prayer for judgment against L. W. Ross, as executor of the estate of Ann B. Cox, for the amount of the note, with interest from the date of the death of Ann B. Cox, and asks that appellant be adjudged to have a lien upon a tract of land described therein and upon the bank stock referred to. A demurrer was filed to the answer, counterclaim, and cross-petition of the Central University of Kentucky and sustained. The latter declining to plead further, its answer, counterclaim, and cross-petition was dismissed. From that judgment this appeal is prosecuted.

The rule is well settled that a promise may be conditional; that is, that the performance may be due, not immediately, but after the lapse of time or the happening of a future event. Such event may be of a certain or uncertain nature. 9 Cyc. p. 615. In the case of *Mason, etc., v. Hughart*, 9 B. Mon. 480, Hughart had become insolvent and had been discharged in bankruptcy from the payment of his debts. Thereafter he made a promise to Mason, etc., to pay the debt from which he had been discharged "when he should be able to do so." This court said: "It is a promise dependent upon a very uncertain contingency, which may never occur, yet it is one which has been enforced. In the case of *Kington v. Wharton*, 2 Serg. & R. [Pa.] 208 [7 Am. Dec. 638], the promise was precisely of this character, and there was judgment for plaintiff." In the recent case of *Chism v. Barnes*, 104 Ky. 317, 47 S. W. 232, 875, it was held that a promise to pay when able could be enforced, although made upon a contingency. We therefore conclude that the note sued upon, no other defect appearing therein, is valid, although payable only in the event of an uncertain contingency. All that was necessary in order to show its right to recover thereon was for appellant to allege, and prove, if denied, that the condition upon which the note was payable had taken place. *Talbott v. Stemmon's Executor*, 89 Ky. 222, 12 S. W. 297, 5 L. R. A. 856, 25 Am. St. Rep. 531; *Eckler v. Galbraith & Lall*, 12 Bush, 71; *Stainton, etc., v. Brown*, 6 Dana, 248.

The only question, then, is whether or not the facts alleged show that all the conditions upon which the note was payable had been fulfilled. By the terms of the note it was payable on the death of Joseph B. Cox if he survived his wife, but, if she survived him, upon her death; and in no event, however, was the contract of subscription to be a binding obligation unless there was enough of Joseph B. Cox's estate not disposed of to meet the subscription. The lower court took the view that the expression in the note "not disposed of" meant "not disposed of in any manner whatever," and he therefore concluded that, as Joseph B. Cox had disposed of the property by will and his wife thereafter disposed of the same property by her will, there was not enough of Joseph B. Cox's estate not disposed of to meet the subscription. We conclude, however, that the language of the note should be construed so as to give it effect, if possible. The record shows that Joseph B. Cox and his wife, Ann B. Cox, had no children. It is evident that he wanted to make a subscription in the cause of education. It will be presumed that he did not intend to do a vain thing. Nor did he intend to mislead and deceive those to whom the obligation was given. If he intended the obligation not to be valid in case he or his wife disposed of it by will, he could not have executed the obligation under such circumstances except for the purpose of deceiving appellant. The obligation was executed in 1889. His will was executed in 1891. He must have executed his will for the purpose of invalidating the obligation, and this purpose must have been in his mind at the time he executed the note. When we consider the language of the note in the light of the circumstances surrounding the maker, and the purpose for which it was made, we conclude that he meant that the obligation should be binding if there remained any of his estate, after the death of himself and wife, which was not expended, used, or consumed in their lifetime, and this was sufficient to pay the obligation; in other words, he reserved to himself and wife the right to use, spend, and consume the estate, and did not intend that the obligation should interfere with them in the enjoyment of his property. If after their death there was enough property to pay the obligation, he evidently intended that it should be paid, and not that he and his wife should defeat this subscription by disposing of his property by will. That being the case, the wife received the property subject to the payment of the note in question, provided she did not use, consume, or spend the estate during her lifetime. As the answer, counterclaim, and cross-petition shows that the estate so devised was practically intact at the death of the wife, when the obligation became due, the devisees under her will took the property subject to the payment of the note in question. In reaching this conclusion we are satisfied that

we are carrying into effect the intention of Joseph B. Cox, who believed that he was making a genuine subscription to the cause of Presbyterian education, and who did not wish the subscription to be defeated, unless it became necessary for him and his wife to consume the property during the lifetime of either. It follows that the demurrer to the answer, counterclaim, and cross-petition should have been overruled.

The judgment is therefore reversed and cause remanded for further proceedings consistent herewith.

### WATKINS v. WATKINS' ADM'R.

(Court of Appeals of Kentucky. Jan. 14, 1910.)

#### 1. EXECUTORS AND ADMINISTRATORS (§ 17\*)—RIGHT TO APPOINTMENT.

Ky. St. § 3896 (Russell's St. § 3919), provides that administration shall be granted to the relations of a deceased, preferring the surviving husband or wife, and then such others as are next entitled to distribution. Section 3897 provides that, if no such person applies for administration, administration may be granted to any person in the court's discretion. *Held*, that where, on motion of a married daughter of a deceased widow, one designated by her as appointed administrator of the estate, and a son of decedent applied at the second county court from the death of decedent for appointment as administrator, it was error to refuse his application.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 44; Dec. Dig. § 17.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 20\*)—APPOINTMENT—PROCEEDINGS.

Where a son of a decedent applied for appointment as administrator, affidavits filed by his sister and by the administrator previously appointed, claiming that the appointment of the son would be improper because of litigation which might arise in which the interest of the applicant would probably compel him to antagonize the interests of his sister, were insufficient to preclude the applicant's appointment, the statements in the affidavits being clearly conjectural, and it not being presumable that his purpose was to obtain advantage over his sister.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 96; Dec. Dig. § 20.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Application by Thomas H. Watkins for the setting aside of an order appointing H. I. Fox as administrator of the estate of Sarah A. Watkins, deceased, and for the appointment of himself as administrator. From a judgment overruling his application, he appeals. Reversed.

Boyce Watkins and L. A. Hickman, for appellant. Pirtle & Jones, for appellee.

SETTLE, J. Sarah A. Watkins, widow of F. G. Watkins, deceased, died in Jefferson county, October 11, 1907, intestate, leaving personal property in which she owned a life estate of the value of \$8,000. The property

seems to have been held in trust by the intestate's son, the appellant, Thomas H. Watkins, and her son-in-law, Dr. Henry W. Pirtle, trustees under the will of F. G. Watkins. They were also executors of the will.

F. G. and Sarah A. Watkins left but two children surviving them, viz., the appellant, Thomas H. Watkins, and Ivie W. Pirtle, wife of Henry W. Pirtle, who are equal devisees under their father's will, and since the death of their mother equally entitled to the trust estate of which she was the beneficiary during her widowhood, except the sum of \$1,000 the will of the father directed should be paid, at the death of the widow, out of the trust estate to his grandson, F. G. Watkins. Shortly after the death of Sarah A. Watkins, the Jefferson county court, upon the motion of Mrs. Ivie W. Pirtle and without notice to appellant, appointed the appellee, H. I. Fox, administrator of her estate, and he thereupon gave the required statutory bond and duly qualified as such fiduciary. On the 26th day of November, 1907, and before the second county court in Jefferson county from the death of the intestate, the appellant, Thomas H. Watkins, appeared in that court, and moved the court to set aside the order appointing the appellee, H. I. Fox, administrator of his mother's estate, and to appoint him (appellant) administrator thereof, at the time tendering the necessary statutory bond with good security required of an administrator and filing in support of the motions his own affidavit and that of L. C. Hickman. The object of his affidavit was to show his relationship to the intestate and consequent right under the statute to qualify as administrator; also, that his appointment as such would be beneficial to the estate and to his sister, Mrs. Pirtle. The purpose of Hickman's affidavit was to show appellant's excellent character, business capacity, and general fitness for the position, and that as administrator his interest would not be antagonistic to that of Mrs. Pirtle. On the other hand, in resistance of his removal and the appointment of appellant as administrator, appellee filed the affidavits of himself and Mrs. Ivie W. Pirtle, in each of which it was, in substance, claimed that appellant's appointment would be improper as in a suit then pending for a construction of F. G. Watkins' will and a settlement of his estate brought by the executors, or in litigation that might in the future arise over the estate of Sarah A. Watkins, the interest of appellant in these estates and the performance of his duties as a fiduciary, would probably induce or compel him to antagonize the interest and rights of Mrs. Pirtle. Upon submission of the matter the county court overruled appellant's motion to set aside the order appointing the appellee, Fox, administrator of Sarah A. Watkins' estate, and refused to appoint appellant in his stead. From the judgment

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

manifesting these rulings an appeal was prosecuted by appellant to the circuit court, and, that court having rendered a like judgment, a second appeal brought the case to this court for review.

Ky. St. § 3896 (Russell's St. § 3919), provides: "The court having jurisdiction shall grant administration to the relations of the deceased who apply for the same, preferring the surviving husband or wife, and then such others as are next entitled to distribution, or one or more of them whom the court shall adjudge will best manage the estate." In *Buckner's Adm'r v. Buckner*, 120 Ky. 596, 87 S. W. 776, 27 Ky. Law Rep. 1032, this court, in passing upon the right of the daughter of an intestate to administer upon his estate, as against another who had been appointed administrator at the instance of a creditor following a waiver by the intestate's mother of her supposed right to qualify, said: "Under this statute the relation first in rank as distributee is entitled as a matter of right to administer upon the decedent's estate, provided such distributee possesses otherwise legal qualifications to act, as for example is a person who is a resident of the commonwealth, and of contractual age and capacity. By the succeeding section, if no such person apply for administration at the second county court from the death of the intestate, the court may grant administration to a creditor, or to any person in the discretion of the court. The discretion vested by these sections is, first, to select from the distributees, where there are more than one of the same rank or degree of relation, such one or more as the court shall judge will best manage the estate. Where, however, there is but one distributee, this discretion cannot exist if the distributee makes application before the second county court from the death of the intestate. After that time the court may, in its discretion, grant letters of administration to any other person. Appellee having shown a legal right to qualify as administratrix of her father's estate, and being the only person so entitled to qualify, the county court erred in refusing to appoint her."

In view of the language of sections 3896, 3897, Ky. St., and the authoritative construction given those sections by the opinion, supra, it cannot be doubted that an order appointing and qualifying a stranger as administrator before the second county court after the death of the intestate is voidable upon motion of a relative having precedence in appointment, provided the latter "possesses otherwise legal qualifications to act." *Young's Adm'r v. L. & N. R. R. Co.*, 121 Ky. 483, 89 S. W. 475, 28 Ky. Law Rep. 451; *Spayd's Adm'r v. Brown*, 102 S. W. 823, 31 Ky. Law Rep. 438.

As Mrs. Pirtle by reason of the disability of coverture was disqualified to act as administratrix of her mother's estate, appellant's right to qualify as administrator was

a preferred one, and therefore superior to that of all others, unless he is incompetent or morally unfit to be intrusted with the management of the estate. Although, but for her coverture, Mrs. Pirtle would have had equally with appellant the right to administer her mother's estate, being thereby disqualified to do so, she was without power to nominate an administrator to the exclusion of appellant who was himself entitled, under the statute, to qualify. 18 Cyc. 91-2; *Triplett v. Wells*, Litt. Sel. Cas. 49. In *Young's Adm'r v. L. & N. R. R. Co.*, supra, the court in considering this question said: "Mary Wherry, being a nonresident of the state, could not qualify herself, and she had no right to dictate to the court who should be appointed administrator in her stead, although it is usual and proper to give consideration to her wishes." It is conceded that appellant is a man of intelligence, excellent character, and good business capacity, and neither of the affidavits filed in opposition to his appointment as administrator charges him with any disqualification given in section 3846, Ky. St. (Russell's St. § 3876), as a ground for the removal of a personal representative. The charge contained in appellee's affidavits that appellant should not be permitted to qualify as administrator of his mother's estate because of litigation then pending, or which may arise, in which his interest might become antagonistic to that of his sister, Mrs. Pirtle, seems to be without foundation in fact. The suit then pending for a construction of the will of F. G. Watkins and settlement of the accounts of the executors has since the filing of the affidavits been determined; the judgment of the circuit court and that of this court both confirming appellant's construction of the will. The record of that case contained nothing that manifested on the part of appellant or his coexecutor any mismanagement of the estate with which they were intrusted by the will. Of course, we are unable to foresee that litigation, if any, may arise between appellant and his sister over their mother's estate, but certainly the affidavits of appellee and Mrs. Pirtle give no tangible reasons for the fears therein expressed, that the appointment of appellant as administrator of his mother's estate would result in litigation, or that his interest as administrator would be antagonistic to that of his sister.

The statements of the affidavits in question in this regard are based wholly upon conjecture. Manifestly appellant is competent to have the management of the estate of the intestate, and it is not to be presumed, in the absence of a reasonable showing to the contrary, that it is his purpose in administering it to obtain some advantage of his sister, or involve the estate in needless litigation. As she is equally interested with him in the estate, the presumption should be indulged, in the absence of proof to the contrary, that his management of the estate

will redound to her interest as well as his own. Moreover, it will be the duty of the county court in permitting the qualification to require of him a good and sufficient bond, and to see that it continues sufficient, and Mrs. Pirtle will be protected by this bond against loss or injury growing out of appellant's administration of the estate.

Being of the opinion that appellant was clearly entitled to be appointed and permitted to qualify as administrator of Sarah A. Watkins' estate, and that the county court and circuit court erred in refusing him that right, the judgment of the circuit court is reversed and the cause remanded to that court, that it may require the county court to grant appellant letters of administration as prayed.

#### CINCINNATI, N. O. & T. P. R. CO. v. ASHURST.

(Court of Appeals of Kentucky. Jan. 18, 1910.)

##### 1. WITNESSES (§ 344\*) — IMPEACHMENT — ADMISSIBILITY OF EVIDENCE.

In an action against a railroad company for breach of a contract entered into by a station agent, the company proposed to prove by the agent on cross-examination that he had been discharged because he was short in his accounts. *Held*, that this evidence was properly rejected, as evidence of specific wrongful acts is not admissible to impeach a witness, but he may be impeached by proof of bad character, and defendant might properly have shown that he had been discharged, but the cause of the discharge was immaterial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1120, 1125; Dec. Dig. § 344.\*]

##### 2. RAILROADS (§ 17\*) — AUTHORITY OF AGENT — EFFECT OF ACTUAL LIMITATIONS.

The rights of a person entering into a contract to perform services for a railroad company with its station agent do not depend upon the actual limitations placed on the agent's authority, but upon the apparent scope of his authority and the conduct of the company subsequent to his employment.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 36-38; Dec. Dig. § 17.\*]

##### 3. CORPORATIONS (§ 433\*) — ACTIONS — EVIDENCE AS AUTHORITY OF AGENT.

In an action against a railroad company for breach of a contract entered into with a station agent, evidence *held* sufficient to go to the jury on the question whether the contract was within the apparent scope of the authority of the station agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1738; Dec. Dig. § 433.\*]

##### 4. CORPORATIONS (§ 432\*) — AUTHORITY OF AGENT — SUFFICIENCY OF EVIDENCE.

In an action against a railroad company for breach of a contract entered into with its station agent, evidence *held* sufficient to support the finding of the jury that the contract was within the apparent scope of the station agent's authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1737; Dec. Dig. § 432.\*]

Appeal from Circuit Court, Scott County.  
"Not to be officially reported."

Action by Robert T. Ashurst against the Cincinnati, New Orleans & Texas Pacific

Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bradley & Bradley and Galvin & Galvin, for appellant. R. E. Roberts and B. M. Lee, for appellee.

HOBSON, J. On October 18, 1907, the freight depot at Georgetown, Ky., burned. Three railways enter Georgetown, all doing their business at the station of the Cincinnati, New Orleans & Texas Pacific Railway Company. There is therefore a large amount of freight every day which is brought into Georgetown by one road and is to be transferred there to another. On the morning after the depot was burned, the station agent made a contract with R. T. Ashurst, by which Ashurst was to transfer the freight, and was to be paid 2½ cents per 100 pounds. Ashurst transferred the freight from this time until February 22, 1908, and, the company refusing to pay him, he brought this suit to recover \$527, the amount that his services came to under the contract. A trial was had which resulted in a verdict and judgment for him, and the railroad company appeals.

There is no criticism of the instructions of the court to the jury. They were very clear, and admirably presented the law of the case. Only one ruling on the admission of evidence is objected to, and that is as to a minor matter. When Reddick, the agent, was on the stand, the defendant proposed to prove by him on cross-examination that he had been discharged because he was short in his accounts. The court properly refused to allow this evidence. A witness may be impeached by proof of bad character, but not by proof of specific wrongful acts. It appeared from the witness' evidence that he was no longer in the service of the defendant. The defendant might properly show that he had been discharged; for this might evidence bias on his part, but the cause of the discharge was immaterial.

The chief question made on the appeal is that the jury should have been instructed peremptorily to find for the defendant on the ground that Reddick was without authority to make the contract with Ashurst. That he made the contract, and that Ashurst in good faith rendered the services sued for under it, are not controverted. But it is claimed that the price agreed upon was too high, and that the making of the contract was not within the apparent scope of Reddick's authority. It is shown that he had before this hired Ashurst to haul coal to the pump, and to do other things now and then; but it is said that these were all in emergencies, and specific things then required to be done. The rights of Ashurst do not depend upon the actual limitations placed upon Reddick's authority by his superiors.

The case turns simply upon the apparent scope of his authority and the conduct of the defendant subsequent to his employment. Reddick was the station agent. He had charge of the station, and the defendant's business at it. When the depot burned, it was within the apparent scope of his authority to make some arrangement by which the freight which was under his charge should be transferred, so that the business of the defendant in his hands would not suffer. The company was charged with notice when its depot burned that some arrangement for transferring the freight different from that followed while the depot stood must be provided. It knew that the freight was being daily transferred. Its superintendent was often on the ground and saw the business going on. As between Ashurst and the company, it was the duty of Reddick to report to his master what he had done. No bill was sent in by Ashurst until December 1st, when he gave his bill to Reddick, who forwarded it to the superintendent. This not having been paid, Ashurst, the next month, gave his bill to Reddick, and sent himself a copy of it to the superintendent; and, not being paid, in a short time he wrote the superintendent a letter. The matter was then taken up by the superintendent, but no other means of hauling the freight was provided until February 22d. Under the proof, there was sufficient evidence to go to the jury as to the contract being within the apparent scope of the authority of the station agent, and their finding is not against the weight of the evidence.

Judgment affirmed.

#### ESTHER TEMPLE OF THE MYSTERIOUS TEN et al. v. SHELBY TABER- NACLE et al.

(Court of Appeals of Kentucky. Jan. 13, 1910.)

##### PARTITION (§ 13\*)—NATURE OF ESTATE.

Where defendant owned the upper story of a building with the right of free ingress, with the same interest in the upper story of any building which might thereafter be erected on the lot, and plaintiff owned the remainder of the property, the parties owned no joint vested interest in the building, within Civ. Code Prac. § 490, permitting a vested estate in realty, jointly owned by two or more, to be sold by order of court in an action brought by either of them, if the property cannot be divided without impairing its value.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 36; Dec. Dig. § 13.\*]

Appeal from Circuit Court, Shelby County.  
"Not to be officially reported."

Action by the Esther Temple of the Mysterious Ten and others against the Shelby Tabernacle and others. From a judgment sustaining a demurrer to the petition, plaintiffs appeal. Affirmed.

Willis & Todd, for appellants. J. C. Beckham & Son, for appellees.

CLAY, C. A demurrer was filed to the following petition and sustained. Appellants declining to plead further, the petition was dismissed.

The petition is as follows:

"The plaintiffs, Esther Temple of the Mysterious Ten, Florence Hall, Kate M. Cardwell, Emma Johnson, Jane Boswell, Paulina White, and Celia Fields, say that Esther Temple of the Mysterious Ten is a corporation located in Shelbyville, Ky., and incorporated by and under the laws of the state of Kentucky, with power to sue and be sued, to contract and be contracted with, and is a charitable organization and incorporation, engaged in nursing and caring for the sick, and burying the dead, among the colored people. The plaintiff Florence Hall is the principal officer of said plaintiff corporation. The plaintiff Kate M. Cardwell is the chairman of the board of trustees thereof. The plaintiffs Celia Fields, Emma Johnson, Jane Boswell, and Paulina White are the trustees of the same. Said plaintiff corporation is composed of a large number of members and are too numerous to be brought before the court within a reasonable time, and they ask that they be permitted to sue for all the members of the said corporation, if the court be of the opinion that they are necessary parties.

"Now the plaintiffs further say that the defendant Shelby Tabernacle is a corporation created by and under the laws of the state of Kentucky, with power to sue and be sued, to contract and be contracted with, and is also engaged in works of charity; that is, in nursing, caring for the sick, and burying the dead among the colored people of this vicinity. Said defendant corporation is located in Shelbyville, Ky., which city is the place where its principal office is kept. Plaintiffs say that the defendants Florence Glass and Rebecca Dupee are the principal and managing officers of said corporation; that the members of the defendant corporation are very numerous, and cannot be brought before the court within a reasonable time, and, if the court be of the opinion that they are necessary parties to this action, then plaintiffs ask that the said defendant corporation, Florence Glass, and Rebecca Dupee, be permitted to defend for all such parties.

"Plaintiffs say that heretofore, namely, on October 16, 1885, there was conveyed by Harriet Adams, etc., by deed recorded in deed Book 'O' No. 3, page 31, to Esther Temple No. 5 of the Mysterious Ten, a certain lot of ground in Shelbyville, Ky., and bounded as follows: Beginning at the southwest corner to the livery stable lot on Main street, now occupied by Brown & Jesse; thence

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

north with the line of said lot about 122 feet to corner in angle of said livery stable lot; thence west with John W. Adam's line about 25 feet to a corner in the line of the Place lot; thence south with the Place line about 122 feet to Main street; thence east with Main street to the beginning. A certified copy of the deed conveying same is filed herewith and made a part hereof marked 'A.'

"In 1897, previous thereto, there was a two-story brick building on said lot, and plaintiffs say that afterwards, to wit, in 1897, there arose a controversy between the plaintiff Esther Temple, etc., and the Shelby Tabernacle, etc., concerning the ownership of the said property, and that there was an action in this court concerning same, and upon a final submission to the court it was adjudged that these plaintiffs were the owners of and entitled to a certain interest therein, and the defendants to a certain interest therein, viz.: The Shelby Tabernacle is entitled to hold, own, and use the upper story of the property hereinbefore described, that is, the room or rooms, over the room or rooms then occupied by Long & Webber, and that they own and have the right of ingress and egress to same, through the room now occupied by Long & Webber, that is, the stairway now used to reach said second story of said property, and to have said right of ingress and egress over and uninterrupted as same was then used. It was further adjudged that the defendants had and should continue to have and hold said right and interest in said property in fee as is necessary and proper for the proper enjoyment and benefits of said upper story, and the said Tabernacle's interest in said lot unoccupied to be the same as in the building, that is, to take and hold and use and occupy the upper story of any building erected thereon. It was further adjudged that all of the remainder of the property herein described is the property of the plaintiff, and that the plaintiff was entitled to hold and enjoy said property, and was further directed that the said parties should make deeds between themselves, conveying said property; but same has never been done.

"Now, plaintiffs say that all the rights of the parties are fully set out in a certified copy of a judgment of the Shelby circuit court in the above-styled cause of Esther Temple No. 5 against the Shelby Tabernacle, which is made a part hereof and marked 'B.' Now, plaintiffs say that by virtue of the aforesaid judgment the plaintiffs are the owners and in possession of the lower story of the brick building located on the lot hereinbefore described, and the right to the use and occupancy of the lower story of any building that might at any time be erected on the unoccupied portion of said lot, and the defendants are the owners and in possession of the upper story of said brick building with the right of ingress and egress thereto through a stairway in the lower story to

the upper story, and the right to the use of the upper story of any building that might be erected on the unoccupied portion of said lot. Plaintiffs say that the joint occupancy of said property is not satisfactory or beneficial to the plaintiffs or the defendants, that said property is not being kept in good repair, same depreciating in value, and the interests of all the parties thereto require and demand a sale of said property, and a division of the proceeds according to the respective rights of the parties, and same cannot be divided without materially impairing its value, and the value of plaintiffs' interest therein.

"Wherefore plaintiffs pray judgment of this court for a sale of the aforesaid property, and a division of the proceeds thereof, after the payment of the cost, and a division of the proceeds among the parties according to their respective rights, and for all further, proper, and equitable relief."

The judgment referred to in the petition is as follows:

"This cause coming on for trial upon the pleadings, proof, and exhibits, and the court being sufficiently advised, it is the judgment of the court that there are and were members of Esther Temple No. 5, before the dissolution, that is, before November, 1889, and are now members of the defendant society, namely, the Shelby Tabernacle, and that they have an equitable interest in the property herein in controversy, and that all of the parties hereinbefore set out have assisted in paying for said property, and have paid or have assisted in paying the just debts thereon. It is therefore adjudged by the court that the defendant the Shelby Tabernacle is entitled to hold, own, and use the upper story of the property herein in controversy, that is, the room or rooms over the room or rooms now occupied by Long & Webber; that is by the stairway now used to reach said second story of the said property; and shall have said right of ingress and egress free and uninterrupted as same is now used. And it is the further judgment of the court that they have and shall hereafter have and hold said right and interest in said property in fee as is necessary and proper for the free, full, and proper enjoyment and benefits of said upper story of said building and said Tabernacle interest in the lot unoccupied to be same as in building, that is, to take and hold or use and occupy the upper story of any building erected thereon. It is the further judgment of the court that all the remainder of said property herein in controversy is and shall hereafter be the property of Esther Temple No. 5, to have and to hold and to enjoy free and uninterrupted use and benefit of said property thereof, and Shelby Tabernacle and said Esther Temple No. 5 are directed to make deeds between them and conveying the property as herein provided and according to the terms and provisions

of this judgment, and, if they shall fail so to do, then the commissioner of this court may be required to make said deeds.

"It further appearing to the court that Long & Webber have retained on said property since the institution of this suit rents amounting to about \$140, and that the Shelby Tabernacle has been collecting rents on the aforesaid upper story of said building since the institution of this suit, which amount is about \$25, said Long & Webber are directed to pay said rents that they now owe to L. C. Willis, attorney for the plaintiffs herein, and to J. C. Beckham & Son, and P. J. Foree, attorneys for the defendants herein, that the said sum paid by Long & Webber and the said sum due from the rents collected by said Shelby Tabernacle will be added together and made one fund, and out of same the cost of this action shall be paid, and the remainder shall be equally divided between the plaintiffs and defendants herein. And this cause is retained for further orders in the enforcement of this judgment."

Section 490 of the Civil Code of Practice is as follows: "A vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity, in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant—(1) If the share of each owner be worth less than one hundred dollars. (2) If the estate be in possession and the property can not be divided without materially impairing its value, or the value of the plaintiff's interest therein."

The question arising in this case is whether or not appellants and appellees have such a vested, joint interest in the property as may be ordered sold under subsection 2 of section 490, above quoted. It appears from the petition that this is not the first litigation arising between the parties to this action. In the former litigation the rights of the parties were settled by the judgment hereinbefore set out. By that judgment the Shelby Tabernacle was given the right to own and use the upper story of the property in controversy, with the further right of free and uninterrupted ingress and egress to and from same. It was also given the same interest in the upper story of any building that might be thereafter erected on any unoccupied portion of the lot. Esther Temple No. 5 was given the right to hold and enjoy the remainder of said property. It is manifest, therefore, that, whatever may be the interest of the parties in the lot itself, they had no joint, vested interest in the building now upon the land or in any building that may be hereafter erected. The Code requires not only that there shall be a vested estate in the property sought to be sold, but a joint ownership of the property. By the terms of the judgment, Shelby Tabernacle

has the exclusive ownership of the upper story of the building now on the premises, and of the upper story of any building that may be hereafter erected. On the other hand, Esther Temple No. 5 has the exclusive ownership of the lower story of the building on that lot. We therefore conclude that, as long as there is a building upon the land, there is no such joint ownership of the property as will justify a court, upon the application of either appellants or appellees, to order the property sold, unless by consent of both parties. If the parties consent, they may have a sale at any time.

Judgment affirmed.

#### GORDON et al. v. SIMMONS.

(Court of Appeals of Kentucky. Jan. 12, 1910.)

##### 1. ADVERSE POSSESSION (§ 57\*)—SUFFICIENCY OF EVIDENCE.

Defendant does not prove adverse possession for 15 years of land under an oral trade therefor by B. with G., the then owner thereof, though two or three witnesses testified the exchange of lands between G. and B. was made, and a line dividing the lands exchanged was marked, 25 years or more ago; they being evidently mistaken, the petition alleging, and the answer, not denying, that G. did not become owner of the land till a certain date, less than 15 years before the commencement of the action, and the deed conveying the land to G. bearing such date, and this being conclusive of such fact.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 57.\*]

##### 2. FRAUDS, STATUTE OF (§§ 69, 70\*)—EXCHANGE OF LANDS.

While an oral agreement fixing a dividing line between the adjoining lands of antagonistic parties is not within the statute of frauds, an oral exchange of lands is within it, like an oral sale of lands.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 111, 112; Dec. Dig. §§ 69, 70.\*]

##### 3. COMPROMISE AND SETTLEMENT (§ 23\*)—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show that an agreement settling a controversy as to land was signed by defendant without knowledge of its contents, and was procured by the fraud of plaintiff.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 94; Dec. Dig. § 23.\*]

Appeal from Circuit Court, Trigg County.  
"To be officially reported."

Action by Bettie Gordon and others against W. F. Simmons. Judgment for defendant. Plaintiffs appeal. Reversed and remanded for new trial.

M. M. Hanberry and John D. Shaw, for appellants. John W. Kelly, for appellee.

SETTLE, J. The appellant Bettie Gordon, widow, and others, heirs at law of A. J. Gordon, deceased, brought suit in the court below to recover of the appellee, W. J. Simmons, a parcel of land described in the pe-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion, which they claim to own and allege to be wrongfully in appellee's possession; also to recover of the latter damages for its unlawful detention and use.

It appears from the record that A. J. Gordon became the owner in 1894 of a 100-acre tract of land known as the "House survey." Included within the lines of the House survey, though not a part thereof, was a 50-acre tract known as the "Turner Mashburn or Boren survey." Appellants live, as did A. J. Gordon at the time of his death, upon the House 100-acre survey. Appellee owns and is in possession of the 50-acre Turner Mashburn or Boren survey. The land appellants seek to recover consists of about 20 acres of the House survey alleged to be wrongfully held by appellee.

It is alleged in the petition that a controversy arose between appellants and the appellee, Simmons, shortly before the institution of the action as to the location of the lines of their respective lands, in which controversy appellee was setting up claim to the 20 acres of the House survey in question by virtue of an alleged exchange thereof by A. J. Gordon, deceased, with appellee's remote vendor, Boren, for 14 acres of the Turner Mashburn 50-acre survey, and also to the 14 acres last mentioned as well, and that, in order to settle the controversy without suit, appellants and appellee entered into a written agreement, whereby appellants released to appellee all that part or parcel of land known as the Turner Mashburn survey, in consideration of which appellee obligated himself to release and surrender to appellants all that part of the House survey claimed by him, the original line of both the House and Turner Mashburn surveys to be ascertained by a survey to be made by the surveyor of Trigg county, each party to pay one-half the costs of such survey; that, pursuant to this agreement, the lines of the House and Turner Mashburn surveys were run and established by the surveyor of Trigg county as claimed by appellants, but that, notwithstanding such agreement and settlement of the controversy between the parties, appellee, in violation thereof, took possession of the 20 acres of the House survey which he had agreed to surrender to appellants, and proceeded to cultivate same.

Appellee by answer attempted to justify his holding of the 20 acres of the House land upon the ground that his remote vendor, Boren, while owner of the 50-acre tract of land, made a verbal swap or exchange of 14 acres thereof to A. J. Gordon, then owner of the House 100-acre tract, for the 20 acres of the latter tract in controversy, and that, pursuant to such exchange, Boren and Gardner established an agreed line between the lands exchanged, and each surrendered to the other, without executing deeds therefor, the land received in the exchange. It was further alleged in the answer that appellee and

his vendors immediate and remote have had and held the actual adverse possession of the 20 acres received by Boren in the exchange with Gordon for more than fifteen years before the institution of appellants' action, which it was claimed entitled appellee to rely upon the statute of limitations in bar of the action; the statute being duly pleaded. It was further alleged in appellee's answer that he signed and acknowledged the writing referred to without knowledge of its contents and by the fraud and procurement of the appellant Bettie Gordon and her agent, A. S. Ford.

Appellants by reply controverted the affirmative matter of the answer. The trial resulted in a verdict and judgment in appellee's favor, and appellants, having been refused a new trial by the circuit court, prosecute this appeal.

It appears from the evidence found in the record, and is conceded by the parties, that when appellee's remote vendor, Boren, owned the 50-acre Turner Mashburn land, he and A. J. Gordon attempted a verbal exchange of lands; that is, Boren agreed to exchange with Gordon, then owner of the 100-acre House survey, 14 acres of the Turner Mashburn land for 20 acres of the House land, and that Boren and Gordon at the time marked a dividing line across the Turner Mashburn land from the south to the north boundary of the House tract on either side of the Turner Mashburn land, which left the 14 acres received by Gordon in the exchange east of the division line, and the 20 acres received by Boren west of that line. The evidence is not definite as to when or to what extent either Gordon or Boren asserted possession over the land received by him in the exchange. It is clear, however, that neither made a deed to the other, but apparent that appellants were willing after appellee acquired the Turner Mashburn or Boren land to let the exchange as made by A. J. Gordon and appellee stand. With this, however, appellee according to the evidence did not appear satisfied, for he set up claim to the 14 acres received by Gordon in the exchange as well as the 20 acres thereby received by Boren. This state of case raised the controversy between appellee and appellants resulting in the written agreement whereby the previous exchange of lands between A. J. Gordon and Boren was ignored, and the parties obligated themselves that appellants should hold the House land of 100 acres according to the lines thereof to be established by the county surveyor, and appellee the Turner Mashburn 50-acre tract according to its boundary as established by the surveyor.

We fail to find from the record that appellee proved possession on the part of himself or vendors of the land in controversy for as much as 15 years before the institution of appellants' action. He did, it is true, prove by two or three witnesses that the exchange

of lands between A. J. Gordon and Boren was made and a line dividing the lands exchanged, marked, and established 25 or more years ago; but these witnesses were evidently mistaken as to the date of the exchange and making of the line, for it was alleged in the petition, and not denied by the answer, that A. J. Gordon did not become the owner of the House 100-acre tract of land until December 17, 1894, and, as the deed conveying him the land bears that date, it, with the undenied averment of the petition, conclusively established the fact. This being true, as is the further fact that appellants' action was instituted by the filing of the petition and issuance of a summons November 6, 1907, it necessarily follows that A. J. Gordon did not own the House land as far back as the two witnesses referred to testified he exchanged lands with Boren. Indeed, to be precise, it is certain that Gordon and his widow and children, following his death, had owned the House land only 12 years, 10 months, and 19 days, when this action was instituted. It is therefore patent that appellee and his vendors could not have had actual, adverse, or even constructive possession of the 20 acres of land in controversy by virtue of an exchange of lands between Boren and Gordon for as much as 15 years before the institution of appellants' action to recover it.

An oral agreement fixing a dividing line between the adjoining lands of antagonistic parties has by this court been held not within the statute of frauds and perjuries; it being the policy of the courts to approve and uphold such agreements as tending to discourage controversies between neighbors and prevent litigation. *Jamison v. Petit*, 6 Bush, 670; *Grigsby v. Combs*, 21 S. W. 37, 14 Ky. Law Rep. 652; *Campbell v. Campbell*, 64 S. W. 458, 23 Ky. Law Rep. 870; *Frazier, etc., v. Mineral Development Co.*, 86 S. W. 983, 27 Ky. Law Rep. 815. But an oral exchange of lands is within the statute, and can no more be enforced than can an oral or parol sale of land. It is true that cases may be found in which the courts have refused to disturb such exchange of lands; but it was only where possession was taken by the parties of the lands received respectively by the exchange and actually and adversely held for as much as 15 years. Appellee has shown no such possession. So, if the written agreement he made with appellants were out of the way, he would nevertheless be unable to hold the land in controversy by reason of the exchange between Gordon and Boren.

It is his contention that the writing was intended to set forth an agreement between himself and appellants to cause to be surveyed and ascertained the line dividing the

lands exchanged by Gordon and Boren, and that he believed it expressed such agreement when he signed and acknowledged it, but that appellants' agent, Ford, fraudulently caused the writing to be prepared in its present form and language, and induced him to sign it without informing him of its contents or meaning. This contention is not sustained by appellee's own testimony. He did say it was not understood by him, but admitted that he had it in his hands, and was thereby given an opportunity to read it. He also failed to deny that it was read to him by Ford. The three attesting witnesses to the writing were Ford, Williams, and Simmons; the latter being a brother of appellee. Ford testified that the paper was written as directed by the parties; and he and Williams also testified that Ford placed the writing in appellee's hands before it was signed by him, and that the latter held it for some time, appeared to be reading it, and had ample time to do so; that Ford received the paper after appellee had thus examined it, and then read and explained it to appellee, who thereupon expressed his satisfaction with the paper and signed and acknowledged it, following which it was duly recorded.

Simmons, the third attesting witness, substantially corroborates both Ford and Williams as to what occurred when appellee executed the writing, and two other witnesses to whom appellee talked after signing the writing testified as to statements from him manifesting his knowledge of its contents and satisfaction with its provisions. According to the survey made in pursuance of the written agreement, the lines of the House 100-acre tract are as claimed by appellants, and they include and show appellants to be the owners of the land in controversy; no evidence being offered by appellee to prove that it is not a part of the House tract.

Our reading of the record convinces us that the verdict of the jury was flagrantly against the evidence; indeed, unauthorized by it; and, in view of the evidence of appellants' right to the land in controversy and the absence of evidence to support appellee's defense, the trial court should have peremptorily instructed the jury to find for appellants as to the ownership of the land, no damage being shown on account of its detention or for injury to it.

This conclusion makes it unnecessary for us to consider the objections urged by appellants to the instructions that were given by the court, except to say that the instructions should not have been given. Only a peremptory instruction as indicated would have been proper.

Wherefore the judgment is reversed and cause remanded for a new trial consistent with the opinion.

**DUFF v. VIRGINIA IRON, COAL & COKE CO. et al.**

(Court of Appeals of Kentucky. Jan. 18, 1910.)

**1. DEEDS (§ 207\*)—SETTING ASIDE—FORGERY—SUFFICIENCY OF EVIDENCE.**

In an action to set aside a deed, evidence held insufficient to show that plaintiff's signature and acknowledgment were forged.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 207.\*]

**2. ACKNOWLEDGMENT (§ 62\*)—EXECUTION—EVIDENCE.**

In view of the verity which should be accorded a deputy clerk's certificate of acknowledgment of a deed, the court, in order to authorize its overthrow on the ground that the grantor's signature was forged, should have before it such evidence as will leave no doubt that such officer was guilty of fraud or mistake.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 346; Dec. Dig. § 62.\*]

Appeal from Circuit Court, Perry County.

"To be officially reported."

Action by Dellah Duff against the Virginia Iron, Coal & Coke Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

F. J. Eversole and P. T. Wheeler, for appellant. Bailey P. Wootton, Jesse Morgan, and Greene, Van Winkle & Schooffield, for appellees.

**SETTLE, J.** On September 19, 1887, there was recorded in the office of the clerk of the Perry county court a deed bearing date July 21, 1887, from the appellant, Dellah Duff, and her husband, Daniel Duff, to T. P. Trigg, trustee, purporting to convey to the latter all the coal, oil, gas, and mineral products in, upon, and under a tract of land on Grapevine creek, in Perry county, owned by Mrs. Duff. The deed purports to have been acknowledged in due form by the grantors before P. C. Napier, a deputy for Ira J. Davidson, then clerk of the Perry county court. By successive conveyances from Trigg, trustee, and various other grantors, the appellee, Virginia Iron, Coal & Coke Company, acquired, as it contends, title to the coal, oil, gas, and mineral products in, upon, and under the land in question. In November, 1895, the Hocking Valley Oil & Gas Company, as lessee of the Virginia & Tennessee Coal & Iron Company, a vendor of appellee, entered upon this land and bored a well to the depth of 1,200 feet near appellant's residence. During the boring of the well some of the hands employed thereat boarded near appellant's residence. On April 24, 1908, appellant instituted this action in the Perry circuit court to cancel the deed from herself and husband to Trigg and the several successive deeds whereby the title to the mineral, etc., in her land passed to appellee, upon the ground that the deed from herself and husband to Trigg was, as to her signature and acknowledgment, a forgery, in consequence of which that deed and the several successive ones, down to and including

the deed to appellee, were null and void and passed no title to the minerals, etc., in, upon, and under her land. The defense interposed by appellee's answer was that the deed to Trigg, trustee, from appellant and her husband, was not a forgery; that appellant, by reason of certain acts set forth in the answer, was estopped to deny the validity of the deed; and that, in any event, the action was barred by the statute of limitations, in that, more than five years elapsed between her discovery of the alleged forgery and the institution of the action, and more than ten years between the commission of the forgery and its institution. After the taking of proof by the parties, and following the submission of the case, the circuit court rendered judgment dismissing the action at appellant's cost, and from that judgment she has appealed.

The record furnishes no evidence whatever of the alleged forgery of appellant's signature to and acknowledgment of the deed, except what is contained in her deposition, in which she positively denied that she signed or acknowledged the deed, or authorized any one to do so for her. She also stated that she could write her name, and had never made her mark to any instrument of writing, and that the mark indicating her signature to the deed to Trigg was not made or authorized by her. She further testified that she did not know of the existence of the deed or of the subsequent deeds, including appellee's, until about a year before the institution of the action, and then learned it through her son, Joseph Duff, who made the discovery upon a visit to Hazard, the county seat of Perry county.

As Napier, the deputy clerk, before whom the deed to Trigg purports to have been acknowledged by appellant and her husband, is dead, it cannot be known what he would have said as to her denial of having signed or acknowledged the deed; but we find that appellee introduced much evidence which strongly conduced to disprove appellant's denial of having signed and acknowledged the deed in question, and which tended to prove that she knew of and acquiesced in its execution. For example, although she knew of the boring of the well in 1895, by the Hocking Valley Oil & Gas Company near her residence, that members of the crew boarded at a little house nearby, and that their meals were prepared by a member of her family, and she then learned under whose and by what authority they were boring the well, she made no objection to the work, did not question their authority to perform it, and made no claim, at that time, that the deed she had made Trigg, trustee, was a forgery. In addition, it was proved by appellee that she boarded a crew of its surveyors in 1902 or 1903, who were surveying her land upon which it claimed the mineral rights; and,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

while she denied any knowledge of the character of work in which they were engaged, it is not probable that what was said about it by the men she boarded would have left her in ignorance of the nature of their work. At any rate, she did not then question their authority to do the surveying in which they were engaged, or make any claim that the Trigg deed was a forgery.

Besides the testimony referred to, appellee proved by Dr. M. E. Combs, an apparently reputable and disinterested witness, that he conducted a school near appellant's residence during the boring of the well on her farm by the Hocking Valley Oil & Gas Company and was frequently at appellant's house, as one of her children attended his school; that she then knew of the boring of the well on her farm at which her son, Joe Duff, was employed; that, in a conversation he had with appellant on one of his visits to her house, they discussed the drilling of the well on her land, and in the conversation she said that if they struck oil she and her husband had fooled away what they had by giving up their mineral rights in the land for the pitiful sum of 50 cents per acre, which was the sum per acre recited in the deed she and her husband had made Trigg, trustee, as the consideration for the conveyance of the mineral rights therein mentioned.

In view of these facts and circumstances, tending to show appellant's knowledge of and acquiescence in the deed to Trigg, trustee, and of the verity that should be accorded the deputy clerk's certificate showing her acknowledgment of the deed, we are not prepared to say that the circuit court erred in rendering the judgment complained of. It will not do to lightly set aside the certificate of such an officer. To authorize its overthrow, the court should have before it such evidence as will leave no doubt that the officer had been guilty of fraud or mistake.

This conclusion makes it unnecessary for us to determine whether appellee can in a case like this rely upon the statute of limitations.

Wherefore the judgment is affirmed.

### PERKINS v. J. M. ROBINSON, NORTON & CO.

(Court of Appeals of Kentucky. Jan. 18, 1910.)

#### 1. MORTGAGES (§ 463\*)—FORECLOSURE—SUFFICIENCY OF EVIDENCE—OWNERSHIP OF MORTGAGED PROPERTY.

In an action to foreclose a mortgage on land, evidence held to show that the mortgagor owned the land at the execution of the mortgage, though he had no deed for it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1368; Dec. Dig. § 463.\*]

#### 2. MORTGAGES (§ 11\*)—PROPERTY SUBJECT—CLAIM TO LAND.

Gen. St. 1888, c. 63, art. 1, § 6, permitting any interest in or claim to realty to be disposed of by deed, authorizes a mortgage of any inter-

est in land, so that one could mortgage land which he had purchased and owned, though he had no deed therefor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 11, 12; Dec. Dig. § 11.\*]

#### 3. DEEDS (§ 26\*)—VALIDITY—REFERENCE TO GRANTOR'S TITLE—EFFECT OF FAILURE.

A deed conveyed good title as between the parties, though it did not state the name of the grantor's grantor or the page of the record upon which his deed was recorded, contrary to Ky. St. § 495 (Russell's St. § 2061), making it unlawful to record a deed conveying more than a life estate which does not refer to the grantor's source of title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 51; Dec. Dig. § 26.\*]

Appeal from Circuit Court, Edmonson County.

"Not to be officially reported."

Action by J. M. Robinson, Norton & Co. against W. C. Perkins and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

W. D. Spillman, J. Morgan Chinn, and W. E. Settle, Jr., for appellant. M. M. Logan and Ora E. Hazelp, for appellee.

NUNN, O. J. The facts of this case, as presented in this record, are very conflicting. It is shown that Bruce and Eugene Perkins were merchants in Rocky Hill Station, Edmonson county, Ky.; that they commenced business prior to the year 1906, the exact time is not stated. They purchased many of their goods from appellee, and in the summer of 1906 had fallen behind with it \$465.80. They were pressed for a settlement and wanted to buy more goods to keep the store going, but appellee refused to extend them further credit unless they would secure it in some way. They promised appellee to execute a mortgage on a house and lot belonging to Eugene Perkins and upon three horses belonging to the firm, and upon this promise appellee shipped them about \$1,000 worth of goods. They delayed in executing the mortgage, and Bruce Perkins wrote appellee a letter explaining the delay, in substance, as follows: That the reason they had failed to send a description of the house and lot to appellee from which a mortgage could be prepared was that Eugene Perkins held only a title bond, that a deed had never been executed to him giving the description of the property, and that, as soon as that was done, they would send the description. In the month of November, 1906, appellant, W. C. Perkins, the father of Bruce and Eugene, prepared and signed a deed to Eugene for the house and lot, and carried it to the county court clerk's office. It was there discovered by the clerk and himself that neither the name of W. O. Perkins' grantor nor the page of the record upon which his deed was recorded were stated in the deed to Eugene, and in this condition it could not be recorded without subjecting W. O. Perkins and the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

clerk to a penalty under section 495, Ky. St. (Russell's St. § 2061). As W. C. Perkins had purchased this property at a judicial sale, and the record of it was in the circuit court clerk's office and the circuit court was in session, they did not take time then to investigate it, but left it there with the understanding that he would return it in a few days, and they would then complete it for record. He never returned to finish the deed, but by some means not explained W. C. Perkins became possessed of the deed, and filed it with his deposition in this action. While the deed was in the county court clerk's office an agent of appellee went to the office and took a description of the house and lot and prepared a mortgage covering same and three horses, which he carried to Rocky Hill Station on January 18, 1907, and Eugene, his wife and his brother, Bruce, executed it in due form. They failed to pay the notes secured by the mortgage and this action was instituted to enforce the lien on the property. They did not defend, but their father, W. C. Perkins, answered and resisted the enforcement of the lien upon the house and lot, claiming that the property was his. He alleged in his pleadings and testified that he agreed to convey this property to his son, so that he might execute a mortgage to appellee in order that he might secure goods in the future with which to keep their stock up; that the agreement was not to execute a mortgage to secure indebtedness to appellee past due; that, when he prepared the deed to his son and executed it, he knew that it could not be recorded because he had failed to state the name of the immediate grantor and the page upon which the deed was recorded; that he had never lodged it for record, and that his son Eugene had never accepted it. He was partially sustained in these statements by his sons, but was contradicted by appellee's agent and the facts and circumstances developed during the trial.

It appears in the record that Eugene became the owner of this property as far back as 1904. Bruce Perkins, in a letter to appellee dated in November, 1906, stated that Eugene owned the house and lot, but had only a title bond for it, and therefore could not send a boundary of the land, as the title bond did not contain it, and that they would endeavor to get a deed to it. In the deed from W. C. Perkins, which was prepared by him in November, 1906, to his son Eugene this language occurs: "And a part of the party of the first's part homestead sold to the party of the second part in 1904 and the same place where the party of the first part now lives." This language shows conclusively that W. C. Perkins sold this house and lot to his son as early as 1904, which agrees with the letter of Bruce to appellee to the effect that Eugene held a title bond to the property. Appellant and his sons gave their depo-

sitions in this case, but neither undertook to make an explanation of this matter. It therefore appears without contradiction that Eugene Perkins was the owner of this property before appellee's debt was created, and had a right to mortgage it, even though he had no deed of conveyance for it. "By section 6, c. 63, Gen. St., it is provided that 'any interest in or claim to real estate may be disposed by deed or will in writing.' And that the right to dispose of such interest or claim was intended to include the right to mortgage as well as to sell absolutely is unquestionable. For it is well settled that every kind of interest in real estate may be mortgaged if it be subject to sale and assignment." *Bank of Louisville v. Baumeister, etc.*, 87 Ky. 6, 7 S. W. 170. We are also of the opinion that the conveyance made and executed by W. C. Perkins to his son Eugene passed the title as between the parties thereto. In the case of *McPherson v. Gordon*, 96 S. W. 791, 29 Ky. Law Rep. 826, this court construed section 495 of the Kentucky Statutes with reference to the conveyances, the alleged defects of which were similar to the ones in the case at bar, and said that the deed passed the title to the grantee. The court in that case said: "The only purpose of this amendment was to make it more convenient and easy for purchasers of real estate to trace the title thereto, and to avoid impositions and losses. In our opinion it would have been better if such a requirement had always been the law. As stated, the effect of the amendment is only to require the name of the next preceding grantor of the grantor to be named in the deed, and places a penalty upon clerks and grantors who violate it. The violation of it, however, does not prevent the title to the real estate from passing from the grantor to the grantee." The lower court should require W. C. Perkins to prepare and present a deed conveying the property to his son Eugene in proper form, and, in case he fails to do so within a reasonable time, then the court should require the commissioner to make such a conveyance at the expense of W. C. Perkins.

For these reasons, the judgment of the lower court is affirmed.

#### AMERICAN JOBBING ASS'N v. POTTER.

(Court of Appeals of Kentucky. Jan. 14, 1910.)

#### PLEADING (§ 93\*) — ANSWER — INCONSISTENCIES.

Defendant, in an action on a contract for the sale of jewelry, denied in his answer that he made the contract except as thereafter set out, and a subsequent paragraph fully stated the facts as to what contract was made. *Held*, that the answer was not defective, there being no inconsistency between the paragraphs.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 189; Dec. Dig. § 93.\*]

Appeal from Circuit Court, Lawrence County.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"Not to be officially reported."

Action by the American Jobbing Association against Isaac Potter. Judgment for defendant, and plaintiff appeals. Affirmed.

Sullivan & Stewart and S. S. Willis, for appellant. M. S. Bur, for appellee

**HOBSON, J.** This suit was brought by the American Jobbing Association against Isaac Potter to recover the price of certain jewelry which it was alleged the plaintiff sold him on January 30, 1906, under a written contract signed by him which was filed with the petition. The defendant by his answer pleaded in substance that he was a merchant doing a small business at Kinross, Ky.; that he was without education, and could scarcely read print; that on January 30, 1906, J. W. Hall, a salesman for the plaintiff came to his store and offered to sell him the merchandise referred to in the petition; that he declined to buy it; that Hall then agreed with him to ship it to him on commission, he to have 25 per cent. of the proceeds of the sale for his services, and to remit every three months; what was left at the end of fourteen months to be returned to the plaintiff; that Hall then proposed to draw up a contract, and read it to him; that, as read to him by Hall, the contract was an agreement on his part to take the stuff on commission as above stated, and that he signed it upon this understanding; that Hall practiced a fraud upon him and obtained his signature to the contract by fraud; that shortly after this he received six notes called for in the contract to be signed by him and returned to the plaintiff; that he had not then opened the goods, and that when he discovered the fraud that had been practiced on him he immediately returned the goods and the papers to the plaintiff without signing the papers. The allegations of the answer were denied by a reply; proof was taken, and, on final hearing, the circuit court dismissed the petition. The plaintiff appeals.

Objection is made to the answer, but we see no substantial defect in it. It pleads the facts aptly and clearly. There was no inconsistency between the first paragraph and the second, for the denials in the first paragraph are accompanied with the statement that he made no contract with the plaintiff except as thereafter set out, and in the subsequent part of the answer the facts as to what contract was made are fully stated. On the trial of the action Hall testified that the contract was made as set out in the petition. On the other hand Potter testified that the transaction occurred as set out in his answer; and Potter's version of the transaction is sustained by two bystanders who confirm him in every important particular. In addition to this the circumstances sustain Potter. He promptly returned the goods

when he learned that the plaintiff looked to him to pay for them, and this before he had opened the box. His testimony shows him a very ignorant man; he can write his own name, but cannot read writing, and can do little at reading print. The proof sustains his allegation that Hall, after he had drawn up the contract, read it to Potter as a contract to receive the goods on commission, and not as a contract to purchase them.

Judgment affirmed.

#### YOUNG v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 14, 1910.)

**ABDUCTION (§ 2\*)—DEFENSES.**

In an action for unlawfully detaining a woman against her will with intent to have carnal knowledge of her, it is no defense that her husband told defendant to go up to the house and have intercourse with his wife, and that it would be all right with her.

[Ed. Note.—For other cases, see *Abduction*, Dec. Dig. § 2.\*]

Appeal from Circuit Court, Scott County.

"Not to be officially reported."

Oscar Young was convicted of crime, and appeals. Affirmed.

B. M. Lee, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

**HOBSON, J.** Oscar Young was indicted and convicted in the Scott circuit court of the offense of unlawfully detaining a woman against her will with intent to have carnal knowledge of her. His punishment was fixed at two years in the penitentiary, and he appeals.

The proof for the commonwealth by the woman detained and two other witnesses shows clearly the defendant committed the offense. His defense was in substance that the woman's husband told him to go up to the house and have intercourse with his wife; that she might kick a little at first, but that it would be all right; that he believed it would be all right with her; that he told her what her husband said, but she did not say anything. That the husband did this is no sort of defense for the defendant. The court allowed this evidence to be given in mitigation of the offense; but he might properly have excluded all the evidence as to what occurred not in the wife's presence. A husband cannot traffic in his wife's purity. His consent for a criminal assault upon her but adds to the indignity. It is just to the defendant to say that he and the husband were both drinking heavily. The wife denied that he said anything to her as to what her husband had said to him.

The case has in it no element of innocent mistake. The defendant struggled with the woman to force her to submit to him, until

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

her cries induced her step-brother, 14 years of age, to go 200 yards to a neighbor's for help and the neighbor came back with him to the house. He did not desist until the other man's footsteps were on the porch.

Judgment affirmed.

#### COMMONWEALTH v. NUNNELLY.

(Court of Appeals of Kentucky. Jan. 6, 1910.)

**FALSE PRETENSES (§ 32\*)—INDICTMENT—FALSITY OF PRETENSE.**

An indictment for obtaining money under false pretenses charged that accused unlawfully and feloniously represented to a person named that a certain mule was his own, and that the person named relied upon such representations, and, believing the same to be true, purchased and paid for the mule; that said representation was false, and known to be so by accused, and made by him to defraud said person, which was done, without which representation said person would not have purchased said mule—is insufficient for failing by special averment to charge that the mule was not the property of the accused.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 32.\*]

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

A general demurrer to an indictment accusing Sidney Nunnelly of obtaining money under false pretenses was sustained, and the commonwealth appeals. Judgment affirmed.

Jas. Breathitt, Atty. Gen., Jno. F. Lockett, Asst. Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and S. V. Dixon, for the Commonwealth. Clay & Clay, for appellee.

O'REAR, J. The commonwealth has prosecuted this appeal from the judgment of the Henderson circuit court, sustaining a general demurrer to this indictment: "Henderson Circuit Court, January term, 1909. The grand jury of Henderson county, in the name and by the authority of the commonwealth of Kentucky, accuse Sidney Nunnelly of the crime of unlawfully and feloniously obtaining money under false pretenses from another, committed in manner and form as follows, to wit: The said Sidney Nunnelly on the 29th day of January, 1908, and before finding of this indictment in the said county of Henderson did unlawfully and feloniously represent to Henry Davis of the partnership of Davis and Browder composed of Henry Davis and Chas. Browder liverymen that a certain horse mule was his own which he desired to sell and the said Davis representing the said firm of Davis and Browder relying upon said representation and believing the same to be true purchased said horse mule of said Sidney Nunnelly and paid for same in check of Davis and Browder which was cashed and charged to their account in bank; said representation was false and known to be so by said Nunnelly and made by him to defraud said Davis and the firm of Davis and Browder,

which was done, without which representation said Davis would not have purchased said horse mule for firm. Against the dignity of the commonwealth of Kentucky."

In *Commonwealth v. Sanders*, 98 Ky. 12, 32 S. W. 129, 17 Ky. Law Rep. 544, it was laid down that an indictment for obtaining money under false pretenses must by special averment negative the matter as to which the alleged false pretense or statement was made. To allege that the statement was "false" is not sufficient. The indictment should have charged that the mule was not the property of the accused, Sidney Nunnelly.

Judgment affirmed.

#### LOUISVILLE RY. CO. v. RAY.

(Court of Appeals of Kentucky. Jan. 19, 1910.)

**STREET RAILROADS (§ 99\*)—CARE REQUIRED IN OPERATION OF—CONTRIBUTORY NEGLIGENCE.**

Where a person familiar with city streets, in passing a street car as it was turning a street corner, failed to make sufficient allowance for the swinging of the car, and in turning, the rear end struck his wagon, causing his injury, he was guilty of negligence precluding a recovery.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 210; Dec. Dig. § 99.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by Martin Ray against the Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Fairleigh, Straus & Fairleigh and Howard B. Lee, for appellant. Popham & Webster and Morton K. Yonts, for appellee.

LASSING, J. Martin Ray sued the defendant railway company for damages alleged to have resulted to him by reason of the negligent operation by defendant of one of its cars. The company denied liability, and upon this issue the case was tried before a jury, with the result that plaintiff recovered a verdict for \$700. A new trial having been denied, the case is before us for review.

The extent of plaintiff's injury is not seriously disputed, and, if entitled to recover at all, defendant is not complaining of the verdict.

The facts, about which there is practically no dispute, are as follows: "Plaintiff was a passenger upon a wagon going north on Fourth street. When the wagon had reached a point near the intersection of P street with Fourth street, it met a car going south on Fourth street, which had stopped to let off passengers and turn the switch to go over onto P street. While the driver of the wagon was attempting to drive by the car, it started out P street, or rather, to turn from Fourth into P street, and, as it swung

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

around, the hind end of the car collided with the front end of the wagon, and plaintiff was thrown to the ground and injured. Both plaintiff and the driver of the wagon knew that this car would turn out P street. Plaintiff had lived in and about Louisville for some years, was familiar with street cars, and knew that, in turning the corner, the rear end of the car would project out over the street further than it would when running on a straight line. Both plaintiff and the driver could have seen the passengers being discharged from the car had they been looking. There was a hole in the street, east of the east track of defendant company, and this is given as the reason for the driver's going so close to the car.

On this state of facts, should a peremptory instruction have been given? If a different and higher degree of care is required of the employees of defendant company when starting a car from that required after it is set in motion, the judgment should be affirmed; but, if not, the peremptory instruction should have been given, for it has been expressly decided, and only recently so by this court in the case of *South Covington & Cincinnati Street Railway Company v. Besse*, 108 S. W. 848, 33 Ky. Law Rep. 52, 16 L. R. A. (N. S.) 890, that, for an injury similarly inflicted by a car while in motion, no liability exists. This court has, in a long line of cases, held, that it is the duty of those in charge of a street car to keep a lookout so as to avoid injuring those who may be crossing or upon the street in front of the moving car. But this rule has never been so extended as to require the employees in charge of the car to keep a lookout at corners and curves so as to prevent others using the street from colliding with the rear end of the car.

In this case the fault clearly lay with the driver. He knew that he could not with safety drive as close to the car as he was attempting to unless it remained stationary. He had no reason to believe that it would do so, but, on the contrary, had every reason to know that, as soon as the passengers were discharged and the switch turned, it would continue on its course out P street. When he discovered the presence of the hole in the street, he should have either checked his horse and not voluntarily driven into a place of danger, or else he should have driven further away from the car than he did. His failure to do one of these things was the direct cause of plaintiff's injury. The car was confined to its track; it could not get out of the way of the wagon, and those in charge of it were powerless to prevent the collision. Both the driver and plaintiff show, by their testimony, that they thought they could pass the car before it started. They, accordingly, made the attempt, and failed. The fault was theirs, or the drivers, certainly not that of the employees of the street car company. No

fair and reasonable distinction can be drawn or made between the duty that those in charge of a car while in motion owe to the public, and that which they owe to the public while the car is being put in motion. The duty is the same, for, so long as the car is stationary, neither life nor property is liable to be injured by it; and it is only when it is set in motion that it becomes necessary for those in charge of it to proceed with that degree of care which the place and circumstances and the crowded condition of the street warrant. In the *Besse* Case, the car was in motion when it passed the wagon near the curve in the street; in the present case, the car started just as the wagon passed it.

In each case both the wagon and the car were in motion when the accident occurred. The one cannot be distinguished from the other, and, this being so, the principles announced in the *Besse* Case control, and the peremptory instruction should have been given.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

#### ELK COAL CO. v. BINGHAM.

(Court of Appeals of Kentucky. Jan. 19, 1910.)

##### 1. APPEAL AND ERROR (§ 882\*)—REVIEW—INVITED ERROR—INSTRUCTIONS.

Defendant cannot complain of the failure of an instruction to cover a certain point, where the court sustained his objection to an instruction covering this point offered by plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3602; Dec. Dig. § 882.\*]

##### 2. TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS.

An instruction the same as one already given was properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 651; Dec. Dig. § 260.\*]

##### 3. CONTRACTS (§ 346\*)—ACTIONS FOR BREACH—PLEADING—VARIANCE.

Where, in an action for breach of contract to mine coal, plaintiff alleged that he agreed with defendant to open an entry and to mine coal in certain places by which he could have made a certain monthly sum, this was not equivalent to an allegation that he agreed to labor for defendant for that monthly compensation, so that, where the proof showed that he was to receive so much per ton for coal mined, there was no variance between the proof and allegations.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1740; Dec. Dig. § 346.\*]

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Action by Robert Bingham against the Elk Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Robt. G. Gordon, O. V. Riley, and D. B. Logan, for appellant. N. J. Weller and E. N. Ingram, for appellee.

NUNN, C. J. This appeal is prosecuted to reverse a judgment for \$300 recovered by appellee for the breach of a contract. A reversal is asked because, as alleged, the peti-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion did not state a cause of action, and for an alleged error in instruction No. 1 given to the jury by the court, and because the evidence was not sufficient to authorize the verdict and judgment. It was alleged, in substance, by appellee in his petition and amended petition: That some time about the last of March or first of April, 1907, while he was laboring in the mine of appellant, he and appellant entered into a contract by which appellant agreed to furnish him labor for the remainder of the year ending January 1, 1908, in opening an entry in its mine and mining coal in its rooms; that he accepted the proposition and commenced laboring thereunder, and was making, and could have made during the remainder of the year, from \$70 to \$90 a month; that, after he had labored thereunder for something more than a month, appellant, without right or any fault upon his part, discharged him and refused thereafter to permit him to perform his part of the contract; that he was unable during the remainder of the year to obtain employment in any other mine by reason of the interference of appellant; that after due diligence he was unable to obtain employment and earn any sum, except to the extent of \$100, and alleged that he had been damaged \$300 by reason of the breach of the contract by appellant. Appellant answered and specifically denied all the allegations of the petition. Upon a trial appellee introduced evidence sustaining his claim, and appellant introduced evidence to the contrary.

It appears that appellant required its employees to purchase their supplies from its store, and it conceived the idea that appellee was not doing this, or that he was not purchasing the amount that appellant thought he should. This seems to have resulted in his discharge. Appellee's proof conduced to show that, if he had been permitted to continue laboring under the contract, he would have made from \$70 to \$90 per month or more, and that he was unable to get employment other than to the extent alleged by him, and the jury was authorized to give him the verdict for \$300.

Appellant complains of instruction No. 1 because the court failed to require the jury to find from the evidence that appellee entered into the contract whereby he agreed to labor for appellant for the remainder of the year 1907. It is sufficient to say that appellee offered an instruction that explicitly covered this point, and the court sustained appellant's objection to it and refused to give it. Furthermore, the instruction given by the court on this question was in the exact language of the one offered by appellant.

Appellant further contends that it was entitled to a peremptory instruction for the reason that it was alleged in appellee's petition that by his contract with appellant he was to labor for from \$70 to \$90 per month, and

the testimony showed that he was to receive 85 cents per ton for coal mined from the entry and 62 cents per ton for coal mined in the rooms, and that there was therefore a variance between the proof and the allegations of the petition. This contention is not tenable. It was appellee's contention in both his petition and amended petition that he was to mine coal from an entry and rooms by which he could have made from \$70 to \$90 per month, if he had been permitted to continue his labor and comply with his part of the contract, and that he was, without any fault on his part, prevented from so doing. This was the issue submitted to the jury, and it found against appellant on the facts, which, in our opinion, the evidence authorized it to do.

For these reasons, the judgment of the lower court is affirmed.

#### CITY OF LOUISVILLE v. POOLEY (two cases).

(Court of Appeals of Kentucky. Jan. 18, 1910.)

##### 1. LICENSES (§ 7\*)—AMOUNT OF FEE—REASONABLENESS.

The rule that the amount of a license fee imposed as a tax is ordinarily a question for the taxing power and the courts will not interfere with its discretion is subject to the limitation that the tax must not amount to a prohibition of any useful or legitimate occupation.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

##### 2. LICENSES (§ 7\*)—LOANS—EXCESSIVE FEE.

The occupation of lending money on salaries or chattels being a legitimate one, an ordinance imposing a license fee amounting to 80 per cent. of the average net earnings of companies engaged in such business is void as unreasonable and prohibitive.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 7.\*]

Appeal from Circuit Court, Jefferson County, Criminal Division.

"To be officially reported."

Actions by the City of Louisville against F. R. Pooley. From the judgments, plaintiff appeals. Affirmed.

Percy N. Booth, for appellant. D. R. Castleman, Pryor, Sapinsky & Castleman, W. L. Doolan, and Stanley R. Wolf, for appellee.

CLAY, C. These two appeals are prosecuted by the city of Louisville from judgments of the Jefferson circuit court holding unconstitutional sections 63 and 64 of the license ordinance of the city of Louisville. Those sections are as follows:

"Sec. 63. Every person, firm or corporation engaged in the business of lending or advancing money (or negotiating for the loan or advance of money) on chattel mortgages, shall pay a license of one thousand dollars per year.

"Sec. 64. Every person, firm or corpora-

tion engaged in the business of lending or advancing money (or negotiating for the loan or advance of money) on assignment of salaries or wages, due or to become due, or discounting salaries or wages, due or to become due, shall pay a license of one thousand dollars per year."

While it is true that the amount of a license fee imposed as a tax is ordinarily a question for the taxing power, and the courts will not interfere with its discretion, yet this court is committed to the doctrine that this rule is subject to the limitation that the tax imposed should not amount to a prohibition of any useful or legitimate occupation. *Hall v. Commonwealth, Use, etc.*, 101 Ky. 382, 41 S. W. 2, 19 Ky. Law Rep. 578; *Fiscal Court of Owen County et al. v. F. & A. Cox Co.*, 117 S. W. 296, 21 L. R. A. (N. S.) 83. There can be no doubt that the business of loaning money on salaries or chattels is a useful, legitimate occupation. In every community there are many persons who have no personal credit, and, in case of an emergency, they have no means of raising money except by a pledge of their salaries or chattels. In such cases the company loaning money on salaries or chattels serves a useful, and, oftentimes, a most beneficent purpose. It may be, however, and doubtless is true, that such companies frequently take advantage of the needy circumstances of those desiring to borrow, and exact a rate of interest far in excess of that allowed by law. If this be the case, we take it that such companies should be regulated by statute so as to remedy the evil. The taxing power should not be used to drive them out of existence. Furthermore, we are unable to see how a burdensome tax could in any manner relieve the borrower of oppression. If placed at an unreasonable sum, the effect would be to drive out a number of smaller concerns, and thereby stifle all competition and create a monopoly in the few who are able to pay the tax. In such a case there would be still greater oppression, instead of relief therefrom. Furthermore, the ordinances in question are not confined to those who charge in excess of the legal rate of interest. They apply alike to all persons, firms, or corporations engaged in the business of lending money on salaries or on chattel mortgages, whether they charge 6 per cent. or a rate in excess of 6 per cent.

Evidence was heard in the court below, and the court held that the evidence showed that the license tax imposed in each ordinance was unreasonable, oppressive, and prohibitive. The evidence heard below is before us, and it shows the total net earnings of 10 of the loan companies on both salaries and chattels, the net earnings of nine companies on salaries, and the net earnings of nine companies on chattels. The amount of the license tax for lending money on salaries is 25 per cent. of the net earnings on

salaries of the company doing the largest business, it is 40 per cent. of the net earnings on loans made on salaries by the company doing the second largest business, it is 100 per cent. of the two next largest, and, as to the remaining five companies, it is from two to five times as much as the net earnings of those companies on salaries. If we take the average earnings of the nine companies on salaries, the amount of the license tax is 84 per cent. thereof. In the case of net earnings on chattels, we find that the license tax of \$1,000 is 40 per cent. of the net earnings of the company doing the largest business, 45 per cent. of the net earnings of the company doing the second largest business, nearly 70 per cent. of the net earnings of the two companies doing the next largest business, and, as to the remaining five companies, the tax is in excess of the net earnings. If we take the average net earnings of the nine companies, we find that the tax is 80 per cent. of that sum. If we take the average net earnings both on salaries and chattels, we find that this amounts to \$2,200. Against this sum is a license charge of \$2,000, for each company loans on both salaries and chattels, and has to pay both license fees.

Having determined that the occupation of lending money on salaries or chattels is a legitimate one, we must apply the same rule to it that we apply to any other useful or legitimate occupation. If a municipality should impose a license tax of \$1,000 upon attorneys at law, and this sum was in excess of the net earnings of the majority of the lawyers practicing therein, and as much as 80 per cent. of the average earnings of all the members of the bar, we would have no hesitancy in holding that the amount of the tax was so unreasonable and oppressive as practically to prohibit the practice of such profession. For the same reasons, we hold that the ordinances in question are unreasonable, oppressive, and prohibitive. Furthermore, we have examined the license fees imposed upon similar occupations, and find that the license fees in question are so much greater than the former that we conclude it was the purpose of the general council to make the license fees in question prohibitive.

Judgment affirmed.

#### SHARP v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 13, 1910.)

##### 1. CRIMINAL LAW (§ 1223\*)—LOCAL OPTION LAW—VIOLATION—PEACE BOND—SECOND OFFENSE.

Under Ky. St. § 2557b, subd. 3 (Russell's St. § 3639), which provides that on the second or any subsequent conviction for a violation of the local option law the court shall require defendant to execute a bond for his good behavior, the court cannot require a peace bond where defendant was convicted of two violations on the same day, since the bond cannot be required

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

until a conviction is had for a second offense which was committed after the conviction for the first.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1223.\*]

## 2. CRIMINAL LAW (§ 1114\*)—APPEAL—RECORD—REVIEW.

Where certain judgments of conviction of the local option law were not made to appear in the motion to require appellant to give a peace bond, they will not be considered on appeal, since they form no part of the record.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1114.\*]

Appeal from Circuit Court, Whitley County.  
"Not to be officially reported."

Alvis Sharp was convicted of violating the local option law, and appeals. Reversed and remanded.

E. L. Stephens and Faulkner & Sharp, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

NUNN, C. J. On the 13th day of November, 1909, J. B. Snyder, commonwealth's attorney for the Twenty-sixth judicial district, filed in the circuit court of Whitley county two informations against appellant, Alvis Sharp. In one of them he charged Sharp with violating the local option law by selling, without license, whisky by retail to one Alex Parks on or about the 10th day of November, 1909. The other information charged him with a like offense for selling whisky to Parks on or about the 13th day of November, 1909. A trial was had in each case, which resulted in appellant's conviction and a fine assessed against appellant in each case of \$60 and cost. Both trials were had on the 26th day of November, 1909. On the same day, but after the two trials were over, the court entered the following order: "The defendant being brought before the court on the charge of having been twice convicted on the charge of selling liquor without license, and the court, after considering the case, binds the defendant in a bond of \$1,000 to keep the peace and be of good behavior for the period of one year from this date, and defendant, failing to give said bond, is committed to jail in custody of the jailer for the period of three months, unless such bond be executed before the expiration of said three months." At the same term of the court appellant, by counsel, moved the court to vacate this order, for the reason (1) that the court abused its discretion by increasing the bond from \$200, as provided by the Kentucky Statutes, to the sum of \$1,000; (2) because the order of the court was not authorized by law.

We deem it necessary to consider only the last ground assigned. The record, as certified by the judge of the district, shows only two convictions of appellant for violating the local option law, both of which were assessed on the 26th day of November, 1909, and im-

mediately preceding the entering of the order requiring the peace bond. Evidently the court was undertaking to enforce its power authorized by subsection 3, § 2557b, Ky. St. (Russell's St. § 3639). This subsection has been expressly considered by this court in the case of Hyser v. Commonwealth, 116 Ky. 410, 76 S. W. 174, and it was held therein that the lower court had no power to place a defendant under a peace bond when the two convictions were had on the same day; that it was implied by the statutes that the offense for which the second conviction took place must have occurred after the first conviction for a like offense. In other words, the General Assembly looked to the reformation of persons and expected the first conviction to accomplish that purpose, but, in case it did not, the court was then authorized to place persons under bond to keep the peace and to not violate the local option law; but this is not to be done until a conviction is had for a second offense which was committed after the conviction for the first. It is conceded that the case of Hyser v. Commonwealth, supra, is conclusive of the one at bar under the record before us as certified by the judge of the lower court; but appellee's counsel presents and offers to file with the record what purports to be copies of two judgments rendered in March, 1909, against this appellant in favor of the commonwealth for violating the local option law. If these judgments had been made to appear in the motion to require appellant to give a peace bond, and been made a part of the record on the appeal, the case would have been different, but, as it is, we cannot consider these judgments because they form no part of the record and have not been so certified; and, besides, if they had been presented as evidence on the motion to require the bond of appellant, he might have been able to show that they had been annulled or reversed. It is sufficient to say, however, that they form no part of the record on this appeal, and therefore cannot be considered. It results that the court erred in requiring appellant to execute a bond to keep the peace.

The judgment is reversed and remanded for further proceedings consistent herewith.

## POTTER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 7, 1910.)

### HOMICIDE (§ 191\*)—ASSAULT WITH INTENT TO KILL—EVIDENCE—ADMISSIBILITY.

On a trial for assault with intent to kill, evidence that prosecutor made an unprovoked assault on accused with a knife a few hours before the offense was admissible to show the feeling of prosecutor toward accused, and to support the theory that prosecutor was the aggressor, and that accused was acting in self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 414; Dec. Dig. § 191.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Jefferson County, Criminal Division.

"Not to be officially reported."

Virgil Potter was convicted of assault with intent to kill, and he appeals. Reversed and remanded.

W. H. Sweeney, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

NUNN, C. J. Appellant was indicted, tried, and convicted in the Jefferson circuit court for the crime of willfully and maliciously wounding Romie Reed with a hatchet, a deadly weapon, with the intent to kill him. He was given the maximum penalty, five years. He asks a reversal on account of alleged error committed against him by the trial court. There was no conflict in the testimony with reference to his hitting and wounding Reed with a hatchet. The only issue was whether he did it maliciously and willfully with the intent to kill him, as claimed by the commonwealth, or whether he did it in self-defense, as claimed by appellant.

There were four witnesses introduced besides the physician. Three of them were for the commonwealth, to wit, Romie Reed, Lillie Reed, his sister, and H. Leslie, his nephew. Romie Reed testified that he was in bed asleep when the wound was inflicted; that he did not know who hit him, nor what weapon was used. The boy stated that he was in the bed asleep with his uncle when appellant struck his uncle, Reed, two licks, and that appellant was in the act of striking the third time when the hatchet flew off of the handle and struck him, the boy, a glancing lick on the knee. Lillie Reed testified that she was in the front room and heard two licks, that she ran to the kitchen where her brother and the boy were sleeping, and appellant told her to go back or he would kill them all. Appellant testified that Reed was not in bed when he hit him; that he got out of the bed and was coming on him with a knife; that he threw the hatchet at and hit him; that he went into the kitchen and was using the hatchet in splitting kindling when it came off of the handle; that Reed seemed to have been aroused by the noise, and he jumped out of the bed and started after him with a knife, and he, appellant, threw the hatchet at him with the result stated.

The trouble between the parties arose between 5 and 6 o'clock in the morning. It was developed upon the trial in the lower court that the parties had a difficulty between 11 and 12 o'clock the night previous to the morning Reed was wounded, and Lillie Reed was asked what her brother, Romie Reed, said about killing appellant, if anything. She answered that he said "he would

cut his throat. He put his knife around his neck, and said he would cut his throat." She was then asked whether her brother was after him with a knife, but an objection was made to this testimony by the commonwealth attorney, which was sustained. Appellant went on the stand and was asked the following question, to wit: "State whether or not the night previous to the time you hit him with the hatchet he cut you 'with a knife, put a knife around your throat, and threatened to kill you the first opportunity he could get, and whether or not he had cut you.'" An objection was sustained to this question, and an avowal made that, if the witness were permitted to answer, he would do so in the affirmative, setting forth the language. The court sustained objections to other testimony along this line, and this is the error for which appellant asks a reversal. We are at a loss to understand why the court permitted Lillie Reed to make the statements referred to and refuse to permit appellant and other witnesses to testify with reference to the same matter. Nor do we understand why the court refused to allow Lillie Reed to answer a question which, if answered in the affirmative, would have shown that Romie Reed made, on the night before the offense charged was committed, an assault upon appellant with a knife. This testimony was certainly competent. If it were true that Reed made an unprovoked assault upon appellant with a knife a few hours before the offense was alleged to have been committed, it would have tended to show the state of feeling existing on the part of Reed towards appellant and to support his theory that Reed was the aggressor, as well as to support his theory that he was acting in self-defense when he struck Reed with the hatchet. As to what effect this testimony would have had upon the minds of the jury we are unable to say. It was competent testimony, however, and should have been permitted to be introduced and considered by the jury. This has been expressly declared in the cases of McGowan v. Commonwealth, 117 S. W. 387; Kennedy v. Commonwealth, 77 Ky. 340; Cockrill v. Commonwealth, 95 Ky. 22, 23 S. W. 659; White v. Commonwealth, 125 Ky. 699, 102 S. W. 298, 1199, and the cases therein cited.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

LOUISVILLE & N. R. CO. v. LUMPKIN.† (Court of Appeals of Kentucky. Jan. 20, 1910.) MASTER AND SERVANT (§ 236\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff, an engineer, went under his engine while it was standing in the yards to make repairs, and while under it another train backed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied March 9, 1910.

down the track toward his engine when his fireman sounded the danger signal, and plaintiff got out and the other train backed into the car attached to his engine, and, after waiting from four to eight minutes when the other train did not move, plaintiff went back under his engine, though another employé advised him that it was unsafe to do that in the yards. The other engine was around a curve so that plaintiff could not see it. He thought he saw the smoke of a detached engine going to the roundhouse, and saw some trainmen on the other train leave it as was usual, when cars were not to be again moved, but the other engine had not left, and, after plaintiff went under his engine, pulled forward and moved his engine, injuring him, the cars of the other train having automatically coupled with the car attached to plaintiff's train, which he did not know. Plaintiff did not give the other trainmen notice that he was going under his engine or investigate to determine whether the train was connected therewith and the repairs thereto were not urgent, and could have been made after his engine was pulled away some distance from the other train. *Held*, that plaintiff was negligent in going under the engine under the circumstances, so that he could not recover for injuries sustained.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 738, 740; Dec. Dig. § 236.\*]

Appeal from Circuit Court, Whitley County.  
"To be officially reported."

Action by John Lumpkin against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for further proceedings.

Benjamin D. Warfield, J. W. Alcorn, H. H. Tye, and Chas. H. Moorman, for appellant. Robert Harding, R. L. Pope, E. V. Puryear, T. Z. Morrow, and Greene, Van Winkle & Schoolfield, for appellee.

HOBSON, J. John Lumpkin was an engineer in the service of the Louisville & Nashville Railroad Company, having charge of a switching engine in its yards at Corbin, Ky. He worked during the day and another engineer took charge of the engine and ran it at night, coming on for duty at 6 p. m. Ten or 15 minutes before 6 p. m. Lumpkin pulled his engine with a box car attached to it up to a water crane and stopped there for two purposes: First, to take water; and, second, to repair some of the appliances of the engine which were out of order, and which it was his duty to repair before he turned it over to the night man. For the purpose of making these repairs, he went under the engine while the fireman turned the crane and began running water into the tank. While they were thus engaged, the fireman saw a train of 42 cars backing down on the track on which they were standing. He at once blew the whistle as a danger signal. At this Lumpkin came out from under the engine, and the men who were backing the cars stopped them, but not before the cars had backed against the cars standing next to the

engine, and pushed that and the engine several feet down the track. Lumpkin and the fireman stood there for several minutes, waiting for these cars to move. In the meantime the night engineer arrived to take charge of the engine. But it was not quite 6 p. m., and Lumpkin said to him, "There is a minute or two repairing to be done under the engine," and was about to go under it again for this purpose. The night man said to Lumpkin that he would not go under the engine; that it was unsafe to go under the engine there in the yard; that a person never knew when something might run against them. Lumpkin replied that it was all over, and again went under the engine. While he was under there making the necessary repairs, the train which had backed against him pulled up. When this train had backed against the car which was attached to his engine, the impact had automatically set the coupling between them, and, when the train pulled up, this coupling being set, it carried with it both the car and Lumpkin's engine, under which he was then at work. The result was that his right arm was cut off, and he brought this suit to recover for the injury. A judgment having been rendered in his favor for \$5,000, the railroad company appeals.

Before going back under the engine to finish the repairs, Lumpkin had stood by the side of the engine from four to eight minutes. He saw some employés on the backing train get down and leave it as was done when no further movement of the cars was to be made. He saw what he thought was the smoke of a detached engine going to the roundhouse. He did not know that the train had become coupled to his box car. The engine which had backed in this train was around the curve from him. He could not see it. He did not go around the curve to assure himself of what the situation was. He did not confer with any of the men on that train to learn what they were going to do. He gave them no notice that he was going under the engine, and they knew nothing of his danger. He knew that the train had backed against his car; and he also knew that sometimes when this was done the coupling would set automatically; but he made no investigation before going under the engine. The engine stood in a busy yard where trains and cars were constantly moving about, and, when he went under the engine, there was no space between the car attached to the engine and the cars of the train which had run against it. Any backward movement of that train would necessarily move his engine. He had only been saved from injury a few minutes before by getting out from under the engine when the fireman sounded the alarm whistle, before the collision occurred. It is insisted that the men in charge of the backing train were negligent in backing it against Lumpkin's car, and that, when they backed it

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date; & Reporter Indexes

against his car, there should have been a man on the rear of this train to see whether it had coupled to the car before the train was moved up. It is pretty evident from the proof that the men in charge of the train did not intend to back against Lumpkin's car, nor to couple to it, and that there was negligence on their part in backing and coupling to it. But Lumpkin was not hurt then. After he got from under the engine, he knew that the train had backed against the car. When he then went under the engine, he knew that any backward movement of the train would move his engine, and he did not know when such a movement might take place, for, although as he thought the engine which had put the cars there had left, he could not see around the curve, and he could not tell at what moment another engine might come against these cars. As a matter of fact, the engine which placed the cars there had not left, and the smoke which Lumpkin saw was the smoke of another engine. When he went under his engine, his engine and car were a part of the train which had backed against them. He could have avoided all danger by moving his engine and car down the track a short distance, and having the men who were with him to watch as before, while he went under the engine to make the necessary repairs. But he did not do this, and went under the engine without taking any precautions for his safety, and without anybody knowing that he was under it except the men who were with him. The train of cars which had backed in was about a quarter of a mile long, and it had simply stood there while the engineer was waiting for the signal to go ahead. The men which Lumpkin saw leave the cars were simply walking away from them temporarily in the discharge of their duties. Cars were constantly moving about in the yard, and no one could tell when cars would be moved, or when they would be sent forward or backward. It was required by the rules that, when work was to be done under cars by any of the men, blue flags were to be put out which would give notice of the danger of moving them.

When Lumpkin went under the engine, he knew that any movement of the engine imperiled his life. He also knew that there could be no backward movement of the train referred to that would not necessarily move his engine back. If that train had backed and had thus injured Lumpkin, it would hardly be maintained that he was not guilty

of contributory negligence in going under the engine; for manifestly he did not take any adequate precautions to know what that train was going to do next. The fact that the train went forward instead of backward in no way affects the question of his contributory negligence in going under the engine; for he went under the engine upon the idea that it was all over, and that no further movement of those cars was to be made. In doing this he took the risk. There was no immediate urgency for the work to be done under the engine. Only a chain on a brake beam had to be adjusted. The engine had been run for several hours as it was; and, if he had moved his engine down the track so that his fireman might warn him of danger as he had done before, he would have discovered at once that the train was coupled to his car. There was the same necessity for care on his part after he saw the train come against his car, as there was for care on the part of the men in charge of the train. It was the duty of both to exercise ordinary care in the handling of what was in their charge. Lumpkin did not exercise any care to ascertain whether his engine and car were free, and, if he had the right to assume they were free, it is hard to see why the men in charge of the train had not an equal right to assume the same thing. It has long been settled that men who go under trains without notice to the trainmen take the risk. We cannot see why this rule should not apply here. Lumpkin knew the cars of the train were against the car that was attached to his engine, and that, so far as any backward movement of that train was concerned, his engine and car were for practical purposes a part of the train. He did not know that the automatic coupling had fastened, but he knew that such couplings were in common use and were liable to fasten. To say that he may recover here would be in effect to hold that a person may go under an engine or cars in a yard like this, without notice to others or taking any precautions for his own safety, and recover for his injury if he is hurt. This we cannot do.

We therefore conclude that, on the facts shown by him, the court should have instructed the jury peremptorily to find for the defendant. This conclusion makes it unnecessary for us to consider the other questions discussed by counsel.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

## MUDD, Warden, v. WOODSIDE.

(Court of Appeals of Kentucky. Jan. 27, 1910.)

## 1. REWARDS (§ 14\*)—RETURN OF ESCAPED CONVICT—STATUTES.

Ky. St. § 3798 (Russell's St. § 5219), provides that the warden shall pay into the state treasury the funds in his hands not required for the current use, and shall deposit all moneys remaining in his hands in some bank to his credit as warden, and shall be allowed no credit in the settlement of his accounts, unless he shall produce the receipt of the person to whom money was paid by him, showing for what it was paid. Section 4688 (Russell's St. § 4978; Act March 27, 1893, p. 607, c. 169, § 9) provides that no money shall be paid out of the treasury except upon the warrant of the Auditor, drawn upon the Treasurer, and then only by the check of the Treasurer upon a designated state depository. *Held*, that these sections furnish no warrant to the warden for a refusal to pay to one who has returned an escaped convict to the penitentiary the reward prescribed to be paid by section 1936 (Russell's St. § 3455).

[Ed. Note.—For other cases, see Rewards, Cent. Dig. § 20; Dec. Dig. § 14.\*]

## 2. REWARDS (§ 8\*)—RETURN OF ESCAPED CONVICT—STATUTES.

Under Ky. St. § 1936 (Russell's St. § 3455), providing a reward for the capture and return of an escaped convict, a party doing so was entitled to the reward, although the convict, because of injuries, had abandoned the idea of escape, and asked him to return her to the prison.

[Ed. Note.—For other cases, see Rewards, Dec. Dig. § 8.\*]

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Mandamus by the People, on the relation of W. M. Woodside, to compel E. E. Mudd, Warden of the State Penitentiary, to pay him a reward for the capture and return of an escaped convict. From a judgment for petitioner, defendant appeals. Affirmed.

Jas. Breathitt, Atty. Gen., and John F. Lockett, Asst. Atty. Gen., for appellant. B. G. Williams, for appellee.

CLAY, C. On or about July 13, 1909, a convict by the name of Dicey Gilpin escaped from the penitentiary at Frankfort. Appellee, W. M. Woodside, recaptured the convict, and conveyed her back to the penitentiary, and delivered her to the appellant. Thereupon the appellant gave appellee the following receipt: "Kentucky Penitentiary, E. E. Mudd, Warden, Frankfort, Ky., July 13th. Received of W. M. Woodside the body of Dicey Gilpin, an escaped convict, for whom a reward of \$100.00 was offered. E. E. Mudd, Warden." Section 1936 of the Kentucky Statutes (Russell's St. § 3455) is as follows: "When a convict shall escape from the penitentiary the warden shall issue a warrant, directed to all sheriffs, constables and marshals in the state, and to all persons, authorizing and requiring them to retake and convey such convict to the penitentiary. The

person recapturing and conveying back to the penitentiary any convict shall be paid by the warden a reward of one hundred dollars, and all reasonable expenses out of the funds belonging to the state. The warden may employ persons to go in pursuit of the convict, and shall pay them a reasonable compensation for their services. If any sheriff, or other officer, shall refuse or willfully neglect to obey the warrant of the warden, he shall be fined not less than ten nor more than one hundred dollars." Charging that he had recaptured and conveyed the said convict back to the penitentiary, and that he was entitled to a reward of \$100 by virtue of the provisions of the above statute, appellee instituted this action for a writ of mandamus to compel appellant, as warden of the penitentiary, to pay to him the sum of \$100.

Appellant answered in two paragraphs. In the first paragraph he pleaded that he had given the receipt under the mistaken belief that appellee had really recaptured said convict; that the reward of \$100 was for recapturing and conveying back an escaped convict, and as such was offered by the state under the statute above referred to, and was not offered by appellant either personally or officially. Appellant further pleaded in the same paragraph that, while the statute under which the action was instituted remains upon the statute book, yet other statutes had been subsequently passed stripping the wardens of the penitentiaries of all moneys, except that received for supplies to the prisons and for salaries, and that he has no funds on hand, nor could he receive any under the law out of which to pay said reward; that since the passage of the act relied upon by appellee the General Assembly has required the covering of all moneys received by the labor of convicts into the state treasury, and that the support of its penal institutions is through specific annual appropriations by enactment of the General Assembly, and that even the salaries of the officials and employes of said institutions are paid by the State Treasurer through the warrant of the State Auditor; that the statute relied upon in the petition was repealed by necessary implication by the following act of the General Assembly (Acts 1891-93, p. 607, c. 169, § 9), approved March 27, 1893; it being section 4688, Ky. St. (Russell's St. § 4978): "No money shall be paid out of the treasury except upon the warrant of the Auditor, drawn upon the Treasurer as now or may hereafter be provided by law, and then only by the check of the Treasurer upon a designated state depository; and no such check shall be given by the Treasurer, even though the Auditor issues a warrant therefor, unless the law under which the money may be claimed expressly directs and orders that it shall be paid out of the public treasury." In paragraph 2 of the answer appellant further pleaded by way

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of defense that in escaping from the penitentiary the said Dicey Gilpin fell from the wall surrounding the penitentiary upon the outside thereof, injuring herself so severely that she was forced, after traveling a short distance therefrom, to seek shelter at the home of appellee, where she revealed to him and his family that she was an escaped convict from the penitentiary; that this was in the nighttime, and on the following morning, having abandoned the idea of escape, she asked appellee to notify the prison authorities to come after her, whereupon appellee, after communicating with said authorities, himself brought her to the prison, where the receipt pleaded was issued to him; that if he was liable to pay the reward offered by the state for the recapture and conveying back of an escaped convict, the facts disclose that there was no recapture of the convict, and the conveying back was a mere accommodation to the prison authorities, for which appellee ought to be paid, if anything, the expense incurred, the value of the time lost from his business, and no more. The special plea contained in the first paragraph of appellant's answer was overruled. Thereupon a demurrer was filed to the second paragraph of the answer, and sustained. The court thereafter entered judgment directing appellant, as warden of the penitentiary, to pay appellee the sum of \$100 and costs of the proceedings. From that judgment this appeal is prosecuted.

The effect of the special plea is that appellant, as warden of the penitentiary, is not liable for the payment of the reward; that appellee's action, if he has any, lies against the Auditor of Public Accounts. Section 3798 of the Kentucky Statutes (Russell's St. § 5219), is as follows: "The warden shall balance his cash account each month and report the same to the commissioners; and on the first Monday of each month he shall pay into the state treasury so much of the funds in his hands as, in the opinion of said commissioners, is not required for the current use of the penitentiary. He shall deposit all money remaining in his hands, not deposited in the treasury in some bank selected by him, to his credit as warden; and he shall be allowed no credit in the settlement of his accounts, unless he shall produce the receipt of the person to whom money was paid by him, which receipt shall show upon its face for what the money was paid. And the books of the warden and his clerks shall at all times be open to the inspection of any committee of the Legislature and to the commissioners." It is perfectly apparent from this statute that the warden has in his hands funds for the current use of the penitentiary. It is made his duty to turn into the treasury so much of the funds in his hands as in the opinion of the commissioners is not required for the current use of the penitentiary. He is required to deposit all money remaining in his hands, not deposited in the treasury, in some bank se-

lected by him, to his credit as warden. That he is authorized to pay out money is shown by the latter part of the section, which provides that he shall be allowed no credit in the settlement of his accounts, unless he shall produce the receipt of the person to whom money was paid by him, which receipt shall show upon its face for what the money was paid. Section 4688 has application only to such money as is in the state treasury; it does not apply to money in the hands of the warden for current use of the penitentiary, which is deposited to his credit as warden, and which has not been turned into the treasury. Furthermore, the repeal of the statute by implication is not favored. It is just as much the duty of the warden to offer a reward for the return of an escaped convict, and to pay the reward, as it is to take care of the prisoners while in the prison and to give to each upon his release a suit of clothes and the sum of \$5. We, therefore, conclude that the reward, if any, was payable by the warden out of the funds in his hands, and not by the Auditor of Public Accounts. If he has no available funds on hand, the commissioners should provide him with such funds out of the appropriations made for the current expenditure of the penitentiary. Upon paying such rewards, of course, the warden will be given credit in his settlements when he produces the receipt signed by the person recapturing and conveying back the convict to the penitentiary, and showing for what the money was paid.

But it is insisted that the facts set out in the second paragraph of appellant's answer, to the effect that the convict voluntarily surrendered herself and requested appellee to notify the prison authorities, did not constitute a genuine case of recapture, and that therefore no reward is due appellee. The very purpose of the reward is to secure the return of the convict. An escaped convict is a menace, not only to every person he meets, but to every community into which he goes. To prevent such danger to the public, and at the same time to confine the convict where he belongs, and, therefore, to have him returned, was the plain purpose of the state in enacting the statute in question. That the recapture and conveying back of the convict is always attended by danger there can be no doubt. The right of a party to the reward does not depend upon the amount of strategy or force employed to effect the capture. If this were true, few would be willing to imperil their lives in such an undertaking. Even where the convict voluntarily surrenders himself, the danger to the party conveying him back to the penitentiary is not passed until the convict has been delivered to the proper authorities. A reward is offered as an incentive to a man to take the risk of such danger. We, therefore, conclude that it matters not that the convict voluntarily surrenders himself,

or is overtaken by force and strategy, just so the party making the capture conveys him back to the penitentiary and delivers him to the warden.

For the reasons given, the judgment is affirmed.

### TALBOTT v. KRAHWINKLE.

(Court of Appeals of Kentucky. Jan. 18, 1910.)

#### 1. JUDGMENT (§ 190\*)—JUDGMENT NOTWITHSTANDING PLEADINGS.

Where the verdict for plaintiff substantially conformed to the Oode and the instructions, the court could not on account of any defect therein sustain defendant's motion for judgment notwithstanding the verdict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 367; Dec. Dig. § 199.\*]

#### 2. JUDGMENT (§ 18\*)—PLEADINGS TO SUSTAIN.

Where the petition stated a cause of action and the reply denied every affirmative averment of the answer, the pleadings authorized a judgment for plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 34-37; Dec. Dig. § 18.\*]

#### 3. EXCHANGE OF PROPERTY (§ 13\*)—BREACH OF WARRANTY.

Where plaintiff traded his mules for a horse represented by defendant to be sound, but which was not so in fact, plaintiff could either sue for a breach of warranty or for the return of the mules.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 25; Dec. Dig. § 13.\*]

#### 4. EXCHANGE OF PROPERTY (§ 13\*)—MISREPRESENTATION—EVIDENCE.

In an action to recover mules traded by plaintiff for a horse represented by defendant to be sound, evidence held to show that the horse was unsound, and that plaintiff had no knowledge thereof.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 27; Dec. Dig. § 13.\*]

#### 5. TRIAL (§ 260\*)—INSTRUCTIONS.

The refusal of instructions substantially covered by those given is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

#### 6. JUDGMENT (§ 305\*)—AMENDMENT.

In an action for the recovery of mules traded by plaintiff to defendant for a horse fraudulently represented by defendant to be sound, the circuit court properly allowed the clerk to amend the judgment at the same term of court, so as to conform to the verdict in plaintiff's favor, and to more particularly describe the property involved in the action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 567; Dec. Dig. § 305.\*]

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by H. W. Krahwinkel against H. A. Talbott. Judgment for plaintiff, and defendant appeals. Affirmed.

Louis I. Igleheart and LaVega Clements, for appellant. J. D. Atchison, for appellee.

SETTLE, J. Appellee brought this action in the court below to recover of appellant a pair of mules valued at \$175 each, and two sets of harness valued at \$5 each, alleged to

be wrongfully held and detained by appellant. Upon the filing of the petition appellee obtained an order of delivery for the mules and harness, under which the property was taken by the sheriff from appellant's possession and returned to him.

In addition to the averments necessary in an action for claim and delivery of personal property, it was alleged in the petition that appellee sold or exchanged the pair of mules at a valuation of \$350 and harness at \$10 to appellant for a horse valued at \$200, a collar worn by the latter valued at \$2, and appellant's check upon an Owensboro bank for \$158; that in making the trade appellant fraudulently and falsely represented the horse to be entirely sound and in every respect suited to the work of hauling saw logs for which appellee wished to own and use him, but that the horse was in fact then unsound and diseased in one shoulder which disqualified him for the work in question, and rendered him practically worthless for appellee's purposes; that the unsoundness of the horse was at the time of the trade unknown to appellee, and could not by reasonable diligence have been discovered by him, but was then known to appellant and was by him concealed from appellee, and that the latter was induced by the false and fraudulent representations of appellant as to the alleged soundness of the horse to make the trade and but for the same he would not have done so. Upon this state of facts appellee alleged in the petition that he had the right to ignore the contract with appellant, which was void and passed no title to either of them to the property received in the exchange, and recover of appellant the pair of mules and harness, and to this end he offered to return and made a tender to appellant of the horse and collar, and also of appellant's check of \$158; this tender having been made upon appellee's alleged discovery of the unsoundness of the horse, which was a few hours after he got him, and again upon and before beginning the trial in the circuit court.

Appellant, by answer, denied that the horse was unsound or that he fraudulently or otherwise represented him to be sound or concealed such alleged unsoundness from appellee, and averred that appellee was a horse trader, that he saw and examined the horse when the trade was made, and that the trade was fairly made. All affirmative matter of the answer was controverted by reply, and on the trial the jury returned in appellee's favor a verdict in the form required in such an action upon which the court entered judgment declaring appellee entitled to the mules and harness, allowing him his costs and restoring to appellant his horse and collar. Following the trial appellant moved the court for a judgment in his be-

half notwithstanding the verdict, which motion was overruled. He thereupon entered motion and filed grounds for a new trial, and, this motion having also been overruled, he has appealed.

As the verdict of the jury substantially conformed to the requirements of the Code and the instructions, the circuit court could not on account of any defect therein have sustained appellant's motion for a judgment notwithstanding the verdict. It is equally clear that the state of the pleadings did not authorize a judgment in appellant's behalf. As the petition stated a cause of action and the reply denied every affirmative averment of the answer, it could not have been successfully urged by appellant that the judgment in appellee's favor was not authorized by the pleadings; consequently there is no ground for appellant's complaint that the trial court erred in overruling his motion for a judgment non obstante veredicto.

It was urged by appellant in support of his motion for a new trial that appellee should not have been permitted to ignore his contract with appellant and recover the property he traded him, but that he might have recovered of appellant damages as for a breach of warranty if the horse he got of him was represented by the latter to be sound when he was in fact unsound, in which case the measure of damages would have been the difference between the value of the horse at the time of the contract in his unsound condition, and what he would have been worth if sound as then represented. This contention is untenable. Appellee had his choice of remedies. He might have sued for a breach of warranty, as suggested by appellant's counsel, but, on the other hand, if, as alleged in the petition, appellant by fraud or deceit induced appellee to accept in the trade a horse that was unsound and unsuited for the work in which he intended to use him, the fraud or deceit consisting in appellant's representing the horse to be sound and suited to appellee's work, when he knew him to be unsound and unfit for such work, or in concealing from appellee such unsoundness and unfitness of the horse, and the unsoundness and unfitness of the horse was then unknown to appellee, and could not by ordinary inspection have been discovered by him, it was equally the right of the latter upon returning or offering to return to appellant the horse and collar and his (appellant's) check to sue for and recover the pair of mules and harness he had given in exchange therefor, and in instituting suit to cause to be issued a writ of delivery for the possession of the property to prevent the risk of a sale or other disposition thereof by appellant pending a trial of the case. *Ruby Carriage Co. v. Kremer*, 26 Ky. Law Rep. 274, 81 S. W. 251; *Gant v. Shelton*, 3 B. Mon. 420; *Phelps v.*

*Quinn*, 1 Bush, 375; *Brown v. Popham*, 15 Ky. Law Rep. 543; *Rahm v. Bunger*, 90 S. W. 257, 28 Ky. Law Rep. 806.

It is also contended by appellant's counsel that the trial court erred in refusing the peremptory instruction asked by him at the conclusion of appellee's evidence, and, again, after the evidence was all introduced. This contention must be rejected, for not only was there evidence tending to sustain appellee's right to recover, but the weight of it entitled him to do so. It proved beyond question that the horse appellee obtained of appellant was unsound or diseased in one shoulder; that the defect or unsoundness consisted in and was caused by a hard protuberance or ridge in the shoulder which made the point of the shoulder project or rise in a peculiar manner; and that this ridge or projection prevented a collar from resting evenly against the shoulders of the horse, and with little use of him in harness would make the shoulders sore and soon render the animal lame and unfit for draft or other purposes. It was also proved that the horse had previously gone lame in the defective shoulder and leg from use, and that the defect in the shoulder is incurable; that, in view of his unsound condition his market value does not exceed \$70 or \$80, whereas, if he were free of the defect in the shoulder, he would be well worth \$200, the amount at which he was valued by appellant and appellee when they traded. It further appeared from the testimony of appellee and two of his employes, who were present when the trade was made, that appellee informed appellant when the latter proposed to trade the horse for his mules that he wanted a heavy horse, a good harness animal, sound in every respect, suitable to work at the wheel of his log wagon, and that appellant then assured appellee in substance that his horse was sound in every particular and was in all respects suited for the work he would require of him, that these representations were accepted and relied upon by appellee, and he was induced thereby to make the trade. Appellee and these two witnesses further testified that, when the trade was made, the horse of appellant had on a collar and harness, and that the collar so concealed the defect in the diseased shoulder that it could not be discovered without close inspection which they were not allowed to make while the trade was in progress, and, though one of the witnesses examined the sound shoulder of the horse, when he attempted to examine the unsound one, appellant stood in the way so that he could not do so. It also appeared from the evidence that, after the trade was consummated, appellant retained possession of the horse until the parties reached appellee's stable, and that he then did not remove the collar from the horse until after he led him into

a stall where his head and shoulder were partly concealed by the remainder of his body from appellee and others present.

It was patent from the evidence that appellee had no opportunity to discover the unsoundness of the horse's shoulder until several hours after his purchase of him, and that, when the opportunity came, the defect was easily discovered. When ascertained, he returned and offered to deliver to appellant both the horse and appellant's check for \$158, together with the collar received with the horse, but appellant refused to accept them. The property was all again tendered appellant before and when the case was tried in the court below, and during the trial the jury by direction of the court and in charge of the sheriff saw and inspected the horse. Appellant's evidence tended to prove that the defect in the horse's shoulder was plainly discernible to casual observation, and that it was not so serious as to render the horse materially unfit for appellee's work; and he denied making to appellee any representations as to the horse's soundness. In many respects, however, he failed to contradict much of what appellee and his witnesses testified as to what he said and did at the time of the trade. As previously in effect stated, the evidence on all essential points seemed to preponderate in appellee's favor, but, in any event, it was all heard by the jury, and the parties and witnesses were doubtless known to them. In addition, they saw the condition of the horse's shoulder and from that and all the facts referred to were not slow to reach the conclusion expressed in their verdict, and we must leave it undisturbed, in the absence of any erroneous rulings on the part of the trial court by which appellant's substantial rights were prejudiced to such an extent as to prevent a fair trial.

It is insisted for appellant that the instructions did not give the law of the case. Their unnecessary length makes it inadvisable to copy them in the opinion. While in some respects inaptly expressed, they are as a whole free from prejudicial error. At least two of those offered by appellant, with slight correction, might properly have been given, but, as what they contained seems to have been substantially expressed in the instructions given, we are unwilling to say that their rejection was error.

It was not improper for the circuit court to allow the amendment of the judgment by the clerk, as it was at the same term of the court and done to conform to the verdict and more particularly described the property involved in the action.

As, on the whole case no sufficient reason for disturbing the judgment has been discovered, it is hereby affirmed.

NICHOLAS v. E. H. ABADIE CO. et al.

(Court of Appeals of Kentucky. Jan. 20, 1910.)

**1. MASTER AND SERVANT (§§ 101, 102\*)—SAFE PLACE TO WORK.**

While the master is bound to furnish a reasonably safe place for a servant to work, he is not required to make it absolutely safe, nor to insure the servant against the ordinary risks incident to the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 139, 173; Dec. Dig. §§ 101, 102.\*]

**2. MASTER AND SERVANT (§ 217\*)—ASSUMPTION OF RISK.**

If the servant is skilled in the work required, and equally or better qualified than the master to know the danger and the danger is so obvious that he must have known it, but nevertheless undertakes it, he cannot complain if injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 574; Dec. Dig. § 217.\*]

**3. MASTER AND SERVANT (§ 286\*)—INJURY—NEGLIGENCE—QUESTION FOR JURY.**

In an action by an experienced servant for injuries from the falling in of the walls of a manhole, while he was engaged in the work of propping or bracing the walls, evidence held to require that the question of defendant's negligence be submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1001; Dec. Dig. § 286.\*]

**4. MASTER AND SERVANT (§ 289\*)—INJURIES—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.**

The question of contributory negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1089; Dec. Dig. § 289.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "Not to be officially reported."

Action by Ben H. Nicholas against the E. H. Abadie Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Archibald B. Young for appellant. O'Neal & O'Neal and Carroll & Middleton, for appellees.

**SETTLE, J.** This is an appeal from a judgment entered in the court below upon the verdict of a jury finding for appellees in an action brought against them by appellant to recover \$1,500 damages for personal injuries, alleged to have been caused by the negligence of appellees and their servants. Appellant's injuries resulted from the falling in of the walls of a manhole on Main street, between Second and Third streets, in the city of Louisville, he being at the time in the manhole engaged in the work of propping or bracing the walls thereof by direction of the foreman of the appellee, E. H. Abadie Company, in whose service appellant was at the time employed. Appellant's legs and feet were caught by the dirt of the infalling walls

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the manhole and granite or cobble stones that fell from Main street therein. A bone of one of his legs was partly fractured or split and other parts of his body bruised by the great weight and pressure of the dirt and stone that fell upon him. His injured leg and other wounds confined him to his residence for some time, and were attended with such physical and mental suffering as would naturally result from such injuries. In addition, he lost considerable time from his work and incurred expense in the matter of surgical bills. Compensation was sought for his mental and physical sufferings, impairment of his ability to earn money, loss of time, and surgical bills.

It appears from the record that appellee E. H. Abadie Company, through its employes, was engaged in the work of ditching Main street between Second and Third for the laying of a conduit to contain underground electric wires, and that a ditch made by it entered a manhole through which it was necessary to pass the conduit. The manhole was constructed and used by the board of waterworks of the city of Louisville for obtaining access to a water main and pipes. The manhole was eight or nine feet in depth, eight feet square. In entering the manhole with the ditch for the conduit, appellee E. H. Abadie Company found it necessary for the safety of its employes to brace or prop the walls of the manhole to prevent them from falling in, and the work of bracing the walls was assigned to appellant and an assistant, who were engaged in its performance when the accident resulting in appellant's injuries occurred. It further appears from the record that in digging the ditch for the electric line conduit the servants of appellee E. H. Abadie Company found it crossed near the manhole by a two-inch pipe which they supposed belonged to the Louisville Gas Company. An employe of that company, at appellee's request, inspected the pipe, but upon cutting into it discovered it to be a water pipe. The appellee board of waterworks then sent some of its servants to repair the pipe, which they later did, but found it necessary to add an elbow to it for the purpose of raising it sufficiently to cross the ditch above the electric line conduit. The place of repairing and changing the water pipe was in a few feet of the manhole, and the work was in progress when the accident resulting in appellant's injuries occurred.

Appellant moved for a new trial in the court below, and now asks a reversal of the judgment upon the grounds (1) that the verdict of the jury was flagrantly against the evidence; (2) that the trial court erred in instructing the jury; (3) that the jury should have been peremptorily instructed to find that appellant's injuries were caused by the negligence of appellees, and only left to find, under a further instruction from the court as

to the measure of recovery, the damages to which they might believe him entitled from the evidence.

It is appellant's contention that it was the duty of his employer, appellee E. H. Abadie Company, to provide him a reasonably safe place for performing the work required of him, and that this duty they failed to perform and were not performing when he was injured; that the manhole was a dangerous place and appellee E. H. Abadie Company's foreman, in directing him to enter the manhole and brace its walls, knew of its unsafe condition, but failed to warn him of the danger or to take any precautions for his safety. That appellee board of waterworks learned of the necessity of repairing and changing its water pipe near the manhole on the day before appellant was injured, and that water was then escaping from it and flowing into the ditch made for the electric line conduit, and likewise knew that the escaping water would dampen the walls of the manhole and increase their tendency to fall in and upon persons working in the manhole; but that, notwithstanding such knowledge and the danger likely to result from the escaping water, it negligently delayed the work of repairing and changing the water pipe until the following day, and then negligently put its servants to making the necessary repairs thereon while appellant and his assistant were at work in the manhole, and by additional excavating in the ditch and knocking with a hammer upon the pipe still further weakened the walls of the manhole and caused them to fall upon and injure appellant.

The evidence introduced in appellant's behalf, particularly his own testimony, strongly conduced to prove the foregoing facts, but, on the other hand, that of appellees reasonably sustained the defense presented by their respective answers; that appellant saw and knew better than all others before he entered the manhole its unsafe condition, the liability of its walls to fall in, and the danger of the work he was employed to do in the manhole, that he was employed to brace its walls because of his experience and skill in such work, and that his employer was unwilling to intrust it to an unskilled and ignorant person. The evidence of appellees further tended to show that the falling in of the walls of the manhole may have been caused by the vibrations of the ground resulting from the passage of street cars, the tracks of which were within a few feet of the manhole, or by the passing of heavily loaded vehicles; the travel of such vehicles on Main street being unusually great.

No matter what may be our opinion as to the weight of the evidence, it is manifest that no ground exists for sustaining appellant's contention that the verdict was flagrantly against, or wholly unsupported by, the evidence. The causes that produced the falling in of the walls of the manhole were largely

conjectural, but the fact must have been evident to appellant when and before he entered the manhole that it was a dangerous place in which to go. In other words, from the evidence before it, the jury were not without grounds to conclude that the dangerous character of the place was so obvious that appellant was bound to have known it. While the master is bound to furnish a reasonably safe place for a servant to work, he is not required to make the place absolutely safe, nor to insure the servant against the ordinary risks incident to the dangers of the employment. If the servant is himself skilled in the work required of him and equally or better qualified than the master to know the danger, and the danger of doing the work is so obvious that he must have known it, but nevertheless undertakes it, he cannot complain if injured in its performance. *Pfisterer v. Peter & Co.*, 117 Ky. 501, 78 S. W. 450, 25 Ky. Law Rep. 1605; *Wilson v. Chess & Wymond*, 117 Ky. 567, 78 S. W. 453, 25 Ky. Law Rep. 1655; *Louisville & Nashville Railroad Co. v. Foley*, 94 Ky. 224, 21 S. W. 866, 15 Ky. Law Rep. 17. Not only does the evidence show this knowledge on the part of appellant of the condition of the walls of the manhole before entering it, but there was some evidence also tending to show that he knew of the work being done on the water pipe nearby by the servants of appellee board of waterworks. The case, therefore, is not one in which it can be said appellant was unacquainted with the surroundings or with the danger of the work he was required to perform, and was therefore compelled to rely upon the judgment of the master as to whether it was safe for him to undertake it. *Ballard & Ballard Co. v. Lee's Adm'r*, 115 S. W. 732. At any rate, the case should have gone to the jury upon all the facts, and the trial court could not without violating the rights of the parties have assumed as a matter of law or fact that the negligence of either of the appellees was established, and, this being true, it would have been error for it to have sustained appellant's motion for a peremptory instruction to that effect.

Appellant's objection to the instructions given by the court are not well taken. The instructions are in the form repeatedly approved by this court, and they submitted to the jury every aspect of the law applicable to the case, except that they were unfavorable to the appellees, in this: that they wholly ignored the defense interposed by each of them that appellant in receiving his injuries was himself guilty of contributory negligence, and there was, as already stated, some evidence tending to prove the obvious danger attending appellant's work in the manhole, and that he knew of such danger before and when he undertook the work.

Finding no cause for disturbing the verdict, the judgment is affirmed.

**WILLIAMS COMMISSION CO.'S ASSIGNEE v. W. A. SHIRLEY & BRO.**

(Court of Appeals of Kentucky. Jan. 12, 1910.)

**1. CONTRACTS (§ 88\*)—CONSIDERATION—PRESUMPTION—BURDEN OF PROOF.**

Plaintiff in an action on a written contract need not show a consideration, but lack thereof is for defendant to plead and prove, the law presuming a consideration for a written contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 403-405; Dec. Dig. § 88.\*]

**2. GAMING (§ 17\*)—RECOVERY OF DEPOSIT AS SECURITY.**

Where one gambles with a bucket shop on the rise and fall of the market price, putting up a margin to secure the shop, and loses, an agreement of the shop to pay him back the money is not void under Ky. St. § 1955 (*Russell's St. § 1807*), declaring void every contract, the consideration of which is money won or lost at gaming; this merely making void contracts for the payment of gambling debts; section 1958 authorizing the recovery from the winner of money lost at gaming, and section 1959 making the stakeholder liable if on demand he does not return the money to the one depositing it.

[Ed. Note.—For other cases, see *Gaming*, Dec. Dig. § 17.\*]

**3. GAMING (§ 17\*)—CONTRACTS—AGREEMENT TO PAY FROM ILLEGAL BUSINESS.**

One's contract to pay another a certain amount is not rendered invalid by the further agreement to pay the net income of a bucket shop till such sum is paid, this being but a provision for one means of payment, and not binding him to continue the illegal business, and such business not being of the essence of the contract.

[Ed. Note.—For other cases, see *Gaming*, Dec. Dig. § 17.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by W. A. Shirley & Bro. against the Williams Commission Company's Assignee. Judgment for plaintiffs, defendant appeals. Affirmed.

Herman Morris and McQuown & Beckham, for appellant. Leon P. Lewis, for appellees.

**HOBSON, J.** The following written contract was entered into between J. P. Williams and W. A. Shirley & Bro.: "This contract made this eighteenth day of March, 1908, between J. P. Williams, doing business under the name of the Williams Commission Company, of Louisville, Kentucky, party of the first part, and W. A. Shirley and G. W. Shirley, doing business under the name of W. A. Shirley & Bro., of Sanders, Kentucky, parties of the second part, witnesseth: Whereas, the party of the first part has received from the parties of the second part the sum of fifty eight hundred and fifty dollars (\$5,850.00) as margins on stock ordered by the parties of the second part to be purchased by the party of the first part which said transactions under the laws of this state are gaming transactions by virtue of the nature of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the contracts under which the above sum of money was paid to the said party of the first part; and whereas, by virtue of said transaction the said party of the first part has become liable to the said parties of the second part in the sum of fifty eight hundred and fifty dollars (\$5,850.00). Therefore, the said party of the first part, in consideration of said liability which he hereby acknowledges as immediately due to the said parties of the second part, and in consideration of the forbearance of the said parties of the second part to sue immediately the said party of the first part on account of the aforesaid liability, covenants and agrees as follows, to wit: Said party of the first part will pay to said parties of the second part the total net proceeds of the business carried on by the said party of the first part under the name of the Williams Commission Company, and the said party of the first part will further pay to the said parties of the second part such other sums of money as the said party of the first part may be able to secure, and the said party of the first part shall continue the payments as aforesaid until the said sum of fifty eight hundred and fifty dollars (\$5,850.00) shall have been paid, together with interest thereon from this date. It is hereby agreed that in computing the net returns of the proceeds of said business, the sum of sixteen dollars (\$16.00) per day shall be allowed for expenses, and all moneys received as net commissions by the said party of the first part trading under the name of the Williams Commission Company, in excess of said sum of sixteen dollars (\$16.00) per day, shall be paid to the parties of the second part, and remittance in full thereof shall be made every Saturday for the business of the week including Saturday, said remittances to be made by New York Exchange or certified check and sent directly to the said parties of the second part. It is further agreed that the party of the first part as collateral security for the faithful performance of this contract shall give to the parties of the second part his promissory note for fifty eight hundred and fifty dollars (\$5,850.00), and as further collateral security shall give to the parties of the second part a mortgage on all the assets of his said business which is operated under the name of the Williams Commission Company. In testimony whereof, the parties hereto have set their hands this eighteenth day of March, 1908. J. P. Williams, W. A. Shirley & Bro., By G. W. Shirley."

Williams at the same time executed to Shirley & Bro. a mortgage on certain property to secure them in their money. The mortgage was duly recorded. After this Williams, becoming insolvent, made an assignment for the benefit of his creditors. Shirley & Bro., a part of whose debt still remained unpaid, filed their petition in equity asking the foreclosure of their mortgage, making Williams

and the assignee defendants to the action. They filed a demurrer to the petition; their demurrer was overruled. They thereupon declined to plead further, and the court entered a judgment for the foreclosure of the mortgage. From this judgment, they appeal.

Sections 1955, 1956, and 1959, Ky. St. (Russell's St. §§ 1807, 1808, 1811), provide as follows: "Every contract, conveyance, transfer or assurance, for the consideration, in whole or in part, of money, property or other thing, won, lost or bet in any game, sport, pastime, wager, or for the consideration of money, property or other thing lent or advanced for the purpose of gaming, or lent or advanced at the time of any betting, gaming or wagering to a person then actually engaged in betting, gaming or wagering, shall be void." Section 1955. "If any person shall lose to another at one time, or within twenty-four hours, five dollars or more, or property or other thing of that value, and shall pay, transfer, or deliver the same, such loser, or any creditor of his, may recover the same, or the value thereof, from the winner, or any transferee of the winner having notice of the consideration, by suit brought within five years after the payment, transfer or delivery." Section 1956. "The stakeholder of any money, or other thing that may be staked on any bet or wager, shall, when thereto notified, return the same to the person making the stake or deposit, and, for failing to do so, the amount or value of the stake may be recovered from him by the party aggrieved." Section 1959.

It is insisted that money advanced with the direction that it is to be invested in margins is simply money advanced to be bet, and an agreement to pay such money is void under section 1955; that in order to recover under section 1956, it must be averred that the money was lost and won in a wager at one time or within twenty-four hours in sums of \$5 or more, and this is not shown; that it was unlawful to invest the money in margins, and when the investment was made by appellant at the direction of appellee, no action lies to recover it; that if the appellant was engaged in conducting a "bucket shop," the contract to pay the \$5,850 out of the net earnings of the unlawful business is void as against public policy; the appellant and appellees thus becoming partners in violating the law; and that before a stakeholder can be made liable under section 1959, it must be averred that there was a wager between the party who staked the money and another; and, before the money is paid to the winner, demand must be made for its return.

This is a suit upon a written contract executed by Williams by which he agreed to pay Shirley & Bro. \$5,850. It was unnecessary for the plaintiff to show a consideration for the contract. The law presumes a consideration for a written contract. If there was no consideration for it, or if at one time

or within twenty-four hours, \$5 or more was not lost, these were facts to be pleaded by the defendant. If the defendant was a stakeholder, or if he had won the money of the plaintiff, when he promised in writing to pay it, the law presumed that there existed a state of case making him liable for the money; and the burden is upon him to show that he was not liable. The method of doing business in a bucket shop is described by this court in *Smith v. Western Union Telegraph Company*, 84 Ky. 664, 2 S. W. 483, 8 Ky. Law Rep. 672, and in *Boyd Commission Co. v. Coates*, 69 S. W. 1090. The market prices as they come in on the ticker are posted on a blackboard. The shop buys or sells indifferently, and always at the price appearing for the time being on the blackboard. If a customer buys he puts up a margin to protect the shop. If the price goes his way he wins; if the price goes the other way he loses; and if it goes below his margin, he must put up more or he is out. In other words, the customer simply bets on the price advancing or declining. He bets with the shop, for no stuff is in fact purchased. It is simply a case of gambling on the rise and fall of the market prices. If a third person had lent Shirley & Bro. money to bet in this way, the case would fall within the latter clause of section 1955. The first clause of that section makes void all contracts for the payment of gambling debts; that is, it would apply if Shirley & Bro. had been permitted by Williams to gamble on the prices without putting up a margin and they had thus fallen in debt to him. The purpose of that section was not to enable the person who had won the money of another to defeat an action for its recovery. The money here was simply put in Williams' hands as security for the payment of a bet made by Shirley & Bro. with Williams. If they had lost their bet they could, under section 1956, have recovered from him the money lost. If they had won their bet they could not recover by action what they had won, but they would still be entitled to have back the money they had put up. Williams occupied here a dual position; he was both stakeholder and bettor; and when the stakeholder in writing promised to pay back the money he had received, it must be presumed that he only promised to do what otherwise the law required him to do. While it is unlawful to invest money in margins, the statute plainly contemplates that the person putting it up may recover his money back.

Williams' contract is simply an undertaking to pay Shirley & Bro. \$5,850. So much of the contract as stipulates for their being paid the total net proceeds of the business subject to certain expenses is simply a provision for one means of payment. The thing that Williams agreed to do was to pay the

money, and if he did not pay it in this way, he was bound to pay it in some other. He was not bound to continue the illegal business, and, if he quit the business, he still owed them the \$5,850. The illegal business is not of the essence of the contract; and the fact that he agreed to turn over to Shirley & Bro. the net proceeds of the business so long as he continued it, in no way affected his liability for the debt if it was not paid in this way.

Judgment affirmed.

# AULTMAN & TAYLOR MACHINERY CO. v. WALKER et al.

(Court of Appeals of Kentucky. Jan. 12, 1910.)

## 1. FRAUDULENT CONVEYANCES (§ 271\*)—ACTIONS—BURDEN OF PROOF.

In an action to set aside a conveyance as in fraud of creditors, the burden was upon plaintiff to show fraud.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 796; Dec. Dig. § 271.\*]

## 2. BILLS AND NOTES (§ 519\*)—EXTENT OF LIABILITY—SUFFICIENCY OF EVIDENCE—TERMS OF CONTRACT.

In an action on two notes given for machinery, in which defendant claimed a credit for an attachment to the machinery not furnished as agreed, evidence held to show that the attachment was not to be included as a part of the machinery sold.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 1802; Dec. Dig. § 519.\*]

## 3. BILLS AND NOTES (§ 519\*)—EXTENT OF LIABILITY—SUFFICIENCY OF EVIDENCE.

In an action on two notes given with two others for a threshing machine which was resold and returned to plaintiff, upon defendant's inability to meet the notes, under an agreement by which plaintiff gave defendant \$1,000 worth of the purchase-money notes, evidence held to establish plaintiff's claim that by the agreement the third note was left partly unpaid and the fourth wholly so, after all proper credits were allowed and their notes returned to defendants as agreed.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 1802; Dec. Dig. § 519.\*]

## 4. COMPROMISE AND SETTLEMENT (§ 17\*)—CONCLUSIVENESS.

Where, when the parties executed a contract by which the machine sold was returned to the seller upon return to the buyer of a part of the purchase-money notes, the buyer did not then claim for credits for an attachment of the machine not received or claim credit for a certain amount as paid thereon, the settlement contract would exclude a claim for such credits in an action by the seller on the notes not discharged by the settlement.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 66-74; Dec. Dig. § 17.\*]

## 5. BILLS AND NOTES (§ 527\*)—PAYMENT—SUFFICIENCY OF EVIDENCE.

In an action on two notes given with two others for a threshing machine which was resold and returned to the seller upon the buyer's inability to meet the notes, in which defendants claim that certain credits should be allowed for payments made, evidence held to show that only \$175 was paid upon the notes after their execution.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 1852; Dec. Dig. § 527.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by the Aultman & Taylor Machinery Company against J. W. Walker and another. From a judgment for partial relief, plaintiff appeals. Reversed as to two defendants, and judgment directed as stated and affirmed as to one defendant.

Jos. R. Grogan, for appellant.

SEATTLE, J. Appellant sued in the court below to recover of appellees, J. W. Walker and W. E. Walker, \$665 and interest alleged to be due it upon two notes, and to set aside a deed conveying to Z. E. Walker, wife of W. E. Walker, a house and lot in Paducah, upon the ground, as alleged, that it was purchased and paid for by the husband who caused it to be conveyed to the wife in fraud of his creditors; it being sought to subject the house and lot to the payment of appellant's debt. Appellant complains that the circuit court erred in only giving it a personal judgment for \$400 against the appellees, J. W. and W. E. Walker, thereby causing it a loss of \$265 and interest, and in refusing to declare fraudulent the deed to Mrs. Walker, or subject the real property to the payment of its debt; hence this appeal.

We gather from the record that on July 19, 1893, appellant sold and delivered to the appellees, J. W. and W. E. Walker, a steam wheat thresher, separator, engine, and other machinery and paraphernalia belonging thereto, at the price of \$1,440, for which appellees executed to appellant their four promissory notes of \$360 each, all of date July 19, 1893, and due October 1, 1893, October 1, 1894, October 1, 1895, and October 1, 1896, respectively; and all bearing interest from date. The payment of these notes was attempted to be secured by a mortgage lien retained upon the machinery sold appellees. Appellees paid on the first of the above notes July 30, 1894, through L. P. Oakes, of Metropolis, Ill., appellant's attorney, \$175, which Oakes credited upon the note and remitted to appellant. Despairing of being able to pay any more upon the notes, appellees, after three wheat seasons' use of the machinery, agreed with appellant's agent, one Milliken, August 27, 1895, to sell and return it to appellant in consideration of \$1,000 to be paid them by appellant in the notes they had given it for the machinery. In addition, appellant agreed to pay appellees \$10, by way of a credit on one of their notes, to deliver the machinery on the bank of the Ohio river where it could be returned to appellant by boat. The contract referred to was reduced to typewritten form and signed by the parties, and shortly thereafter appellees returned the machinery to appellant as provided by the contract of resale.

It is the contention of appellant that at

the time this contract was made there was but one credit to which appellees were entitled, and that this credit, \$175, had been duly entered upon the first of the notes referred to; that the first, second, and third notes, were then credited with the \$1,000 it agreed to allow appellees for the returned machinery and with the \$10 expense of delivering same upon the bank of the river, which credits entirely liquidated the first two notes and left a credit of \$384 to be entered on the third note, which was duly placed thereon as of August 27, 1895. This left the third note partly unsatisfied and the fourth and last note wholly unpaid, and these are the two notes upon which suit was brought in this case.

Among other matters of defense interposed by appellees' answer was the claim that, under their contract for the purchase of the machinery and as parts thereof, they were to be delivered by appellant a register and straw stacker; the cost price of the first being \$40, and of the last \$200, but that appellant wholly failed to deliver them either of these parts of the machinery, whereby they were damaged \$240, for which amount they were entitled to a credit upon the notes executed for the machinery. That in addition to the \$175 credited upon the first note, they paid appellant the further sum of \$200 which they failed to credit on the notes; furthermore, that under the contract of August 27, 1895, for the return of the machinery by them to appellant, the latter agreed to cancel and surrender to them all four of the notes which appellees had executed for the machinery, by which means the \$1,000 agreed value of the machinery at that time was to be paid them by appellant.

The answer contains the admission that the first two of the notes referred to were surrendered to appellees by appellant, but avers that the latter wrongfully retained and has never returned to them the two last notes, which are the ones sued on. In addition to the matters of defense referred to, the answer traversed the averments of the petition as to the alleged fraud in the conveyance of the Paducah house and lot to Mrs. Z. E. Walker. Upon the issues thus made by the pleadings the parties took proof, and upon submission of the case judgment was rendered by the court as in the beginning of the opinion indicated. As to the issue with respect to the conveyance to Mrs. Walker, it is sufficient to say that the circuit court did not err in refusing to declare it fraudulent, or to subject the property to the payment of appellants' notes, for the burden of proof was upon appellant to show the alleged fraud in the conveyance, and it produced no evidence to establish such fraud. As to appellees' contention that they purchased with the thresher and other machinery a register and stacker, we have carefully examined the proof with the conclusion that

the contention in respect to the stacker is not sustained. The contract under which the purchase of the machinery was made is in writing and appears in the record. It shows that the register was included in the sale of the machinery to appellees, but that the stacker was not. Neither fraud nor mistake is alleged in the execution of this contract, and appellant's agent, Milliken, who made the sale to appellees, testified that a stacker was not included; besides, we find in the record a letter from appellees to appellant, written more than a year after their purchase of the machinery, in which it was in substance stated that appellees would desire before the beginning of another wheat threshing season to purchase of appellant a stacker. These facts conclusively show that the stacker was not contracted for with the other machinery. As appellees did not receive the register and its cost price was \$40, they would have been in position to claim a credit for that amount upon the notes sued on, but for the contract of August, 1895, by which they returned the machinery to appellant.

On the issue presented as to the contract of August, 1895, we think the evidence clearly sustains appellant's version of the settlement then made. Although fraud or mistake in this contract is alleged by the answer, the evidence fails to sustain either. The writing shows, as claimed by appellant, that the \$1,000 allowed appellees for the return of the machinery was to be paid them in their own notes, and that this was done, the \$1,000 fully satisfying the two first notes, and giving a credit on the third note for \$384. This is also shown by the testimony of Milliken, and the further fact that the first two notes were then surrendered to appellees, which, as previously stated, they do not deny. Moreover, in a conversation between one of the appellees and appellant's attorney, occurring shortly before the institution of the suit, appellees' indebtedness upon the two notes sued on was expressly admitted, and their inability to pay them then stated. It is also evident that no hardship resulted to appellees from the contract under which they returned to appellant the machinery. The \$1,000 allowed them for it was a fair valuation in view of their having had the use of the machinery during three wheat threshing seasons, and the amount for which they remained in appellant's debt after the return of the machinery, was no more than they should have been charged for the use they made of it during the three seasons referred to. The contract of August, 1895, also fully settled all questions as to credits to which appellees were entitled, then or prior thereto. They then made no claim for credits on account of not having received the register or stacker, nor did they then claim to have theretofore paid \$200 to appellant

upon the notes they executed for the machinery. In other words, the settlement and contract of August, 1895, excluded all defenses now interposed by appellees as to the stacker, register, or the alleged credit for \$200.

We may further say that the proof clearly shows that only \$175 was paid by appellees upon the notes after their execution. This payment they admit was made to appellant's attorney, Oakes, to whom they also claim the \$200 was paid. Oakes testified that \$175 was the only payment ever made him, and this was credited upon the first note and sent to appellant. In addition, Milliken testified that at the time of the settlement of August, 1895, appellees admitted that the \$175 credit upon the first note was the only payment they had made to appellant upon the machinery. In our opinion the court should have given appellant judgment for the amount of the two notes sued on, with interest from the date of each, subject to the credit amounting to \$384 indorsed upon one of them. In other words it was error to allow appellees credit for the \$200 given by the judgment, whether such credit was on account of the stacker or the \$200 alleged to have been paid by them.

Wherefore, the judgment appealed from is reversed as to the appellees, J. W. and W. E. Walker, that another may be entered against them in conformity to the opinion, and affirmed as to the appellee, Mrs. Z. E. Walker.

#### CONTINENTAL CASUALTY CO. v. FLEMING.

(Court of Appeals of Kentucky. Jan. 7, 1910.)

INSURANCE (§ 665\*)—INDEMNITY INSURANCE—LIABILITY—EVIDENCE.

In an action on an indemnity policy, stipulating for a minimum liability on insured losing his life from fighting or from injury intentionally inflicted on him by another, evidence held to show that insured was intentionally killed by another while engaged in fighting, precluding a recovery for any greater sum than the minimum liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1719; Dec. Dig. § 665.\*]

Appeal from Circuit Court, Kenton County, Criminal, Common Law, and Equity Division.

"Not to be officially reported."

Action by Mary Fleming against the Continental Casualty Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Manton Maverick, Archer & Osler, and Frank M. Tracy, for appellant. B. F. Graziani, for appellee.

CARROLL, J. Thomas R. Fleming, who had a policy of indemnity in the appellant company, died from the effects of a gunshot wound inflicted by a man named Mitchell. In an action on the policy, the law and facts were submitted to the court, and a judgment

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

entered against the company for \$2,800, the full amount of the policy. The company admitted its liability in the sum of \$230, and prosecutes this appeal from the judgment against it in excess of this amount.

The policy among other things stipulated that if the life of the insured was lost from "fighting, rioting, or from injury intentionally inflicted upon the insured by himself or another person \* \* \* then in all such cases \* \* \* the limit of the company's liability shall be one-tenth the amount which would otherwise be payable under this policy." If Fleming's death was caused by fighting or injuries intentionally inflicted upon him by another person, the company's liability is limited to the amount it offered to pay. On the other hand, if his death did not result from fighting or injuries intentionally inflicted, the judgment of the lower court is correct. There is no law question presented in the case, and, as stated by counsel for appellee, the only question involved is whether or not the judgment is flagrantly against the evidence.

The facts are substantially these: Fleming was a locomotive engineer in the employment of the Cincinnati Southern Railroad, and about 1 o'clock on the morning of April 16, 1906, was engaged in assisting to take a train of cars from Cincinnati out to Erlanger. There were two engines attached to the train, one in front pulling, and the one operated by Fleming in the rear of the train. Next to Fleming's engine, there were three empty passenger cars. When the train reached a trestle near Ludlow, it was running very slow, and Fleming got out of his engine and run by the side of the track to the second passenger car for the purpose of consulting a brakeman as to how the cars should be arranged when they reached Erlanger. After getting the desired information from the brakeman, Fleming started back towards his engine, and the brakeman testifies that about a minute after Fleming left him he heard several shots fired, raised the window of the passenger car and looked out, and as he did so he saw some person running past the car. He then got out of the car and went back to the engine and asked the fireman where Fleming was, and the fireman replied that he had gone to see him. He then looked down the track and saw Fleming lying about two car lengths from the engine in the middle of the track. He went to him and found him in a dying condition with a pistol in his hand. An examination of the pistol showed that four of the chambers were empty. He testified that Fleming during the afternoon had fired one shot out of the pistol at a mark in Ludlow, but that he did not know when the other shots were fired, nor did he know who shot Fleming or why he was shot. The fireman on Fleming's engine testifies that when the engine stopped, or was moving slowly, on the trestle, Fleming told him to run the engine, that he was going to ask the brakeman how

they wanted the switching done at Erlanger, and he left the engine for this purpose; that when Fleming came back, after talking to the brakeman, that he (the fireman) looked out of the engine and heard Fleming, who was standing by the side of the engine, tell a negro standing on the steps of the tender that "he could not ride there" or "with them," and that he would have to get off. The negro got off, and Fleming asked him where he was going. The negro said he was going to Knoxville, and Fleming asked him where he was from, and he said "Cincinnati"; that he heard Fleming say, "Why, you look like you have done something," and the negro said he hadn't; and about that time the train commenced to move, and Fleming told the fireman to go ahead, and a moment or two afterwards he heard four or five shots. When Fleming told him to go ahead, he was standing on the plank walk by the side of the trestle three or four feet from the engine, and the negro was standing close to him; that, a few minutes afterwards, the brakeman came and asked where Fleming was, and he was found about two car lengths from the engine. He heard the shooting but did not know who did it. He also stated that he heard the negro call Fleming a d— w— s— o— a b— when Fleming told him he could not ride on the train. This was all the evidence in chief in behalf of appellee, plaintiff below.

Mitchell, whose deposition was taken in the penitentiary at Frankfort where he was serving a sentence for killing Fleming, said that he had come from Cincinnati to Ludlow, and was trying to get passage on a train going south, and walked by the engine in which Fleming was. He then said: "The engineer was hanging with his head out of the window. I said 'Howdy' as I passed by. He said 'Howdy.' I went on about two car lengths. He says, 'Say, Jack, come back here, I want to see you.' I turned and went back to him. When I went back to him, he got down between the tender and the steps with a pistol in his hand. He says to me, 'Where are you from?' I says, 'I am from Cincinnati.' He says, 'What street?' I says 'Off of Sixth and Smith.' He says, 'Whose house?' I said, 'I am from Eveline's house if you want to know that. He says, 'What have you got on you?' I says, 'I have got nothing.' He says, 'I know you is got something.' And he said to his fireman, 'Hold your torch over here,' and the fireman held his torch over his back in my face. He says to his fireman, 'Come on, lets go to him, and see what he has got.' He jumped off the train and held a pistol in my face and said, 'Throw up your hands or I'll kill you.' I threw up my hands, and he commenced reaching for me. I whirled, and said to him, 'I ain't got anything on me,' and I ran off from him. He ran after me. He says, 'Halt! Halt! or I'll kill you,' and every time he said, 'Halt,' he shot—in all three times. About

that time I had run to the south end of the trestle, and I said to myself, 'I reckon he is going to kill me sure enough, and I had might as well get out my gun.' I pulled my gun, and I fired it twice over my shoulder." He further testified that after the shooting he fled and was arrested in Ohio and taken back to Covington where he was tried, and that he was leaving Cincinnati because he had gotten into some trouble. The fireman, in rebuttal, said that the conversation and remarks testified to by Mitchell did not occur, and that he did not hold a torch over his face. This was all the evidence.

Under these facts, we see no escape from the conclusion that Fleming was not only intentionally killed, but killed while he was engaged in fighting. The uncontradicted evidence is that, when Mitchell called Fleming the vile epithet testified to by the fireman, he started to run, and that Fleming followed him and shot at him at least three times. And that the negro, after Fleming was shot, and while he was chasing him, fired at him over his shoulder, killing him. *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300, 8 S. W. 570, 10 Ky. Law Rep. 260, 12 Am. St. Rep. 484; *American Accident Co. v. Carson*, 99 Ky. 441, 36 S. W. 169, 18 Ky. Law Rep. 308, 34 L. R. A. 301, 59 Am. St. Rep. 473.

Wherefore the judgment is reversed, with directions for a new trial in conformity with this opinion.

#### INTER-SOUTHERN LIFE INS. CO. v. BOYD.

(Court of Appeals of Kentucky. Jan. 19, 1910.)

##### 1. INSURANCE (§ 446\*)—LIFE INSURANCE—SUICIDE OF INSURED—EFFECT.

An insurer in a life policy stating that on the death of insured by self-destruction, sane or insane, the insurer shall be liable only for the return of the premiums paid, is liable for the face of the policy where insured at the time he killed himself was so insane that he did not know that he was taking his life, or did not know that the act he was committing would probably result in death.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1159, 1160; Dec. Dig. § 446.\*]

##### 2. INSURANCE (§ 665\*)—LIFE INSURANCE—SUICIDE OF INSURED—EVIDENCE.

Evidence held to show that insured in a life policy killed himself when so insane that he did not know that he was taking his life.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1720; Dec. Dig. § 665.\*]

Appeal from Circuit Court, Muhlenberg County.

"Not to be officially reported."

Action by Nannie T. Boyd against the Inter-Southern Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

McChord, Hines & Norman, for appellant. F. O. Jones and R. Y. Thomas, Jr., for appellee.

CARROLL, J. This action was brought by the appellee, Nannie T. Boyd, the beneficiary, to recover of the appellant, insurance company, on a policy issued by the appellant company on the life of Edgar L. Boyd, husband of appellee. The policy contained the following clause: "In the event of the death of the insured by self-destruction, whether sane or insane, within one year after the issuance of this policy, and until the full second annual premium shall have been paid in cash, the liability of the company shall be only for the return of the premiums actually paid thereon." In its answer the company alleged that Edgar L. Boyd came to his death by self-destruction within 12 months from the date of the issue of the policy, and pleaded and relied upon the foregoing clause as a defense to the action. A trial before a jury resulted in a verdict for the appellee, and from the judgment upon that verdict this appeal is prosecuted.

In *Mutual Benefit Life Insurance Co. v. Davless*, 87 Ky. 541, 9 S. W. 812, 10 Ky. Law Rep. 577, *Manhattan Life Insurance Co. v. Beard*, 112 Ky. 455, 66 S. W. 35, 23 Ky. Law Rep. 1747, *Masonic Life Association v. Pollard*, 121 Ky. 349, 89 S. W. 219, 28 Ky. Law Rep. 301, 123 Am. St. Rep. 198, *Metropolitan Life Insurance Co. v. Thomas*, 106 S. W. 1175, 32 Ky. Law Rep. 770, and *Bankers' Fraternal Union v. Donahue*, 109 S. W. 878, 33 Ky. Law Rep. 196, we held, notwithstanding a clause in the policy like the one in question, that if the insured at the time he killed himself was so insane that he did not know that he was taking his life, or that the act that he was committing would probably result in his death, the company would be liable. So that, whatever may be the rule in other jurisdictions, we are committed to the doctrine laid down in the foregoing cases, and do not feel disposed to depart from it.

The court instructed the jury that:

"(1) If the jury believe from the evidence that the deceased, Edgar L. Boyd, took his own life by shooting himself with a pistol, they will find for the defendant, whether the said Edgar L. Boyd was sane or insane at the time, unless the jury should further believe from the evidence that at the time he shot himself, if he did shoot himself, the said Boyd was so insane that he did not know that he was taking his life, and, if the jury believe from the evidence that at the time he shot himself, if he did shoot himself, he was so insane that he did not know that he was taking his life, then and in that event the jury should find for the plaintiff in the sum of \$1,000 with interest from the 19th day of April, 1908.

"(2) Although the jury may believe from the evidence that Edgar L. Boyd was insane at the time he shot himself, if he did shoot himself, yet the jury should find for the defendant, unless they should believe from the

evidence that at the time he did so he was so insane that he did not know that the act he was committing would probably result in his death."

In view of the foregoing authorities, counsel for the appellant do not complain that the instructions are not correct, but do insist that the appellant was entitled to a peremptory instruction, or else that the verdict is so flagrantly against the evidence that it should be set aside and a new trial granted.

Edgar L. Boyd was a married man about 31 years old. He had been married some three years, and was devoted to his wife, at all times until a few weeks before his death treating her with the greatest consideration and kindness. He owned a house and lot, had some money in the bank, and, unless his suicide is put upon the ground that his mental condition was such that he did not know the nature and quality of his act, no reason can be assigned for it. His death occurred on Wednesday morning, and on the Monday previous he went from his home in Central City to Paducah, returning Tuesday. On Tuesday evening he learned that an old and intimate friend of his had been either killed or seriously injured in a mine accident, and this information caused him great distress. Tuesday night he was restless, only sleeping a few hours, and seemed worried; and on Wednesday morning was nervous, suffering with a severe headache, as well as complaining of pains in his side, and seemed unusually gloomy and despondent. Shortly after breakfast his wife heard a pistol shot in the house, and found him with a pistol in his hand, which she took away from him and put in a trunk, locking the trunk. About an hour afterwards he took the key out of his wife's pocket, and went out in the hall where the trunk was, unlocked it, took the pistol out, and shot himself twice. For some days before he killed himself he was heard to say that he did not care to live any longer, and would rather die than live, and acted in such a curious and unusual manner and did such foolish things as to alarm his friends and relatives, although they did not anticipate that he would take his life. There is some evidence that he occasionally drank to excess, although it does not appear that he was drinking at the time he took his life. When he went to Paducah on Monday, he left without telling his wife where he was going, or bidding her good-bye, although theretofore when leaving home to be gone any length of time he had always told her where he was going. There was also evidence that for a few days before he shot himself he was cross and irritable. Upon his return from Paducah he replied to a relative who asked him where he had been that he did not know where he had been or what he had done.

All these facts and circumstances and others that might be mentioned were sufficient

to warrant the jury in concluding that at the time the deceased shot himself that he was laboring under such unsoundness of mind that he did not know what he was doing. It is difficult to account for his act upon any other reasonable hypothesis. There was no reason shown by the evidence why he should have intentionally killed himself. His domestic relations were happy. He had sufficient means to provide for the wants of himself and wife. He was not involved in any financial or other trouble or burdened by cares that might induce a man to commit suicide for the purpose of obtaining relief. Situated and surrounded as Boyd was, he had every cause to desire to live, and none to desire to die. Of course, in cases like this, no human tribunal can tell the secret influences operating upon the mind of a person who takes his life, or the motive that may prompt him to do so awful a thing. All that we can do is to inquire into his surroundings, his condition, his personal relations, his domestic affairs, his habits, his traits of character, and from these make up our minds the best we can whether the suicidal act was intentional or the result of a state of mind that deprived the person of the power of understanding the nature and quality of his act.

Although there is some evidence conducing to show that Boyd understandingly and intentionally took his life, we think the weight of the evidence is that he did not know what he was doing.

Wherefore the judgment of the lower court must be affirmed.

**ELLIS v. WESTERN NAT. BANK et al.**  
**WESTERN NAT. BANK v. LOUISVILLE**  
**TRUST CO. et al.**

(Court of Appeals of Kentucky. Jan. 19, 1910.)

**1. BANKS AND BANKING (§ 138\*)—PAYMENT OF CHECK IMPROPERLY SIGNED—LIABILITY OF BANK.**

A bank which had agreed with an insurance company, having a deposit with it, that the company's checks should be honored only when signed by its president, and countersigned by another officer, as required by its by-laws, to the knowledge of the bank, having attempted to pay to itself money from the deposit on a check signed only by the company's president, was liable to the company's receiver therefor; and was not entitled to retain it, notwithstanding the check was improperly drawn, on the theory that it was used to pay a debt for which the company was liable; it being used to pay a note given to the bank, not by the company, but by individual promoters thereof, for a loan which they turned over to the company, to enable it to comply with the law requiring it to have a certain amount of cash on hand, over and above any liability, before it could do business.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 393; Dec. Dig. § 133.\*]

**2. COSTS (§ 98\*)—ALLOWANCE.**

Where the receiver of a company, the officers of which had abandoned it entirely to him, refused to sue a bank on a claim the company

had against it, and a creditor of the company brought the action in behalf of all its creditors, and afterwards the receiver was made plaintiff, and the name of the creditor was stricken from the petition as a party plaintiff, it was error in doing so to award costs against him, judgment having finally been rendered against the bank; and the creditor having under the circumstances had a right to sue.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 370; Dec. Dig. § 93.\*]

Appeals from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Action by Hugh Ellis, and the Louisville Trust Company, receiver of the People's Life & Accident Insurance Company, against the Western National Bank, now Continental National Bank. From a judgment against the bank, it appeals; and from an order striking from the petition the name of Ellis as plaintiff, and awarding costs against him, he brings a cross-appeal. Affirmed.

Thum & Roy, for plaintiffs. Flexner & Campbell and Robert G. Gordon, for defendant.

LASSING, J. On August 11, 1905, the People's Life & Accident Insurance Company was organized, and began writing insurance on the assessment plan. It did not prosper, and in a short time after its organization was placed in the hands of the Louisville Trust Company and one Megrew as receivers. Megrew died, and the Louisville Trust Company continued to act as receiver. During its existence, two death claims were presented against it, for \$1,000 and \$1,100 respectively; and in addition to these claims it owed debts amounting in the aggregate to a sum largely in excess of its total assets. All of its available assets were converted into cash and distributed among the creditors, and, after this had been done, there were remaining due and unpaid debts amounting to something like \$8,000. After said company went into the hands of the receiver, its officers and directors ceased to take any interest in its business, and, in fact, abandoned it entirely to the receiver.

Among the assets which were alleged to belong to the company was an open account in the Western National Bank, which claimed to owe the company a balance of \$1.29. Hugh Ellis, a creditor of the insolvent insurance company, insisted that this showing on the part of the bank did not represent the true balance which it owed to the insurance company, but that, as a matter of fact, said company had on deposit in said bank the sum of \$1,001.29; that, although the president of the insurance company had attempted to withdraw \$1,000 of its funds from said bank and pay off and satisfy a note for \$1,000, which had been executed to said bank by Reed and Brannon, two of the promoters of said insurance company, the

check under which this fund was attempted to be withdrawn from the bank was not properly signed and countersigned by the officers of the insurance company, and hence the insurance company was not properly chargeable with this check. He demanded of the receiver that he proceed against the bank to recover this \$1,000, for the benefit of the creditors of the insurance company. The receiver, doubting his right to subject this \$1,000 to the debts of the insurance company, declined to proceed against the bank for same. Thereupon said Ellis instituted a suit in the Jefferson circuit court, wherein he set up the facts and asked that the bank be required to pay this money to the creditors of the insurance company, and asked that he be permitted to sue for and on behalf of all such. Some of the larger creditors and the receiver were made parties defendant to this suit. The receiver answered, and, without pleading to the merits of the claim, simply stated that it doubted its right to proceed and had declined for this reason. The bank answered, and not only denied liability, but specially challenged plaintiff's right to sue. Upon the issue thus joined proof was taken and the cause submitted for judgment.

The chancellor held that the claim set up and asserted by the plaintiff Ellis was one which should properly have been asserted by the receiver, and the parties were thereupon rearranged by proper and appropriate pleading, and the Louisville Trust Company, receiver of the People's Life & Accident Insurance Company, was made a party plaintiff, and filed a supplemental and amended petition, in which it set out practically the same state of facts as had been set up by the plaintiff in his petition and its amendment, and also pleaded that the name of the defendant, the Western National Bank, had by law been changed to the Continental National Bank, and asked that the suit proceed against the said bank in its changed name. Thereupon the defendant bank moved the court to enter an order dismissing absolutely the petition of the plaintiffs, with judgment for costs. This motion was overruled. A motion was then entered by said bank to strike from plaintiff's petition the name of Hugh Ellis as a party plaintiff, and this motion, over the objection of the plaintiff Ellis, was sustained, and his name was stricken from the petition as a party plaintiff. Of this action the plaintiff Ellis complains, and from the court's ruling in dismissing the petition as to him and giving judgment for costs against him, he prosecutes a cross-appeal. Thereafter, the cause proceeded regularly, and, upon full consideration, the chancellor found and adjudged that the \$1,000, which the insurance company through its president had attempted to pay to said bank in satisfaction of the debt above refer-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

red to, was the property of said insurance company, and the check by which it was attempted to be withdrawn from said bank was not the check of said insurance company, by reason of the fact that it had not been signed by the proper officers of the company so as to warrant and justify the bank in paying the money thereon. From this finding and judgment of the court, the bank appeals.

The evidence in this case has taken quite a wide scope, but the real issue is a comparatively narrow one, being confined to the question as to whether or not the check upon which the bank undertook to withdraw \$1,000 from the account of said insurance company was so drawn that it could properly be held to be the act of said insurance company.

It appears from the record that in order for the insurance company to receive the sanction of the insurance department to commence business, it was necessary that it have on hand a certain amount of cash, and, as the company did not have this necessary amount of money, an arrangement was made with the bank by J. V. Reed and Stuart E. Brannon, two of the promoters of said company, by which they executed their joint note to the bank for \$1,000, the net proceeds of which was placed to the credit of the insurance company, and this sum, supplemented by the amount of the discount, made up the \$1,000 which the president of the insurance company attempted to pay by the check out of which this litigation grows. The by-laws of the insurance company provide that all checks on the deposit of said company should be signed by the president and countersigned by one of two other designated officers. The bank was advised of the existence of this by-law, and, in fact, had entered into an agreement with the insurance company that the checks were to be honored only when so drawn, signed, and countersigned. Under this arrangement, 37 checks were drawn by the insurance company and honored by the bank. The check which is the subject of this litigation was number 38, and it was signed by the president of the insurance company alone, and was made payable to the bank for the purpose of paying off and satisfying the Reed and Brannon note. When presented to the bank it was honored, and the note was paid. At the time this check was drawn, the other officers of the insurance company, whose duty it was to countersign it, refused to do so. The fact that it was not signed and countersigned as all the other checks had been was of itself, in the absence of any special contract and arrangement in regard to the signing of these checks, sufficient to have put the bank upon notice that this check was not such authority as would warrant it in paying out the funds of the insurance company thereon. But here we have a positive agreement between the bank and the insurance company that the

checks were only to be honored when signed by the president and countersigned by one of the other officers of the insurance company, hence, no check which failed to measure up to these requirements as to the signatures of the officers of the insurance company could bind the insurance company or protect the bank against loss if paid by it.

The note in question was not the debt of the insurance company. It is true that certain of the promoters of said company had borrowed this money on their individual indorsements for the company to enable it to begin business, but the name of the insurance company did not appear upon the note which was executed to raise this money, for if it had it would have left the company in no better position than it was (toward complying with the requirements of the law) before the note was executed, for the law required that it have so much cash on hand over and above any liability. As between the insurance company and the bank, the insurance company was not liable for the payment of this debt, and the suggestion that, even though the check was not properly drawn, the bank should nevertheless be permitted to retain the fund because it had been used to pay the debt for which the insurance company was liable, has no application here. The bank had contracted with the insurance company that the funds of the latter should be withdrawn from the former only upon checks signed and countersigned in a certain particular way. The check in question not being so drawn, the bank was without authority to charge the account of the insurance company therewith. The bank was no more authorized to charge this account with this \$1,000 check, signed by the president of the insurance company alone, than it would have been to charge the account of the insurance company with the checks drawn by the president thereof in his individual capacity. And when it paid out the money on this unauthorized check, it paid out, not the money of the insurance company, but money belonging to the bank. This being true, the chancellor properly held that it was answerable to the receiver for the benefit of the creditors of the insurance company for the full amount thereof.

An attempt is made to show that an arrangement had been made between the president of the bank and the president of the insurance company whereby this fund, which had been so borrowed for the benefit of the insurance company, was to remain in the bank and not be checked out for any other purpose than the payment of the Reed note. If such an arrangement had been made between the president of the bank and the president of the insurance company, it would not have been binding upon either, and such an arrangement would certainly not be upheld where the interests of creditors, not parties to nor acquainted with such secret arrangement, had intervened. But a consideration of

this question is obviated, for the reason that the record does not show that the bank ever entered into such an arrangement or understanding; but, on the contrary, it shows that, at the time such an arrangement is alleged to have been made, Smith was no longer president of the bank, and hence in no wise qualified or competent to speak for or represent it.

On plaintiff's cross-appeal, only the question of his costs is involved, for the judgment of the chancellor subjecting this \$1,000 to the payment of the debts of the insurance company secured to him the full relief sought in his suit, and he is now complaining of the action of the chancellor in striking his name from the petition, upon the sole ground that it subjects him to the payment of costs, when the judgment shows that it was upon his initiative and through his efforts that the assigned estate had been benefited to the extent of this recovery. It is clear from the pleadings that the receiver was unwilling to proceed against the bank for this money, and, had it not been for the plaintiff's efforts, nothing on this account would have been recovered for the creditors. As a matter of equity and right, the plaintiff should have been given judgment for his costs, either against the bank or the receiver.

A suit must be brought in the name of the real party in interest. Where the real party in interest refuses to proceed, we see no reason why those beneficially interested may not do so. The owner of this money was the insurance company. It had been abandoned by its officers and directors, and its affairs were under the immediate management and control of an officer of the court. This officer was refusing to attempt to collect this money. Its refusal would have resulted in a loss to the creditors of the insurance company, the only persons who were in fact interested in its recovery. Under such circumstances to have denied to a creditor the right to sue for it would have been to defeat the ends of substantial justice. The question is simplified when viewed from another standpoint. Suppose that, when the plaintiff demanded of the receiver that he proceed against the bank for this \$1,000, and the receiver had declined to do so, the plaintiff had petitioned the court to require the receiver to proceed against the bank for this money? Upon considering such application, either in the shape of a motion or by petition for mandamus, the chancellor would have directed the receiver to proceed, and would certainly not have dismissed the plaintiff with judgment for costs against him for having made the motion or instituted the suit. Strict equity would require, in such case, that any costs incurred be borne by the receiver, if not by the defendant bank, and in no event should the plaintiff, who was entirely in the right, be made to pay the costs. As practically all

costs made by the plaintiff up to the time of his removal from the suit were only such as would have been made by the receiver had he proceeded alone, the judgment in favor of the receiver for the costs of the suit satisfies all of the costs, except such as were made in an effort to have the suit dismissed as to the plaintiff, or his name stricken from the record as a party plaintiff, and as this cost was made by the defendant bank, or on its motion, it is proper that it should be made to pay same. It is not necessary to reverse the case on plaintiff's cross-appeal in order that this may be done, but the chancellor will direct the clerk to tax all costs in this litigation against the defendant bank.

Judgment affirmed on the original and cross-appeals.

### CITY OF RICHMOND v. GENTRY.

(Court of Appeals of Kentucky. Jan. 6, 1910.)

#### 1. WATERS AND WATER COURSES (§ 178\*)—FLOODING LANDS—OBSTRUCTION OF WATER COURSE—MEASURE OF DAMAGES.

Where an obstruction causing recurring overflows of land is of a temporary character, the measure of damages is the diminution in the value of the land for use, or its rental value, and not the diminution in its salable value.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 255; Dec. Dig. § 178;\* *Damages*, Cent. Dig. §§ 276½, 282.]

#### 2. WATERS AND WATER COURSES (§ 178\*)—FLOODING LANDS—OBSTRUCTION OF WATER COURSE—NATURE OF OBSTRUCTION—DAMAGES.

Where the obstruction causing the overflow of land is of a permanent character, all damages to such land, past, present, and contingent, must be recovered in one action.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 255; Dec. Dig. § 178;\* *Damages*, Cent. Dig. §§ 276½, 282.]

#### 3. WATERS AND WATER COURSES (§ 178\*)—FLOODING LANDS—OBSTRUCTION OF WATER COURSE—WHEN ACTION ACCRUES.

Where the obstruction causing the overflow of land is permanent in nature, the cause of action for damages accrues when the structure is completed, or when the injury to the property is first occasioned.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 178.\*]

#### 4. WATERS AND WATER COURSES (§ 176\*)—FLOODING LANDS—OBSTRUCTION OF WATER COURSE—WHO ENTITLED TO SUE.

Where the obstruction causing land to be overflowed, is permanent in character so that the damages are in gross, and there can be but one recovery, such damages are recoverable by the then owner of the land, and not by a successor in title.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 244; Dec. Dig. § 178.\*]

#### 5. WATERS AND WATER COURSES (§ 178\*)—FLOODING LANDS—OBSTRUCTION OF WATER COURSE—CHARACTER OF OBSTRUCTION—"PERMANENT STRUCTURE."

As affecting the damages to be recovered for overflowing land by a structure obstructing a water course, when it would cost as much to alter the structure causing the obstruction,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as to build it in the first instance, and it is of a durable character, evidently intended to last indefinitely, it may be regarded as "permanent."

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 255; Dec. Dig. § 173.\*

For other definitions, see *Words and Phrases*, vol. 6, p. 5313.]

Appeal from Circuit Court, Madison County.

"To be officially reported."

Action by Martin Gentry against the city of Richmond for damages from flooding plaintiff's land. Plaintiff had judgment, and defendant appeals. Reversed.

T. H. Collins, for appellant. Stella M. Templeman and J. Tevis Cobb, for appellee.

O'REAR, J. Appellee acquired a lot in the city of Richmond about four years ago. The surface of the adjacent territory is such that its natural drainage is through a branch which traverses this property. The branch at that point has been walled up and covered over so as to make it a kind of a sewer. Just below the property the branch crosses First street. The city some years ago graded and improved this street. A 36-inch sewer was laid under the street to accommodate the flow of water from the branch. The city had also built other sewers which conducted surface water from other sections, into this branch above appellee's lot, augmenting the quantity of water passing through the sewer. This additional water would otherwise have passed off naturally in other directions. The conditions mentioned have existed for a time preceding appellee's purchase of his lot. The sewer under First street is not large enough to carry off readily all the water caused to pass through it during heavy rains, and in consequence it overflows some of the adjoining lands, including appellee's lot. This suit was brought by appellee against the city to recover damages for injury done to his lot by the conditions named. It was also charged that the sewerage produced foul odors, greatly inconvenienced the plaintiff, and detracted from the value of his lot.

The court submitted the issue to the jury, and fixed the measure of damages as the depreciation in salable value of the lot caused by the recurring overflows. The instructions given the jury by the trial court were erroneous. If the structure—that is, the sewer under First street—had been of a temporary character, the measure of damages would have been not the difference in the salable value of the property injured thereby, but the diminution of the value of the use or rental value of the property. *Pickerill v. City of Louisville*, 125 Ky. 213, 100 S. W. 873, 30 Ky. Law Rep. 1239; *City of Madisonville v. Hardman*, 92 S. W. 930, 29 Ky. Law Rep. 253; *Hughes v. General Electric, etc., Co.*, 107 Ky. 485, 54 S. W. 723, 21 Ky. Law Rep. 1202; *E.*

*L. & B. S. R. Co. v. Combs*, 10 Bush. 382, 19 Am. Rep. 67. Whether an obstruction constituting a nuisance is a permanent one, in which event all the damages to a particular lot resulting from it must be recovered in one action, or temporary, when successive actions may be maintained to recover the damages, is often difficult to determine. As has been repeatedly held, if the structure is permanent, not only must all damages, past, present, and contingent, be recovered in one action, but they accrue when the structure is completed—or at least when the first injury is occasioned to the property—and are recoverable by the then owner of the lot. *Hughes v. General Electric, etc., Co.*, supra; *L. & N. R. Co. v. Lambert*, 110 S. W. 305, 33 Ky. Law Rep. 199. It is deemed a taking of the property, and as no alteration of the structure is practicable, it is assumed that the condition will remain unchanged. The law disfavors a multiplicity of suits. It encourages the settlement of controversies in the simplest and most expeditious manner, consistent with justice. It would be an unjust burden to allow repeated recoveries for injury to property which in the nature of the case is liable to recur frequently, when the whole matter could as well be settled in the one action. If, however, the structure is one which can be removed, or remodeled so as to obviate a recurrence of the damage, then it is better to allow a recovery for only so much of the damage as had occurred up to the time of the trial. For the parties thereafter could, and might, remove the objectionable feature. In such event it would be unjust to allow a recovery of damages in excess of the injury already sustained, as future damages might not ensue.

Obviously, if the structure is permanent and the damages recoverable in one gross sum, covering all time, that should end the matter. To allow additional recoveries of the same nature would be to mulct the defendant a number of times for the same wrong, and compel it to make compensation repeatedly for one taking of the property. It is equally clear that the person from whom the property was taken, its owner at the time of the permanent injury, is the one to be compensated. If he sells the property subsequently, he sells it in its impaired state. The purchaser buys it under the existing conditions which detract from its value, and fixes the consideration accordingly. *L. & N. R. Co. v. Lambert*, supra. If he were allowed then to recover the diminished value he would get something he had not bought. It is upon these considerations that is rested the rules of compensation above outlined. A sewer under a street is a permanent structure, as that term is used. When it would cost as much to alter a structure as to build it in the first instance, and when it is of a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

durable character, evidently intended to last indefinitely, it may be regarded as permanent. If an underground sewer is not a permanent structure, then there are none. It was held to be so in *Madisonville v. Hardman*, supra. It follows that the damage done to this lot by the building of the sewer in question accrued to the former owner of the lot, and was then recoverable by him.

Limitation was not relied on by the city. Nor was it necessary that the city should have pleaded the statute. The statute may be a bar to a cause of action. But when the facts disclosed show that the plaintiff never had the cause of action, the statute will not apply. The damages resulting from the sewerage are governed by the same rule as that applied to the sewer. They all arise out of the installation of the system by the city before appellee acquired the lot, and the situation was as permanent as it is the nature of such things to be. The circuit court should have peremptorily instructed the jury to find for the defendant city.

Reversed and remanded.

#### CITY OF LOUISVILLE v. SAGALOWSKI et al.

(Court of Appeals of Kentucky. Jan. 20, 1910.)

##### 1. LICENSES (§ 7\*)—CONSTITUTIONALITY OF ORDINANCE—UNIFORMITY OF TAXATION.

Const. § 171, provides that all taxes shall be uniform upon all property subject to taxation. Section 181 provides that the General Assembly may delegate the power to cities to impose license fees on occupations. Ky. St. § 2080, being part of a charter of cities of the first class, provides that each city may impose license fees on occupations. A city of the first class by ordinance provided that every person or corporation who intends to commence the business of selling any goods, etc., except by sample, shall first obtain a license. *Held*, that the ordinance is not in violation of Const. § 171, as, under that section and section 181, it is competent for cities to select the occupations on which to lay a license tax, and it is not essential that all callings be taxed under the license system, and the city may classify those of the same occupations imposing a different license tax upon each class if the classification is a reasonable one, and the tax imposed is the same on all the class; neither is it essential that the license tax shall be uniform with the property tax, the license tax being in addition to the property tax, and it is lawful to impose a license tax on merchandising as an occupation.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 8, 9; Dec. Dig. § 7.\*]

##### 2. LICENSES (§ 7\*)—MUNICIPAL ORDINANCES—VALIDITY—AMOUNT.

Whether a license tax is so high as to be prohibitive is tested by considering whether the tax bears so heavily on the class taxed as to prohibit the occupation, and an ordinance imposing a license tax on merchandising which fixes the amount to be paid for one year at \$250 if the year begins on the first of September, and the sum of \$100 for the time between the 1st of January and the 1st day of the following September, and the sum of \$50 for the time beginning at any time between the 30th of

April and the 1st day of August and ending on September 1st, *held* not so high as to be prohibitive.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 15; Dec. Dig. § 7.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by Sagalowski & Son against the City of Louisville. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Clayton B. Blakey and Elmer C. Underwood, for appellant. Eugene R. Attkisson and Alex G. Barrett, for appellees.

O'REAR, J. This appeal involves the validity of an ordinance of the city of Louisville, which reads as follows: "Every individual, firm or corporation who intends to commence, after the first day of September of any year, the business of selling any goods, wares or merchandise, except by sample, shall first obtain a license therefor and pay in advance for the same as follows, viz.: If said business is commenced after the first day of September, and before the second of January, said license fee shall be two hundred and fifty dollars. If said business is commenced at any time after the first day of January and before the first day of May, the license fee shall be one hundred dollars. If said business is commenced at any time between the 30th day of April and the first day of August, said license fee shall be fifty dollars. Each license issued under this section shall entitle the licensee to conduct or carry on said business until the first day of the next succeeding September. Each agent or employé who conducts or manages said business, or assists in the conducting or managing said business before a license has been obtained therefor, shall be guilty of a violation of this ordinance, and shall be liable to the penalty hereinafter provided." While this ordinance was before the court for construction in *Louisville v. Roberts & Kreiger*, 105 S. W. 431, 32 Ky. Law Rep. 182, its constitutionality on the ground now presented seems not to have been raised or considered.

It will be observed that the effect as well as evident purpose of the ordinance was to impose a tax on those itinerant merchants who come in after September 1st—the time of assessing such property for state, county, and city taxes, and who would likely leave before the next assessing period came around. The suit was brought by appellees who were merchants opening up after January 1st and before August 1st, and who were compelled to pay the license tax imposed by the ordinance or suffer prosecution and fine in the police court, seeking to recover the license taxes paid. A general demurrer to the petition filed by the city was overruled.

The circuit court held the ordinance to be

violative of the Constitution in two respects: One, that it was not uniform taxation; and the other that the tax was so exorbitant as to amount to confiscation.

Resident merchants have to pay a city as well as a county and state tax upon their stocks of merchandise valued as of the 1st day of September of each year. The city rate alone was \$1.80 on the \$100 of assessed value. The whole tax would be something like \$2.50 on \$100. The city's contention is that a great many people would open up a business as merchants after September 1st and quit it just before September 1st of the next year so as to escape this tax of \$1.80 or \$2.50, or whatever it might be. The resident merchants were not only put to a serious disadvantage in the competition which their more favored competitors were thus enabled to give, but the city was defeated in the collection of considerable revenue from a class of merchants who played at hide-and-seek with the tax assessors, with all the advantages on the side of the dodgers.

Appellees assail the ordinance upon the ground that it violates the uniformity clause of the Constitution (section 171, Const.), in that (1) all merchants in the city of Louisville are not required to pay a license tax; (2) even under the ordinance, those who are required to pay a license tax are not assessed upon a uniform scale—e. g., \$250 a year for those who enter after September 1st and before January 2d, those between January 1st and May 1st \$100, and those between April 30th and August 1st \$50, is not proportioned as to time, volume of business, or any other reasonable basis. By virtue of section 181 of the Constitution " \* \* \* the General Assembly may by general laws \* \* \* delegate the power to counties, towns, and cities, and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations, and professions." The sources of revenue of cities of the first class are defined by section 2980 of the Kentucky Statutes, being part of the charter of cities of the first class, which reads as follows: "Each city shall raise a revenue from ad valorem taxes and from a tax based on income, licenses, and franchises, \* \* \* and may impose license fees on stock used for breeding purposes and on franchises, trades, occupations, and professions." It has been held, construing sections 181 and 171 of the Constitution, that it is competent for the municipalities to select the trades, callings, or occupations which they deem proper to lay a license tax upon, and that it is not repugnant to the uniformity clause of section 171 either that all callings are not taxed under the license system, or that all occupations that are required to pay a license are not made to pay the same. *Hager v. Walker*, 128 Ky. 1, 107 S. W. 254, 32 Ky. Law Rep. 748, 15 L. R. A. (N. S.) 195; *Brown-Foreman Co. v. Commonwealth*, 125

Ky. 402, 101 S. W. 321, 30 Ky. Law Rep. 793; *Louisville v. Schnell*, 114 S. W. 742; *Carlisle v. Hechinger*, 103 Ky. 381, 45 S. W. 358, 20 Ky. Law Rep. 74.

It is allowed that the state or the municipality may classify even those of the same occupations, and impose a different license tax upon each class. All that is required is that the classification shall be a natural and reasonable one, and that the tax imposed shall be the same upon all of the class. *Strater Bros. v. Commonwealth*, 117 Ky. 604, 78 S. W. 871, 25 Ky. Law Rep. 1717. It is not necessary that a license or occupation tax shall bear the relationship of uniformity to property tax paid upon property. The Constitution does not contemplate that kind of uniformity. The two phases of taxation are wholly different. The ad valorem system is the principal plan of taxation in this state. The license system is cumulative, and in addition to the property tax. They are not related systems, and were not intended to be measured one with the other. In the classification of callings selected as the subject of license tax, the only limitations in the Constitution are that there shall be an equality of the burden imposed on all who naturally or reasonably belong to the class, that the tax shall not be confiscatory, and shall be imposed by general law for public purposes. Merchandising as an occupation may be taxed upon the license system. But it does not follow that all merchants must pay the same license fee, or that all merchants must be included. They may be separated into grades or classes, regulated by any reasonable and just consideration which really makes of them separate classes. Drygoods merchants might be formed into one class, grocery merchants into another, druggists into another. But such is not this classification. The policy was primarily to raise revenue. It was secondarily to raise it from a class of property holders not otherwise reached by the taxing process. Those who do and those who do not may well be regarded as separate classes. Those who pay taxes upon regular assessments are a naturally distinct class of citizens from those who, though in the same business, so manage as to begin and continuing it as to be out of business on the day as of which the assessments are made. It was competent for the city council to have treated them as two distinct classes, though engaged in similar occupations. It was also competent to further divide the class to be subjected to the license tax into classes, as was done. Those who begin their business after the assessing period but in time to get the benefit of the profitable holiday trade naturally enjoy a privilege more lucrative than do those who come in later; and those who get the benefit of plying their trades during the midwinter and early spring seasons have an easily perceived advantage over those who come in at the end of the spring, while those who begin in Au-

gust find the dull summer season, just before autumn, and would probably be on hand for assessment the 1st of September. The divisions of the classes seem logically arranged, and the proportioning of the tax just. The argument advanced by appellee that these itinerant merchants are thus doubly taxed, because in addition to the license tax imposed on them they pay, or must be presumed to have paid, on their property—that is, the money that was invested in the merchandise, and which was on hand in some form on September 1st—rests on a purely ideal basis of fact. It is well known that but a small per cent., probably not over 1 per cent., of money is listed for taxation, and stocks, bonds, notes, and similar securities but little more. The fact is notorious, and was probably in the mind of the council when formulating the ordinance under consideration. Visible property pays more taxes because it cannot be hid. Dodging in and out between assessing dates seems one of the ways of escaping taxation. It was to catch that class that the ordinance was drawn. If perchance some unoffending merchant fall within the class temporarily, his hardship will not avail the horde of old offenders who would continue to enjoy without cost what others provide. Similar statutes or ordinances have been upheld in states having similar provisions in their Constitutions to ours. *State of Wyoming v. Willingham*, 9 Wyo. 290, 62 Pac. 797, 52 L. R. A. 198, 87 Am. St. Rep. 948; *Des Moines v. Bolton*, 128 Iowa, 108, 102 N. W. 1045. In this state we have long had a statute imposing a license tax on peddlers—who are in a sense itinerant merchants. They are of the class who are “here to-day and gone to-morrow.” If not made to pay a license tax, they would ply their trades in competition with taxpaying merchants, reaping where they had not sown. The constitutionality of the statutes taxing them under the license system is no longer questioned. Doubtless the tax so imposed is quite disproportionate to the ad valorem tax laid on resident dealers in the same commodities.

Finally it is urged, and was so held by the chancellor below, that the tax in this ordinance is so high as to be prohibitive. Instances might be cited, could easily be imagined, where any license tax of enough moment to meet the requirements of its enactment bore so heavily on certain individuals as to be severely onerous, perhaps oppressive. Yet no tax nor other rule is to be tested by its exceptions alone. The test is whether the tax bears so heavily on the class, not isolated and exceptional individuals, as to prohibit the occupation—as to be confiscatory. There is nothing appearing in this record that such is the actual effect of this tax, nor does it appear to us as being so.

Judgment reversed and remanded, with directions to sustain the demurrer to the petition.

# UNITED STATES FIDELITY & GUARANTY CO. v. MILLER, Judge.

## SAME v. DOUGLASS' TRUSTEE.

(Court of Appeals of Kentucky. Jan. 19, 1910.)

### APPEAL AND ERROR (§ 1207\*)—REMAND—PROCEEDINGS AFTER REMAND.

Where the court on appeal decided that on the death of testator's wife the estate passed in fee to his five children, one of whom was a defaulting trustee, thereby enabling his surety to subject in part payment of the sum paid as surety his one-fifth interest in the estate, and that the trustee and surety were chargeable with a specified sum in addition to the amount the trial court had required them to pay, a judgment on the return of the case, which recited that the successor of the trustee was only entitled to recover from the surety four-fifths of the sum previously paid and four-fifths of the specified sum, and which left open for further proceedings the right of the surety to subject any other part of the interest of the trustee in the estate, conformed to the decision on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4696, 4699; Dec. Dig. § 1207.\*]

Appeals from Circuit Court, Jefferson County, Chancery Branch, First Division.

“Not to be officially reported.”

Mandamus by the United States Fidelity & Guaranty Company against Shackelford Miller, Judge of the Circuit Court, to compel the rendition of a judgment in accordance with the decision of the court on appeal, and the United States Fidelity & Guaranty Company appeals from a judgment entered after reversal in an action between it and George L. Douglass' trustee. Petition for mandamus dismissed, and judgment appealed from affirmed.

Thomas W. Bullitt, Bullitt & Bullitt, and Wm. W. Gaunt, for appellant. Carter & Carter, Bodley & Baskin, Dodd & Dodd, and H. H. Nettleroth, for appellees.

CARROLL, J. In the first-mentioned case the appellant upon petition moved this court to issue a writ of mandamus against the Honorable Shackelford Miller, judge of the Jefferson circuit court, chancery branch, First division, to appear and show cause why he refused to carry into effect the mandate of this court in the cause of the United States Fidelity & Guaranty Company v. Douglass' Trustee. The second case is an appeal from the judgment entered after the reversal by the same chancellor in the above-mentioned case.

It will thus be seen that the only question involved is whether or not the judgment entered upon the return of the case was in conformity with the opinion of this court in *United States Fidelity & Guaranty Company*

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

v. Douglass' Trustee, 120 S. W. 328, and the mandate issued thereon.

An examination of the opinion of the court will disclose that only two questions were involved on the appeal or disposed of by the court: First, whether or not upon the death of Mrs. Carter the estate passed in fee to her five children; and, second, whether the court erred in failing to charge Lattimore D. Carter, the defaulting trustee, and his surety, the guaranty company, with \$1,900. Upon the first question we held that upon the death of Mrs. Carter the estate did pass in fee to her five children, and the effect of this ruling was to enable the guaranty company to subject, in part payment of the sum it had been required as surety to pay for him as trustee, the one-fifth interest of Lattimore D. Carter in the estate. Upon the second point we held that the trustee, and his surety, were chargeable with \$1,900 in addition to the amount they were adjudged to pay in the lower court. No question was made by counsel that the court erred in its judgment fixing the amount of the defalcation by the trustee. Indeed, on the former appeal the sole effort of the guaranty company was directed to having the judgment of the chancellor that the estate did not pass in fee to the children upon the death of Mrs. Carter reversed, in order that it might subject Lattimore D. Carter's interest in the estate; the chancellor having adjudged that he had no interest that could be subjected.

Previous to its former appeal it had paid over to Clarke, as the successor of Carter, trustee, under orders of the chancery court, the sum of \$73,029.79, the amount for which it was held liable as surety. Upon a return of the case, the judgment here appealed from was entered. In this judgment it is recited that Clarke, trustee, was only entitled to recover from the guaranty company four-fifths of the sum it had previously paid, and in addition thereto four-fifths of \$1,900, which it was also held responsible for. And, as the trustee had collected from it the whole of the defalcation, he was directed to repay to it one-fifth thereof, and this he at once did. And, as there had been no adjudication of the amount of Lattimore D. Carter's interest in the estate of George L. Douglass, or adjudication of the amount that the guaranty company was entitled to recover from the estate on account of Lattimore D. Carter's interest in it, the judgment provided that: "And it appearing that issues have not yet been joined upon said amended and supplemental answers, counterclaims, and cross-petitions filed herein by said defendant, the United States Fidelity & Guaranty Company, and that it would be premature at this time to attempt herein to determine the amount of the interest or share of said Lattimore D. Carter in said total shortage or in the estate of George L. Douglass, deceased, it is therefore ordered that this cause be retained for such further proceedings as may be neces-

sary or proper to determine the rights of all parties arising under said amended and supplemental answers, counterclaims, and cross-petitions, and it is further expressly provided that nothing herein contained shall prejudice or affect the rights of said plaintiff trustee or of the beneficiaries under said will of George L. Douglass, deceased, to charge against the interest or share of said Lattimore D. Carter in said estate or against the sum herein ordered repaid unto the said the United States Fidelity & Guaranty Company all costs, disbursements, and expenses properly incurred in ascertaining, establishing, recovering, and settling the amount of said trustee's shortage or defalcation, and also all the costs and expenses of administration of said trust and the settlements thereof." In other words, the judgment only determined that the guaranty company was entitled to be repaid one-fifth of the amount that it had paid into court under the former judgment, and was liable for the further sum of four-fifths of \$1,900. Its right to subject any other part of the interest of Lattimore D. Carter in the estate of George L. Douglass was left open for further proceedings.

On behalf of the appellant, the guaranty company, the argument is now made that the judgment does not conform to the opinion of this court, or at least that it was prematurely entered. And it is insisted: First, that when the former judgment was set aside as directed by the opinion, there should have been no new judgment entered until after the amended and supplemental answers, counterclaims, and cross-petitions, which were rejected by the lower court in the first judgment, had been filed and the case stood regularly for hearing; second, that it was entitled to an opportunity to take proof to reduce, if it could, the amount of the defalcation; and, third, that the effect of the opinion was to adjudge that the powers of P. N. Clarke, as trustee under the will, and his right to prosecute the action against the defaulting trustee and his surety, ceased upon the death of Mrs. Carter, and therefore upon the return of the case the action should have been prosecuted in the name of the children of Mrs. Carter and not the trustee.

The new judgment, or the one now appealed from, does not in any manner whatever prejudice the rights of the guaranty company. The amount due by it on account of the defalcation was determined in the former hearing of the case. Indeed, it is not now seriously insisted that any mistake was made in finding against it the amount specified in the judgment. So that we feel safe in saying that the guaranty company was not prejudiced by the judgment against it in this particular. The new judgment placed the guaranty company precisely in the same condition as if it had only been required to pay in the first place four-fifths of the amount of the defalcation and had been allowed to retain Lattimore D. Carter's share in it. Its right

to subject to its claim against Lattimore D. Carter any other interest he may have in the estate is expressly reserved to it in the judgment. Even if it might be said that entering the new judgment was technically premature, it cannot be successfully maintained that any substantial right of the guaranty company was prejudiced thereby.

The opinion did not in terms or effect adjudge that the powers of Clarke as trustee terminated at once upon the death of Mrs. Carter. Although upon her death the trust ended, and the estate passed in fee into the possession of the children, yet Clarke's trusteeship would continue until he had settled his accounts as trustee. Clearly the money in his hands collected under the former judgment from the guaranty company should not be paid to it. The heirs of Mrs. Carter, excluding Lattimore D. Carter, are entitled to it. When, if at all, it is paid to them by the trustee, is not a question that concerns the guaranty company. It is a matter between the four children of Mrs. Carter and Clarke. There can be no doubt that the payment to Clarke by the guaranty company of the amount adjudged against it was a complete acquittance to it for the amount paid. Neither the children, nor any other person, can require it to again pay any part of this sum. The children of Mrs. Carter are made parties defendant to its cross-petition allowed to be filed by the judgment, and so in the subsequent litigation by the guaranty company to subject the interest of Lattimore D. Carter in the estate the beneficiaries of the fund and the parties directly interested in the estate will be before the court and can assert their rights.

In our opinion the judgment entered by the chancellor conformed to the opinion of this court and its mandate.

Therefore the petition for a mandamus is dismissed, and the judgment appealed from is affirmed.

## BAINS et al. v. GLOBE BANK & TRUST CO.

FIRST NAT. BANK OF PADUCAH et al.  
v. BAINS et al.

(Court of Appeals of Kentucky. Jan. 20, 1910.)

### 1. WILLS (§ 785\*)—MARRIED WOMEN—RIGHTS OF HUSBAND.

Under the statute giving the wife the right to dispose of her property by will, and giving the husband the right to elect to take under the will, a wife's property, not subject to the husband's creditors, passes under her will, unless the husband elects to take under the statute, and the husband's creditors may not complain of his election to take under the will, and equity will not compel him to exercise his election for the benefit of his creditors.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2085; Dec. Dig. § 785.\*]

### 2. LIFE ESTATES (§ 15\*)—ENHANCEMENT IN VALUE—RIGHT OF REMAINDERMEN.

The enhancement in the value of corporate stock while in the hands of the life tenant under a will bequeathing the same to one for life, with gift over to others, belongs to the remaindermen.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 34; Dec. Dig. § 15.\*]

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Consolidated actions by the Globe Bank & Trust Company and by the First National Bank of Paducah against George W. Bains and others. From the judgment certain of the defendants appeal, and plaintiffs file cross-appeal. Judgment on cross-appeal affirmed, and on appeal of defendants reversed and remanded.

D. G. Park, for First Nat. Bank. John G. Miller, W. Mike Oliver, Hendrick & Corbett, and Wm. Marble, for heirs and devisees of Wilhelm. Bradshaw & Bradshaw, for Bains

HOBSON, J. The Globe Bank & Trust Company brought a suit in the McCracken circuit court to enforce the collection of two notes aggregating the sum of \$5,811.35, executed to it by the Register Newspaper Company, with James E. Wilhelm, M. E. Beadles, and Ella B. Wilhelm as sureties; the latter being the wife of James E. Wilhelm, and Mrs. Beadles being his mother-in-law, the widow of William E. Beadles who died in October, 1893. Mrs. Wilhelm executed no mortgage to secure the notes, and they were therefore unenforceable against her, as she was only a surety in them. Prior to the death of William Beadles, he deeded to her real estate in Paducah, which is now very valuable. She died on April 4, 1908, leaving surviving her husband and four children. She and her husband were married in 1887, and had issue born in 1889. The bank insisted that at her death her husband took an estate by the curtesy in this land, and undertook to subject it to its debt. She left a will, which was duly admitted to probate, by which she devised the land to her children, giving her husband in effect a home there with them, and devised to him other property. Her will was duly admitted to probate and was not renounced by the husband; on the contrary, he accepted his provisions and took under it. It is insisted for the bank that in so doing he practiced a fraud upon his creditors, and that, notwithstanding the will and the fact that he has not renounced the will, he still owns a life estate in the land which may be subjected to its debt. The circuit court so held, and the devisees of Mrs. Wilhelm appeal.

Under the law in force before the adoption of the present statutes, a married woman might be empowered by a decree in chancery to dispose of her property by will. Mrs. Sal-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

He H. Wills was so empowered, and made a will devising her land to others. Her husband's creditors interposed, and insisted that the land was subject to their debts. The court, rejecting this, in *Garner v. Wills*, 92 Ky. 388, 17 S. W. 1024, 13 Ky. Law Rep. 727, said: "The power conferred upon Mrs. Wills by that judgment, if a valid judgment, had the effect to remove the disability of coverture in respect to disposing of her real estate by will and to deprive her husband of any interest therein that the law would have otherwise given him at her death, had she not disposed of the same by will. But it is said such power should not be so construed as to deprive the husband of his right to curtesy in his wife's land so far at least, as creditors are concerned, as that would be a fraud upon them. But why would the exercise of such power be any more a fraud upon them than the sale or gift of the land by the husband and wife? If the wife had conveyed her land by deed of gift to her children, the husband joining in the deed, his creditors, after her death, could not complain, because he had at the time of the conveyance no interest in the land that was subject to their demands against him; his right to curtesy, even if there were issue born alive, would depend upon the contingency of his wife dying first, or said estate being disposed of in her lifetime. His right to curtesy does not attach upon marriage like the wife's inchoate right to dower attaches upon marriage, which right she cannot be deprived of without her consent exercised in a certain way; but the husband's right to curtesy is entirely contingent upon having issue born alive and his wife's death preceding his, the owner of the land; and, as said, if he and his wife sell said land, his creditors cannot complain of being defrauded by the sale; and, if so, the court empowers her to dispose of her land, which includes his contingent right of curtesy, by her will. We perceive no difference in the effect upon creditors in the two cases."

The same question was again presented to this court in *Bottom v. Fultz*, 124 Ky. 302, 98 S. W. 1037, 30 Ky. Law Rep. 479. The court, reaching the same conclusion under the present statute, said: "This court has decided, in the cases of *Brand v. Brand* [109 Ky. 721], 60 S. W. 704, 22 Ky. Law Rep. 1366, *Gillisple v. Boisseau*, 64 S. W. 730, 23 Ky. Law Rep. 1046, and *Smoot v. Heyser*, 113 Ky. 81, 67 S. W. 21, 23 Ky. Law Rep. 2401, that a husband may renounce the will of his wife as provided by section 2067 [Ky. St. 1903]. This is a personal privilege given to the husband, and it is one which he may exercise or not, at his pleasure; and we are of opinion that the court could not require of appellant that he exercise that right. The law provides that he may, within one year, renounce the will, and elect to take under the law. If he wishes to avail himself of his statutory right, he must follow the provisions of the statute, and his failure to do so within the

time prescribed amounts to an election on his part to stand by the provisions of the will; but he has the entire year within which to act. The trial judge was evidently of opinion that appellant could not be required to elect, and, as he had not renounced the will as prescribed by law, that he was taking under it."

We adhere to the rule thus laid down. The cases to which we are referred in other jurisdictions holding otherwise seem to have turned on statutes which differ from ours. Our statutes give the wife the right to dispose of her property by will; she is given the right to dispose of all of her estate in this way. The husband, like any other devisee, is given by the statute the election to take under the will or not; but the chancellor will not for the benefit of his creditors control him in exercising his discretion in this matter. *Hill, etc., v. Cornwall & Bro.*, 95 Ky. 512, 28 S. W. 540, 16 Ky. Law Rep. 97; *Townsend v. Townsend*, 127 Ky. 230, 105 S. W. 937, 32 Ky. Law Rep. 240, 16 L. R. A. (N. S.) 316. The object of the statute was to protect the wife not only in the enjoyment of her property while living, but to enable her to dispose of it by will at her death; and the husband's creditors cannot complain of any disposition which she makes of the property. It was not subject to their debts while she lived. She and her husband could have deeded it to the children then, and the creditors could not have complained. When the same result is reached by will, they are equally without ground of complaint. Her property passes under her will, unless the will is renounced as provided by the statute.

This disposes of the first appeal. The other appeal arises in this way: The First National Bank of Paducah held similar notes, and it brought an action for their enforcement. This action was consolidated with the action which had been brought by the *Globe Bank & Trust Company*; and in the consolidated actions both banks undertook to hold the estate of Mrs. Wilhelm and her sister, Mrs. Bains, who had also died, liable on these facts: They were the daughters of Mrs. Beadles, and it was insisted that they had received estate from her to the amount of the debts and were therefore liable for the debts. The estate which Mrs. Beadles had came to her from her husband, William Beadles, under the following provision of his will: "I give to my wife, Mary E. Beadles, all of my estate, both real and personal, to have, use, and enjoy during her lifetime, and at her death, to be equally divided between my two daughters, Mrs. Ella Wilhelm, and Mrs. Mary Perkins." Mary Perkins named in the will was afterwards Mary Bains. The banks insisted that Mrs. Beadles under the will of her husband took all the estate as life tenant, that she did not spend the income, that the accumulation of income belonged to her in her own right, and that this property descended from her at her death

to her two daughters, and did not come to them under their father's will.

The personal property that came to Mrs. Beadles, as shown by the appraisal, amounted to \$37,723.28. In addition to this, she received about \$1,550 that was not appraised, making the total amount received by her, \$39,273.28. After her death the two daughters made a division of the estate, and in this division the estate was put at \$61,918; but this division included the real estate to the extent of \$13,000 which had been in the hands of Mrs. Beadles, and it also included the property deeded to Mrs. Wilhelm which was valued at \$5,000, making in all \$18,000 of real estate. It also included \$1,600 advanced to Mrs. Wilhelm by her father before his death, and \$3,000 advanced to Mrs. Bains by him. These sums aggregated \$4,600, and when added to the real estate make \$22,600. In addition to this, the bank stock in this division was valued much higher than in the appraisal. The enhancement in the value of the stock while in the hands of the life tenant belonged to the remaindermen. *Letcher v. German National Bank*, 119 S. W. 236. When we deduct all of these items from \$61,918, the amount the property was appraised at in the division between the two daughters, the balance is a little less than the amount of the estate that went into the hands of Mrs. Beadles. In addition to this, among the property which was turned over to the two daughters were notes and other things not of the cash value that they were put at in that appraisal; and so, on the whole, it is apparent that, instead of the fund increasing in the hands of the life tenant, there was a considerable shrinkage. This conclusion makes it unnecessary for us to consider what were Mrs. Beadles' rights under the will of her husband, for we conclude that there was no accumulation of income while the estate remained in her hands.

On the appeal of the Globe Bank & Trust Company, and the First National Bank, and on the cross-appeal of the Globe Bank & Trust Company, the judgment is affirmed. On the appeal of J. E. Wilhelm, G. W. Bains, etc., the judgment is reversed, and cause remanded to the circuit court with directions to the circuit court to dismiss the plaintiffs' petitions.

### COMMONWEALTH LIFE INS. CO. v. DAVIS.

(Court of Appeals of Kentucky. Jan. 13, 1910.)

#### 1. INSURANCE (§ 650\*)—ACTIONS ON POLICIES—EVIDENCE—STATUTES.

Ky. St. § 679 (Russell's St. § 4400), providing that no application for insurance or rules of the company having any bearing on a contract of insurance shall be admissible in a controversy between the parties unless a copy there-

of is made a part of the policy, does not apply where the policy was never issued, and the application and receipt for the first premium form the only evidences of a contract between the parties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1671, 1672; Dec. Dig. § 650.\*]

#### 2. INSURANCE (§ 136\*)—CONTRACT IN GENERAL—CONSTRUCTION—APPLICATION.

A condition in the receipt for the first premium paid for life insurance that no obligation was incurred by the company unless at the date of the delivery of the policy insured was in sound health was binding, and, where an insured person was ill from the disease from which he died before the policy was issued, no recovery can be had.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 228; Dec. Dig. § 136.\*]

Appeal from Circuit Court, Boyd County.

"To be officially reported."

Action by Mary E. Davis against the Commonwealth Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

Gregory & McHenry and Hager & Stewart, for appellant. James A. Williams, for appellee.

CARROLL, J. On January 30, 1907, the appellee, Mary E. Davis, applied to appellant company for insurance in the sum of \$500 upon the life of her husband, David Davis. She paid the agent of the company 60 cents, the amount of the first premium, and agreed to pay a like amount every week during the life of the policy, but no other premium was paid or offered to be paid by her during the life of the insured. When the payment was made, she took from the agent the following receipt: "Received from Mrs. Davis sixty cents, being a deposit on account of application for insurance in the Commonwealth Life Insurance Company made this date, which said deposit is to be paid by me to the company if the application be accepted, and returned to the applicant if the application be rejected. No obligation is incurred by said company by reason of this deposit, unless and until a policy is issued upon said application, and unless at the date and delivery of said policy the life proposed is alive and in sound health." On the back of this receipt there was printed: "If the holder of this receipt does not receive a policy of insurance or the return of the money herein receipted for within three weeks, write, stating name of agent and particulars to Darwin W. Johnson, Secy., Louisville, Ky." At the time this application was made the insured was in good health, but on March 11, 1907, he was stricken with pneumonia and died from the effects of this disease on March 17, 1907. At the time of his death no policy in pursuance of the application had been delivered to the insured or Mrs. Davis, but the policy had been issued and sent to the local agent for deliv-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ery. This suit was brought by Mrs. Davis to recover the amount of the insurance, less 60 cents a week from the date of the application until the death of the insured. The lower court rendered a judgment against the company for the amount claimed, from which judgment it prosecutes this appeal.

The case went off on a demurrer to the answer of the company, and so no dispute as to the facts appears in the record. In her petition Mrs. Davis averred that the company accepted the risk and issued a policy in accordance with the application, which was sent to the local agent to be delivered to the insured, but that the insured was sick with the disease from which he died at the time the policy was received by the local agent, and he refused to deliver it. In an answer, to which a demurrer was sustained, the company admitted the execution of the receipt, the payment of 60 cents, and that the application of the insured was accepted by it, but on account of errors and unavoidable delays not until March 12th, at which time it issued a policy and sent it to the local agent, who received it on March 14th, but refused to deliver it for the reason stated, but tendered back the 60 cents. It denied its liability upon the ground that both the receipt and application stipulated that no obligation was assumed by the company "unless at the date and delivery of said policy the life proposed is alive and in sound health," and that, as the insured was not in sound health either when the policy was issued by it or received by its local agent, it incurred no obligation under the contract.

It being admitted that the policy was not issued while the insured was in sound health, or delivered to him at all, the case narrows down to the single question whether or not the receipt of the first premium, the acceptance of the application, and the issuance of a policy completed an enforceable contract between the parties notwithstanding the conditions in the receipt and application. It is insisted by counsel for Mrs. Davis, and the lower court apparently so ruled, that neither the receipt nor the application, both of which contain the condition upon which the company relies to defeat a recovery, can be considered because they were not attached to the policy. Section 679 of the Kentucky Statutes (Russell's St. § 4400) provides that: "All policies \* \* \* which contain any reference to the application of the insured, or the constitution, by-laws or other rules of the corporation, either as forming part of the policy or contract, between the parties thereto, or having any bearing on said contract, shall contain or have attached to said policy or certificate a correct copy of the application as signed by the applicant, \* \* \* and unless so attached and accompanying the policy, no such application \* \* \* shall be received as evidence in any controversy, between the parties to or inter-

ested in said policy or certificate, and shall not be considered a part of the policy or of the contract between such parties." The argument is made that, as neither the receipt nor application was made a part of the policy, neither of them can be considered. We are somewhat at a loss to understand upon what reason this argument is based, when it is admitted that no policy was ever delivered to the insured. If the policy had been delivered to the insured, and it failed to contain or have attached to it a copy of the receipt or application, and a suit had been brought on the policy so delivered, the statute would be applicable, and neither the receipt nor the application would be competent evidence. Whether either or both were attached to the policy actually issued we do not know. It is fair to presume that they were. Here the beneficiary is attempting to hold the company liable upon a policy that was not delivered to the insured, and at the same time insisting that the only evidence showing that any contract of insurance was ever attempted to be made should not be considered. If the receipt and application are eliminated from the case, then there is nothing to show that any contract of insurance was ever attempted to be made.

The case for Mrs. Davis is rested solely upon the ground that the first payment was made accompanied by an application which was accepted. The issue between the parties is briefly this: The beneficiary contends that the contract of insurance was entered into, while the company claims that only an application for insurance was made and that the contract was not fully executed until the application was accepted, and a policy issued and delivered in accordance with the terms of the application. We therefore think it is clear that the statute does not embrace the case we are considering, and that both the receipt and application are admissible to determine the rights of the parties.

The answer of the company avers that the policy was not issued until March 12th, and that on March 11th the insured was stricken with the disease from which he died. So that, accepting this averment as true, the insured was not in sound health when the policy was actually issued by the company. Under these circumstances, it is manifest that a valid contract of insurance was not made, as one of the conditions upon which the company agreed to issue and deliver the policy was that the insured should be in sound health at the date of its issuance and at the time of its delivery. The company had the right to annex this condition to the application, and, although it may have accepted the application in ignorance of the condition of the health of the insured, it had the right according to the plain language of the application to decline to issue the

policy or decline to deliver it if before issue or delivery it ascertained that the insured was not in sound health. Having this view, we cannot agree with counsel for Mrs. Davis that the contract was completed when the application was accepted. This view of the case would ignore entirely the reasonable condition in the application. The very writing upon which the insured made the proposition to the company to issue him a policy agreed that the company might do this, and this part of the proposition is as valid and enforceable as any other feature of it.

There is a line of authorities holding that, when a policy is issued and sent or given to an agent to be delivered by him to the insured, the agent is the agent of the insured, and that the receipt of the policy by the agent has the same effect as the delivery of it to the insured would have. *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134; 25 Cyc. 720. But an examination of the authorities so holding will disclose that at the time the policy was received by the agent the insured was in good health, and, this being so, the policy would be treated as if delivered to the insured when received by the agent. The distinction between these cases and the one we are considering is plain, as here it is conceded by the pleadings that, when the policy was delivered to the agent, the insured was on his deathbed. In *Mutual Life Ins. Co. v. Thomson*, 94 Ky. 253, 22 S. W. 87, 14 Ky. Law Rep. 800, relied on by counsel for appellee, it does not appear that the application or policy contained the provision found in the application in this case, and the court held that, as the policy was sent to the agent to be unconditionally delivered to the insured, its reception by the agent was in effect a delivery to the insured. In *Cooper v. Pacific Mutual Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705, the court held that, when the company accepted the application and issued the policy, a valid contract was completed between the parties, although the insured died before the policy was delivered. But in that case there was no condition that the policy should not be valid unless the insured was alive and in good health at the time of its delivery. In *Lee v. Union Central Ins. Co.*, 41 S. W. 319, 19 Ky. Law Rep. 608, the receipt given to the insured for the first premium at the time of his application stipulated that he was to be insured from the date of the receipt, provided the application was approved. The application was approved and a policy issued, but before its delivery Lee died, and the court held that the condition in the receipt and the issue of the policy completed the contract. The answer of the company presented a good defense, and the demurrer should have been overruled.

Wherefore the judgment is reversed, with directions to proceed in conformity with this opinion.

#### OLINE et al. v. CHARLES.

(Court of Appeals of Kentucky. Jan. 6, 1910.)

#### 1. ATTORNEY AND CLIENT (§ 123\*)—MUTUAL RIGHTS AND LIABILITIES—DURATION OF RELATION.

The court will not draw a nice line as to when the relation of attorney and client ceases, as affecting a transaction between them, and will not enforce any contract made while the confidence engendered by relation continues, and where the parties did not deal at arm's length, on equal terms.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 239-245; Dec. Dig. § 123.\*]

#### 2. ATTORNEY AND CLIENT (§ 123\*)—MUTUAL RIGHTS AND LIABILITIES—DEED OF CLIENT.

Where attorneys, after procuring a judgment, having execution levied, and buying in land for their client, induced her to convey them for \$150, the difference between the judgment and their fee, when the land was worth \$6,000, the deed will be set aside.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 239-245; Dec. Dig. § 123.\*]

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Action by Victoria Charles against J. S. Cline and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Roscoe Vanover, J. S. Cline, and Geo. Pinson, Jr., for appellants. O. M. Whitt and P. B. Stratton, for appellee.

HOBSON, J. Victoria Charles had a debt against her brother, Nelson Daniels, which she placed in the hands of J. S. Cline and George Pinson, Jr., as her attorneys. They brought a suit in her name against Daniels, and obtained a judgment for \$200 and cost. Execution issued upon the judgment in her favor, and was levied upon Daniels' three-thirteenths of the land owned by his father, William Daniels, at his death, he having bought out the interest of two other children. The land so levied upon was appraised at \$2,000 a share, or \$6,000. It was sold on July 17, 1905, by the sheriff and was bid in by the plaintiff for her debt. It was not redeemed within twelve months. On July 17, 1906, George Pinson, Jr., one of her attorneys in that case, appeared at her house, which was some miles from the county seat, and demanded their fee, \$50. She said that she could not pay him. He then proposed to pay her \$150 and pay the cost if she would assign to him her bid for the land. He had with him a check for \$150, and also a written transfer for her to sign. She says that he told her then that it was just like turning her hand over whether she got anything out of it or not, that the only thing sold was an interest in her mother's dower, and that

she did not know that it was an interest in the whole place. Pinson denies making these statements. However, it is clear that he did not tell her that the land which had been sold was valued at \$6,000. She declined to sign the paper or accept the check. He then left it with a neighbor named Dotson. Dotson took it over to her a few days later when her husband had returned home, and she signed it, and took the check. Cline and Pinson when they received the transfer from Dotson immediately had the sheriff to make them a deed for the land, and after this Mrs. Charles brought this suit against them to set aside the deed on the ground that the transfer had been obtained from her by fraud, and that she had been overreached. The defendants filed answer denying the allegations of her petition. Proof was taken, and on final hearing the circuit court set the deed aside. Cline and Pinson appeal.

It is undisputed that Cline and Pinson were Mrs. Charles' lawyers, who had recovered the judgment, and who had bid in the land for her at the sheriff's sale. The sheriff had not made her a deed for the land. Their employment, it is insisted, ceased when they bid in the land at the sheriff's sale, and it is urged that they were no longer her attorneys when they obtained the transfer for her. We do not think that a nice line should be drawn in a matter of this sort, as to where the relation of attorney and client ceases. Mrs. Charles had a right to look to Cline and Pinson as her advisers in the matter. They had secured the judgment, they had bid in the land, and the court will not enforce as between them and their client any contract made while the confidence engendered by the relationship still continued, and where it is manifest from all the circumstances that the parties were not dealing at arm's length and did not stand on equal footing. The amount of the consideration is entirely out of keeping with the value of the property, and while the attorneys may not have intended to take advantage of their client, it is not such a transaction as the court will uphold.

Judgment affirmed.

#### NEAL v. FINLEY.

(Court of Appeals of Kentucky. Jan. 12, 1910.)

##### 1. TENDER (§ 15\*)—MODE AND SUFFICIENCY—CHECK—OBJECTIONS.

Tender of payment by check is sufficient where the drawer has sufficient funds in the bank to meet the payment, unless the refusal is upon the ground that the tender is not in lawful money.

[Ed. Note.—For other cases, see Tender, Cent. Dig. § 44; Dec. Dig. § 15.\*]

##### 2. SPECIFIC PERFORMANCE (§ 101\*)—NECESSITY OF TENDER—WAIVER.

Where a party covenanted to convey the mineral in lands on payment of a certain sum,

his refusal to convey on demand was a waiver of tender of the purchase price by the purchaser giving him an immediate action for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 293; Dec. Dig. § 101.\*]

##### 3. MINES AND MINERALS (§ 55\*)—CONVEYANCES AND CONTRACTS—GRANTS OF MINERAL AND MINING RIGHTS—SERVITUDES.

A covenant to convey the mineral in a part of certain lands, together with all necessary mining rights, included a conveyance of such easements in the balance of the land as were necessary to accomplish the mining and removal of the mineral.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 154, 156; Dec. Dig. § 55.\*]

##### 4. MINES AND MINERALS (§ 55\*)—CONVEYANCES AND CONTRACTS—GRANTS OF MINERAL AND MINING RIGHTS—SERVITUDES.

Where a party covenanted to convey the mineral together with the necessary mining rights in certain land which was a parcel wholly within a larger boundary of his land, a right of way over the land not conveyed, as of necessity, was included in the covenant.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 154, 156; Dec. Dig. § 55.\*]

Appeal from Circuit Court, Whitley County.

"To be officially reported."

Action by H. F. Finley against J. J. Neal. Judgment for plaintiff, and defendant appeals. Affirmed.

C. W. Lester, for appellant.

O'REAR, J. Appellant sold and covenanted to convey to appellee all the coal and other mineral within a certain boundary of land in Whitley county, at the rate of \$4 an acre. The quantity of land was so much of the tract described "as is covered by what is known as the Blue Gem vein of coal." The quantity was to be ascertained by survey within three months, to be done by Finley. A covenant of the bond runs: "I bind myself and representatives to make said Finley a good and sufficient title to said lands, together with all necessary mining rights, when the purchase money is paid." Within three months after the date of the contract, Finley caused the land to be surveyed. The surveyor reported that the quantity covered by the Blue Gem vein of coal is 45.5 acres. Thereupon Finley tendered appellant Neal his check upon a bank of Williamsburg, in which he had enough on deposit to meet the check. Neal declined to accept the check, upon the ground that the deed prepared by Judge Finley did not properly locate the land as to the name of the water course upon which it is situated, and, when that was corrected, declined to sign the deed. His reason for declining seems to have been alone because he was disappointed in the quantity of land disclosed, claiming that the true area was 65 acres. He offered to convey if paid

upon the basis of 65 acres. This suit for specific performance resulted. The only evidence in the record is the bond, which is the basis of the suit, and the depositions of Judge Finley and his surveyor, Lewis Francis. Judge Finley's testimony relates to the tender. Francis testified as to the time and manner of making the survey. He said that the outcropping of the Blue Gem vein of coal was ascertained, and the boundary agreed to by appellant, Neal, who was present; that he ran the lines and made the measurements and calculation thereon accurately; and that the area under which that vein appeared is 45.5 acres only. Upon the record thus presented, the circuit court adjudged a specific execution of the contract, and ordered Neal to sign and deliver a deed in conformity to the contract. The court defined the boundary, as testified to by Neal, adding that the deed should contain an easement of right of ingress and egress over Neal's other land not conveyed, so as to enable grantee to mine and remove the coal from the premises conveyed. Neal appeals. He assigns as error: First, that the allegation of tender was not proved; and, second, that the conveyance ordered exceeds the covenant in the bond, in that the bond did not contain an agreement as to the easement.

It is true that ordinarily a tender of payment in any way than by legal tender money is not good. But the parties may waive that feature of the law. If tender is made in bank bills, or check, the tender will be deemed sufficient (provided, in case of check, the drawer has sufficient funds in the bank to meet the payment) unless the refusal is based upon the ground that the tender is not in lawful money. *McGrath v. Gegner*, 77 Md. 331, 28 Atl. 502, 39 Am. St. Rep. 415; *Jones v. Overstreet*, 4 T. B. Mon. 547; *Campbell v. Williams*, 15 Ky. Law Rep. 704. The objection by Neal was not based on the ground that the tender was by check. Furthermore, when he declined to execute the deed at all, Finley was not obliged to tender the payment of the balance of the purchase price. Neal's act in refusing to convey was a waiver of the tender by the grantee, and gave the latter immediately an action for specific execution. The clause in the contract that Finley should have all necessary mining privileges was an agreement to convey him such easement as was necessary in the property out of which the estate was to be conveyed to enable him to enjoy the right to mine and remove the coal. But, independent of that, it appears that the parcel to be conveyed was wholly within a larger boundary of the grantor's land. In that state of case, it is implied in the contract that a right of way, as of necessity, was included in the covenant to convey.

We perceive no error in the record.

Judgment affirmed.

# SCHONBACKLER et al. v. HAYDEN.

(Court of Appeals of Kentucky. Jan. 14, 1910.)  
DRAINS (§ 35\*)—PROCEEDINGS FOR ESTABLISHMENT—DISMISSAL.

The owner of land petitioned for the opening and extension of a ditch, and reviewers established the grade, assessed the costs, etc., when one who had purchased petitioner's land moved to dismiss the proceedings, and others then filed a petition alleging that they were owners of some of the land assessed and reviewed, and asking to be permitted to prosecute. *Held*, that it was error to dismiss the proceedings.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 35.\*]

Appeal from Circuit Court, Daviess County.  
"Not to be officially reported."

Petition by Joseph Schonbackler for the extension of a ditch, in which proceedings W. R. Hayden petitioned that the proceedings be dismissed. From a judgment dismissing the proceedings, others who desired the matter prosecuted appeal. Reversed.

Robert G. Hill, for appellants.

O'REAR, J. Joseph Schonbackler filed in the Daviess county court a petition for the opening and extension of a ditch. Viewers reported favoring the proposed ditch. Reviewers established the grade, assessed the cost, found and apportioned the benefits, and named the persons affected by the proposed work. The parties reported were duly summoned, but failed to answer. Appellee filed a petition in the proceeding alleging that he had bought the land of petitioner Schonbackler, and that he (Hayden) did not desire the ditch opened. He asked that the proceeding be dismissed. Others, who are here appellants, then filed their petition in the proceedings, alleging that they were owners of some of the land assessed and reviewed, and asking to be permitted to prosecute the action. The county court dismissed the cause upon this state of the record. Upon appeal to the circuit court, when the cause stood for trial de novo, a summons was issued against the persons reported by the reviewers as those affected by the proposed work. Still no defense was filed or exceptions taken to the reviewers' report. The circuit court dismissed the appeal. These rulings appear to us to be erroneous. When a petition is filed under the statute to have a ditch established, opened, extended, repaired, or enlarged, the reviewers' report bringing in all necessary parties, the cause is thereafter for the benefit of all parties named who chose to avail themselves of it. It is not thereafter within the power of the petitioners to dismiss the cause to the prejudice of the proposed work.

The circuit court should have heard the appeal on its merits, and, if no exceptions are filed by the parties summoned, then the judgment should in conformity to the statute provide for letting the work.

Reversed and remanded for further proceedings consistent herewith.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**MONARCH TOBACCO WORKS v.  
NORTHERN.**

(Court of Appeals of Kentucky. Jan. 14, 1910.)

**1. MASTER AND SERVANT (§ 285\*)—INJURIES TO SERVANT—QUESTION FOR JURY.**

In an action for injuries to a servant owing to an explosion of a radiator, the question as to the cause of the explosion held one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.\*]

**2. MASTER AND SERVANT (§ 124\*)—DUTIES OF MASTER—APPLIANCES AND PLACES FOR WORK—TESTING.**

Where a master installed in his factory an old, used radiator without testing it, and subjected it to a heavy steam pressure, and failed to provide a waste drainage, whereby the radiator exploded and injured a servant, the master was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by Delphos Northern against the Monarch Tobacco Works. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Bennett G. Young, Marlon W. Ripy, and O'Neal & O'Neal, for appellant. Morton K. Yonts and J. Morgan Chinn, for appellee.

O'REAR, J. Appellee, a boy about 14 years old, was engaged about the tobacco factory of appellant. His duty was to wash and dry tin plates used in impressing brands on the tobacco plugs. There was a steam radiator in the room. Immediately and above the radiator was a tank of water, used for washing tins. The water was heated by the waste steam from the radiator. Appellee's work was at this tank and radiator. Whilst engaged in his work at the tank, the radiator exploded, severely injuring the boy, and permanently impairing his hearing, and probably the use of his right hand. In this suit by the boy against the employer to recover damages for the injuries inflicted by the explosion, it was charged that the radiator was negligently constructed, and permitted to remain out of repair, and that the employer negligently suffered or caused a high pressure of steam to be turned into the radiator, with the resulting injury to the plaintiff that has been mentioned. The verdict was for the plaintiff. The principal error assigned for reversal is that the court should have peremptorily instructed the jury to find for the defendant, upon the ground that the evidence failed to show the cause of the explosion. This assignment must be disposed of on the plaintiff's evidence.

The machinist who put in the radiator testified that he had had many years' practical experience in his work; that the radiator was an old one, having been removed from some other plant; that it was necessary, and

is always necessary, to provide for the draining of steam radiators, else the condensed steam, when the steam is shut off, forming water, seals the pipes of the radiator, so that, when steam is again turned into it, it comes into contact with the water, and the vacuum left by the condensed steam, causing sharp and more or less violent shocks, called hammering. The violence of the shocks depends upon the force of steam and the amount of resistance. In this radiator, instead of having provided a waste drainage by which the radiator might have been "bled" after the steam was turned off, and before again turning it on, the waste pipe ran up and into the tank above. The witness testified that the president of appellant directed the work done in that way in order to heat the water in the tank as well as to provide soft water for washing the tins. He also testified that the plan adopted was dangerous, always liable to cause explosion, and that he so explained to the president at the time. Other mechanical engineers introduced as witnesses testified that it was highly dangerous to so construct a steam radiator, that the hammering caused by the passing of the steam and water necessarily impairing the strength of the castings of the radiator, making an explosion more liable. There was a pressure of 100 pounds of steam on the radiator when it exploded. After the explosion, pieces of the radiator showed that there were old cracks inside the castings, how caused and when, of course, not directly shown.

Appellant contends that there was not proof of the cause of the explosion; that it might have been the fact upon which plaintiff rested his case, or it might have been latent defects in the material of the radiator. The old cracks are of themselves evidence of violent shocks to the castings. They tend to sustain the engineer's testimony that the hammering in the pipes and radiator would break or weaken the castings, so that in time they would be unable to withstand the steam pressure of 100 pounds. It was in the testimony that these pipes and castings are always subjected to a test of 750 pounds to the square inch before being installed. If the cracks had then been there originally, the castings would have given way. It did give way under a pressure of 100 pounds. If the cracks weakened the castings at that point, the strength would have yielded at the instant its limit was reached. It is certain that the defect was not structural. If an old, used radiator was installed by appellant without testing, and in defiance of the laws of steam engineering, resulting in a bursting of the casting and injury of an employé placed to work about it, the owner will be held liable. The cause of the explosion is as certainly and satisfactorily proven as it is possible ever to connect such an effect with its cause. The evidence is circumstantial, aided by the opin-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ions of expert machinists whose experience has taught them the applied laws of mechanics.

We think the peremptory instruction was properly overruled. The instructions given fairly submitted the issues to the jury.

Judgment affirmed.

### JUSTICE et al. v. JUSTICE.

(Court of Appeals of Kentucky. Jan. 25, 1910.)

#### 1. EVIDENCE (§ 452\*) — PAROL EVIDENCE — DEED.

Parol evidence is admissible to aid in construing a deed containing a latent ambiguity, where there is nothing in the deed itself from which it may be determined what is meant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2093-2101; Dec. Dig. § 452.\*]

#### 2. BOUNDARIES (§ 37\*)—CONSTRUCTION—EVIDENCE—SUFFICIENCY.

In an action to recover land claimed to have been included in a deed which described it as extending to a cliff on the top of a ridge, where there were two cliffs on the ridge, evidence held to sustain a finding that the second or further cliff was meant.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-194; Dec. Dig. § 37.\*]

#### 3. EVIDENCE (§ 274\*) — LOCATION — DECLARATIONS.

Where a father conveyed to a son and daughter parts of a tract of land, declarations made by him as to the boundary between the two portions were not self-serving, as he had no interest in the location of the line, and, where they were made in the presence of his daughter who acquiesced therein, they were competent evidence against those claiming under her in a suit in which the question of the boundary was involved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1121-1134; Dec. Dig. § 274; Boundaries, Cent. Dig. § 156.]

#### 4. EJECTMENT (§ 69\*)—PLEADING.

Where plaintiffs suing to recover land based their claim on a deed to A., and it became apparent there was a latent ambiguity in the deed, it was unnecessary for defendant to plead this ambiguity, as plaintiffs were bound to recover on the strength of their title, which was already in issue.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 69.\*]

Appeal from Circuit Court, Pike County.  
"Not to be officially reported."

Action by William Justice and others against Dave Justice. From a judgment for defendant, plaintiffs appeal. Affirmed.

J. M. Roberson and F. W. Stowers, for appellants. Roscoe Vanover, for appellee.

**BARKER, J.** This is an action to recover about three acres of land in Pike county, Ky. Both parties claim title through a common vendor, Andrew Justice, and the question in issue turns upon the correct location of a common line in a deed from Andrew Justice and wife to Elizabeth Adams, dated January 14, 1876, and a deed from the same vendors to Ambrose and Jane Justice sub-

sequently executed. The appellee claims under the latter deed, and appellants claim under the first.

The real question between the parties is whether a call in the deed to Elizabeth Adams was the first cliff reached on a ridge, or a second cliff, some distance beyond the first; the call being simply "to a cliff on the top of the ridge." The evidence shows that there are two cliffs on the top of the ridge, and therefore whether the vendor meant the first or second constitutes a latent ambiguity in the deed. If he meant the first cliff reached in projecting the call, then appellants should succeed. If he meant the second cliff, then it is conceded that appellee is entitled to the judgment. There is nothing in the face of the deed which tends to throw any light upon the crucial question; and, this being true, the rule is elementary that parol evidence is competent to solve the latent ambiguity.

Undoubtedly, everything else being equal, we should not hesitate to say that the first cliff reached in projecting the call should be accepted as the one meant by the vendor; but it was shown by parol testimony that the vendee, Elizabeth Adams, in her lifetime told her son, Will Adams, that the second cliff was the corner in her boundary. It is also shown by the testimony that during the lifetime of both the vendor, Andrew Justice, and the vendee, his daughter, Elizabeth Adams, the old man in the presence of his daughter pointed out the second cliff as the one constituting the corner, and that she acquiesced in it. The testimony further shows that for eight years prior to the death of Elizabeth Adams, who was the beneficiary of the life estate under the original deed from her father, Andrew Justice, the appellee, Dave Justice, had a tenant occupying part of the disputed territory, and that he frequently cut timber and did other acts of ownership which would have been trespasses had he not been the owner of the land, and that he sold a part of it as a site for a neighborhood school; all of this being done without any protest on the part of Mrs. Adams or claim by her that she was the owner of the land in question. With all this evidence in, the trial court—a jury being waived—found that the second cliff was the true corner and dismissed the petition of appellants.

The declarations of Andrew Justice in his lifetime were not self-serving, as he had no interest in the location of the line. He had made deeds to his children for the two tracts, and he had no self-interest in the establishment of the boundary between them; and, as his declarations were made in the presence of his daughter, Elizabeth Adams, and she acquiesced in the declarations, what was said is clearly competent as against her and the remaindermen. There is no legal principle which requires the appellee here to plead the

existence of a latent ambiguity in the deed to Elizabeth Adams. Appellants were the plaintiffs in the court below, and they were bound to recover the land upon the strength of their title which was placed in issue by the answer. The cases cited by appellants do not sustain their contention that, in order to show there is a latent ambiguity in a deed or will, the ambiguity must be specially pleaded. The ambiguity became apparent in the attempt on the part of appellants to establish their claim to the land in dispute, they undertaking to show that by their deed the first cliff was meant, whereas appellee undertook to show that the vendor meant the second cliff encountered on the ridge, and the whole contention between the parties turned upon the correct answer of the question: Which cliff did the vendor mean in describing the boundary of land conveyed to his daughter? The question is one wholly of fact, and we are not willing to say that the trial judge to whom this question was submitted by agreement of the parties erred in the conclusion he reached. It seems to us there was ample evidence to support his conclusion, and we are not willing to reverse his judgment. It is therefore affirmed.

#### CAPLINGER et al. v. PRITCHARD.

(Court of Appeals of Kentucky. Jan. 21, 1910.)

#### 1. APPEAL AND ERROR (§ 395\*)—BOND ON APPEAL—FAILURE TO EXECUTE—DISMISSAL.

Under Civ. Code Prac. § 724, providing that on appeal a bond must be executed to the effect that appellant will perform the judgment rendered on appeal, whereupon the clerk of court shall issue an order to the judge of the inferior court to stay all proceedings thereon, the execution of the bond is the basis for the action of the clerk; and, where it was not executed on appeal from the county to the circuit court before him within 60 days after the judgment, as required by law, the appeal was properly dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2064-2070, 3127; Dec. Dig. § 395.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 516\*)—ACCOUNTING—ENFORCEMENT.

While where the settlement of an executor or administrator is contested in the county court, which tries the exceptions on their merits, the remedy of the aggrieved party is by appeal, where there is no trial and the exceptions are dismissed without a hearing, an action may be instituted in equity in the circuit court to surcharge the settlement and force an accounting.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 516.\*]

Appeal from Circuit Court, Trimble County.  
"To be officially reported."

In the matter of the settlement of the accounts of Frank Pritchard, administrator of the estate of J. F. Caplinger, in which Linnie G. Caplinger and others filed exceptions. From an order overruling and dismissing the exceptions, exceptors appealed to the circuit

court; and, from an order dismissing the appeal, they appeal. Affirmed.

Claude B. Terrill, for appellants. G. W. Peak, Edwards, Ogden & Peak, for appellee.

NUNN, C. J. The time is not stated, but prior to the year 1903 appellee was appointed administrator of the estate of J. F. Caplinger, and in the early part of the year 1903 he made a partial settlement, and about November of that year he made what he alleged to be a final settlement. Appellants, the widow and children of J. F. Caplinger, filed exceptions to both settlements. On the 23d day of November, 1903, appellee resigned as such administrator in open court, which resignation was accepted. A rule was awarded against him requiring him to file in the county court by January 15, 1904, a statement or correct copy of a sale bill and an inventory of the estate of J. F. Caplinger, which went into his hands as such administrator. (It is indicated that the originals, if ever filed, were lost.) It appears that he did not respond to this rule, but his attorney did for him and denied the jurisdiction of the court to grant and require him to respond to such a rule, as he was no longer the administrator of the estate, and made the same claim with reference to the exceptions made and filed by the widow and children to his settlements. The matter of exceptions to the settlements was referred to a special commissioner to take proof and report with reference thereto, and as to the state of accounts existing between appellee and the estate. The commissioner made and filed his report showing that appellee owed the estate about \$1,307, but did not file the evidence taken with it. At least it is not copied in the record. Thus matters stood until February 9, 1907, when the county court entered the following order: "Came the parties and F. J. Pritchard, still protesting and objecting to the jurisdiction of the court herein, and all proceedings had thereunder, and the court being advised sustained the demurrer, and refused to consider the exceptions filed by Mrs. Linnie G. Caplinger, Grace Caplinger, by her guardian, and Mabel Caplinger, and the same are all overruled and dismissed by the court. And the rule heretofore taken is dismissed. To all of which rulings said Mrs. Linnie G. Caplinger, Grace Caplinger, by her guardian, and Mabel Pritchard (Caplinger) except and pray an appeal to the circuit court which is granted. And it is further adjudged by the court that the said Frank Pritchard recover of the plaintiff his costs herein expended." Appellants appealed from this order to the circuit court, and, failing to get service on appellee, proceeded against him as a nonresident. On the 24th day of February, 1909, plaintiff in the appeal to the circuit court, appellant here, moved the circuit court to submit the case to which defendant in that court, appellee here, object-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed, as shown by an order of that date. But the action of the court on that motion does not appear. It appears that at the June term, 1909, appellee by attorney moved the court to dismiss the appeal, because no appeal bond had been executed. Appellants then tendered a bond, the court took the matter under advisement until the 13th day of November, 1909, and then made an order dismissing the appeal because no bond was executed at the time the appeal was taken, nor tendered within 60 days, the time fixed by law, and from that order appellants appealed to this court.

Section 724, Civ. Code Prac., provides that an appeal must be taken by presenting a certified copy of the judgment of the lower court and the amount of the costs, and caused to be executed before the clerk by one or more sufficient sureties a bond to the effect that appellant will satisfy and perform the judgment that shall be rendered on the appeal. Whereupon the clerk shall issue an order to the judge of the inferior court to stay all proceedings thereon. This was all complied with, except the execution of the bond. The case of Huggins on Petition, 102 S. W. 849, 31 Ky. Law Rep. 475, was similar to the one at bar, and an appeal bond was not executed as required by the Code, and for this reason the lower court dismissed the appeal, and was sustained in its action by this court.

This is conclusive of the case at bar, unless the court erred in refusing to accept the bond tendered by them when the motion was made to dismiss the appeal for the want of a bond, which was rendered long after the expiration of the 60 days from the time of the rendition of the judgment in the county court. This court has decided that when a party undertakes to give a bond required by law, and it is defective, the court should permit the party to make the bond perfect, but it has never decided that, when a party fails to execute a bond within the time prescribed by law, he should be permitted, or that the court has power to permit the execution of the bond after the time allowed by law for its execution, and it is our opinion that it is not within the authority of the court to do so. The section of the Code referred to requires the execution of the bond before the clerk has the authority to issue the order to stay the proceedings on the judgment, and to direct the inferior court to transmit to his office all the original papers in the case, or to issue summons thereon. The execution of this bond is the basis for the action of the clerk, and, as it was not executed before him within 60 days after the judgment of the county court, the lower court did not err in dismissing the proceeding. If, however, appellee as administrator still owes the estate on a fair settlement of his accounts, the parties in interest are not without a remedy. An action may be instituted in equity in the

circuit court surcharging his settlements, and force him to account for what he owes the estate. The proceedings had in the county and circuit courts are not a bar to such an action, as the issues therein were not tried upon their merits, or at all, as expressly shown by the orders of the county and circuit courts. The rule is well established that when a settlement of a fiduciary is contested in the county court, and that court tries the exceptions on their merits, the remedy of the aggrieved party is by appeal, but not so when there is no trial, and his exceptions are dismissed without a hearing, as in the case at bar. *Bell v. Henshaw*, 91 Ky. 430, 15 S. W. 3, 12 Ky. Law Rep. 674, and *Turley's Adm'r v. Barnes, etc.*, 103 Ky. 127, 44 S. W. 446, 19 Ky. Law Rep. 1808.

For these reasons, the judgment of the lower court is affirmed.

CARROLL, J., not sitting.

#### LANSLOWNE v. REIHMANN et al.

(Court of Appeals of Kentucky. Jan. 25, 1910.)

#### CONTRACTS (§ 27\*)—IMPLIED CONTRACT—BREACH—RIGHT OF RECOVERY.

Plaintiff took an assignment of a lease for certain premises from R. for 19 months. At the expiration of this time he exercised the option in the lease to renew. The premises were used for saloon purposes, as known by the owner and plaintiff's assignor. When plaintiff's license expired, the owner and plaintiff's assignor refused to sign his petition for a new license, whereupon it was refused. *Held*, that there was no contract with either to sign such a petition, and hence they are not liable to plaintiff for loss because of his failure to secure a license.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 27.\*]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

"Not to be officially reported."

Action by A. J. Lansdowne against H. H. Reihmann and another. From a judgment for defendants, plaintiff appeals. Affirmed.

A. E. Stricklett, for appellant. B. F. Graziani, for appellees.

CLAY, C. Section 1 of an ordinance of the city of Covington relating to the sale of spirituous, vinous, and malt liquors provides that a person applying for a license shall present a petition to the general council to the effect that the petitioner for license is of good reputation, which petition shall be signed by at least 10 freeholders residing in and holding real estate in the voting precincts in which the said sales are proposed to be made, and shall also be signed by the owner or agent of the house or premises wherein said sales are made, to signify his consent. It further provides that, if the general council are satisfied that such license should be granted, they shall pass an order to that effect.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellant's petition avers that on the 1st day of May, 1906, appellee H. H. Reihmann, by contract in writing, leased to appellant, A. J. Lansdowne, a certain house at the northwest corner of Fifth and Scott streets in Covington, Ky., together with all the bar fixtures and equipment therein located. Said lease was for a period of 19 months, and at the expiration of that time appellant was given the privilege of renewing his lease on the premises, and the bar fixtures therein located for a further period of two years. Said premises were leased by appellant for the purpose of conducting a saloon therein for the retailing of spirituous, vinous, and malt liquors. It was known to appellees Reihmann and Rousellott that appellant had rented the premises for said purpose. After he entered into the contract with Reihmann, he paid the rent of \$55 per month to appellee Felicia Rousellott, who accepted said monthly installments of rent and issued her receipt therefor. At the expiration of his term of 19 months, appellant gave appellees notice in writing that he exercised his right to renew the lease for the additional two years. Thereafter he entered upon the enjoyment of his rights under said lease for the additional period.

The property in question was owned by appellee Felicia Rousellott. Reihmann in making the contract with appellant acted with the approval of his coappellee. He thereafter accepted appellant as a tenant for 19 months and also for the renewal period. Appellant procured the necessary licenses to conduct his business from the United States government and from the state and county authorities. In order to conduct the business, it was necessary to procure a license from the city of Covington, to secure which it was also necessary to obtain the written consent of appellee Rousellott. When the city license theretofore obtained by appellant was allowed to expire, he presented his application to the city of Covington for renewal of his license. He applied to appellees to sign his application, but each refused. By reason of their refusal, he was compelled to close up his place of business.

In order to more conveniently use the place for a saloon, and believing that appellees would carry out their contract, appellant made certain improvements upon the premises and purchased certain goods and fixtures of the value of about \$300. This expense was incurred by him in the belief that he would be permitted to renew his license. The petition concludes with an allegation that he by reason of the refusal of appellees to sign his petition for renewal of his license lost the use of the unexpired part of his licenses, issued to him by the United States, the state of Kentucky, and the county of Kenton, of the value of \$——. It was further alleged that appellant's business was a profitable and growing business, and that by reason of appellees' failing and refusing

to sign his petition he was damaged in the sum of \$4,500. To the foregoing petition appellees filed a demurrer, and the demurrer was sustained. Appellant thereafter amended his petition, and alleged that appellee Reihmann rented the premises in question for saloon purposes, and that it was agreed and understood by and between appellee Reihmann and appellee Rousellott at the time of making said lease that the premises should be so used. It is further charged that the appellee Reihmann on May 1, 1906, entered into the contract referred to in the original petition, wherein Reihmann assigned to appellant all his rights under said lease. Thereafter appellant filed a second amended petition, charging that the premises in question at the time of the lease thereof by appellee Rousellott to appellee Reihmann had been continuously used for more than fifteen years for saloon purposes, and that ever since that time there had been a saloon conducted on the premises; that at the time of the execution of said lease by said Rousellott to said Reihmann said premises were equipped with bar, shelving, and other fixtures suitable for saloon purposes, and that said premises were leased by said Reihmann for saloon purposes; that this purpose was known to appellee Rousellott at the time of the execution of the lease; that the premises were far from the principal portion of the city of Covington, and were in slight demand for purposes other than that of carrying on a coffee house or saloon. Thereafter appellee demurred to the petition as amended, and the demurrer was sustained. The appellant then filed another amended petition, wherein he set forth the section of the ordinance referred to, and alleged that he was a person of good character and reputation, and, had appellees signed his petition and given their consent in writing that said premises should be used for saloon purposes, he would thereby have been enabled to secure a license from the city council to continue the business of retailing liquor. A demurrer was also sustained to the petition as amended. Appellant declining to plead further, his petition was dismissed. From that judgment this appeal is prosecuted.

Whether or not the owner of property may make a valid contract to sign an applicant's petition for a saloon license, and to consent thereto in writing, is a question we deem it unnecessary to decide. Suffice it to say that neither the allegations of the petition nor the various amendments thereto show any such contract on the part of appellees. There was no provision in the lease from Reihmann to Lansdowne by which the former agreed to sign the application of the latter for a license. As he was not the owner of the property, it was not necessary that he should do so. Nor was there any contract on the part of appellee Rousellott to sign the application of Reihmann himself. Nor did she contract to sign the application of Lansdowne. The

mere fact that she consented to the assignment of the lease by Reihmann to Lansdowne by accepting the rent from Lansdowne did not place upon her the duty of signing Lansdowne's petition when he elected to renew the lease. It does not appear that appellant was deprived of the improvements made upon the premises. He simply states that the goods purchased and the improvements made were of no value to him without the use of the premises. There is no charge in the pleadings that appellant is being held for the rent. So far as the pleadings show, he merely gave up the premises. Under such circumstances, there was no implied contract on the part of appellee Rousellott to sign the petition. She cannot therefore be held liable in damages for failing to do that which she was under no obligation to do. We conclude, then, that neither the petition, nor the petition as amended, states any cause of action against the appellees.

Judgment affirmed.

### MIDDLETON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 27, 1910.)

#### 1. CRIMINAL LAW (§ 1172\*)—APPEAL—INSTRUCTIONS—REVERSIBLE ERROR.

Under Cr. Code Prac. § 225, directing the manner in which instructions shall be given, while it is bad practice to give additional instructions after the argument has commenced, it is not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.\*]

#### 2. CRIMINAL LAW (§ 1172\*)—APPEAL—INSTRUCTIONS—REVERSIBLE ERROR.

Ordinarily, the giving of an unauthorized instruction is ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.\*]

#### 3. HOMICIDE (§ 340\*)—INSTRUCTIONS—HARMLESS ERROR.

In a trial for homicide, where all the evidence showed that the parties were always at least 100 yards apart from the time the trouble began until deceased was killed, and the jury had only to determine who commenced the difficulty and who fired the first shot, an instruction that if defendant commenced, or willingly engaged in, the conflict with deceased with the intention of doing him bodily harm, and continued the conflict up to the time of the killing, the plea of self-defense was not available, neither aided nor hindered the jury, and hence, though unnecessary, was not prejudicial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.\*]

#### 4. CRIMINAL LAW (§ 814\*)—TRIAL—INSTRUCTIONS.

The refusal of an instruction not warranted by the facts proven is proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. § 814.\*]

#### 5. HOMICIDE (§ 250\*)—SUFFICIENCY OF EVIDENCE.

In a trial for murder, evidence held sufficient to support a conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.\*]

#### 6. CRIMINAL LAW (§ 1186\*)—APPEAL.

Where it appears that accused has had a substantially fair trial of the merits of his case, a conviction should not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3219; Dec. Dig. § 1186.\*]

Appeal from Circuit Court, Bell County.  
"To be officially reported."

Walter Middleton was convicted of murder, and appeals. Affirmed.

W. F. Hall and E. N. Ingram, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

LASSING, J. Walter Middleton and his two cousins were indicted by the grand jury of Harlan county for the murder of Harmon Scott. Appellant, Walter Middleton, was given a separate trial in the Harlan circuit court, and the jury failed to agree. The case was then transferred to the Bell circuit court, and in a trial in that court held in April, 1909, the jury again failed to agree. For the third time the case was called for trial at the September term, 1909, at the Bell circuit court, and upon this trial appellant was found guilty and given a lifetime imprisonment.

He seeks to reverse the judgment predicated on that finding of the jury on the ground that the court erred in instructing the jury, and also that the court committed error in rewriting one of the instructions after the case had been partially argued. The question raised by this last ground for reversal has heretofore been before this court, and we will dispose of it before entering upon a consideration of the correctness of the instructions given. Section 225 of the Criminal Code of Practice directs the way and manner in which instructions shall be given by the trial court, and, in construing this section as applicable to cases where conditions have arisen similar to those under consideration, it has been expressly held that, while it is bad practice to give additional or explanatory instructions after the argument has commenced, it is not ground for reversal so to do. *McDaniel v. Commonwealth*, 6 Bush, 326; *West v. Commonwealth*, 20 S. W. 219, 14 Ky. Law Rep. 217. Appellant is not complaining that the instruction as rewritten by the judge and as given to the jury is not in form, but merely questions the right of the trial judge to do so. Under the decisions above referred to, this error will not authorize a reversal, and hence, unless his objections to the instructions as given, and particularly No. 7, are well taken, or unless he was entitled to an instruction authorizing him to act in defense of his cousins as well as himself, the judgment must be affirmed. Not only does appellant challenge the correctness of instruction No. 7 as given, but stoutly contends that, under the proof, it should

not have been given at all, and that in lieu thereof he was entitled to have given to the jury an instruction directing his acquittal if he was acting in the defense of his cousins. To pass upon these questions correctly it becomes necessary to consider the evidence in detail.

Appellant and his cousins lived with his father on Martin's fork of the Cumberland river, in Harlan county, Ky. The deceased, Harmon Scott, lived with his mother, in Lee county, Va., near the Kentucky state line. On Saturday, September 14, 1907, he came across Stone Mountain into Kentucky to a meeting that was being held on Martin's fork. After the services were over, he went down Martin's fork to Bascom Saylor's still to get some whisky. He had with him some \$6 or \$7, a 45-caliber revolver, and a pair of saddlebags. Appellant and his two cousins, who were indicted with him, had gone down Martin's fork to John Scott's store in the afternoon, some little time before deceased went down that way. John Scott is a brother of the deceased, Harmon Scott. Appellant carried with him a Winchester rifle, and at least one, if not both, of his cousins had a shotgun as they went from home, and both of them had shotguns as they returned. Whether John Middleton had his shotgun as he went down to the store or not is disputed. By the time deceased got to Saylor's house, the Middleton boys had not started back up the fork. The stillhouse was down the creek from Saylor's house, and there were two ways of reaching it, one by the road, and another and shorter way through the field. Saylor told deceased to go around the road, as he was on horseback, and he would go through the field and meet him there and accommodate him. As deceased rode off down the road to go to the still, the Middleton boys were seen coming through the field from the stillhouse to Saylor's house. Whether or not they saw deceased as they came up is not shown, but they could have seen him had they looked in his direction, as the way was clear. Deceased went on to the still and bought and paid for a quart and a pint of whisky, put the bottles in his saddlebags, took a drink of whisky from a cup, and started shortly thereafter back up the creek in the direction from which he came. After going about 250 or 300 yards, he overtook and passed the Middleton boys near the home of Anthony Ely, a brother-in-law of appellant, and, according to the testimony of appellant and his cousins, nothing out of the ordinary passed between them, and he rode on out of sight. Shortly after he passed, they say that John and Tom Middleton fired their shotguns at a bush on the roadside toward the river, and that very soon thereafter deceased appeared in the road about a hundred yards away and headed toward them, and commenced firing his pistol at appellant. This fire was returned by all three of the Middleton boys, and deceased ran away.

They continued on their way up the creek and soon came within sight of deceased again, and again he opened fire on appellant, who was somewhat in advance of his cousins. After he had fired at appellant, and while in the act of firing again, appellant fired two shots at him, and he disappeared over a knoll or hill in the road from view. Mrs. Surginer, a witness for the commonwealth, who lives between Anthony Ely's and the home of appellant's father, testifies that her attention was attracted to the road by the shots, and upon looking in that direction she saw deceased running his horse up the road, and appellant and one of his cousins running after and shooting at him as he galloped away. Many witnesses testify that shortly after the Middleton boys had gone up the creek they heard shots, first two heavy shots, then many shots, heavy and light, and a little later two light shots, that seemed to be further away, and that cracked like a rifle. Shortly after the shooting ceased, Lewis Smith came up to appellant and his cousins in the road, and together they went on toward appellant's father's house, which was the direction in which deceased had gone. Soon they came upon his saddlebags in the road. A short distance beyond they found his dead body lying in the road. His pistol, lying near him, was cocked, and three empty and three loaded hulls were found in it. An examination of his body showed that he was shot in the back by a 32-caliber bullet, and that the shot ranged up, went through his heart, and lodged in the breastbone, which shot, according to the testimony in the case, produced instant death. Upon discovering the body the Middleton boys went home. The commonwealth proved, by one Hensley, that he had heard appellant threaten to kill deceased, a short time before, the next time he went up a certain branch. Several witnesses testify that the character of appellant and his cousins was bad.

This, in substance, is the evidence upon which the court gave the instructions usually given in a murder trial, on murder, manslaughter, and self-defense, with the instruction to find the accused guilty of manslaughter if in doubt as to the degree of his guilt. No fault is found with any of these instructions, and, indeed, there could well be none, as they are aptly drawn.

In addition to these, the court gave two other instructions, Nos. 6 and 7. No. 6 is clearly in appellant's favor, and no complaint is made of it. In No. 7 the court, in substance, told the jury that if they believed from the evidence, beyond a reasonable doubt, that defendant commenced, or willingly and mutually engaged in, the conflict with the deceased with the intention to do him bodily harm, and continued and urged said conflict up to and including the time defendant shot and killed deceased, if he did so shoot and kill him, he could not avail himself of the plea of self-defense. We are of opinion

that it was unnecessary to give this instruction, and, while ordinarily the giving of an unauthorized instruction is ground for reversal, after a careful examination of the evidence in this case we are of opinion that the substantial rights of appellant were not prejudiced, and, this being so, the case should not be reversed because this instruction was given. If the parties had been near enough to each other to have left in the minds of the jury any doubt as to the manner in which the conflict was commenced or carried on, or there had been any words passed between them prior to the trouble or while it was in progress, then the jury might have been misled by this instruction. But since all of the evidence shows that these parties were always at least a hundred yards apart, from the time the trouble began until deceased was killed, the jury had only to determine who commenced the difficulty, who fired the first shot, who was at fault; and, in arriving at this conclusion, the instruction complained of neither aided nor hindered the jury, and hence was not prejudicial.

There is no merit in the contention of appellant that the trial court should have given him an instruction authorizing him to, and justifying him if he did, shoot in defense of his cousin, because there is no evidence upon which to base such an instruction. Appellant was asked why he fired when he did upon each occasion that he fired, and he testifies positively and clearly that he fired in defense of himself. Nowhere does it appear that he regarded his cousins in danger of being shot by deceased, and nowhere does it appear that deceased was shooting at his cousins. On the contrary, it is made clear from the testimony of appellant, and his cousins as well, that deceased was firing at appellant. This being so, and appellant admitting that he was shooting at deceased because he believed that his own life was in danger, the court did not err in failing to give an instruction which was not warranted by the facts proven.

The case, while not complicated, is rendered difficult because of the conflict in the testimony of the witnesses upon the vital point. If appellant and his witnesses are to be believed, deceased was shot down by appellant after he had made two murderous assaults upon him with a heavy or large revolver. While, on the other hand, if the testimony offered by the commonwealth is true, deceased was killed while he was making an effort to escape. He was shot in the back. Of this one fact there is no doubt, and this point tends most strongly to corroborate and substantiate the testimony of Mrs. Surginer, who says that when they passed her house deceased was riding rapidly away and being pursued and fired at by appellant and his cousins. The theory of the commonwealth is supported by evidence amply sufficient to up-

hold the verdict of the jury, which must have been influenced in large measure by the fact that deceased was shot in the back; and although appellant attempts to account for this by saying that, while he was shooting at appellant, his horse was rearing and plunging, and intimates that it must have whirled so that deceased's back was turned toward appellant just as he fired the last shot, this idea evidently did not impress itself upon the minds of the jury, and they accepted the testimony of Mrs. Surginer as true and on it based their finding and verdict.

An examination of the record shows that in the conduct of the trial no difficult questions were presented to the court, and but few objections made to the introduction of testimony, and that such as were made bore upon immaterial or inconsequential points. We find no prejudicial error committed during the conduct of the trial, and, as said by this court in the case of *Mullins v. Commonwealth*, 108 S. W. 252, 32 Ky. Law Rep. 1216, and again in the case of *Collett v. Commonwealth*, 121 S. W. 426, and recently emphasized in the cases of *Hargis v. Commonwealth* (decided December 1, 1909) 123 S. W. 239, and *Parrish v. Commonwealth* (decided December 9, 1909) 123 S. W. 339, where it appears that the accused has had a substantially fair trial of the merits of his case, a judgment of conviction should not be disturbed.

Applying the same rule in this case, the judgment must be affirmed.

#### THOMPSON & CO. v. TAYLOR et al.

(Court of Appeals of Kentucky. Jan. 13, 1910.)

##### 1. PRINCIPAL AND AGENT (§ 73\*)—LIABILITY OF AGENT.

Where an agent who solicited orders for merchandise and collected money therefor and forwarded the same to his principal, knew that his clerk employed to solicit orders collected money from customers, he was liable to the principal for the act of the clerk converting the money so collected.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 117, 151; Dec. Dig. § 73.\*]

##### 2. HUSBAND AND WIFE (§ 149\*)—PROPERTY OF WIFE—LIABILITY FOR HUSBAND'S DEBTS.

A home purchased partly with the husband's exempt property and partly with the money of the wife derived from a sale of real estate given her by her father, where title is taken in the name of the wife, is not subject to the husband's creditors.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 573, 574; Dec. Dig. § 149.\*]

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Action by Thompson & Co. against J. M. Taylor and another. From a judgment for defendants, plaintiff appeals. Reversed as to defendant J. M. Taylor, and affirmed as to Pearl Taylor.

N. R. Patterson, for appellant.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**BARKER, J.** The appellants Thompson & Co. are merchants in Louisville, Ky. The appellee J. M. Taylor was their agent in Pineville, Ky. The scope of his agency originally was to solicit orders for the purchase of fruits and vegetables and such like merchandise, and to send these on to his principals, who shipped the goods to the customers and collected the accounts. G. D. Taylor was an impecunious first cousin of J. M. Taylor. The latter, desiring to aid his cousin, employed him to place orders for his principals, but did not expressly authorize him to collect anything for appellants. It seems, however, that G. D. Taylor collected from various customers sums aggregating \$117.81, which he failed to pay over, but appropriated to his own use. An investigation uncovered these transactions, and G. D. Taylor thereupon paid over \$33, which he still had in his possession, leaving a balance due of \$84.81. Subsequently he fled the country, and it is said that he has since died. Thompson & Co. thereupon instituted this action against J. M. Taylor to recover a judgment for the sum of \$84.81, collected, as aforesaid, by G. D. Taylor, and also to subject a small tract of land which stood in the name of Pearl Taylor, the wife of J. M. Taylor, to the payment of her husband's debt, on the theory that this land had been fraudulently conveyed by the husband to the wife. J. M. Taylor placed in issue all of the allegations of the petition which alleged authority in G. D. Taylor to collect accounts belonging to Thompson & Co., and also denied all the allegations of fraud in connection with the conveyance of the property to his wife. The case having been submitted to the chancellor for final judgment, he dismissed the petition, and from this order Thompson & Co. have prosecuted this appeal.

We think the court erred in dismissing the petition, in so far as it sought a judgment against J. M. Taylor for the money collected by his clerk, G. D. Taylor. The evidence clearly shows that J. M. Taylor frequently collected money from the customers of his principals and forwarded it to them at Louisville. It also shows that he knew that G. D. Taylor had been collecting money from the customers of Thompson & Co. prior to the wrongful conversion complained of in this case. This being true, he is responsible for the acts of his clerk.

But we think the court correctly dismissed the petition as to Pearl Taylor. The evidence shows, without contradiction, that the purchase of the little home which stands in the name of the wife was made partly with merchandise of the husband which had been set aside to him as exempt under the statute, and partly with money of the wife derived from the sale of realty given her by her father. This being true, nothing went into the purchase of the home to which the creditors

were entitled; and therefore they cannot ask that the property in question be subjected to their debts.

For these reasons, the judgment is reversed as to J. M. Taylor for further proceedings consistent herewith, and affirmed as to Pearl Taylor.

### STROTHER v. MILLER.

(Court of Appeals of Kentucky. Jan. 27, 1910.)

#### 1. CONTRACTS (§ 10\*)—OPTION TO PURCHASE—MUTUALITY.

Where the owner of a stallion agreed to sell a one-half interest in it to another on a stated date, the owner meanwhile to have possession during seasons, and the other to have possession and care of the horse at other times, the contract was not lacking in mutuality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 24-40; Dec. Dig. § 10.\*]

#### 2. SALES (§§ 19, 20\*)—CONSIDERATION.

A contract of the owner with another to sell a one-half interest in a stallion given in consideration of an agreement whereby the other released his right to buy the horse from those from whom the owner obtained it, and of an undertaking of the other to care for the horse four months in the year, was based on a valuable consideration.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 31, 32; Dec. Dig. §§ 19, 20.\*]

#### 3. SALES (§ 82\*)—CONTRACT—TIME AS ESSENCE.

Time was not of the essence of a contract to sell a one-half interest in a horse at a stated date; and, if the buyer within a reasonable time after the specified date offered the sum due, it would be a sufficient compliance as to time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 220; Dec. Dig. § 82.\*]

Appeal from Circuit Court, Graves County.  
"Not to be officially reported."

Action by L. J. Miller against W. C. Strother. Judgment for plaintiff, and defendant appeals. Affirmed.

Sims, Du Bose & Rodes, for appellant.  
Wright & McElroy, for appellee.

**CARROLL, J.** In the fall of 1906 the appellee, Miller, entered into an arrangement with Sullenberger Bros. of Virginia, by which he was to purchase from them a stallion for \$400. After Miller ascertained that he could purchase the horse for \$400, he falsely represented to Strother, who also wanted to obtain a stallion, that this one could be bought for \$800, and Strother and Miller then agreed to buy the horse in partnership, Strother being under the impression that the horse would cost \$800, and each of them would pay \$400. Miller's purpose in representing to Strother that the horse would cost \$800 was to induce Strother to pay the entire purchase price, so that he might obtain a half interest in the horse without any cost to himself. Shortly after this Strother wrote to Sullenberger Bros., informing them of his purchase of a half interest in the horse, and inclosing his check for \$400. Up-

on the receipt of this letter, Sullenberger Bros. wrote Strother that they had agreed to sell the horse to Miller for \$400, and did not intend to be party to the fraud attempted to be perpetrated by Miller upon Strother. They further wrote that, if Strother wanted the horse, he must see Miller and get his consent to cancel the contract they had made with him to sell him the horse for \$400, and that, when released from any obligation to Miller, they would sell the horse to Strother, and in the meantime would hold his check. Upon receipt of this letter, Strother went to Miller and confronted him with the letter that he had received from Sullenberger Bros. Strother testifies that Miller then said: "You can go ahead and buy him, and I will have to drop out. Of course, you can go ahead and buy him, and set up against me and crowd me out." To which Strother replied: "No two wrongs make a right, and I am not disposed to take any advantage of you, although you haven't treated me right." Miller then said: "Well, suppose you buy the horse, and let me have a half interest in him, and let the horse stand for my part." To which Strother responded: "I will tell you what I'll do. I'll give you an option on him for a reasonable length of time, and you can come up with your part of the money and then you can have a half interest in the horse at the first price." This proposition was acceptable to Miller, and thereupon a verbal agreement concerning the horse was entered into between Miller and Strother. When this arrangement was made, Strother wrote Sullenberger Bros. that Miller had released any right he might have to purchase the horse, and that he, Strother, would take him at the price of \$400. Upon receipt of this letter, Sullenberger Bros. wrote that they must have a written release from Miller, and so Strother wrote a release for Miller to sign, which he did, and at the same time the following contract also written by Strother and signed by him only was entered into: "Dec. 5, 1906. I hereby agree to sell L. J. Miller one half interest in Victor Denmark, a stallion, for two hundred (\$200) dollars on Oct. 1, 1908, provided the horse lives. I am to stand said stallion at Richardsville, Ky., or at such places as I think most profitable & am to keep horse eight months out of each year and am to collect for all seasons that are collectable and at end of time (Oct. 1, 1908) am to allow one half of proceeds less forty dollars or \$10. per month while making seasons and any other necessary expenses to go to L. J. Miller to pay said \$200.00 and interest at 6 per cent. from December 1, 1906, to date when purchase is to be made Oct. 1, 1908. In case the above named horse should die before Oct. 1, 1908, I am to repay all money paid out on the horse by L. J. Miller, and (\$10.00) ten dollars per month for the time he has kept him and I retain all collections for seasons from horse." Soon after this, the horse arrived and was taken by

Miller to his place and kept by him until the spring of 1907, when he was turned over to Strother to make the season. At the end of the season, the horse was taken by Miller and kept until the spring of 1908, when he was again put in the possession of Strother to make the season for that year.

The bills advertising the horse for the season of 1907 were signed by the names Strother and Miller, but in the following year the name of Strother alone was signed to the bills on account of the fact that there was another man named Miller standing a stallion in the neighborhood, and this caused some confusion and loss of patronage. From the time the arrangement was made between Miller and Strother by which Strother should purchase the horse there was no misunderstanding or disagreement between the parties until October 1, 1908. At this date, which was the time fixed in the contract when Miller was to have a one-half interest in the horse, a settlement was made between the parties according to the terms of the contract, and it was found that Miller in compliance with the terms of the contract owed Strother \$79.09. Strother then relates what happened as follows: "Miller says: 'How much does this leave me in the price of the horse?' I told him \$79.09. He said: 'Why, I haven't got the money right now for you, but I will pay you in a few days.' I told him 'No,' that I had to-day set to close the matter up, and I wanted my money. I said: 'Don't you realize your option expires tonight at 12 o'clock?' He says: 'I didn't think you would exact it of me, because I know I wouldn't exact it of you.' Then I told him I was going to settle according to our agreement. Then he went off and came back and begged me to give him some more time, and I refused to do it. I told him all the time that, if he would get my money by 12 o'clock that night, I would accept it, and then he would own one-half of the horse. So between 9 and 10 o'clock that night he came back with a check, and I told him that was not money, that it took money to pay the debt." Strother further says that if Miller on October 1, 1908, had offered the \$79.09 in money, he would have taken it and Miller would have owned one-half of the horse. He also testifies that the check tendered by Miller was good.

It will thus be seen that according to the evidence of Strother the only reason why he refused to recognize Miller as an owner of a one-half interest in the horse on October 1, 1908, was because Miller on that day did not tender him in money \$79.09 in place of giving him a good check for that amount. It is also in evidence that, when Strother refused to accept the check, Miller offered to get the money the next day, but Strother would not accept it. Whereupon Miller brought this suit against Strother, and asked for a dissolution of the partnership, a settlement of the accounts, that he be adjudged

a half interest in the stallion, and for his sale. Upon a trial of the case, a judgment was entered awarding Miller a half interest in the horse, and giving Strother a lien on Miller's interest to secure him in the payment of \$79.09, with interest from October 1, 1908. The action was referred to the master commissioner to settle the partnership accounts and an order entered directing a sale of the horse. From this judgment Strother appeals.

The first contention is that the contract lacks mutuality, and for that reason is not enforceable. The contract, however, is not lacking in mutuality. Miller under its terms as construed by the parties was to and did have the possession and care of the horse during the time he was not making the seasons, as Strother was to keep him eight months and Miller four months in each of the years.

The next point is that it was merely an option upon the part of Strother, not based on any valuable consideration. As we understand the case, the contract was based on two considerations: First, the agreement by which Miller released his right to purchase the horse from Sullenberger Bros., thereby enabling Strother to buy him; and, second, the undertaking of Miller to care for the horse four months in the year.

It is further argued that time was of the essence of the contract, and, if Miller desired to enforce compliance with it, he should have tendered on October 1, 1908, to Strother in money the amount due under the contract to entitle him to a half interest in the horse. And it is said that Miller did not tender any money at all, and that the check assuming it to be a tender did not cover the amount due. In contracts like this we do not think time is the essence of the contract. If Miller within a reasonable time after October 1, 1908, had offered to pay to Strother the amount due by him, it would have been a compliance with the contract so far as time was concerned. In answer to the proposition that the sum tendered by Miller was not sufficient, we need only say that the amount tendered was the exact amount Strother told him he owed, and surely, if Miller offered the amount that Strother himself said was due, Strother is not in a position to claim that it was not enough.

Upon a consideration of the whole case, it seems to us that the contract was nothing more nor less than an agreement upon the part of Strother in consideration of certain things agreed to be done and which were done by Miller to give him a half interest in the horse for a specified sum at a specified time. And as Miller performed all the conditions of the contract, except the actual tender in money of the amount due on the day it was due, he was entitled to have the con-

tract enforced, as was done by the lower court.

Wherefore the judgment is affirmed.

## EVERSOLE et ux. v. FIRST NAT. BANK OF HAZARD.

(Court of Appeals of Kentucky. Jan. 18, 1910.)

### 1. JUDGMENT (§ 377\*)—EQUITABLE RELIEF.

Ordinarily, when a suit is brought to enforce a mortgage, if no answer is filed, or if a bad answer is filed, the judgment will bar a subsequent proceeding even in the same suit to assert a homestead.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 377.\*]

### 2. INFANTS (§ 110\*)—VACATING JUDGMENTS.

A married woman who has filed a bad answer asserting a homestead right for her husband in a mortgage foreclosure suit in which her infancy is also pleaded, cannot open the judgment under Civ. Code Prac. §§ 391, 518, as having been erroneously rendered against a person under disability, by tendering at the next term a good answer; married women, though infants, being excepted from the operation of the statute in such cases.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 110.\*]

Appeal from Circuit Court, Perry County.

"To be officially reported."

Action by the First National Bank of Hazard against H. C. Eversole and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

See, also, 118 S. W. 961.

Eversole & Eversole, for appellants. Bailey P. Wootton, Jesse Morgan, and Greene, Van Winkle & Schoolfield, for appellee.

HOBSON, J. On April 1, 1908, H. C. Eversole and wife, Della, executed a mortgage on two tracts of land to secure two notes to R. C. Newberry. Newberry assigned the notes to the First National Bank of Hazard, and the bank brought this suit to recover judgment on the notes and to foreclose the mortgage. Della Eversole, the wife of H. C. Eversole, filed an answer, in which she pleaded that she was an infant 17 years old at the time that she signed the mortgage and undertook to plead that one of the tracts of land was the homestead of the family, consisting of herself, her husband, and her infant son. The circuit court sustained a demurrer to her answer, and entered judgment for a sale of the property. She appealed from the judgment, and on the appeal it was affirmed upon the ground that her answer was insufficient, in that it showed that the land belonged to her husband and it did not show that the family resided on it. The court, concluding its opinion, said: "As will be observed, appellant did not allege in her answer that she was a bona fide housekeeper, or that she kept house at all, or that she and her husband resided upon or occupied the land. It may be, in so far as it appears

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

from the pleading, that she never occupied the land as a homestead. The tenor of her pleading is to the effect that her husband owned the land and cultivated it for the purpose of making their support. The inference is that they lived elsewhere and had never occupied the land since their marriage. If the allegations in her pleading are true, she has an inchoate right of dower in the land, which is not affected by the judgment appealed from." *Eversole v. First National Bank*, 118 S. W. 962. While the case was pending in this court, the judgment not having been superseded, the land was sold under the judgment, and at the next term of the court the commissioner filed his report of sale. Della Eversole then filed her amended answer, and her exceptions to the sale, in which she averred that the tract of land referred to was the residence of the family, and that they were bona fide housekeepers residing on it. She also averred that she was still an infant, and prayed the court to set aside the judgment and sale and to adjudge her a homestead in the land. The court overruled her motion to set aside the judgment and overruled her exceptions to the report of sale, and she again appeals.

The chief question made on the appeal is that the amended answer and the exceptions to the report of sale show that the tract of land in controversy was the residence of the defendants, and that they were entitled to a homestead in it. In other words, these pleadings contained the allegation that this court pointed out as lacking in the original answer.

The question to be determined on the appeal is: May a married woman who files an insufficient answer open the judgment which has been entered by tendering at the next term a good answer, and should she upon this showing be allowed to set aside the sale which has been made upon the judgment? Ordinarily, when a suit is brought to enforce a mortgage, if no answer is filed, or if a bad answer is filed, and a judgment is entered subjecting the land, this judgment will bar a subsequent proceeding even in the same suit to assert a homestead. *Snapp v. Snapp*, 87 Ky. 554, 9 S. W. 705, 10 Ky. Law Rep. 598; *Hill v. Lancaster*, 88 Ky. 338, 11 S. W. 74; *Kimbrough v. Harbett*, 110 Ky. 98, 60 S. W. 836, 22 Ky. Law Rep. 1578; *Shaw v. Milby*, 63 S. W. 577, 23 Ky. Law Rep. 646. The husband was before the court at the original hearing and filed no answer. In *Hill v. Lancaster*, the wife was not a party to the proceeding at all, when the judgment was rendered. She and her husband afterward presented a petition to be made parties, claiming a homestead. Sustaining the lower court and refusing to open the judgment, this court said: "It is not denied—indeed, it is a fact—that the appellant as between him and the appellee, Lancaster, etc., as his creditors, was entitled to a homestead in said real estate; but his entire interest in this said real

estate having been sought to be sold to satisfy the demands of these creditors, and he having appeared upon the merits, and having failed to set up his homestead right, which would have been a complete bar to the appellee's action, if the real estate was not worth more than \$1,000, and, if more than \$1,000, then a bar to the extent of \$1,000 worth of the land, his effort to set up his right to his homestead came too late. To allow a defendant to split his defenses relying upon one until judgment is rendered upon it against him, and at the next term open the judgment and plead another defense, and so on, would be a mockery of legal justice. Therefore it is a universal rule that the final judgment of a court of competent jurisdiction is not only conclusive of all issues actually decided, but of all that might and should have been decided by it. And there is no good reason why the assertion of a homestead right should be made an exception to this salutary rule. The fact that his wife joins him in asserting the right can make no difference, for the right to the homestead is exclusively his. He may sue for it without joining his wife. If sued for, he may defend the action without joining his wife, and the decision will be conclusive of his right. He may make a valid sale of it without joining his wife. So the fact that the appellant's wife joined in the petition added nothing to the strength of his case."

It is true that the wife here undertook to defend the action for the husband, but that does not help the matter. She failed to present a good defense. By section 391 of the Civil Code of Practice an infant other than a married woman may show cause against a judgment; but by the express language of the section married women are excepted from its operation. By section 518, the court in which a judgment has been rendered has power after the expiration of the term to vacate it for erroneous proceedings against a person under disability, except coverture, if the condition of the defendant does not appear in the record, nor the error in the proceedings. Here the condition of the defendant appeared in the record, for the answer disclosed that she was an infant, and it also showed that she was a married woman, and therefore under the disability of coverture. The judgment therefore cannot be vacated in the court which rendered it under either of these sections, and we do not find in the Code any other provisions for the vacation of such a judgment. A litigant is given his day in court, but he is not given two days. Married women when sued are, under the Code, treated as other litigants, although they may be infants; the reason apparently being that they have husbands to protect their interests. The matter is controlled by the statute, and we have no discretion but to enforce it. Under the circum-

stances, the court properly refused to allow the amended answer to be filed.

Some exceptions were filed to the sale on account of the way the land was sold; but, in view of the price which the land brought, and all the circumstances, we are satisfied the defendant's substantial rights were not prejudiced by this matter, and would in no manner be advanced if the sale were set aside and a resale had.

Judgment affirmed.

#### DERSCH et al. v. MILLER.

(Court of Appeals of Kentucky. Jan. 26, 1910.)

"To be officially reported."

On petition for rehearing. Petition denied. For former opinion, see 122 S. W. 177.

HOBSON, J. Section 2463, Ky. St. (Russell's St. § 2383), provides: "A person who performs labor or furnishes materials, \* \* \* for the improvement, in any manner, of real estate by contract with, or by the written consent of, the owner, contractor, subcontractor, architect or authorized agent, shall have a lien thereon, and upon the land upon which said improvements shall have been made or on any interest such owner has in the same to secure the amount thereof with costs; and said lien on the land or improvements shall be superior to any mortgage or incumbrance created subsequent to the beginning of the labor or the furnishing of the material; and said lien, if asserted as hereinafter provided, shall relate back and take effect from the time of the commencement of the labor or the furnishing of the materials: Provided, that such lien shall not take precedence of a mortgage or other contract, lien or bona fide conveyance for value without notice, duly recorded or lodged for record according to law, unless the person claiming such prior lien shall, before the recording of such mortgage or other contract lien or conveyance, have filed in the clerk's office of the county court of the county wherein he shall have performed labor or furnished material, or shall expect to perform labor or furnish materials, as aforesaid, a statement showing that he has performed or furnished, or that he expects to perform or furnish, such labor or materials, and the amount in full thereof, and his lien shall not, as against the holder of said mortgage or other contract lien or conveyance, exceed the amount of the lien claimed, or expected to be claimed, as set forth in such statement."

It will be observed that by the statute the person who makes the improvement is given a superior lien on the land, which takes effect from the time of the commencement of the labor or the furnishing of the materials. But it is provided that this lien shall not take precedence of a mortgage for value with-

out notice duly recorded or lodged for record unless the person furnishing the labor or material has first filed his statement in the county clerk's office as provided by the statute. It will thus be seen that the mechanic has the superior lien, though he fails to file any statement in the county clerk's office, except as to a mortgage for value without notice regularly lodged for record. Under the statute, Miller had a superior lien, unless Dersch's mortgage was for value and without notice. It was incumbent on Dersch, under the statute, to show that he was a bona fide purchaser without notice, in order for him to have priority over Miller. This he did not do. His pleadings are entirely silent on this subject. He who claims priority as a bona fide purchaser without notice must plead the facts. 2 Pomeroy's Equity, §§ 784, 785; Deskins v. Big Sandy Co., 121 Ky. 601, 89 S. W. 695, 28 Ky. Law Rep. 565. Under the pleadings, as well as the proof, the circuit court properly gave Miller priority.

The petition for rehearing is therefore overruled.

#### WILLIS v. WITT.

(Court of Appeals of Kentucky. Jan. 19, 1910.)

APPEAL AND ERROR (§ 345\*)—FILING APPEAL—LIMITATIONS.

That appellant is given time within which to prepare and tender his bill of evidence and exceptions does not prevent the running of Civ. Code Prac., § 738, fixing the time for the filing of the appeal, and the statute begins to run when the motion for new trial is overruled, and an appellant unable to file his appeal within the statutory period must secure an order from the appellate court extending the time, or he loses his right to appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1895; Dec. Dig. § 345.\*]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action between John Willis and James H. Witt. From a judgment for the latter, the former appeals. Dismissed.

J. C. & D. M. Chenault, for appellant. Grant E. Lilly, for appellee.

LASSING, J. The judgment appealed from in this case was rendered at the February term, 1908, of the Madison circuit court. Appellant was then given until the following May term to tender his bill of evidence and exceptions. Within the time given the bill of evidence was tendered, but was not approved and filed until the February term, 1909. The appeal was not filed until May 4, 1909, which was not within the time, as provided for by section 738 of the Civil Code of Practice, within which it might be taken. The fact that appellant was given time within which to prepare and tender his bill of evidence and exceptions did not prevent the running of the statute, as was expressly held

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the case of Western Union Telegraph Co. v. Johnson, 100 Ky. 589, 38 S. W. 1043, 18 Ky. Law Rep. 982. The statute begins to run when the motion for a new trial is overruled. The only way in which the time for filing an appeal granted by the lower court can be extended is by order made upon application in this court. If, for any reason, a litigant finds that he is unable to file his appeal in this court within the statutory period, he must secure an order from this court extending the time within which to file his appeal, or lose his right.

This not having been done, the appeal is dismissed.

### CINCINNATI, N. O. & T. P. RY. CO. v. ZACHARY'S ADM'X.

(Court of Appeals of Kentucky. Jan. 21, 1910.)

MASTER AND SERVANT (§ 276\*)—DEATH OF SERVANT—NEGLIGENCE—EVIDENCE—VERDICT.

In an action for death of a railroad switchman, evidence held insufficient to show the manner in which decedent lost his life, and therefore insufficient to sustain a verdict in favor of his administratrix.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.\*]

Appeal from Circuit Court, Jessamine County.

"Not to be officially reported."

Action by Charles Zachary's administratrix against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

N. L. Bronaugh and Galvin & Galvin, for appellant. Robert Harding, E. B. Hoover, John Welch, E. V. Puryear, and Greene, Van Winkle & Schoolfield, for appellee.

LASSING, J. This is the second appeal of this case. On the first appeal the judgment was reversed because flagrantly against the evidence. 106 S. W. 842, 32 Ky. Law Rep. 678. The second trial was had in November, 1908, a year and eight months after the first trial, and about three years after the death of Zachary, the plaintiff's intestate.

Two distinct theories are advanced as to how Zachary met his death. For the plaintiff it is urged that, because of the faulty and defective condition of the roadbed on the side track where the car was being placed at the time decedent was killed, the car was derailed, and by reason thereof he was thrown to the track, run over, and killed. Whereas, for the defendant it is insisted that he either fell from the car while attempting to get on or off of it, or walked in front of it for the purpose of crossing over to the opposite side, and slipped or fell and was caught and dragged some distance, and finally that his body was run over, and that

this threw the car from the track. No one saw him killed or knows exactly how it occurred. Each party has introduced witnesses who examined the premises immediately following the accident, or, at most, a few days thereafter, and from the appearance of the ground, the body itself, and the car that was derailed, the theory of each is adduced. In order to establish plaintiff's theory, it was incumbent upon her to show that the car was off the track some distance beyond the point where the spur track leads off to the Standard Wheel Company. Upon establishing this fact plaintiff's case was made practically to rest.

The only witness introduced by either side on the first trial, who testified to having seen evidence of this car being off the track north of the switch, upon which decedent's body was evidently caught just before it was jerked or thrown from the track, was Lon Rigney; and, while this court held, in the former opinion, that the testimony of this witness was overwhelmed by the weight of the testimony of the other witnesses, still, being some evidence, it was sufficient to warrant the submission of the case to the jury. Between the first and second trials this witness experienced a change of heart, mind, and memory, and, according to his testimony given upon the second trial, he was entirely mistaken and wrong in stating, on the former trial, that there were any marks or evidence upon the ground that the car was off the track at a point north of the switch above referred to, that his testimony upon the first trial was not true, and that, as a matter of fact, he saw no such marks upon the ground as he had testified to upon the first trial, and that there were no such marks to be seen. With his testimony changed, plaintiff was deprived of all the testimony which this court said warranted the submission of the case to the jury, and must have lost but for the fact that two other of her witnesses, in the interim between the first and second trials, had their minds and memories materially strengthened upon the vital point in the case, and upon the second trial these two witnesses, Dow Singleton and O. V. Ball, testified that, when examining the ground north of the switch on the day after the killing, they saw evidences clearly showing that the car was off the track north of that point. Singleton is a railroad man of much experience, and a brother-in-law of deceased. He was not present when deceased lost his life, but visited the ground shortly thereafter, and examined the premises and familiarized himself with the facts and conditions as best he could, with a view of ascertaining the cause of his brother-in-law's death, and, although upon the first trial he was the chief witness as to location, etc., and was referred to in the opinion as being

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a railroad man of experience, he overlooked the only vital point in the case, and, in fact, so far as appears from the record, never thought of it until after this court had commented upon the fact that, although he had visited the ground and examined it, he saw no marks indicating that the car was off the track north of the switch. Nor did Ball, on the first trial, testify to having seen any signs indicating that the car was off the track north of the switch. This elasticity of memory and change of front on the part of witnesses always leaves their honesty of purpose open to serious question. And yet they are conditions with which courts and juries are constantly confronted. Too frequently this condition represents the weakness of human nature rather than a desire on the part of witnesses to speak the truth. The hope of reward, as it has in the past, continues to, and doubtless ever will, exercise a most potential, and at times controlling, influence over both mind and memory. This is to be regretted, yet it is nevertheless true. But with the testimony of these witnesses changed, as above described, and a showing on the part of plaintiff, through the undertaker, that decedent's body, while horribly mutilated, had none of the bones broken, the case given to the jury was practically the same as was before the first jury, and which was reviewed here. Plaintiff presents no stronger case than upon the first trial, and, like plaintiff's testimony on the former trial, upon the vital question as to where the derailment occurred, the testimony offered in support thereof on this trial is simply overwhelmed by the weight of the evidence to the contrary, to wit, that it did not occur at a point north of the switch. Nor is there any force in the argument that, as no bones were broken in decedent's body, it could not have caused the derailment, for any force sufficient to have torn and mutilated his body as described might have thrown the empty car from the track.

After a careful consideration of all the evidence we discover no well-defined idea as to how the decedent lost his life. It is all speculation, pure and simple. Summarized, it is this: The night was dark; he went in the discharge of his duty down in the direction in which the car was being moved; he threw the switch so as to let the car pass upon the side track; and, following this act on his part, all of the other employés on the train lost sight of him. They neither saw nor knew anything of his movements from that time until one of them saw his lantern fly out from under or behind the car, and heard him cry out. Upon going where the light was seen, he was found lying between the two tracks, more dead than alive. He never spoke, and, with his death, it seems all chance of discovering how it was brought about was forever lost. It is possible that

all that plaintiff contends for may be true, but this is not enough. The law casts upon the plaintiff the burden of making out her case, not by probabilities, presumptions, or conclusions, but by substantial evidence. There is practically no evidence in the record before us as to how decedent met his death, and the verdict of the jury, being flagrantly against the evidence, must be set aside.

Much complaint is made that the verdict is grossly excessive; but, as the judgment must be reversed for the reasons above indicated, we do not pass upon this question.

Judgment reversed, and cause remanded for further trial and proceedings consistent herewith.

#### WINBURN v. WINBURN.

(Court of Appeals of Kentucky. Jan. 25, 1910.)

##### 1. HUSBAND AND WIFE (§ 283\*)—SEPARATE MAINTENANCE—RIGHT.

A separate maintenance may be awarded a wife upon facts which would not authorize a divorce under the statute; as, where the wife was justified in leaving her husband's home because of his conduct.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1062-1073; Dec. Dig. § 283.\*]

##### 2. HUSBAND AND WIFE (§ 297\*)—SEPARATE MAINTENANCE—ACTION—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a finding that plaintiff was entitled to a separate maintenance by defendant, her husband.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 297.\*]

Appeal from Circuit Court, Henry County.

"To be officially reported."

Action by Mary I. Winburn against George W. Winburn. From a judgment for plaintiff, defendant appealed, and plaintiff took a cross-appeal. Affirmed.

Turner & Turner, for appellant. Wilson D. Crabb and H. K. Browne, for appellee.

LASSING, J. On April 7, 1908, appellant, George W. Winburn, married the appellee, Mary I. Prewitt, a widow with several children. He was 56 and she 50 years of age. They lived together as husband and wife until the 21st day of May following, in all about six weeks, when she left him for the alleged cause of his cruelty and inhuman treatment of her, and shortly thereafter brought suit against him for maintenance. The material allegations of her petition were traversed. Much proof was taken in support of her complaint and his defense. The case was finally submitted to the chancellor for judgment, and he granted the prayer of the petition, and allowed the plaintiff \$12 per month for her maintenance, and allowed her \$125 as fees for her attorneys. The defendant is complaining of so much of the judgment as al-

lowed any sum whatever for maintenance, because for him it is insisted it is unauthorized, and, even if authorized, is excessive. Plaintiff is complaining of, and has prayed a cross-appeal from, so much of the judgment as only allowed her \$125 fee for her attorneys, when she should have had at least \$250 on this account.

The right of a wife to maintain such an action has been several times passed upon by this court. In *Hulett v. Hulett*, 80 Ky. 864, it was held that, where a husband treats his wife with such cruelty as to compel her to leave him, she may maintain an independent cause for alimony without seeking a divorce, and a separate maintenance may be awarded the wife by the chancellor on a state of facts which would not authorize the granting of a divorce. *Zumbiel v. Zumbiel*, 113 Ky. 841, 69 S. W. 708, 24 Ky. Law Rep. 590. Nor is the chancellor, in granting to the wife a separate support, restricted to the consideration of statutory grounds for divorce alone, but he may take into account any evidence offered to show that the wife was justified in leaving the home of her husband; and if, in his judgment, the evidence warrants it, he may grant her the relief sought, although the acts proven are not by statute made grounds for divorce. And it has further been held that, where the acts of the husband are such as to justify the wife in leaving him, she may sue for separate maintenance without waiting for the year to run. In view of these authorities and former rulings of this court, the petition unquestionably stated a cause of action, and the demurrer thereto was properly overruled. The judgment of the chancellor, granting to the appellant a separate maintenance, should be upheld if the evidence supports the pleadings.

It is shown that the defendant was a man well advanced in years, who had by thrift, economy, and frugality accumulated an estate variously estimated as worth from \$9,000 to \$12,000. He had, prior to their marriage, lived alone in a frame dwelling upon his farm, surrounded by little or none of the comforts of life. "Make, accumulate, and save" had evidently been his slogans. He was uneducated, and seemed neither to have any interest in or care for the little conveniences which go to make up the comforts of the modern country-life home. His wife, while likewise uneducated, had enjoyed such comforts in her home life as the average farmer's wife living in the country surrounds herself with. She had a family of children, well-bred, well-raised, and fairly well educated. Two of her daughters, at least, were married. None of her children, it seems, actively opposed her marriage to defendant, and yet none of them were pleased with it. Under these circumstances these people were married. After their marriage he went to her home and lived there with her and her children for a week or 10 days. During this time there is no complaint but what he deported himself in a way

becoming a dutiful husband. At the expiration of this time they went to his home to live. As it was so poorly furnished and turned out to be poorly provisioned, she took with them from her home several wagonloads of furniture and provisions. Two of her children, little girls, 9 and 18 years old, went with them. They had not lived at his home long before their marital troubles commenced. The floors of his house were uncarpeted. She had not taken the carpeting from her house, and requested her husband to buy one. At first he consented, later repented, and refused to pay for it, or to permit her to bring it into the house, under the statement that he did not need the room or the carpet. Telephones were in common use in that community. She wanted a telephone in the house. He declined to permit this to be put in. He bought nothing in the way of provisions with which to furnish and run the table at his home, but seemed content to use what she brought there, and regarded that as sufficient. He declined to wait upon his wife, and, when she wanted a horse and buggy, refused to hitch it up for her. She was compelled to do this work herself. In all of this he showed himself to be a man so unappreciative of those things that go to make up a married woman's life that it could hardly be expected that he could retain, if he had ever secured, her love. But it is in evidence that this conduct on his part was borne by his newly acquired wife with patience and fortitude, and that it was not until his conduct toward her assumed a more objectionable form that she openly rebelled and refused further to live with him. As above stated, she took two of her children to his home, a little girl 9 and another 13 years of age. He was very unkind to them, especially to the smaller child, and perhaps the first open rupture that occurred between him and his wife was due to what is termed a wholly unwarranted and unjustifiable correction of this child. As evidences of his displeasure at having these children at his home, it is cited that at the table he would refuse to pass articles of food to them, or to pay any attention to them, or to heed civil requests on their part that he wait upon them at the table. It is also cited that when in these moods, which seemed to have possessed him most of the time after they moved to his home, he would refuse to answer his wife when she spoke to him, and in many ways showed his displeasure with her and his dissatisfaction with his lot. On as many as three separate occasions he is shown to have used towards her, in the presence of her little girls, language too foul and vulgar to be quoted. It was this conduct on his part that caused his wife to refuse to live with him longer. It is true that this testimony is in the main made by her children, and the salient portions thereof altogether by her children, and it is urged by counsel for appellant in brief that this testimony should be received with great caution, and given but lit-

the consideration; but, inasmuch as these witnesses stand uncontradicted and unimpeached, we are unable to say that their testimony is either colored or untrue. Great as is the duty which appellee owed to her husband by reason of their marital relation, she owed an even greater duty to these children, and her husband had no right to demand of her that she should separate herself from them, because of their tender years, and neither did he have a right to expect her to permit them to be brought up in an atmosphere surcharged with vulgarity and profanity. If his own sense of consideration for his wife had not prevented him from the use of such language in her presence, his sense of propriety and decency should certainly have made him refrain from using such language in the presence of these innocent little girls, children whose characters in life were being molded and developed, and upon whose lives the constant association with one addicted to the use of such language must leave an indelible imprint. One cannot read the record without being impressed with the idea that the defendant had, very shortly after his marriage to plaintiff, become dissatisfied with his lot, and this feeling was intensified by his wife's wanting him to go to some slight expense to make their home comfortable. This made him sullen, morose, and insulting to his wife and her little daughters, and although it is in evidence that he expressed a desire to have his wife return to and live with him after they had separated, such an expression on his part is so at variance with his conduct toward and treatment of her during the last month that they lived together as to make one doubt his sincerity upon this point.

On consideration of the whole case, we are of opinion that the chancellor reached the proper conclusion in adjudging that the wife was entitled to a separate maintenance by her husband; and, considering appellant's estate and its fair rental value, after taking into account the estate owned by his wife in her own right, the allowance of \$12 per month was little enough—in fact, it might have been larger—and we would not have been disposed to disturb his finding.

On the question of allowance to plaintiff's attorney, raised on the cross-appeal, we are of opinion that, according to the scale of fees usually charged in circuit courts in country counties like Henry, \$125 is a good fee—much larger than is usually charged in cases of this character, and quite as large as any good lawyer would have charged had the work been done under contract. We are therefore of opinion that the \$125 which the chancellor fixed as a fair and reasonable fee was sufficiently large to fairly compensate plaintiff's counsel for all services rendered in this case.

The judgment is therefore affirmed on both the original and cross-appeals.

CORNELISON et al. v. MILLION, County Judge.

(Court of Appeals of Kentucky. Jan. 21, 1910.)

1. WILLS (§ 440\*)—CONSTRUCTION—INTENTION OF TESTATOR.

In the construction of a will, it is of primary importance to ascertain the testator's intention, which is to be gathered from the language of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.\*]

2. WILLS (§ 491\*)—CONSTRUCTION—QUESTION FOR COURT.

The construction of a will involved in an action, or so much thereof as is applicable to the case, is for the court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1058; Dec. Dig. § 491.\*]

3. WILLS (§ 612\*)—CONSTRUCTION—ESTATE BEQUEATHED.

Testator, by a codicil, confirmed his prior will and provided that all the cash notes and debts owing to him, after payment of his debts, should pass to two grandchildren named, and if there be any other heir, full brother or sister to them, they should share equally, the money to be loaned and the interest used for the benefit of the children, and each to draw his share of the principal on coming of age. Held, that the gift was absolute and not subject to condition that the grandchildren should not take unless they lived to reach majority, so that on the death of one of the grandchildren, before reaching majority, his share passed by descent, one-half each to his surviving father and mother, as provided by Ky. St. §§ 1393, 1403 (Russell's St. §§ 3810, 3821).

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1389; Dec. Dig. § 612.\*]

4. JUDGES (§ 36\*)—LIABILITY—FAILURE TO REQUIRE SETTLEMENT OF GUARDIAN.

Where, in an action against a probate judge by the survivors of certain infant legatees to recover for the judge's negligence in failing to require biennial settlements of their guardian and to inquire into the solvency of his sureties as required by Ky. St. §§ 1065, 1068 (Russell's St. §§ 4161, 4164), by which complainants claim they lost their estate, they only sought to recover such amount as belonged to them, the court properly deducted from the judge's liability the amount bequeathed to one of the legatees who died before reaching majority and whose share passed to his surviving parents, for which the guardian was not legally chargeable.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 36.\*]

5. PLEADING (§ 236\*)—AMENDMENTS—RIGHT TO FILE—DISCRETION.

Where no reason was given why amended pleadings, offered when judgment was about to be rendered on the verdict, had not been offered sooner, and they presented no new defense and were not offered to make the pleading conform to the proof, and, if filed, could not have exerted any appreciable change in the result, the court's refusal thereof was not an abuse of discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.\*]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by Pal Cornelison and another against E. C. Million, County Judge. From a

judgment for plaintiffs for less than the relief demanded, they appeal. Affirmed.

See, also, 112 S. W. 654, 33 Ky. Law Rep. 1086.

Grant E. Lilly, for appellants. W. S. Moberly, for appellee.

LASSING, J. This is a suit to recover of E. C. Million, county judge of Madison county, certain money due Pal and Eli Cornelison from their guardian. It is prosecuted under sections 1065 and 1068, Ky. St. (Russell's St. §§ 4161, 4164), which require that the county judge shall make biennial settlements with guardians, and at least once in each year inquire into the solvency of their sureties. The petition charges that the defendant was negligent in the discharge of these duties as to these plaintiffs' guardian to such an extent as to render him liable for the money lost by them because of the insolvency of their guardian and his bond.

This is the second appeal of this case. On the first appeal (112 S. W. 654, 33 Ky. Law Rep. 1086) the only question before us was the sufficiency of the pleadings. Upon the return of the case to the circuit court, the defendant answered, and, besides putting in issue the charges of negligence in looking after the particular fund in question, pleaded that one-third of this sum sought to be recovered of him did not in fact belong to the plaintiffs, but belonged to their father and mother, under the following state of facts: Eli C. Cornelison, by a codicil to his will, left a fund to be divided between Eli and Ernest Cornelison, the only then living children of his son, with the further provision that any other full brother or sister that might thereafter be born to them should share equally with them in this fund, and, as they arrived at the age of 21 years, each was to be paid his share thereof. During their infancy, the income was to be expended for their benefit. When this will was probated, there were three of these children, Eli, Ernest, and Pal. J. W. Bales was appointed guardian for them, executed bond, and took charge of the fund and managed it, as set out in the former opinion, until his ward, Pal, became of age. As above stated, one of his wards, Ernest, had died. It is made to appear from the pleadings that, before the death of Ernest, the guardian made no division of the fund in his settlements, but reported it as a whole, while after the death of Ernest he made separate settlements for Pal and Eli, dividing the fund which he had received for the three equally between the two remaining wards. The defendant pleads that this misconception of his duty on the part of the guardian cannot be made to operate to increase the guardian's liability; or, at least, that defendant cannot be held answerable for the misappropriation or loss of any fund which did not properly belong to the plaintiffs; that, upon the death of Ernest, his interest in the fund passed, by the laws of de-

scient and distribution, to his father and mother, each of whom was then living, and Pal and Eli had and took no interest whatever in it. This amended pleading was traversed. Upon the issues thus formed, the case was submitted to a jury, under the following instructions: "(1) The jury should find for the plaintiffs Eli and Pal Cornelison unless they believe, as stated in the second instruction. (2) If the jury believe from the evidence that if the defendant E. C. Million had from December 1, 1890, to December 31, 1901, annually made a careful inquiry into the solvency of Socrates Maupin as the security on the bond of J. W. Bales as the guardian of the plaintiffs, such inquiries would not have disclosed such facts with reference to the solvency of said Maupin as to cause a person of ordinary judgment to conclude that there were reasonable grounds to believe that the guardian's bond was not amply sufficient to protect the plaintiffs as wards of said Bales from all loss, the jury should find for the defendant."

The jury found for plaintiffs, and thereafter, and before judgment had been entered, the plaintiffs moved the court to permit them to file certain additional pleadings and for a reference of the case to the master to audit the accounts of the guardian and ascertain and determine defendant's liability. These several motions were overruled, as was the motion of the father and mother of plaintiffs to be permitted to interplead and disclaim any interest in the fund in the hands of the guardian which had belonged to their son Ernest. The pleadings raised no issue as to the amount due further than to question the right of plaintiffs to be given credit for the share of their deceased brother, and, from the data before him, the trial judge entered a judgment against defendant in conformity with and upon the verdict of the jury. Being dissatisfied therewith, plaintiffs appeal. There is no bill of evidence in the case, and, as the pleadings support the verdict and judgment, the only question before us is as to the correctness of the court's ruling in refusing to permit the amendments offered by plaintiffs to be filed, and in the construction placed by him upon the codicil to the will of Eli C. Cornelison, deceased, which is filed with and made a part of the record in this case.

The construction of the will, or of so much thereof as is applicable to the case under consideration, was properly for the court, and, as he was of opinion that under it each of the three children living at the date of the death of their grandfather took a one-third interest in the fund, and his judgment is predicated upon this construction, the correctness of his conclusion in this particular becomes of primary importance. The said codicil is as follows: "I Eli C. Cornelison of Madison county Kentucky do make this my codicil hereby confirming my last will made on the seventeenth day of January 1884 so

far as this codicil is consistent therewith and do hereby will that all the cash and cash notes and any debts that may be owing me after my debts have been discharged shall be Eli's and Ernest Cornellison's and if there be any other heir full brother or sister to them they shall share equally. This money shall be loaned and the interest shall be used for the benefit of the children, to clothe and to educate them, and as they become of age, each shall draw his part of the principal. In witness whereof I have signed and sealed and published and declared this instrument as my will at Berea Madison county, Ky. on May 16, 1884. Eli C. Cornellison."

In the construction of wills it is of primary importance to ascertain the intention of the testator, and this intention is gathered from the language used in the will. With this end in view, we find that the purpose of the testator, as plainly expressed in this codicil to his will, was to give the fund in question to his grandchildren, Eli and Ernest Cornellison, and such brothers and sisters of the full blood as they might have. It will be observed that he does not attempt to limit the bequest to such of his grandchildren as may live to be 21 years of age, but, on the contrary, the provision that each child, upon reaching his majority, shall be entitled to receive his share of the fund, precludes the idea that such was his intention. The gift was absolute, and the only limitation was that only the income could be used for the benefit of such infants during their minority. The principal was to be kept intact and paid over to each child as he reached his majority. There is nothing in the language that would indicate that the testator intended only such of his grandchildren as reached their majority should take this fund. It may be, as earnestly contended by counsel for appellants, that he intended the interest of any child dying during minority should go to his remaining brothers; but, if such was his intention, he failed to so express it in the language used in the draft of this codicil. Hence, when one of those entitled to an interest in this fund died, his share must be disposed of as directed by statute for the distribution of the personal estate of an infant. This is regulated by sections 1393 and 1403, Ky. St. (Russell's St. §§ 3810, 3821), which clearly provide that it goes to his father and mother, if living, one-half to each. His brothers and sisters have no interest whatever in it, and the ruling of the trial court to this effect was unquestionably correct.

The allegation in the answer that the guardian had included in his settlement the entire fund, one-third of which did not belong to his wards, is not seriously disputed, and, in his brief, counsel for appellants practically concedes it to be true. It was therefore entirely proper for this one-third of the fund in question to be deducted from the entire

amount with which the guardian stood charged, since it is sought in this suit to recover only such amount as belonged to the appellants. After the jury had found for plaintiffs, under instruction No. 2, all that remained to be done was to enter judgment for the amount with which the guardian was properly chargeable, and this the trial judge did. There was no necessity for a reference to a master, the accounts were not complicated, and such a course would have but prolonged the litigation and unnecessarily increased the cost.

The supplemental pleadings offered by appellants came too late. They presented no new defense, or, rather, no defense which could not have been presented before the trial, and, so far as it appears from an inspection thereof, were not offered to make the pleadings conform to the proof. The right to file amended pleadings, as has been repeatedly decided by this court, is a matter that must address itself to the sound discretion of the court, and the court's ruling in regard thereto is never disturbed unless it satisfactorily appears that the ends of substantial justice have been defeated. No good reason appears why the pleadings offered in this case were not tendered sooner, and, indeed, it is not clear how, if permitted to be filed, they could have exerted any appreciable change in the result. But, however that may be, the judge was of opinion that after the case had been tried, and judgment was about to be rendered on the verdict of the jury, the plaintiffs should not be permitted to reopen the case, and in this conclusion we concur.

Judgment affirmed.

#### COOLEY et al. v. COOLEY'S ADM'X.

(Court of Appeals of Kentucky. Jan. 21, 1910.)  
WILLS (§ 600\*) — CONSTRUCTION — SALE OF PROPERTY.

Under a will of the husband bequeathing all of his property to his wife and children, naming them, appointing his wife executrix without bond, and giving her "full power to dispose of, as she thinks best, the estate to the best interest of herself and children," the wife had the right to sell and convey the property either publicly or privately, and invest the purchaser with fee-simple title.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1335-1339; Dec. Dig. § 600.\*]

Appeal from Circuit Court, Graves County.  
"Not to be officially reported."

Action between Roy Morris Cooley and others and J. N. Cooley's administratrix. From an adverse judgment, Roy Morris Cooley and others appeal. Affirmed.

F. B. Martin, for appellants. W. P. Lee, for appellee.

CARROLL, J. The only question is whether or not Mrs. Willie May Cooley can sell and convey the real estate mentioned in the fol-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lowing will and pass a good title thereto: "In the name of God, Amen. I Jessie N. Cooley, being of sound mind and disposing memory, being desperately wounded, to the end that my wife and children might be protected, I hereby will and bequeath all my property, real, personal and mixed to my said wife Willie May Cooley and my children, Roy Morris Cooley, Daisey Bell Cooley and Pete Eli Cooley,—and hereby appoint my wife Willie May Cooley the executrix of this my last will and testament, and give her full power to dispose of as she thinks best, the estate to the best interest of herself and children. And having full confidence of her integrity and uprightness, and her desire to protect herself and my said children, in carrying out this my last will, I nominate her as executrix of my will, and desire that no bond be required of her." Under this will, Mrs. Cooley has the power to sell and convey the property, either publicly or privately as she thinks best, and invest the purchaser with the fee-simple title thereto.

The question of what interest she has in the estate is not before us; but the testator evidently intended that the estate should be held by the wife as trustee for the benefit of herself and children, with the power of disposition in her. If at any time it may seem necessary for the protection of the interest of the children, the chancellor upon application by them may take such action and make such orders as may be necessary to make secure for their benefit their interest in the property.

Wherefore the judgment is affirmed.

#### DORIAN v. CITY OF PADUCAH.

(Court of Appeals of Kentucky. Jan. 21, 1910.)

MUNICIPAL CORPORATIONS (§ 145\*)—OFFICERS—QUALIFICATION—BONDS.

Under Ky. St. §§ 3131, 3132 (Russell's St. §§ 1240, 1241), requiring the treasurer of cities of the second class to give a bond, etc., and section 3753 (section 4855), providing that no officer required to give bond shall enter on the duties of his office until the same is given, one eligible as treasurer, who was duly elected and took the oath of office, and who tendered a sufficient bond and thereafter attempted to perform the duties, was entitled to the office as de jure officer and to salary, though the city authorities arbitrarily refused to approve the bond, and Const. § 160, authorizes an officer to hold the office until his successor is qualified.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 319-322; Dec. Dig. § 145.\*]

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by John J. Dorian against the City of Paducah. From a judgment for defendant, plaintiff appeals. Affirmed.

T. L. Crice and David Browning, for appellant. James Campbell, Jr., for appellee.

CLAY, C. John J. Dorian was elected treasurer of the city of Paducah in November, 1903. His term expired in January, 1908. He qualified and served the term. At the November election, 1907, he was re-elected for another term of four years, beginning in January, 1908. By the charter of the city of Paducah he was not eligible to succeed himself. Realizing that he was ineligible to re-election, the authorities called an election to take place at the November election, 1908, to fill the vacancy in the office. At this election one George W. Walters was elected treasurer. As Dorian refused to give up the office, Walters instituted an action to recover possession thereof and to restrain Dorian from interfering with him in the discharge of his duties. The McCracken circuit court gave judgment in favor of Walters. The case was then appealed to this court, where it was held that Dorian was ineligible to succeed himself as treasurer, and that Walters was entitled to the office upon showing his eligibility. The judgment of the McCracken circuit court was reversed, however, because Walters had not alleged facts showing that he was eligible. Upon the return of the case to the lower court, the fact of eligibility was shown, and judgment was entered declaring Walters was entitled to the office. On November 16, 1908, Walters appeared before the board of councilmen and presented his certificate of election, and also bond in the sum of \$20,000. The surety upon this bond was perfectly solvent, and the bond was regular in all respects. Walters took the oath of office, but the board of councilmen did not approve his bond; they simply directed that the bond be recorded in the minutes and made a part of the record. Afterwards the board of aldermen concurred in the action of the board of councilmen. Upon the return of the case of Dorian v. Walters, the board of councilmen, on February 15, 1909, approved the same bond that Walters had presented to it in November, 1908. On February 18, 1909, the board of aldermen approved the same bond. During the months of November and December and up until February 18th, when the bond of Walters was approved by the board of aldermen, Dorian, who had been the acting treasurer of the city of Paducah, continued to and did perform the duties imposed upon the treasurer of that city. During that time he had charge and control of, and was in possession of, the records of the office of treasurer and of the office itself. He paid the accounts and bills ordered to be paid by the general council. From the 16th day of November on Walters opened up an office for the transaction of business of the city treasurer, advertised himself as such, and collected certain license fees and taxes. During such time the general council knew he was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
124 S.W.—24

acting as such treasurer and was receiving and depositing funds belonging to the city of Paducah. The general council paid Dorian for his services the months of November and December. Walters instituted an action against the city of Paducah to recover salary for the same time. The judgment below was rendered in favor of the city, and on appeal to this court that judgment was affirmed. This court held that the payment to Dorian, who was a de facto officer, had been made before judgment of ouster, and that this payment was a good defense against Walters' claim for the salary for the same period of time. *Walters v. City of Paducah*, 123 S. W. 287. After judgment of ouster was entered against Dorian, the city of Paducah paid Walters the salary of the office of city treasurer for the months of January and February. This action was instituted by appellant Dorian to recover from the city of Paducah the salary of the office from the first Monday in January until February 18th, the day on which Walters' bond was finally approved. The lower court gave judgment in favor of the city of Paducah, and Dorian appeals.

By section 3132, Ky. St. (Russell's St. § 1241), the treasurer of cities of the second class is required to give such bond and receive such salary as the general council shall by ordinance provide. The general council of the city of Paducah fixed the salary of the treasurer at \$1,800 per year, and provided that he should give bond in the sum of \$20,000. Section 160 of the Constitution, after providing for the election of mayors, legislative bodies, and police judges, and fixing their terms of office, provides as follows: " \* \* \* But other officers of towns or cities shall be elected by the qualified voters therein, or appointed by the local authorities thereof, as the General Assembly may, by a general law, provide; but when elected by the voters of a town or city, their terms of office shall be four years, and until their successors shall be qualified." Section 3131 of the Kentucky Statutes provides that the treasurer of cities of the second class shall be elected by the qualified voters of the city. Section 3753 (Russell's St. § 4855) provides that no officer from whom a covenant is required shall enter upon the duties of his office until the same is given. It further declares that a breach of the provision, or a failure to take the oath of office prescribed by law, shall be a misdemeanor, punishable by a fine of not less than \$50 or more than \$100, and by removal from office. From these various provisions it is argued by counsel for appellant that the latter had the right to hold over until his successor was elected and qualified; that his successor did not properly qualify until his bond was finally approved by the board of aldermen on February 18, 1909; that from

the first Monday in January until February 18, 1909, appellant was not only the de facto treasurer of the city, but the treasurer de jure, and is therefore entitled to the emoluments of the office during that period of time. As the duty of approving the bond in question devolved upon the general council, it may be conceded that if that body refused to approve the bond because it was improperly executed, or the surety offered was not solvent, or for any other good and valid reason, its judgment in the matter would be conclusive. However, we do not think it within the power of a general council to arbitrarily and willfully refuse to approve a bond that is in all respects legal and sufficient, and thus prevent the officer tendering such bond from taking the oath of office and exercising his right of office. No objection was made to Walters' bond at the time it was offered. The general council subsequently approved the identical bond that it refused to approve in the first instance. It thus admitted that the bond so tendered was in all respects valid and sufficient. It is manifest that the general council, in refusing to approve the bond, did so for the purpose of recognizing Dorian as the city treasurer, and not because there was any valid objection to the bond. Its action, then, was arbitrary and without legal excuse. As Walters was eligible to the office and was duly elected, and as he took the oath of office and tendered a good and sufficient bond, and thereafter attempted to perform the duties of the office, and did in fact perform certain duties, we conclude that he did all that the law required him to do in order to entitle him to the office; and, having done all that he was required to do in the premises, he cannot be deprived of his compensation by the arbitrary action of the general council in refusing to approve a bond which, by its subsequent approval thereof, it admits to be in all respects legal and sufficient. We therefore conclude that Walters, and not appellant, was the de jure officer during the time for which appellant seeks to recover the salary of the office. That being the case, the salary in question was properly paid to Walters, and appellant has no right to recover salary for his services during the same period of time.

Judgment affirmed.

MAHONING COAL CO. v. DOWLING et al.  
(Court of Appeals of Kentucky. Jan. 21, 1910.)

1. REFORMATION OF INSTRUMENTS (§ 45\*)—  
PROCEEDINGS—EVIDENCE.

The evidence necessary to correct a mistake in a deed, or to establish a right inconsistent with its provisions, must be clear and convincing.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 157-193; Dec. Dig. § 45.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2. ADVERSE POSSESSION (§ 13\*)—EVIDENCE—SUFFICIENCY.**

Under the rule that adverse possession to ripen into title must be open, continuous, notorious, and to a well-defined boundary, the occupation of land by tenants for a few years who worked on adjoining land, the occasional cutting of small timber for mine props, and the taking of tan bark therefrom, together with the payment of the taxes, was insufficient to establish title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 13.\*]

**3. STIPULATIONS (§ 18\*)—CONCLUSIVENESS—MATTERS CONCLUDED.**

Where the parties to a suit to determine title to land agreed that for the purposes of the trial it would be conceded that plaintiff had a regular derivation of title of record from the commonwealth, the defendant cannot claim that plaintiff's title was insufficient to sustain a judgment in their favor.

[Ed. Note.—For other cases, see Stipulations, Dec. Dig. § 18.\*]

Appeal from Circuit Court, Pulaski County.  
"Not to be officially reported."

Action by Ed Dowling and others against the Mahoning Coal Company. From a verdict for plaintiffs, defendant appeals. Affirmed.

Denton & Wallace, for appellant. O. H. Waddle & Son, for appellees.

CARROLL, J. This action was instituted in the Pulaski circuit court by appellees against the appellant to recover possession of a tract of land containing 150 acres, and upon the conclusion of all the evidence the court instructed the jury to return a verdict in favor of the appellee. So that the only question now before us is the correctness of the ruling of the court upon the evidence.

The facts are substantially these: Prior to 1881 a patent issued to Stewart & Porter for a large tract of land in Pulaski county. This patent did not describe the senior patents, of which there were several, within its exterior boundary. Some time before the date mentioned, John Garey, one of the appellees, and J. W. F. Parker and Joe C. Parker, became the owners of this Stewart & Porter survey; Garey being the owner of one-third thereof and the Parkers two-thirds. In August, 1881, the Parkers for a valuable consideration conveyed to Garey all their right, title, and interest in the Stewart & Porter land. The deed conveying the land did not reserve to the Parkers any part or interest in it. The appellees are the vendees of Garey, and the appellant is the vendee of the Parkers. The contention is made on behalf of the appellant that, although no interest was reserved in the conveyance mentioned, yet at the time it was made it was understood and agreed between the parties that 150 acres included in the Stewart & Porter patent which had been surveyed in the name of M. E. Parker was reserved and

did not pass by the conveyance. This 150 acres is the land in controversy. The record presents two issues: First, whether or not this 150-acre survey was reserved; and, second, did the Parkers and their vendee, the appellant company, have the adverse possession of it for more than 15 years before this suit was instituted by appellees for its recovery?

It seems that in March, 1881, the decision of this court in the case of Hamilton v. Fuggett, 81 Ky. 366, involved in great doubt and uncertainty the validity of patents that did not describe excluded senior patents, and the effect of this decision was known to the Parkers and Garey at the time the conveyance was made. The Parkers contend that being apprehensive the Stewart & Porter patent was void, and for the purpose of avoiding its effect, they had procured several persons to survey for their benefit boundaries of land within this Stewart & Porter patent with the intention of holding the land under these surveys in the event that the Stewart & Porter patent should be held invalid. And that, with this purpose in view, there was surveyed at their instance to M. E. Parker in June, 1881, a boundary containing 150 acres, being the same in controversy, and that afterwards in 1884 a patent for this survey was issued to M. E. Parker. It is their further insistence that it was understood and agreed between themselves and Garey at the time they made the deed to him that this M. E. Parker survey was excepted from the conveyance of their interest, and that they retained the ownership and possession of it, and that this survey passed a title to M. E. Parker superior to the Stewart & Porter patent. The evidence, however, upon the point that it was agreed and understood between the parties that this M. E. Parker survey was excepted from the conveyance, is not in our opinion sufficient to overcome the deed in which there is no exemption whatever. This deed, signed and acknowledged by the Parkers, conveyed to Garey without any reservation all the interest that they had in the Stewart & Porter survey. And as the M. E. Parker survey was made for the benefit of J. C. Parker, one of the grantors in the Garey deed, he owned whatever M. E. Parker might have by virtue of it, and it passed by the deed to Garey. The evidence necessary to correct a mistake in a deed or to establish a right inconsistent with its provisions must be clear and convincing. If this rule did not obtain, deeds would be of little value. We have carefully read the evidence upon this issue, and in our opinion the court did not err in ruling that the evidence was insufficient to sustain the contention that this M. E. Parker survey was reserved at the time the conveyance was made.

The next question is: Was there sufficient evidence on behalf of appellant to take the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

case to the jury upon the plea of adverse possession? The land in controversy is divided into two unequal parts by the Southern Railway. On the east side of this railway there is about four acres, and on the west side of it the remainder of the tract is located. The four acres on the east side was conveyed by Garey to a man named Wood soon after Garey purchased it, and on this four-acre tract there has at all times been one or more houses actually occupied by Wood and other persons, and it is now owned by the Parkers by virtue of a deed made to them by Wood. So that this four acres is not involved in this controversy, and was excepted by the court in the judgment giving to Garey the remainder of the land. The boundary on the west side of the railway, until within the last few years, was open, uninclosed mountain land. No part of it was ever in cultivation, and, with the exception of a cabin in one corner of it which was occupied for a few years by some persons who worked on adjacent land, it has never been in the actual occupancy of any person. There is some evidence that the Parkers paid the taxes on the land, and that some small timber for mine props was occasionally cut from it, and tan bark gotten off of it. In our opinion the evidence is wholly insufficient to invest the appellant with a title to the land by adverse possession. As frequently decided by this court, it is essential, in order to sustain a plea of adverse possession, that the adverse holding must be open, continuous, notorious, and to a well-defined boundary, and that the mere payment of taxes is not of itself sufficient to support this defense. *Interstate Investment Co. v. Bailey*, 93 S. W. 578, 29 Ky. Law Rep. 468; *Overton v. Overton*, 123 Ky. 311, 96 S. W. 469, 29 Ky. Law Rep. 736. Measured by this rule, the proof fails to show a continuous or notorious holding, or a holding to a well-defined boundary. The occasional cutting of small timber, and the fact that for a few years there was a house on the corner of the land in a remote place occupied by a tenant, falls far short of measuring up to the standard of adverse possession.

The argument is further made that the title of appellees is not sufficient to uphold the judgment in their favor. Counsel for appellant in making this point evidently overlooked the following agreement in the record: "The parties here agree that the deeds evidencing plaintiffs' (appellees') title need not be introduced; it thereupon being agreed between them for the purposes of this trial that the plaintiffs (appellees) had a regular derivation of title of record from the commonwealth of Kentucky to them for the lands granted by the Stewart & Porter patent above copied."

Wherefore the judgment of the lower court is affirmed.

## CHESAPEAKE & O. RY. CO. v. HALL.

(Court of Appeals of Kentucky. Jan. 13, 1910.)

### 1. CARRIERS (§ 108\*)—CARRIAGE OF FREIGHT—LIABILITY.

A carrier of freight is an insurer against any loss or damage to the goods, except that caused by the act of God, or the public enemy, so that it is liable for a larceny by its agent in charge of the freight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 481; Dec. Dig. § 108.\*]

### 2. CARRIERS (§ 110\*)—PRINCIPAL AND AGENT (§ 101\*)—CARRIAGE OF FREIGHT—LIABILITY.

The acts of an agent in procuring carriage of freight of his principal are binding on the principal, but the ignorance of the agent as to the contents of the package delivered for shipment, and innocence of any intention to deceive the carrier, or to conceal the value of the goods, do not affect the liability of the carrier where the principal intended to deceive the carrier or to conceal the value of the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 497-500; Dec. Dig. § 110.\* Principal and Agent, Cent. Dig. § 256; Dec. Dig. § 101.\*]

### 3. CARRIERS (§ 110\*)—CARRIAGE OF FREIGHT—FRAUD OF SHIPPER—EFFECT.

Where a shipper, to obtain a lower rate or for any other reason, gives false information to the carrier as to the contents or value of a package delivered for transportation, or attempts by concealment to deceive the carrier as to the value or description of the articles it contains, he cannot recover the value of the goods, where the appearance of the package is not sufficient to put the carrier on notice as to its contents.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 497-500; Dec. Dig. § 110.\*]

### 4. CARRIERS (§ 110\*)—CARRIAGE OF FREIGHT—FRAUD OF SHIPPER—EFFECT.

A shipper of a trunk by freight must notify the agent of the carrier that it contains money, as a carrier need not accept money to be shipped as freight, unless it is first notified, so that it may charge a rate sufficient to justify it in taking the degree of care observed in the transportation of money, notwithstanding the Constitution declaring that the common-law liability of a carrier shall not be limited.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 497-500; Dec. Dig. § 110.\*]

### 5. CARRIERS (§ 39\*)—CARRIAGE OF FREIGHT—MONEY.

In the absence of evidence, the carriage of money is strictly speaking not in the line of the duty of a carrier holding himself out only as a carrier of goods, wares, and merchandise.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 39.\*]

### 6. CARRIERS (§ 399\*)—CARRIAGE OF PASSENGERS—PERSONAL BAGGAGE—LIABILITY.

A carrier of passengers permitting them to carry personal baggage is not liable for the loss of an unusual amount of money carried as baggage, or for more than might be needed to defray the usual personal and traveling expenses of the passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1522; Dec. Dig. § 399.\*]

### 7. CARRIERS (§ 400\*)—CARRIAGE OF FREIGHT—LARCENY BY AGENT—LIABILITY.

A carrier receiving a trunk for carriage by freight without notice that it contains money is liable for the larceny of the money by an agent of the carrier in whose immediate care the trunk is placed, though the carrier would not have been liable if the money had been

stolen by a stranger, or had been lost by its negligence, or other cause, and though the shipper was guilty of the first wrong in failing to notify the carrier of the fact that the trunk contained money.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1531-1534; Dec. Dig. § 400.\*]

Appeal from Circuit Court, Floyd County.  
"To be officially reported."

Action by Sarah J. Hall against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Worthington, Cochran & Browning, F. T. D. Wallace, Walter S. Harkins, and Joseph D. Harkins, for appellant. May & May and James Goble, for appellee.

CARROLL, J. Sarah J. Hall by her agent delivered to the appellant company at Kenova, W. Va., a trunk to be shipped by it to Harold, Ky. She paid 50 cents in advance for the transportation by freight of the trunk. There were no marks on the outside of the trunk to indicate who owned it, but the agent at Kenova attached to the handle of the trunk a metal check, and delivered to the agent of the appellee a duplicate. At the time the trunk was shipped, and when it was received at Harold, it was securely locked and in sound condition. The trunk contained a lot of clothing, and also \$687.50 in money. After the trunk had been at Harold a few days, and before it was called for, the agent of the company at that place, under the pretense that he wanted to know who was the owner of the trunk, broke open the lock in the presence of some persons who happened to be present, and ascertained from letters in the trunk the name and address of Mrs. Hall, the owner. Some time afterwards, Mrs. Hall got possession of the trunk, and discovered that the money was missing. Whereupon she brought suit against the company to recover the value of the money. A trial resulted in a judgment in her favor, and the company appeals.

There is no contradiction in the evidence that, when the trunk reached Harold, it was securely locked and in sound condition and contained the money sued for. Nor is there any denial of the fact that the trunk was broken open by the agent. The agent did not testify in the case, and there is no direct evidence that he abstracted the money, but many circumstances not necessary to detail point to him as the guilty person, and there was sufficient evidence to warrant the jury in so finding.

The court instructed the jury that if they believed from the evidence that the trunk contained the money, and that it was taken from the trunk by the agent of the company while the trunk was in his charge as such agent, they should find for Mrs. Hall, and refused upon the request of the company to

instruct the jury, first, that if they believed from the evidence "the trunk was such as is generally used to contain things of ordinary personal apparel and of apparently small value, and plaintiff failed to disclose to the defendant company, its officers and agents, the real value of the contents of the trunk, and that the same contained money, they should find for the company"; and, second, "that if they believed from the evidence that the money was willfully and voluntarily taken from the trunk by the agent, and appropriated by him to his own use, that the company was not liable for his wrongful acts."

Passing for the present the question that the carrier is not liable because it did not have notice that the trunk contained money, we hold that it will not be permitted to escape liability upon the ground that its agent in breaking open the trunk and abstracting the money committed a crime or acted outside the line of his duty or the scope of his employment. When the carrier accepted the trunk, it assumed the obligation of delivering it to the owner in the condition in which it was when received. In other words, it became an insurer against any loss or damage to the trunk except that caused by the act of God or the public enemy. To hold that a common carrier may be exonerated for loss occasioned to freight, if the loss is caused by the wrongdoing of one of its servants in charge of the freight, would be to establish a rule entirely at variance with all the law on the subject of the duties and liabilities of common carriers, and to announce a doctrine that would leave the shipper defenseless from the acts of the very person into whose absolute care he had intrusted his goods. The shipper has no voice in the selection of these agents, and no control whatever over their habits or conduct. They are selected by the carrier, employed and discharged by it at pleasure, and it owes a duty to the public to see to it that they are honest and faithful in the performance of the services for which they are employed. If they are not, the carrier is answerable in damages for their wrongdoing or misconduct, whether it amounts to a crime or not. The fact that the act is criminal in itself, and subjects the agent to prosecution, cannot lessen the liability of the carrier. It employed and placed him in a position of trust, and the public dealing with it had the right to assume that he was honest. If the trunk while in the custody of the carrier had been broken into by a stranger, and the contents injured or carried away, the carrier as an insurer would undoubtedly be liable, although the act of breaking into the trunk and carrying away the property may have been criminal. As the carrier is liable for the acts of a stranger in injuring or misappropriating goods, we can see no reason

why it should escape because the wrong is committed by one of its agents. Its responsibility and liability is the same in the one instance as in the other. In coming to this conclusion we do not find it necessary to inquire into the torts or wrongful acts of the servant that the master will generally not be held liable for, if they are committed by the servant outside the line of his duty or the scope of his employment. The law usually applicable in cases where it is sought to hold the master for the acts of his servant has no place in the consideration of the question we are considering, as the liability of common carriers for loss of property has a separate, distinct, and well-fixed place in the law.

The next question presented is that the carrier is not liable because it had no notice that the trunk contained the money. No inquiry as to its contents was made by the agent to whom the trunk was delivered for shipment, nor can it be said that any intentional concealment of its contents was made by the consignor. The failure of the consignor to inform the agent of the carrier that the trunk contained money was not due to any purpose on his part to practice a deception or obtain a lower rate than would be charged if its contents had been known. In fact, the consignor seems to have been entirely innocent of any purpose to deceive or defraud. He did not know that the trunk contained anything like the amount of money that was in it, although he did know that there was some money in it. Mrs. Hall, the owner, was in another state at the time the trunk was shipped, and merely gave directions to her agent to have it shipped to Harold, without telling him how to ship it or informing him that it contained a large amount of money. The fact, however, that the trunk was shipped by the agent to Mrs. Hall does not place her in any better position than if it had been shipped by her in person, as she is bound by what her agent did or failed to do, and the case must be treated as if the shipment had been directly made by her. It would not do at all to say that if the agent or person actually attending to the shipment of an article was ignorant of its contents and innocent of any intention to deceive or defraud, or to conceal the value of the goods, that the carrier would be liable when it would not be if the goods were shipped by the owner or a person who did know the nature and value of the contents. We think this proposition too plain to need further elaboration. So that, if the shipper was under any duty to inform the agent of the carrier that there was money in the trunk, and did not impart this information to the agent, his failure to do so must defeat the right of Mrs. Hall to recover, unless it is saved by the fact that the money was taken by an agent of the carrier. It is well settled that if the shipper for the pur-

pose of obtaining a lower rate, or indeed for any other reason, gives false or misleading information to the carrier as to the contents or value of a package, or attempts by evasion or concealment to deceive the carrier as to the value or description of the articles it contains, he cannot recover the value of the goods or property contained in the shipment that he failed upon inquiry to furnish information concerning, or the value of which he purposely concealed, if the appearance of the package was not sufficient to put the carrier on notice as to its contents. This reasonable rule, introduced and established to enable the carrier of goods to exercise a degree of care commensurate with the value of the property, and to prevent imposition being practiced upon it by the shipper in obtaining a lower rate than would be charged if the real value of the articles shipped were known, is everywhere recognized. *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587; *Shackt v. Illinois Central R. Co.*, 94 Tenn. 658, 30 S. W. 742, 28 L. R. A. 176; *Hutchinson on Carriers*, § 332; 5 Am. & Eng. Ency. of Law, 345, 371; *Bottom v. Charleston & W. R. Co.*, 72 S. C. 375, 51 S. E. 985, 2 L. R. A. (N. S.) 773, 110 Am. St. Rep. 610, 5 Am. & Eng. Ann. Cas. 118; 6 Cyc. 380; *Story on Bailments*, § 565.

If, therefore, the agent of the carrier had made inquiry of the shipper, and had been informed that the trunk did not contain money, or if there had been any intentional concealment or fraud practiced by the shipper for the purpose of deceiving or misleading the carrier as to the value of the goods, there would be no difficulty in determining that the carrier was not liable. But, in the absence of evidence of this character, the case comes down to the narrow question whether or not the failure of the consignor to notify the carrier that the trunk contained money relieves the carrier from liability. It may be conceded that the general rule is that the carrier will be liable unless some false representation or statement, either voluntarily or in answer to inquiries, is made as to the value of the goods, or there is an intentional and fraudulent concealment of their value. But this rule should not in fairness be applied when the outward appearance of the article offered for shipment is such that a person of ordinary prudence would not assume or suspect that it contained money. The appearance of the trunk did not itself furnish any information or notice that it contained money, and it is not reasonable to assume that the agent—supposing him to be a man of ordinary prudence—would suspect that its contents were other than articles of wearing apparel, household goods, and the like such, as are usually placed in trunks for shipment. Clearly he could not anticipate that there was in the trunk a large amount of money. The trunk was shipped by freight—a most unusual method of

shipping a package containing a large amount of money. Under these circumstances, we are of the opinion that the shipper should have notified the agent that the trunk contained money, and that it was not necessary that the agent should have made any inquiry, or that there should have been any fraudulent or intentional concealment by the shipper. As aptly said in *Hutchinson on Carriers*, § 330: "Fraud may be as effectually practiced upon the carrier by silence as by a positive and express misrepresentation. The neglect or failure to disclose the real value of a package, and the nature of its contents, if there be anything in its form, dimensions, or other outward appearance which is calculated to throw the carrier off his guard, whether so designed or not, will be conduct amounting to a fraud upon him. The intention to impose upon him is not material. It is enough if such is the practical effect of the conduct of the shipper, as, if a box or package, whether designedly or not, is so disguised as to cause it to resemble such a box or package as usually contains articles of little or no value, whereby the carrier is misled. For by such deception the carrier is thrown off his guard and neglects to give the package the care and attention which he would have given if it had been known its actual value." No good reason can be assigned why the agent should have made any inquiry as to the contents of the trunk. It was in good condition for shipment, and he had the right to believe that it contained such articles as are usually carried in trunks. It cannot be doubted that, if the agent had known that there was \$687 in money in the trunk, he would, if it had been accepted for shipment by freight, have exercised unusual care for its protection from loss, and charged a much higher rate than was charged for its transportation, or would have declined to accept it for shipment by freight, as we think he might safely have done. In the absence of evidence to the contrary, the carriage of money is, strictly speaking, not in the line of the duty of a carrier who holds himself out only as a carrier of goods, wares, and merchandise.

*Lee v. Burgess and Graham*, 9 Bush, 652, was an action to recover from a common carrier the value of money received by it for shipment and lost. In considering the case the court said: "It is not pretended in this case that the carrying of money is within the ordinary and usual business of a steamboat, and therefore it will not do to say that because goods, wares, merchandise, and passengers are carried on this boat therefore the owners are common carriers of gold or bank bills. We do not intend to say that one may not be a common carrier of money or bank bills. This liability may be assumed with reference to money as well as ordinary freight; but, where such a liability is sought to be established, it must be shown that the par-

ty charged is a common carrier of bank bills, where the carrying of such packages is not within the ordinary business in which the carrier is engaged. Suppose the clerk of this boat had refused to accept the package for delivery upon the appellee's tendering compensation, could the company or the owners have been made liable by reason of such refusal? We think not, and for the reason that it was not within their employment." To the same effect is *Knox v. Rives*, 14 Ala. 249, 48 Am. Dec. 97; *Pfister v. Central Pacific R. Co.*, 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404. In line with these cases, it is generally ruled that a common carrier of passengers that permits them to carry personal baggage is not liable for the loss of an unusual amount of money carried in a trunk or package as baggage, or for more than might be needed to defray the usual personal and traveling expenses of the passengers. *Hutchings v. Western & Atlantic R. Co.*, 25 Ga. 61, 71 Am. Dec. 156; *Jordan v. Falls River R. Co.*, 5 Cush. (Mass.) 69, 51 Am. Dec. 44; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; *Orange County Bank v. Brown*, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129; *Illinois Central R. Co. v. Matthews*, 114 Ky. 973, 72 S. W. 302, 24 Ky. Law Rep. 1766, 6 L. R. A. 846, 102 Am. St. Rep. 316. We might further add that in these days there would be little reason for holding that a railway common carrier should be required to accept money to be shipped as freight, because there is operated in connection with almost every such carrier in the country express companies who make a specialty of carrying money and other valuable and small packages. But, whether or not it is the duty of a railway carrier to accept money to be shipped as freight, we are clearly of the opinion that it should not be required to do so unless it is first notified of the value of the money purposed to be shipped, so that it may charge a rate sufficient to justify it in taking that degree of care usually observed in the transportation of money, and that it will not be liable without notice for the loss of money shipped by it as freight. We do not, of course, mean to hold that it is the duty of the shipper in every case to inform the agent, unless inquiry is made, as to the contents or value of the articles shipped. This is only necessary when its contents are altogether different from what one would assume were contained in such a package, as where money or valuable jewelry or the like is put in a trunk or box. If the package presented for shipment contains the kind of goods that are generally or usually sent in such packages, or that a person of ordinary judgment and prudence might assume would be shipped in them, the carrier will be liable for the value of the contents no matter what they are, unless false or misleading statements as to the contents are made by the

shipper, either voluntarily or in response to inquiries, or he fraudulently or intentionally conceals the true value or character of the goods for the purpose of obtaining a lower rate.

In reaching this conclusion, we have not overlooked the fact that the Constitution declares that the common-law liability of a carrier shall not be limited. We have no intention of doing this, but we have found no authority holding that at common law, in the absence of notice, a carrier would be held responsible for the value of money shipped in a package, the appearance of which did not indicate or give any notice that it contained money. The common-law rule does not authorize either actual or constructive fraud to be practiced upon the carrier, or impose upon it liability greater than it had reason or right to assume it was undertaking when it accepted the shipment. *Hutchinson on Carriers*, § 329.

But the point is further made that, although the reasons stated are sound and would be applicable if the trunk had been lost by negligence or the money stolen by a stranger, as it was taken by an agent of the carrier, it cannot claim exemption. The argument in support of this proposition is that the agent represented the carrier and in the eye of the law was the carrier, and hence as the money was taken by the agent to whose care the goods were committed, it cannot excuse itself on the ground that it had no notice of the contents of the trunk, as it did have such notice when the money was taken, and must be held liable for its own individual wrong. If the carrier or its agent into whose custody the trunk came did not have notice of the fact that it contained money, the carrier will not be liable. But here the agent of the carrier in whose immediate care the trunk was placed did have notice that there was money in the trunk, and after such notice did abstract it. We therefore think that the commission of the theft by its agent is sufficient to hold the carrier, although it would not have been liable if the money had been taken by a stranger or had been lost by its negligence or other cause. When the agent took the money, it was the carrier itself taking it. When the agent discovered that there was money in the trunk, it was his duty to have protected it, or at least to have exercised care to do so.

Nor can his wrongdoing be excused upon the ground that the shipper himself was guilty of the first wrong. Whatever wrong the shipper is chargeable with cannot save the carrier from the tort of its own agent after he had notice of the fact that there was money in the trunk. It is upon this ground alone that we hold the carrier liable.

Wherefore the judgment of the lower court is affirmed.

## NEW YORK LIFE INS. CO. v. EVANS.

(Court of Appeals of Kentucky. Jan. 26, 1910.)

### 1. INSURANCE (§ 372\*) — LAPSE OF POLICY — WAIVER BY INSURER.

A provision in a life policy and in a premium note that the policy shall lapse by failure of insured to pay the note, being wholly for the insurer's benefit, is one which it may waive, and such waiver may be express or implied.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 941; Dec. Dig. § 372.\*]

### 2. INSURANCE (§ 392\*) — LAPSE OF POLICY — WAIVER OF PROVISION BY INSURER.

The acceptance by an insurer of a premium note is a waiver of the policy provision for cash payment of the particular premium in advance, but such waiver is only for the time for which the note is to run, and, if the note provides for forfeiture of the policy if not paid at maturity, it is treated substantially as the same provision in the policy is.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1056; Dec. Dig. § 392.\*]

### 3. INSURANCE (§ 392\*) — LAPSE — WAIVER.

If an insurer, after a policy has lapsed, retains the unpaid premium note merely as evidence that it has been canceled and acts consistently with its claim of forfeiture, it does not waive the forfeiture; but if it retains the note as evidence of indebtedness to it, or asserts it as a debt against insured, the forfeiture is deemed to have been waived.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1069; Dec. Dig. § 392.\*]

### 4. USURY (§ 18\*) — PENALTIES AND FORFEITURES — LOAN ON INSURANCE POLICY.

An agreement for a loan from an insurance company on a policy, providing that, in default of payment on the interest for a month after due, the company could cancel the policy for the customary cash surrender value after deducting the loan and accrued interest, being a stipulation for forfeiting a substantial benefit under the policy, was in the nature of a usurious extortion, and void as against the statutes.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. § 31; Dec. Dig. § 18.\*]

### 5. INSURANCE (§ 665\*) — FORFEITURE OF POLICY — EVIDENCE.

Evidence held to show that an insurance company had not elected to treat a life policy as lapsed for failure to pay a premium note when due, but was holding it in abeyance, deferring final action until it had exhausted the chance of having insured continue it, when the note was paid.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1716; Dec. Dig. § 665.\*]

Appeal from Circuit Court, Hickman County.

"To be officially reported."

Action by Tennie Evans against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

J. H. McIntosh, Wm. Marshall Bullitt, Keith L. Bullitt, and Bullitt & Bullitt, for appellant. Robbins & Thomas, Joe W. Bennett, R. L. Evans, and R. G. Bobbins, for appellee.

O'REAR, J. Appellant issued to Dillard M. Evans a life policy on April 20, 1888, for

\$2,000, which was payable to appellee, the wife of the insured. The annual premium was \$54.80. The premiums were all paid, down to the one due April 20, 1904. The latter was not then paid. On May 15, 1902, the insured borrowed from the company \$300 on this policy, secured by a pledge of the policy. The loan agreement provided that the loan was in no instance to be extended beyond the duration of the policy. The premium due April 20, 1904, not having been paid, the policy was, by its terms, subject to lapse.

A condition of the policy reads: "If the premiums are not paid as hereinafter provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the company, except that (as provided by the act of May 21, 1879, chap. 347, Laws of the State of New York), if this policy, after being in force three full years, shall lapse or become forfeited for the nonpayment of any premium, a paid-up policy will be issued, on demand within six months after such lapse with surrender of this policy, under the same conditions as this policy, except as to payments of premiums, but without participation in profits, for such an amount as the net reserve on this policy at the time of lapse, computed by the American table of Mortality and interest at four and one-half per cent., after deducting all indebtedness to the company, will purchase as a single premium at the present published rates of the company, at the age of the insured at the time of lapse."

On June 11, 1904, the insured applied for reinstatement, furnishing a medical certificate of his health. He then paid in cash \$15, one year's interest in advance on the \$300 note above named, \$14.80, and 20 cents (the latter as interest) to be applied on the premium then due, and executed the following "blue note": "Pol. 230131. April 20, 1904. Without grace, six months after date I promise to pay to the order of the New York Life Insurance Co., forty dollars, at Bank of Commerce, Louisville, Ky., value received, with interest at the rate of 5 per cent. per annum. This note is given in part payment of the premium due 4/20/04 on the above policy, with the understanding that all claims to further insurance, and all benefits whatever, which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to the New York Life Insurance Co., if this note is not paid at maturity, except as otherwise provided in the policy itself. \$40.00. Dillard M. Evans, Milburn, Ky. Tennie Evans, Milburn, Ky."

This note was not paid at maturity. Considerable correspondence ensued, the company urging the insured to "reinstate" his policy. He was advised in the first of the letters dated October 26, 1904, that "the above policy lapsed for the nonpayment of the April, 1904, premium on account of the note

of \$40.00 due October 20, 1904." The detail of those communications, and of the transaction of June 11, 1904, will be taken up later on in the opinion. On January 17, 1905, the insured sustained a severe injury. On the 19th of January, 1905, he sent the company a draft on a New York bank for \$40. He died on January 20, 1905. The bank collected the draft, but referred the matter of reinstatement to its Louisville agency, as the insured did not accompany the draft with a certificate of health. The company had not then learned of the death or of the injury to the insured. It declined to pay the policy. This suit was brought by the beneficiary to recover the face of the policy less the loan of \$300. The company denied liability, on account of the nonpayment of the note named, except that it admitted that on October 20, 1904, when the policy lapsed, as it claims, the net value of the reserve of the policy, after deducting indebtedness, would buy, at the company's published single rate for one of the then age of the insured, a policy of paid-up insurance of \$185, which was tendered in court, but was declined. Two issues were made by the pleadings: One, that the company had waived its rights to declare the policy forfeited upon the nonpayment of the note given for the premium. The other that there was sufficient surplus due the insured on the policy to have paid off the \$40 note. However, the court instructed the jury upon a different issue—one not presented in the case. The verdict was for the plaintiff. Appellant contends that it was entitled to a peremptory instruction, upon the evidences and issues, to find for it. This is the principal point urged for reversal.

Whether appellant was entitled to a nonsuit verdict depends on whether there was a total failure of proof on behalf of the plaintiff below on either of the issues presented. It is true that the policy as well as the premium note each provides that the policy shall lapse by the fact of the failure of the insured to pay the note. But it is also true that that provision is one wholly for the company's benefit, and one which it therefore may waive. The waiver may be express, or it may be by such conduct as evinces the purpose of the company not to enforce it. It does not necessarily include the elements of estoppel. It is enough if the company actually elects not to enforce the provisions of forfeiture, or even fails to do so before the policy contract becomes a claim upon the death of the insured. The policy provides for an automatic forfeiture. If the conditions were such that there then remained nothing to be done by the company to consummate the forfeiture, it would operate of its own force. But we will see that such was not the case here.

A number of cases have come before this court involving forfeiture features of insurance policies similar in many respects to this one. In those cases, as here, the insured

had executed premium notes, in lieu of paying the premiums in cash. The standard form of life policies provides for the payment of premiums in cash in advance as condition precedent to the continuation of the contract. Yet in each instance notes, conditioned as the one at bar, had been accepted by the insurers in lieu of the cash payments. It was once thought, and sometimes held, that the notes did not waive the stipulation for cash payment—that the insured carried the risk of dying uninsured until the premium note was paid in cash. That view was early abandoned. It is now universally held that the acceptance by the insurer of the note is a waiver of the policy provision for cash payment of the particular premium in advance. But it is waived only for the time for which the note is to run, and, if the note contains a provision of forfeiture of the policy if not paid at maturity, it is treated substantially as the same provision in the policy is. Consequently that provision of forfeiture may be waived by the insurer, upon the same principle that the policy provision may be waived. So it has been held that if the note is not paid at maturity, and if the insurer intends to and does thereupon treat the policy as void for that nonpayment, the forfeiture will be enforced. *St. Louis Mutual Ins. Co. v. Grigsby*, 10 Bush, 310; *Johnson v. Southern Mutual Life Ins. Co.*, 79 Ky. 403; *Fidelity Mutual Ins. Co. v. Price*, 117 Ky. 25, 77 S. W. 384, 25 Ky. Law Rep. 1150; *Moreland v. Union Central Life Ins. Co.*, 104 Ky. 129, 46 S. W. 516, 20 Ky. Law Rep. 432; *Union Central Life Ins. Co. v. Duvall*, 46 S. W. 518, 20 Ky. Law Rep. 441; *Manhattan Life Ins. Co. v. Myers*, 109 Ky. 372, 59 S. W. 30, 22 Ky. Law Rep. 875; *N. Y. Life Ins. Co. v. Warren Deposit Bank*, 75 S. W. 234, 25 Ky. Law Rep. 325; *Franklin Mutual Life Ins. Co. v. McAfee*, 90 S. W. 216, 28 Ky. Law Rep. 676. Where the insurer, after the policy had lapsed, retained the note merely as evidence of the fact that it had been canceled, and acted consistently with its claim of forfeiture, it is held not to be a waiver of the forfeiture. *Moreland v. Union Central*, supra; *Union Central v. Duvall*, supra. If, however, the insurer retains the note as evidence of indebtedness to it, or asserts it as a debt against the insured (which is the same thing), the forfeiture is deemed to have been waived. The reason is, the note is consideration for the carrying of the policy for the full term it represents, say one year. If the insurer asserts it as a debt owing it, then it must concede the equivalent, which is its liability upon the policy for the period represented by the premium note. The company will not be heard to say that the insured owes it for insuring him for one year, yet deny that he is insured. Other conduct of the insurer denoting its election to consider the insurance as still in force may also operate to waive the forfeiture. The courts are alert to seize upon such circumstances

and conduct to relieve from forfeiture; forfeitures being abhorrent to the law. They have been tolerated in insurance more than in any other character of transaction, because of the supposed necessity of prompt payment by the insured in order to enable the insurer to keep its obligations to its other policy members. But as it is being better understood now that the insured, after they have paid a few premiums, have established a fund, called the "reserve of the policy," with which to pay the liability of each policy when it matures, insuring themselves with their own means, as it were, there is less reason for the exception in favor of life insurance contracts, as compared with other contracts, than formerly appeared. By virtue of legislation, and under stress of competition from those jurisdictions where the legislation exists, prohibiting the forfeitures of policies, after a given number of premiums have been paid, but instead, requiring or providing for the issue of paid-up policies, or for extended insurance that the value of the reserve of that policy will buy at single premium rates, the old-fashioned forfeiture clauses are now about obsolete. In truth, in this policy, as we have seen in the clause quoted above, there is not a forfeiture at all, but a conversion of the policy, automatically, from one class to another—from a twenty-year life for \$2,000 to a paid-up limited. The provision as to "forfeiture" is a misnomer, so far as that word is generally and properly used in law. Formerly, the insurer was benefited, after a time, in having the policy forfeited. Now it is not. Rather the contrary. Instead of the policy's being "forfeited," it is now usually spoken of as "lapsed," which, while in one sense synonymous with "forfeited," now has a somewhat less harsh meaning; is not so complete; is, instead of annihilation, to fall in the scale of value, or privilege. This much has been said, in order to better apply the facts of the case to the proposed instruction for a nonsuit.

The company retained the \$40 note. The note is filed in the record as evidence, marked "canceled." When it was canceled is not clear from the testimony. It is once intimated that it was canceled immediately after its due date, and when it was returned from the Bank of Commerce, unpaid. But this does not appear very clearly. On the other hand, the correspondence filed shows that the company still entertained the hope that the insured would continue the policy, and repeatedly urged him to do so. That was not necessarily inconsistent with the plea that the policy had abated by reason of the nonpayment of the note. But the company had agreed in the policy that if it lapsed for nonpayment of the premium it would then, immediately upon the policy's being returned to it with a demand to that effect, issue a paid-up policy. In this instance there was not occasion to return the policy to the com-

pany. It was already possessed of it, by reason of the pledge for the \$300 loan note. Nor was the demand necessary to have enabled the company to cancel the old policy and issue the paid-up policy in its stead. The company evidently so understood the contract, for it wrote the insured in more than one letter, "if you have any intention whatever of reinstating the above policy, you should do so as soon as possible, as we are notified by the company that unless the policy was immediately reinstated they would settle it under the terms of the loan agreement." The loan agreement, which is the blue note copied above, contains no stipulation as to any settlement upon nonpayment of premium, except that which is "provided in the policy itself." That, as we have seen, is the issuance of a paid-up limited policy. On November 11, 1904, the vice president of appellant company wrote this letter to the Louisville branch office: "Re-policy No. 280.-131. Evans. Dear Sir: The above policy pledged to the company as security for a loan, has lapsed by the nonpayment of the premium and interest, and will be settled under the terms of the loan agreement unless reinstated immediately. Please inform us at once if there is any chance of effecting reinstatement." This answer was noted on the bottom of the letter: "Ren'l. Dept. Hold open as long as possible, as we believe insured will reinstate. Lou. Br. W."

There was a loan agreement executed by the insured and his wife to the company in 1902, to secure the \$300 loan alluded to. It provided for the payment of interest in advance at the rate of 5 per cent. per annum, and contained this stipulation: "Interest is payable in advance, but in case said loan is repaid or said policy canceled under section 4, interest will be charged to the date of repayment or of cancellation, and any excess will be refunded." Section 4, referred to, provides: "That in the event of default in payment of said interest, or of any premiums on said policy, for one month after they shall respectively become due, said party of the first part (the company) which is irrevocably hereby appointed the attorney for that purpose, is hereby authorized at its option to cancel said policy and its accumulations, for the customary cash surrender value then allowed by said party of the first part for the surrender of policies of this class \* \* \* after deducting said loan and accrued interest."

The policy had no surrender cash value inducted on it, available as of the date of its lapse. The stipulation for forfeiting a substantial benefit under the policy as a penalty for the nonpayment of a note for money loaned was in the nature of a usurious extortion, and void as against the statutes. *N. Y. Life Ins. Co. v. Curry & Bro.*, 115 Ky. 100, 72 S. W. 736, 24 Ky. Law Rep. 1930, 61

*L. R. A. 268, 103 Am. St. Rep. 297.* In this loan agreement the incorporation of that additional feature, a burden to the policy, not in the original policy, was null for the same reason. The only involuntary settlement which was legal under the loan agreement was the one in which the paid-up policy was to be issued. As a matter of fact the company did neither, nor did they return to the insured the excess of interest paid on the \$300 note; all showing the company had not elected to treat the policy as lapsed for the purpose of settlement. If it was not lapsed for that purpose, then it was not lapsed at all. There was no neutral ground of nonliability upon the policy by which the company could yet retain its policy holder's money, note, policy, and all intact, giving up nothing, committing itself to nothing, yet holding itself so that it could in case of eventualities take either horn of the dilemma its then interest might prompt. Nor was the policy marked "lapsed." We are convinced that the company's attitude was that of holding the policy in abeyance, deferring final action, until it had exhausted the chance of having the insured continue it. To lapse the policy, the matter should have been closed, the rights of the parties, whatever they were, then ascertained and adjusted. That the company did not do; instead, it held the whole matter open. True, it observed in its letters to the insured that the policy had "lapsed," and urged him to become "reinstated." But those letters, at best, were but attempted recitals of what had been done, and expressions of hope or advice as to what ought to be done by the insured. Writing a letter that a policy had lapsed, when it had not, did not alter its status. The fact was, and remained, that the policy continued precisely as it was before, no indorsement, no entry, no step toward settlement, nothing to fix a changed relation of the policy holder to the company. On the company's showing alone it failed to show that the policy had lapsed.

In addition, four witnesses testified that they had seen and read a letter from the company to the insured, written in January, 1905, in which he was asked to pay the \$40 note past due. The letter was lost. The motion for a peremptory instruction was then properly overruled.

What occurred after the insured was injured has little relevancy to the issues to be tried. The then payment of the \$40 note would not alone have reinstated him, if the policy had actually been canceled previously. Still the fact was relevant as tending to show how the insured and insurer interpreted the correspondence, and the concurrent transaction.

Reversed and remanded for a new trial under proceedings consistent herewith.

**KASEY'S ADM'R v. LOUISVILLE, H. & ST. L. RY. CO.†**

(Court of Appeals of Kentucky. Jan. 19, 1910.)  
RAILROADS (§ 274\*)—INJURIES TO PERSONS AT STATIONS—NEGLIGENCE.

A carrier unloaded a wheel, and placed it in a safe position on the depot platform. During the day strangers changed its position, and left it standing poised in a dangerous position. No agent of the carrier observed the change. On the evening of the same day a child, accompanied by his father, going to the depot to look for freight, touched the wheel, and it fell on him, killing him. *Held*, that the carrier was as a matter of law not guilty of negligence defeating a recovery, though the father was free from contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 868-872; Dec. Dig. § 274.\*]

Appeal from Circuit Court, Breckenridge County.

"Not to be officially reported."

Action by Gordon R. Kasey's administrator against the Louisville, Henderson & St. Louis Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Mercer & Mercer, for appellant. Helm & Helm, for appellee.

**BARKER, J.** Gordon R. Kasey, an infant child about two years old, was killed on the freight platform of appellee's station at Ekron, Ky., by a heavy iron wheel falling upon and crushing him. The father of the infant qualified as administrator of his estate, and instituted this action to recover damages for his death, on the theory that the injury was caused by the negligence of appellee's agents and servants who had placed the wheel upon the platform.

The wheel was about 3 feet in diameter, and weighed about 300 pounds. It had been received as freight at the station at Ekron some time during the day upon which the accident happened. The station agent, who received the wheel, with the assistance of two other men, placed it in an upright position about 22 inches from the wall of the freightroom, and then leaned it over so that the top rested against the wall of the freightroom, and the bottom rested on the platform, as said before, at a point about 22 inches from the wall. Without contradiction, it appears from the evidence that the wheel standing at the angle thus formed was in such a position that it could not have caused any injury to the infant. Afterwards, and without the knowledge or consent of the station agent, two men in no wise connected with the railroad undertook to ascertain whether or not they could lift the wheel. The first of these, one Bruner, lifted it from the platform twice, and then left it standing upright. The second man then essayed to lift it, but was unable to do so, and merely rolled it backwards and forwards. The result of all this was that the wheel was left standing in an upright position, and on a platform which slant-

ed from the wall of the freightroom towards the railroad track. The evidence is not clear as to how long the wheel stood in an upright position, but it is certain that the plaintiff failed to show that anybody connected with the railway knew of the change in its position from the angle of safety at which it had been placed by the railway employes. In the evening, about 7 o'clock, after the office of the railway had been closed, the father of the infant, who lived just opposite the station, and who, it seems, expected to receive by freight a wheel such as the one standing upon the platform, observed it from his house across the street, and, thinking, perhaps, it was the wheel he was expecting, started across the street to more carefully inspect it. While on his way he met his wife and infant son, and, taking up the child in his arms, in company with his wife, walked over to the platform. When he reached the platform, without observing the dangerous position of the wheel, he placed the child upon the platform, and he immediately ran to the wheel in childish fashion and placed his hand upon it, with the result that the wheel fell upon him, crushing him to death almost instantly.

After the evidence was in, the trial court sustained a motion for a peremptory instruction to the jury to find a verdict in favor of the defendant, which was done. Of this ruling the appellant, the administrator of the infant, now complains.

As said before, the employes of the railway originally placed the wheel in a perfectly safe position so far as the infant was concerned. Nobody pretends that, had the wheel remained in this position, the infant could, or would, have been injured by it. Nor is it contended that the employes of the railway knew of the change in the position of the wheel. It is true that the station agent, Cox, passed along by the wheel several times after he had received it, and he was of opinion that had the wheel been standing upright when he passed he would have noticed it, and he therefore argued that the change in the position was made after he left the station. It is not shown exactly at what time Bruner and Dowell moved the wheel from the position in which the employes of the railway had placed it; but certain it is that neither Cox, the station agent, nor any other employe, if there was another there, observed the change that had been made.

We think this case is governed by the well-settled principle enunciated by this court in *Georgetown Telephone Co. v. McCullough's Adm'r*, 118 Ky. 182, 26 Ky. Law Rep. 72, 80 S. W. 782, 111 Am. St. Rep. 294. In that case it appeared that the Georgetown Telephone Company had placed a quantity of dynamite in a room controlled by it next to a room where its operators worked. Two persons in no way connected with the telephone

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
† Rehearing denied March 2, 1910.

company, without authority moved the dynamite from the room, where it was, out into the hall, which was common to the building, and there placed it near the door leading to the operators' room of appellant, where, in some manner not explained in the record, it was exploded, with the result that it blew in the door of the operators' room with such force that it with great violence struck and caused the death of one of the young lady operators. The question which arose in that case was whether or not under the facts as stated the company was liable; and it was held, after a review of the authorities, that the telephone company was not liable because the removal of the dynamite to the place at which it was exploded was the unauthorized act of persons not connected with the corporation. The principle there settled is identical with that in the case at bar. Here the company placed the wheel in a perfectly safe position. Unauthorized persons changed its position, and left it standing so poised that the touch of the infant was sufficient to throw it over on him. Certainly the appellee is not responsible for this act on the part of wrongdoers who, without authority, meddled with the wheel.

We do not think the father was guilty of contributory negligence because he failed to observe the dangerous position of the wheel at the time he placed the infant upon the platform. Nor do we think the station agent was guilty of negligence because he failed to observe the change in the position of the wheel by the wrongdoers. It follows, therefore, that the court correctly awarded a peremptory instruction to the jury to find in favor of the defendant at the conclusion of the evidence.

Judgment affirmed.

### FOXWORTHY v. ADAMS et al.

(Court of Appeals of Kentucky. Jan. 26, 1910.)

#### 1. GIFTS (§ 32\*)—INTER VIVOS—GIFT OF DONOR'S "CHECK."

A gift of one's check is incomplete until the check has been paid or accepted by the bank, for a "check" is a mere order to the payee to draw the amount called for, and, when given without consideration, it may be revoked by the maker so long as it remains unacted on in the hands of the payee.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 63; Dec. Dig. § 32.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1108-1112; vol. 8, p. 7600.]

#### 2. GIFTS (§ 34\*)—INTER VIVOS—GIFT OF DONOR'S CHECK.

A gift of the donor's check, payable immediately, and delivered subject to the terms of a written memorandum stipulating that the check shall not be payable until after the donor's death, is not a valid gift inter vivos.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 70; Dec. Dig. § 34.\*]

#### 3. HUSBAND AND WIFE (§ 41\*)—CONTRACTS—VALIDITY.

Notwithstanding the statutory power of husband and wife to contract with each other, husband and wife may not contract with each other for the payment by the husband to the wife for her services in nursing him during his illness; it being the duty of husband and wife to attend, nurse, and care for each other, where either is unable to care for himself.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 224; Dec. Dig. § 41.\*]

#### 4. BILLS AND NOTES (§ 92\*)—CHECKS—CONSIDERATION.

A check given in payment of services rendered and thereafter to be rendered the maker by the payee is supported by consideration and is enforceable, though delivered subject to a written memorandum stipulating that the check shall not be payable until after the maker's death.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-212; Dec. Dig. § 92.\*]

#### 5. EVIDENCE (§ 419\*) — PAROL EVIDENCE — CONSIDERATION OF CHECK.

Evidence of the actual consideration of a check, delivered pursuant to a written memorandum reciting that the check was given for a specified sum due from the maker to the payee, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.\*]

#### 6. GIFTS (§§ 4, 34\*)—"INTER VIVOS"—WHAT CONSTITUTES.

To constitute a valid "gift inter vivos," there must be an absolute transfer of the property from the donor to the donee taking effect immediately and fully executed by a delivery by the donor and acceptance by the donee, and a gift to take effect after the donor's death, the donor in the meantime retaining the control of the property, is not a valid gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 3, 17, 68-71; Dec. Dig. §§ 4, 34.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3091-3093; vol. 8, p. 7671.]

#### 7. HUSBAND AND WIFE (§ 49½\*)—GIFTS OF NEGOTIABLE INSTRUMENTS — WRITTEN ASSIGNMENTS.

An indorsement on a note, reciting that the payee assigns the principal to his wife, he retaining the interest for life, and that should he outlive his wife the note shall remain a part of his estate, and a delivery of the note, is not a valid gift inter vivos to the wife.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 49½.\*]

Appeal from Circuit Court, Nelson County.  
"To be officially reported."

Proceedings by Minnie F. Foxworthy for the final settlement of her accounts as executrix of T. S. Foxworthy, deceased, in which Martha Adams and others filed exceptions. From a judgment overruling some of the exceptions and sustaining others, the executrix appeals, and the objectors prosecute a cross-appeal. Affirmed on the original appeal, and reversed on the cross-appeal.

C. T. Arkinson and John S. Kelley, for appellant. John A. Fulton and N. W. Halstead, for appellees.

CLAY, C. T. S. Foxworthy died, testate, in Nelson county, Ky., on July 10, 1907, aged

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

87 years. His first wife, Nancy Foxworthy, died many years ago. About 11 years prior to his death, he married appellant, who was then Minnie Fitzgerald. T. S. Foxworthy had no children by either wife. His first wife, Nancy Foxworthy, devised to him a well-improved homestead of 27 acres, located on the Louisville pike about 8 miles from Bardstown, but only for the period of his natural life. T. S. Foxworthy, at the time of his death, owned a farm worth about \$6,000, and personal property amounting to \$5,000 or \$6,000. Several years prior to his death, he made a will, by which he devised to his wife, Minnie Foxworthy, this farm and certain personal property of the value of \$1,700. The residue he devised to his heirs at law per stirpes. By a codicil he made certain bequests to a servant, Henry Graham, to the Baptist Orphans' Home, and to the trustees of the Cox's Creek Baptist Church. The amount of his property devised to his wife was about \$7,700, while that devised to his heirs at law amounted to about \$4,000.

For almost two years prior to his death the testator was confined to his house, and nearly all the time to his bed. During that time he required constant nursing and attention. This duty fell upon his wife. The testimony shows that it was well and faithfully performed; indeed, no one could have been more dutiful and attentive than appellant was during the period of his illness. Dr. Charles McClure, a nephew of his first wife and a very close neighbor, gave him much medical attention during this period as his condition required. The evidence shows that he, too, was faithful and attentive and made frequent visits to the home of the testator. On March 19, 1907, the testator drew a check on the People's Bank of Bardstown, Ky., for the sum of \$500, payable to the order of appellant, Minnie Foxworthy. On March 20, 1907, a second check was drawn on the same bank for a similar amount, payable to the order of Charles McClure, the physician who attended him. The evidence tends to show that the body of each of these checks was written by Dr. McClure, and the testator's name was signed thereto by his wife. It further appears, however, that she frequently, at the direction of the testator, signed his name to checks.

On March 22, 1907, J. C. Abell, a neighbor and close friend of the testator, who frequently assisted him in the transaction of his business, wrote, at the request of the testator, the following paper: "March 22nd, '07. I this day give to my wife, Minnie F. Foxworthy, and Dr. Charles each a check for five hundred dollars, payable out of my estate after my death. It being my desire to make each of them a present for their close attention to me during my sickness, not having the ready cash on hand I take this method, as it is my desire that they shall each receive the above amount. \$180.05 was due Dr. McClure on acct. to date. The balance, \$319.95,

I give to him as a present. T. S. Foxworthy. Witness: Jas. C. Abell." This paper was signed by T. S. Foxworthy, and his signature witnessed by J. C. Abell. This writing, together with the checks, was given to Abell by the testator to keep. The next morning the testator sent for Abell and told him to bring the checks back to him, but also stated that if he met Dr. McClure to deliver the latter his check. This Abell did. He then returned the other check to Foxworthy, who gave it to his wife in Abell's presence. The dictated writing of March 22, 1907, Abell kept until after the testator's death; the testator having directed him so to do. On the 20th day of February, 1907, some five months prior to his death, the testator, who then held a note on J. C. Abell for \$1,000, dated May 29, 1906, due one day after date bearing interest from date, requested Abell, who happened to be at his home, to write upon the note the following indorsement: "I this day assign the principal of this note to my wife, Minnie Foxworthy, and the interest I am to have until my death, this February 20th, 1907. Should I outlive my wife then it to remain a part of my estate." Abell then wrote the above assignment upon the note in question. The testator signed his name below the assignment, and Abell thereupon signed his name as witness.

On August 12, 1907, Mrs. Foxworthy qualified as the testator's executrix. On that day certain indebtedness to the estate was paid. Out of this indebtedness the two \$500 checks, made to Minnie Foxworthy and Dr. McClure, were satisfied and paid. On December 12, 1907, she made a partial settlement as executrix, and was credited by the two \$500 checks. On May 8, 1908, she made final settlement with the county court. On June 8, 1908, Martha Adams and others, as legal heirs of the testator, filed exceptions in the Nelson county court to said two credits of \$500 each, and also claimed that she should be charged with the Abell note of \$1,000 and interest as part of the testator's estate for which she had not accounted in her settlements. On the trial of these exceptions evidence was heard and reduced to writing and signed by the county judge, and made a part of and filed with the settlements. The county court surcharged the settlement by striking out the two credits of \$500 each, and holding that the executrix should account as such for the Abell note. On appeal to the Nelson circuit court the chancellor held that the executrix was entitled to credit for the two checks, but must account for the Abell note and interest. From this judgment the executrix has appealed, and Martha Adams and others have prosecuted a cross-appeal.

We shall first discuss the propriety of the court's action with reference to the two checks. The rule is that a gift of one's own check is incomplete until the check has been paid or accepted by the bank. "A check, being a mere order or authority to the payee

to draw the amount called for, when given without consideration, may be countermanded or revoked by the maker so long as it remains unacted on in the hands of the payee. Until payment or acceptance there is not a complete delivery of the subject-matter such as is essential to constitute a valid gift." *Am. & Eng. Encyc. of Law*, vol. 14, p. 1030. In the case of *Throgmorton v. Grigby's Adm'r*, 124 Ky. 512, 99 S. W. 650, 30 Ky. Law Rep. 661, it was held that the issuance and delivery of a check for the purpose of a gift is not a delivery of the money, so that, the check not having been paid or accepted by the drawee, the gift is not completed, and therefore the drawer cannot be considered as holding the money as trustee for the payee. In the case before us the checks were made immediately payable, but they were delivered subject to the terms of the written memorandum handed to Abell. Appellant and Dr. McClure accepted the checks upon those terms. By such terms the checks were not even payable until after the death of the maker. It is perfectly plain, therefore, that the checks are not good as a gift *inter vivos*.

But it is insisted by counsel for appellant that the checks have sufficient consideration to support them, and are therefore collectible as other contracts, no matter how denominated by the maker. The answer to this question depends on whether or not there was any obligation on the part of the testator to pay the sums represented by the checks. In this connection it is contended that Mrs. Foxworthy nursed and cared for the testator during his sickness, and the service thus performed constituted sufficient consideration for the check given to her. While the power of husband and wife to contract with each other has been greatly enlarged by recent statutes, we conclude that it is not within the power of husband and wife to contract with each other for the payment for such services as were rendered by appellant. It is the duty of husband and wife to attend, nurse, and care for each other when either is unable to care for himself. It would be contrary to public policy to permit either to make an enforceable contract with the other to perform such services as are ordinarily imposed upon them by the marital relations, and which should be the natural prompting of that love and affection which should always exist between husband and wife. We therefore conclude that neither the check, itself, nor the services which appellant performed, created any obligation against the estate of the testator.

A different question is presented in the case of the check to Dr. McClure. It is shown that prior to the execution of the check he had performed medical services of the value of \$180.05. The memorandum referring to the circumstances under which the check was given shows that it was given not only in payment of the bill theretofore rendered, but as a present for the close atten-

tion given the testator during his sickness. There is proof in the record to the effect that the check was actually given in payment of the services theretofore rendered and of the services thereafter to be rendered. It is insisted by counsel for appellant that such testimony contradicts the written memorandum containing the terms under which the check was delivered. It was competent, however, to show the actual consideration. Such proof was therefore admissible. Furthermore, such proof did not really contradict the writing, for it is evident that, while Mr. Foxworthy used the expression "present," it was his purpose to compensate the physician for his services rendered. We therefore conclude that, as the check to Dr. McClure is supported by sufficient consideration, appellant is entitled in her settlement to be credited with the amount thereof.

We next come to a consideration of the Abell note. Did the assignment and delivery of the note constitute a valid gift *inter vivos*? The rule is that to constitute a valid "gift *inter vivos*" there must be a gratuitous and absolute transfer of the property from the donor to the donee, taking effect immediately, and fully executed by a delivery of the property by the donor and acceptance thereof by the donee. Gifts *inter vivos* have no reference to the future, but go into immediate and absolute effect. Thus a gift of property to take effect after the donor's death, the donor in the meantime retaining the control and dominion of the property, cannot be sustained. The delivery must be absolute. All gifts that are not to take effect at once are void. In the case of *Stark v. Kelley et al.*, 113 S. W. 498, the rule is thus stated: "To constitute a gift *inter vivos*, the property must be delivered absolutely, and the gift must go into immediate effect, and, where future control over the property remains in the donor until his death, there is no valid gift *inter vivos*." In the case of *Walden's Adm'rs v. Dixon*, 5 T. B. Mon. 170, the defendant, Dixon, in an action of detinue by David Walden's administrator, claimed the property by gift from said David, and the defendant proved by one witness that, a day or two before the intestate left Kentucky, he told the witness that he had given up his mare to the defendant, and that if he never did return defendant was to have her, but if he returned he was to have her again. The mare was left in Dixon's possession. The intestate never returned. This court held that the gift of the mare was not a valid gift *inter vivos*, for the reason that the right and interest retained by Walden were inconsistent with the definition of a title by gift, as explained by Blackstone, in his chapter on Gift, Grant, and Contract.

In the light of the above authorities, let us examine the language of the assignment. For the purpose of arriving at the purpose and effect of the assignment, we must consider the whole language employed. In the

first place, Mr. Foxworthy assigns the principal of the note to his wife, but reserves to himself the interest as long as he lives. He then says: "Should I outlive my wife, it is to remain a part of my estate." It is the contention of appellant that the property was given to her absolutely, subject to be defeated by her death during Mr. Foxworthy's lifetime. We might reach this conclusion if we considered the first clause alone. As a matter of fact, however, the assignor reserved for himself not only the interest on the note as long as he lived, but the note itself in case he survived the assignee. The use of the word "remain" is significant; it indicates that the note was to continue a part of his estate until his death in the lifetime of the wife, and was not to take effect until that time. Furthermore, Mrs. Foxworthy could not have collected the proceeds during the lifetime of the assignor. She alone could not have instituted suit upon the note and have recovered. When the language of the whole assignment is carefully considered, it is manifest that Mrs. Foxworthy's title to the note differs in no wise from the title obtained by Dixon in the transaction above referred to. In neither case did the gift become effective until the death of the donor. We therefore conclude that the assignment and delivery of the Abell note did not constitute a valid gift *inter vivos*.

The judgment is affirmed on the original appeal, and reversed on the cross-appeal.

#### McDANIEL v. HUTCHERSON.

(Court of Appeals of Kentucky. Jan. 20, 1910.)

#### 1. FRAUDS, STATUTE OF (§ 50\*)—CONTRACTS—TIME OF PERFORMANCE—AGREEMENTS WITHIN A YEAR.

Statute of Frauds, § 7 (Ky. St. § 470 [Russell's St. § 1775]), prohibiting an action upon any agreement which is not to be performed in one year, unless some memorandum thereof is in writing, does not apply to contracts which may be performed within a year, and a contract to furnish plaintiff a home during defendant's lifetime and give him defendant's home place at the latter's death was not within the statute.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 76, 77; Dec. Dig. § 50.\*]

#### 2. FRAUDS, STATUTE OF (§ 44\*)—REAL ESTATE—AGREEMENT TO TRANSFER.

A contract by defendant to furnish plaintiff a home during the former's lifetime, and give him defendant's home place at the latter's death, is within Statute of Frauds, § 6 (Ky. St. § 470 [Russell's St. § 1775]), prohibiting an action upon a contract for the sale of real estate or any lease thereof for longer than a year, unless the contract or some memorandum thereof is in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 66; Dec. Dig. § 44.\*]

#### 3. FRAUDS, STATUTE OF (§ 125\*)—BREACH OF CONTRACT—DAMAGES.

If plaintiff did anything under an oral contract with defendant, within the statute of frauds, by which defendant agreed to furnish plaintiff a home during defendant's lifetime, if

plaintiff would come to this state and live with him, and to give him his home place at defendant's death, before the contract was disaffirmed by defendant, plaintiff could recover reasonable compensation therefor, such as the reasonable expense of moving, and reasonable compensation for loss sustained in giving up his business elsewhere.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 277; Dec. Dig. § 125.\*]

#### 4. DAMAGES (§ 153\*)—PLEADING—ALLEGATIONS—BREACH OF CONTRACT—SPECIAL DAMAGES.

In an action for breach of contract by which defendant agreed to furnish plaintiff a home during defendant's life if plaintiff would come to this state and live with him, and to give him defendant's home place at the latter's death, plaintiff could not recover as damages the expense of moving to this state, and reasonable compensation for loss sustained in giving up his business elsewhere, etc., where the petition did not allege the amount of such expense, or the amount of loss incurred in leaving his former home.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 422-425; Dec. Dig. § 153.\*]

#### 5. DAMAGES (§ 153\*)—ALLEGATIONS—SUFFICIENCY.

A petition, which, while not specifying the amount of special damage sustained, stated a cause of action and showed some loss to plaintiff, was sufficient on demurrer.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 422-425; Dec. Dig. § 153.\*]

Hobson, Barker, and Lassing, JJ., dissenting.

Appeal from Circuit Court, Mercer County. "To be officially reported."

Action by Grant McDaniel against John Hutcherson. From a judgment dismissing the complaint, plaintiff appeals. Reversed and remanded for further proceedings.

E. H. Gaither, for appellant.

SETTLE, J. Grant McDaniel filed in the Mercer circuit court the following petition: "The plaintiff, Grant McDaniel, states that in the year 1908, he was living with his family in the state of Illinois, and that the defendant, John Hutcherson, was living in Mercer county, Ky., that to induce the plaintiff to leave his home and business in the state of Illinois, the said defendant agreed and promised that if the plaintiff and his family would come to Kentucky, and live with the defendant, he, the defendant, would furnish the plaintiff a home during defendant's life, and that he would give the plaintiff his home place at defendant's death. He says that said home place consists of about 150 acres of land in Mercer county, Ky., of the value of \$100 per acre. He says that said promise and agreement was verbal, but that at divers times during the year 1908 it was renewed and confirmed by writings signed by the defendant, and that in compliance with and accordance with said agreement and contract this plaintiff canceled and abandoned his contract and home in Illinois and came to Kentucky at a great expense and loss of time and money, and came to the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

home of the defendant, and then and there agreed to perform the said contract and to live with the defendant, and work for him as agreed in said contract and agreement with the defendant, but that the defendant then refused to furnish the plaintiff a home or work, or to permit him to live with him as agreed, and refused and failed to perform any part of said contract, and refused to furnish the plaintiff with a home or work, and refused to secure to plaintiff his said farm at his death, and that by reason of his said failure the plaintiff was compelled to take his family into inadequate and unhealthy quarters, and to do unprofitable work in order to support himself and his family, and that he was thereby caused to suffer great hardships and loss, and that his children became sick from exposure caused by the defendant's failure to comply with said contract, and by reason of said exposure and hardships two of his children died. He says that defendant is over 80 years old, and in feeble health. He says that by reason of defendant's failure to comply with his said contract the plaintiff has been damaged in the sum of \$20,000, for which he prays judgment and for all proper relief."

The defendant filed a general demurrer to the petition. The court sustained the demurrer. The plaintiff then filed an amended petition, filing with it the letters referred to. These letters were not sufficient to show that a contract had been made as alleged in the petition, although they were to some extent confirmatory of the allegations of the petition. The court sustained a general demurrer to the petition as amended. The plaintiff declined to plead further, and, his action having been dismissed, he appeals.

The only question arising on the appeal is whether the petition discloses an enforceable obligation. By the seventh section of the statute of frauds (Ky. St. § 470 [Russell's St. § 1775]), no action may be brought upon any agreement which is not to be performed in one year, unless it or some memorandum of it is in writing. Under this provision a contract that cannot be performed within a year is unenforceable; but the statute has been uniformly held not to apply to contracts that may be performed within a year. *Dickey v. Dickinson*, 105 Ky. 748, 49 S. W. 761, 20 Ky. Law Rep. 1559, 88 Am. St. Rep. 337. So it has been held that a verbal contract to support a child might have been completed by the death of the child within a year from the time it was made. *Stowers v. Hollis*, 83 Ky. 548. For the same reason a contract by a son to support his mother during her life has been upheld. *Whitley v. Whitley*, 80 S. W. 825, 26 Ky. Law Rep. 134. See, also, *Standard Oil Co. v. Denton*, 70 S. W. 232, 24 Ky. Law Rep. 906; *Yellow Poplar Lumber Co. v. Rule*, 106 Ky. 455, 50 S. W. 685, 20 Ky. Law Rep. 2006. Under these authorities the contract set up in the petition is not within the seventh clause of the statute of frauds.

By the sixth section of the statute of frauds, no action shall be brought to charge any person upon any contract for the sale of real estate, or on any lease of it, for a longer time than one year, unless the contract or some memorandum of it is in writing. A life estate in land is a fee, and under the statute can only be created by a contract in writing. The contract to furnish plaintiff a home during defendant's life, and to give him the home place at the defendant's death, is within the statute. In *Berry v. Grady*, 1 Metc. 553, Grady had married a niece of Belt's, whom Belt had raised, and to whom he was much attached. Grady was about to move to Mississippi, and, to induce him to stay in Kentucky, and buy a farm in Woodford county, Belt agreed to pay \$5,000 of the purchase money in three annual installments. He paid \$2,000 and died before paying the remainder. It was held that, as the contract had been performed by Grady, and as he had qualified as administrator of the deceased, he might retain, as administrator, the \$3,000 balance of the purchase money for the land. Concluding its opinion, the court said: "The agreement was performed by Grady on his part, relying upon its fulfillment by his intestate, who, had he lived, would undoubtedly have performed his part of it. It would therefore amount to a fraud upon the former, after he has executed the agreement, to deprive him of the benefit of it, on the ground that the contract was verbal merely. He cannot be restored to the situation he was before the contract was made, nor can he be compensated in damages by any other standard than that furnished by the contract itself. The equity, as well as the law of the case, is therefore in favor of the appellee."

In *Speers v. Sewell*, 4 Bush, 239; *Myles v. Myles*, 6 Bush, 237; *Usher v. Flood*, 83 Ky. 552; *Thomas v. Feese*, 21 Ky. Law Rep. 206, 51 S. W. 150; *Story v. Story*, 61 S. W. 279, 22 Ky. Law Rep. 1731; *Doty v. Doty*, 119 Ky. 204, 80 S. W. 803, 26 Ky. Law Rep. 63, 2 L. R. A. (N. S.) 713, and in a number of other cases cited therein—it was held that, where services had been rendered during the life of another, on the promise that the person rendering the service should receive at the death of the person served a legacy, a reasonable compensation may be recovered for the services actually rendered; or where the person performing the contract was to receive a certain piece of land, the value of the land may be considered in fixing the compensation where there is no other adequate way of measuring the consideration received. Under the principle settled in these opinions, the plaintiff may recover reasonable compensation for what he did under the contract before it was disaffirmed by the defendant; that is to say, he may recover his reasonable expenses in moving to Kentucky, a reasonable compensation for the time lost in so doing, and a reasonable compensation

for any loss that he actually sustained in giving up his home and business in Illinois and coming to Kentucky. The petition is not sufficient to warrant a recovery of the special damages we have indicated, as it does not show the amount of the expenses incurred, the amount of time lost or its value, or the amount of loss actually incurred by the plaintiff in giving up his home in Illinois; but, as it shows some loss, it is sufficient on demurrer. There can be no recovery beyond the items we have indicated.

Judgment reversed, and cause remanded for further proceedings consistent herewith. The plaintiff may have leave to amend his petition.

HOBSON, J. (dissenting). The opinion of the court makes the defendant liable in damages to the plaintiff to the extent that he sustained loss in giving up his home and contract in Illinois, his time lost, and his expenses incurred in moving to Kentucky, although it is conceded by the court that the contract set up is within the statute of frauds and not enforceable. Where the defendant has received the consideration, and then relies on the statute, he may be required to return the consideration he has received; but no adjudged case or text-writer, so far as I can find, makes him liable in damages for the loss in plaintiff's business, or his expenditures to others, where he refuses to carry out the contract.

In 29 Am. & Eng. Encyc. 836, the rule is thus well stated: "Although part performance by one of the parties to a contract within the statute of frauds will not, at law, entitle such party to recover upon the contract itself, he may nevertheless recover for money paid by him, or property delivered, or services rendered in accordance with and upon the faith of the contract. The law will raise an implied promise on the part of the other party to pay for what has been done in the way of part performance. But this right of recovery is not absolute. The plaintiff is entitled to compensation only under such circumstances as would warrant a recovery in case there was no express contract, and hence it must appear that the defendant has actually received or will receive some benefit from the acts of part performance. It is immaterial that the plaintiff may have suffered a loss because he is unable to enforce his contract." See *Hambell v. Hamilton*, 3 Dana, 501; *Montague v. Garnett*, 3 Bush, 297; *Mannen v. Bradberry*, 81 Ky. 153; 20 Cyc. 298.

In *Browne on Statute of Frauds*, § 118a, the rule is thus stated: "The rule that, where one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon a count for money paid, or recover for the services upon a quantum meruit, applies only to cases where the defendant has

received and holds the money paid or the benefit of the services rendered. It does not apply to cases of money paid by the plaintiff to a third person in execution of a verbal contract between the plaintiff and defendant such as by the statute of frauds must be in writing."

That damages cannot be awarded for the violation of a contract within the statute of frauds, see *Ala. Mineral Land Co. v. Jackson*, 121 Ala. 172, 25 South. 709, 77 Am. St. Rep. 46, and notes; *Dumphy v. Ryan*, 116 U. S. 497, 6 Sup. Ct. 486, 29 L. Ed. 703; *Franklin v. Matoa Gold Mining Co.*, 158 Fed. 941, 86 C. C. A. 145, 16 L. R. A. (N. S.) 381, 14 Am. & Eng. Ann. Cas. 302. That the defendant is not liable unless the money paid or the services rendered inured to his benefit, see *Kimmins v. Oldham*, 27 W. Va. 265; *Emery v. Smith*, 46 N. H. 157; *Marcy v. Marcy*, 9 Allen (Mass.) 8; *Pierce v. Paine*, 28 Vt. 34, and cases cited.

The plaintiff's petition fails to show that the defendant actually received any benefit from what the plaintiff did. The plaintiff has only suffered a loss because he is unable to enforce his contract. The circumstances are not such as would warrant a recovery in the absence of an express contract. There are no facts on which an implied assumpsit by the defendant to pay anything can be predicated. The plaintiff has sustained a loss; the defendant has received nothing. To make him compensate plaintiff for his loss is simply to make him pay damages for breaking his contract. The defendant had under the statute a legal right to refuse to carry out the contract, and while he must in such a case return what he has received under it, he cannot, for exercising a legal right, be made to suffer a loss, or be compelled to compensate the plaintiff for the loss he thereby sustained. To make the defendant answerable in damages for the plaintiff's loss of his home and business in Illinois, or his expenditures in time and money on the faith of the verbal contract, is to hold him liable for not carrying out that contract, although the statute for the prevention of frauds and perjuries gives him the right to do so.

For these reasons, I dissent from the opinion of the court.

BARKER and LASSING, JJ., concur in this dissent.

#### ALEXANDER v. OWEN COUNTY (four cases).

(Court of Appeals of Kentucky. Jan. 20, 1910.)

#### 1. TAXATION (§ 549\*)—COLLECTION—COMPENSATION OF SHERIFF.

Under Const. § 106, requiring the fees of county officers to be regulated by law, the fiscal court could not agree to a compensation to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sheriffs for collecting county revenue other than that fixed by statute.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1047; Dec. Dig. § 549.\*]

#### 2. COMPROMISE AND SETTLEMENT (§ 19\*)—IMPEACHMENT OR SETTING ASIDE—MISTAKE.

A settlement, based on a mutual mistake of the parties, whether of law or fact, may be opened for correction.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 72, 73; Dec. Dig. § 19.\*]

#### 3. LIMITATION OF ACTIONS (§ 96\*)—MISTAKE—SETTLEMENT BY SHERIFF—IMPEACHMENT.

The statute of limitation began to run against the right of a county to surcharge a sheriff's tax collection settlement when a mistake therein was discoverable by the exercise of reasonable diligence.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 476; Dec. Dig. § 96.\*]

#### 4. LIMITATION OF ACTIONS (§ 95\*)—PUBLIC OFFICERS—LACHES.

Ordinarily neglect or laches of public officials is not chargeable to the public, as barring a suit by lapse of time, where no intervening right of a third person is to be affected.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 473, 474; Dec. Dig. § 95.\*]

#### 5. TAXATION (§ 557\*)—COLLECTION—COMPENSATION OF SHERIFF.

Since under Ky. St. 1903, § 4143, the amount of taxes delinquent when collected or collectible belongs to the county, the fiscal court could not properly agree that, if the sheriff would promptly pay off claims to the county as they were presented, using his own money when necessary, instead of interest, the county would not require him to account for the penalties which he might collect.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1068-1077; Dec. Dig. § 557.\*]

#### 6. TAXATION (§ 557\*)—COLLECTION—SETTLEMENT BY SHERIFF—OPENING—EFFECT.

A tax collection settlement made by the sheriff is a single transaction, and, when it becomes final, whether by limitation or judicial pronouncement, it is final as an entirety, but when it is opened for fraud or mistake, it stands as if the settlement had not been closed, and is open for the correction of all errors and frauds, though such latter errors or frauds might have been barred if standing alone.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1072; Dec. Dig. § 557.\*]

#### 7. TAXATION (§ 570\*)—COLLECTION—LIABILITY ON SHERIFF'S BOND—NATURE OF CLAIM.

Under Ky. St. §§ 4067, 4241 (Russell's St. §§ 5959, 6170), prohibiting the sheriff from collecting taxes before they are duly assessed and certified to him, and making it his duty to report to the county court, for assessment, all omitted lists and persons coming within his knowledge, an action by a county against the sheriff on his bond for sums collected of taxpayers not assessed, or whose names did not appear on the assessor's books, yet who were actually liable to assessment, was not really for taxes collected and accounted for, but in the nature of an action for breach of the sheriff's bond for the performance of his duties.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 570.\*]

#### 8. JUDGMENT (§ 252\*)—PLEADING—CONFORMITY TO PRAYER.

Under Civ. Code Prac. § 90, in an action in equity for specific relief under a prayer of general relief on issue joined, the court may grant the parties any relief to which they might

appear entitled, and which it is within the jurisdiction of the court to grant; and hence, in an action by the county to surcharge a sheriff's tax settlements, it was proper to charge defendant with taxes collected from taxpayers not on the assessment books, though liable to taxation.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 441; Dec. Dig. § 252.\*]

Appeal from Circuit Court, Owen County.

"To be officially reported."

Actions by Owen County against P. A. Alexander. From the judgments defendant appeals and plaintiff cross-appeals. Judgments affirmed on the original appeal and reversed on the cross-appeal, and cause remanded.

W. D. Moody, H. W. Alexander, W. A. Lee, and H. G. Botts, for appellant. Clore, Dickerson & Clayton, for appellee.

O'REAR, J. Appellant Alexander was the sheriff of Owen county for the 4-year term 1898-1901. As such he was ex officio collector of the state revenue and county levies in that county for those years. The tax lists were certified to him, and he collected and paid over, in the main, that which was specifically certified. But in his settlements he was not charged with certain penalties which he collected, nor was he charged with interest on the balance which in reality he owed the county on a proper settlement at the end of each of the years. He was credited with a straight commission of 7 per cent. on the total amount collected, whereas, the statutory commission was and is 10 per cent. on the first \$5,000 collected, and 4 per cent. on the balance. There were a number of errors in the assessor's books, such as failure to extend to the total columns all the property or polls assessed, notwithstanding which the sheriff collected on the true totals, but reported and settled only for the totals shown in the assessor's books. There were a number of instances of alterations of the assessor's books after they had been returned and revised by the county boards of supervisors. The effect was that the sheriff seemed to have collected more taxes due the county than he was by the face of the books required to settle for. Throughout the term of this sheriff, indeed throughout the preceding term (when he was a deputy sheriff, and engaged as such in collecting county taxes), there existed a system of the sheriff's collecting taxes from citizens and taxpayers who were not assessed, or at least whose names did not appear on the assessor's books for the particular years, yet who actually were liable to assessment and to the payment of taxes for those years. The sheriff collected them as if they had been assessed, failed to report them as having been omitted, and failed to account to the county for the sums so collected. Probably more than 1,000 such collections are shown to have been made by appellant, and not ac-

counted for by him in any of his settlements. Such lists were locally called "sleepers," and so designated throughout these records.

These several suits were brought against the sheriff on his bonds to surcharge his settlements, and to recover the amounts justly owing the county by him on a fair settlement. The sheriff interposed a number of defenses. He pleaded the statutes of limitation against the suits; more than 5 years having elapsed from the time of his final settlements in each instance (save for the year 1801) before the suits were filed. It was insisted by him that the actions being for the correction of his settlements upon the ground of fraud or mistake, the 5-year statute of limitations (section 2515, Ky. St.; Russell's St. § 224) applied, and as his settlements were matters of record, the county could have at once discovered the alleged frauds or mistakes by the least diligence on the part of the fiscal officers. As to the collection of the taxes from those not assessed he claims that until they were assessed he had not the right to collect them, and that his act in doing so only gave those who paid the taxes a right of action against him to recover the sums so paid. *Commonwealth v. Alexander*, 33 Ky. Law Rep. 971, 112 S. W. 586. The county levy laid for 1898 was 90 cents on the \$100 worth of taxable property; for 1899, the same; for 1900, 90½ cents; and for 1901, 92½ cents. In addition \$1.50 poll tax was levied for each of the years. The county owed a bonded debt, created prior to the adoption of the present Constitution. In each of the years named there was laid of the total levy 35 cents on each \$100 worth of property to create a sinking fund to pay the bonded debt. The Constitution allows only 50 cents on the \$100 to be collected for county purposes in a year, except to the extent necessary to discharge indebtedness created prior to the Constitution. Section 157, Const. Thus it appears that for the years 1898 and 1899 there was levied an excess of 5 cents, for the year 1900, 5½ cents, and for the year 1901, 7½ cents, on the \$100 in excess of the constitutional limitation. *Whaley v. Commonwealth*, 110 Ky. 154, 61 S. W. 35, 23 Ky. Law Rep. 1292; *Sparks v. Robinson*, 115 Ky. 453, 74 S. W. 176, 24 Ky. Law Rep. 2336. Appellant pleaded that such excess was void, that the county had not the right to collect it, and that, whether he collected it or not, the county had not the right to compel it to be paid into the county treasury, inasmuch as he was liable at the suit of the taxpayers for it. *Whaley v. Com.*, supra; *Sparks v. Robinson*, supra. The upshot of it was the trial court sustained appellant in each of his pleas except as to the "sleepers." Appellant prosecutes this appeal because he was charged anything on that score, and the county prosecutes cross-appeals because it was denied judgment on other items sued on.

Not only were these four cases heard together in the court below, but similar suits against appellant's predecessor, as well as his successor in office, containing similar grounds of complaint and defenses as here, all were prepared and heard together. In this way this record presents a rather comprehensive view of governmental matters in Owen county for a period of about 10 years, embracing appellant's term of office. And it is an astounding picture. The tax rate has been increased; the assessed value decreased, except for the last year or so of the period; the county indebtedness grew constantly, so did the expense of administering the county government; the Constitution was disregarded as to the limit of taxation; the statute providing for equalizing assessments in the several counties was also purposely disregarded; the statute fixing the compensation of the sheriff was ignored, and the county made to pay several hundred dollars a year excessive commissions; the assessing officers, the fiscal courts, county clerks, and indeed the whole county official machinery seems to have been under the domination of a lawless spell, by reason of which the burdened taxpayers have been mulcted more than \$100,000, if we may believe the evidence in this record. How much more heaven only knows. For the record shows that it does not show all.

That appellant was fully aware of the conditions, knew he was collecting money to which he was not entitled, and knew he was failing in his duty to the county as an official, we have no doubt. In addition to a volume of evidence incriminating him in these particulars, including his failure to list his own property and pay taxes on it, his declining to testify in his own behalf in the case, after having had opportunity to do so, and his refusal to bring in his tax stub books to show, as they doubtless would and ought to have shown, every dollar collected by him as taxes, are enough to convict him of actual knowledge of conditions and the fraudulent purpose to profit by them in spite of the law if he could.

We will first take up the question of the commissions. The statute then in force fixed the commission of the sheriff for collecting the county levy at 10 per cent. on the first \$5,000, and 4 per cent. on the residue. Sections 1729, 1884, 4148, Ky. St. 1903. Prior to the adoption of the present Constitution there had been in force a special act, applicable to Owen county, fixing the commission of the sheriff at 7 per cent. It seems to have been the opinion, as well as the custom of the fiscal court and other officials concerned, that the local act remained in force after the new Constitution. Such is the testimony of the witnesses who deposed on that point. Section 106 of the Constitution requires that the fees of the county officers shall be regulated by law, and that means, under sections 59, 60, Const., a general law

applicable alike to every officer of the class. The special act applying to Owen county was repealed by the general law subsequently enacted regulating the fees of the sheriffs generally, as being utterly repugnant thereto. It is of the class of local tax statutes, special municipal acts, and that host of enabling and partial acts so rife under the former Constitution as to have grown into an abuse, calling into being the convention to frame a new Constitution, the dominant feature of which is uniformity, and equal benefits and burdens in the matter of government. The fiscal court was without lawful power to agree to a different rate than fixed by the statute. It appears that both parties were laboring under the mistaken notion that the old act was still in force. This mutual mistake as to law gave rise to the erroneous proceeding, no doubt. In this state the rule is that a settlement may be opened for correction when it was based upon a mutual mistake of the parties, whether of law or fact. *Hahn v. Hart*, 12 B. Mon. 426; *Louisville v. Zanone*, 1 Metc. 151; *Louisville v. Anderson*, 79 Ky. 334, 42 Am. Rep. 220; *Underwood v. Brockman*, 4 Dana, 317, 29 Am. Dec. 407; *Fitzgerald v. Peck*, 4 Litt. 125. When was the mistake discoverable by the exercise of reasonable diligence? For that will be the date from which the statute will begin to run. In *Louisville v. Anderson*, supra, the question of limitation arose in an action to recover a tax paid under a mutual mistake of the parties. The court observed that: "The mistake was mutual, and both acted during the whole period as if the right to demand and receive was unquestioned." The point here raised was not decided because of the state of the pleadings. The statute which gives 5 years within which to sue to correct a mistake concedes that until the error is discovered the statute of limitation should be suspended, but not longer than 10 years in any event. A mistaken belief as to the law is a fixed state of mind until something comes to knowledge to disturb it. One does not go about forever doubting his own belief. Where there is nothing to put him on inquiry there is no call for diligence other than originally existed in the matter. Only within a few months before these suits were brought did the fiscal court learn that it had been in error in its previous understanding as to the commission allowed the sheriff by law. Nor, so far as shown, was the sheriff better informed. The inquiry came about through a determination to have the county's fiscal matters checked up by an expert accountant, who discovered the errors, and for the first time brought them to the notice of the parties. The overhauling of the books and accounts of the county seems to have been when a new administration succeeded the one whose errors and loose methods had caused or made possible the trouble now in suit. Ordinarily negligence or laches of public officials is not chargeable to the public.

When the public elects officials, it has done all it can do for the time. If the officials are not so diligent as they might have been, their laches will not be imputed to the public, where no intervening right of a third person is to be affected. Furthermore, we seriously doubt whether there was a time when a controlling number of the public officials, charged with the duty of investigating Owen county's fiscal affairs for those years, were so situated as that they were free to act with that independence necessary to discover and make public the errors and frauds contained in these settlements, until the investigation was begun which led up to these suits. The statute did not begin to run until the errors were discovered—within 5 years of the bringing of the suits, and within 10 years of the accrual of the cause of action. The facts of this case are materially different from those of *Green County v. Howard*, 127 Ky. 379, 105 S. W. 897, 32 Ky. Law Rep. 243. The difference in commissions, after correcting certain mathematical errors in the settlements, was as follows: For 1898, \$890.33; for 1899, \$770.38; for 1900, \$686.57; for 1901, \$900.50. The statute (section 4143, Ky. St. 1903) fixes a penalty of 6 per cent. on the amount of the taxes delinquent after the first of December in the year in which they are payable, to be collected off the taxpayer as the taxes are. This penalty when collected, or collectible, belongs to the county. *Com. v. Pate*, 85 S. W. 1096, 27 Ky. Law Rep. 623; *Bates v. Knott Co.*, 67 S. W. 1006, 24 Ky. Law Rep. 73. Appellant collected penalties during the four years in question to the following amounts: For 1898, \$312.52; for 1899, \$405.16; for 1900, \$506.66; for 1901, \$478.84.

It was claimed, in other cases prepared with this one, that there was an express agreement between the fiscal court and the sheriff that if the sheriff would promptly pay off claims against the county as they were presented, using his own money where necessary, instead of interest, the county would not require him to account for the penalties which he might collect. No record was made of the alleged agreements. Nor would a record of them have validated them. Such an agreement was beyond the competency of the fiscal court to make.

Inasmuch as the settlement is opened on account of the mutual mistake, and for the other reasons assigned, concerning the allowance of commissions, it will be open for the correction of all errors and frauds practiced, although such latter errors or frauds might have been barred if standing alone. The settlement made by the sheriff is a single transaction. When it becomes final, whether by limitation or judicial pronouncement, it is final as an entirety. When, however, it is opened for fraud or mistake, then it stands as if the settlement had not been closed.

The claim of the county for the sums collected of so-called sleepers is really not a claim for taxes collected and unaccounted

for. But it is in the nature of an action for breach of the sheriff's bond to well and duly perform the duties of his office. The statute not only prohibits the sheriff from collecting taxes before they are duly assessed and certified to him (section 4067, Ky. St.; Russell's St. § 5959), but it is made the duty of the sheriff to report to the county court for assessment all omitted lists and persons coming within his knowledge (section 4241, Ky. St.; Russell's St. § 6170). When the sheriff knew that the persons and property constituting the list of sleepers were not assessed, it became his duty, by virtue of the the statute cited, to cause them to be reported for assessment. That he purposely failed to do. In the meantime limitation has barred the county of the right to assess such omitted property and polls. Section 2515, Ky. St.; *L. & J. Ferry Co. v. Com.*, 57 S. W. 626, 22 Ky. Law Rep. 480; *Chicago, etc., R. Co. v. Com.*, 115 Ky. 278, 72 S. W. 1119, 24 Ky. Law Rep. 2124; *Com. v. Nute*, 115 Ky. 239, 72 S. W. 1090, 24 Ky. Law Rep. 2138. The sheriff's neglect to perform his duty in that respect was a breach of his bond, from which the county has sustained damage in the loss of the taxes that would have been due and collectible from the omitted items if assessed. But the county could have collected only to the limit fixed by the Constitution. Therefore it lost only what it could have collected legally. The report of the expert accountant shows that for the year 1898 the sheriff collected and failed to account for polls and property tax, not assessed, \$2,886.94; for 1899, \$1,516.24; for 1900, \$2,477.83; for 1901, \$1,849.55—making \$8,680.56, on that score. (This includes both state revenue and county levy. But these suits involve only the county levy. The proportion is easily ascertained). But it was developed on the trial that some of these items so reported by the accountant were really on the assessor's books, or conceded to be, though generally under some initial, nickname, or different name, as to make it necessary to resort to extraneous evidence to identify the persons as the same. Of these items, the aggregate during appellant's term is \$1,140.32. Some of the items are polls only; some are mixed polls and property; some for one year, and some for another. Without going into detail of them here, it is indicated how they should be carried into the settlement: The omitted polls should be charged to the year in which omitted, at \$1.50 each; the omitted property should be charged to the year in which omitted at the rate of 85 cents on the \$100 only. The report of the accountant, Charles G. Harris, as corrected by his list shown on pages 1995-1997 of the record, should be taken as basis of the settlement in the matter of sleepers. This report of Harris is adopted for the reason that it appears to us to have been made by a thoroughly competent and impartial accountant, after great labor and painstaking investigation. It is as

accurate as it seems practicable to have made it under the circumstances. All doubts were finally resolved in appellant's favor, and he is in that report only charged with the sums shown to have been collected by him or his deputies. He and his counsel had the amplest opportunity to point out any errors in the report, and with his stub books in his possession he could unerringly have told whether the items charged against him were actually collected by him, or by his deputies for him, and accounted for by them to him. His failure to make objection to any item on the report as revised as being unauthorized by the facts is persuasive of the accuracy of the report as far as it went.

It is complained by appellant that as this action was only for the surcharging of his settlements had with the county court, which had been formally approved and recorded, it was error for the trial court to have gone beyond the function of correction, as it did in charging the sleepers to appellant. In an action in equity for specific relief, under a prayer of general relief, on issue joined it is competent for the court to grant the parties any relief to which they may appear entitled, and which it is within the jurisdiction of the court to grant. Section 90, Civ. Code Prac.; *Bank v. Coke*, 45 S. W. 867, 20 Ky. Law Rep. 291; *Lillard v. Brannin*, 91 Ky. 511, 16 S. W. 349, 13 Ky. Law Rep. 74; *Bridgford v. Barbour*, 80 Ky. 529. The circuit court did not err in granting the relief here indicated. But it did err in not granting enough.

The evidence discloses that the amounts collected by appellant, and not reported or accounted for by him, were ascertained by sending into the county and gathering up all the receipts of taxpayers who could be found, and who would surrender their receipts to be copied or used in the investigation. Many persons refused to deliver their receipts; some had been lost or destroyed; other taxpayers had died or moved away. There were some 4,000 and odd voters in the county. The examination being conducted included, as has been said, a period of 10 years. Probably 135,000 tax receipts and property lists had to be examined, classified, re-examined, verified, and properly charged and credited. The sheriff refused to lend his aid in the examination further than, after the initial report was filed by the accountant and published in book form by the fiscal court of the county, appellant pointed out a number of errors, which are corrected in the lists as indicated in this opinion. Only about two-thirds of the tax receipts were produced to the accountant. The results herein stated were made up from the receipts actually produced or examined, with few exceptions. If the same ratio of wrongdoing by the sheriff had been maintained in those not produced, the liability of appellant would have been increased probably one-third.

Of the taxes collected and paid over by

appellant, about \$30,000 a year, he claims that there was included the illegal excess levy indicated above, and that as he is, under the authority of *Whaley v. Commonwealth*, supra, and *Com. v. Baske*, 124 Ky. 468, 99 S. W. 316, 30 Ky. Law Rep. 400, 11 L. R. A. (N. S.) 1104, liable to suit by persons who paid the excess, he should be given credit in this settlement for such excess. The most of the taxpayers of the county pay only small sums. The average is not over \$8 a head of a family a year, including his poll. The excess would therefore average about 35 cents a year for each voter of the county. Limitation has barred the collection of all, or of practically all, of these items. The taxpayers have not sued for their recovery. The sums were voluntarily paid to the county, and have gone to defray its indebtedness. If the county had to repay these sums to appellant, it would result in a vast increase of the county's liabilities; to be finally borne by these taxpayers. The result would be to take from them illegally about \$1,500 a year, and by judicial determination, because they elected to abide their payment, make them pay that much more, to be given to the sheriff, who has no right to it, legal or moral. The court of chancery will not lend its power to produce such an unconscionable result.

The judgments were for less than the appellee was entitled to recover. They are therefore affirmed on the original appeal. On the cross-appeal of the county the judgments are each reversed. Upon the return of the cases to the circuit court a settlement will be made as of each of the years as herein indicated, charging appellant 6 per cent per annum interest from the end of the year, on the sum found due for that year, and credit him on the sum found to be due by the judgment rendered heretofore, and which has been superseded, as of the date of the supersedeas.

Remanded for proceedings and judgment in conformity herewith.

## LOUISVILLE & A. R. CO. v. HIRAM BLOW & CO.

(Court of Appeals of Kentucky. Jan. 27, 1910.)

**CARRIERS (§ 94\*)—FREIGHT—WRONGFUL DELIVERY—ACTIONS—AMOUNT RECOVERABLE—CREDITS.**

Where two of three cars consigned to plaintiff were delivered to another, who subsequently became bankrupt, and plaintiff proved his claim against the bankrupt's estate for the value of all three cars, believing that they were all delivered to him, and was allowed a part of the total value of all the cars, in a subsequent action against the railroad company for the value of the two cars wrongfully delivered, the full amount recovered from the bankrupt's estate will not be allowed as a credit against plaintiff's claim, but only the pro rata payment on the two cars wrongfully delivered; the railroad com-

pany having no interest in the amount allowed by mistake for the third car.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 94.\*]

Appeal from Circuit Court, Madison County.

"To be officially reported."

Action by Hiram Blow & Co. against the Louisville & Atlantic Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wallace & Harris, Benjamin D. Warfield, and J. Tevis Cobb, for appellant. A. R. Burnam & Son and Bodley & Baskin, for appellees.

**BARKER, J.** The appellees, Hiram Blow & Co., were the owners of, and had consigned to them at Richmond, Ky., three car loads of whisky barrel staves of the value of \$1,495.63. These cars were hauled to Richmond by the appellant, the Louisville & Atlantic Railroad Company, and two of them were wrongfully delivered to the Hume Cooperage Company, of Richmond. The third car was held by appellant, and for some reason unexplained in the record was not received by Hiram Blow & Co. until some time after the conversion of the other two cars. Shortly after receiving the two cars of staves above referred to, the Hume Cooperage Company became insolvent and went into bankruptcy. The appellees, Hiram Blow & Co., thereupon proved a claim against the bankrupt for the sum of \$1,495.63, being the full value of all three cars of staves, although only two had been delivered to and received by the bankrupt. Presumably this was done because Hiram Blow & Co. thought at the time that all of the cars had been delivered to the Hume Cooperage Company. The estate of the bankrupt corporation paid 73½ per cent. of the total amount of claims proved, and Hiram Blow & Co. therefore received 73½ per cent. on the total value of the three cars, when, as a matter of fact, they were entitled to only 73½ per cent. of the aggregate value of two cars.

Afterwards the appellees instituted this action against the Louisville & Atlantic Railroad Company for the value of the two cars of staves which it had wrongfully delivered to the Hume Cooperage Company, crediting the account by the amount received from the bankrupt estate as their pro rata on the two cars wrongfully delivered as aforesaid. The appellant admits its liability for the wrongful delivery of the two cars of staves, but insists that the account should be credited by the full amount which appellees received from the bankrupt estate; and this is the real question arising upon the record. For appellees, it is insisted that the dividend paid by the assignee in bankruptcy on the car which was not delivered to the bankrupt, and for which the bankrupt was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not at all liable, was money paid to them by mistake, in which the railroad corporation has no interest; that all the railroad corporation is entitled to receive credit for is the pro rata paid them on the two cars which it wrongfully delivered to the Hume Cooperage Company. The circuit judge accepted the view of appellees, and allowed appellant credit by the dividend received on the value of the two cars which had been wrongfully delivered, and gave a judgment against appellant for the difference between that sum and the value of the two cars wrongfully delivered.

It seems to us that this judgment is correct. The matter in dispute between the railroad and Hiram Blow & Co. was the wrongful delivery of the two cars received by the bankrupt. Whether the appellees put in a claim for a third car or for five other cars which the bankrupt had not received was entirely immaterial to the railroad company. The fact that Hiram Blow & Co., either by mistake or fraud, received from the bankrupt's estate more money than they were entitled to, does not concern the appellant. It may be that by proper proceedings Hiram Blow & Co. can yet be made to pay back to the bankrupt's estate for the benefit of the other creditors the money they wrongfully obtained. If this were done, where would be the right of appellant to a credit for this money? Suppose, for example, we should accept the view of appellant, and credit its claim by the money wrongfully received by Hiram Blow & Co., and afterwards the latter were required to pay it back to the bankrupt's estate, as perhaps might rightfully be done, then, clearly, Hiram Blow & Co. would lose on an admittedly just claim against the railroad corporation the sum so paid back by them to the bankrupt's estate. It seems to us clear that the fact that Hiram Blow & Co. received money they were not entitled to does not concern the appellant. The latter wrongfully delivered two car loads of staves belonging to appellee to the Hume Cooperage Company. For the value of these staves it admits it is liable. Rightfully Hiram Blow & Co. could only have proved up a claim against the bankrupt's estate for the two cars which were actually delivered. The dividend they received on these two cars was justly credited on their claim against the railroad for the wrongful delivery, and when the railroad received this credit it received all to which it was entitled. In any other sums Hiram Blow & Co. may have wrongfully received from the bankrupt's estate the railroad company has no interest. The legal rights of the parties to this litigation must be settled according to the facts involved in the actual transaction which took place; extraneous facts or circumstances cannot be introduced into the case to aid either party. The wrongful act of Hiram Blow & Co., in proving up a false claim for a third car, has no legitimate connection with this case; that

fact is no more connected with the real issue here than if Hiram Blow & Co. had stolen a sum of money from the bankrupt's estate pending the litigation; and the railroad corporation has no more right to have the amount of money which Hiram Blow & Co. wrongfully obtained from the bankrupt's estate, either by fraud or mistake, credited upon the rightful claim against it, than it would have had to have credited money stolen by that company from the bankrupt's estate. In each case Hiram Blow & Co. would be liable to the bankrupt's estate for the amount so wrongfully obtained, and, this being true, the railroad corporation cannot have a lawful right to be credited by the sums obtained. Two different persons cannot have a separate legal right to the same thing at the same time. If the bankrupt's estate has had a right all the time since the wrong of Hiram Blow & Co. to recover back this money, then it cannot be true that the railroad corporation was also entitled to it; in other words, the railroad corporation is entitled only to be credited by such sums as Hiram Blow & Co. received and had a legitimate title to.

The two cases cited by appellant to support its contention are not apposite to the question we have here, and, when properly analyzed and understood, they are rather against than for the principle insisted upon by it. In *Jellets v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 265, 15 N. W. 237, the plaintiff sued the railroad corporation for the value of a car load of corn which it had wrongfully delivered to one Webb. The defendant railroad corporation, in its answer, alleged that, after the wrongful conversion of the car load of corn by Webb, he (Webb) had paid the owner, Jellets, the full value of the corn wrongfully converted by him. This allegation was stricken out of the answer by the trial court. The judgment was reversed by the Supreme Court of Minnesota for this error. Clearly that case does not support the contention of appellant here. All that it holds is that the railroad corporation, when sued for the wrongful delivery of the corn, was entitled to show that the person to whom the corn was delivered had paid to the owner its full value. Of course, the owner could not recover the full value of the corn, first from the party to whom the railroad wrongfully delivered it, and then from the railroad in addition. The case cited is authority only for the railroad's right to be credited by the amount Hiram Blow & Co. received from the bankrupt's estate for the two cars of staves. If the bankrupt's estate had paid all claims against it in full, then where would have been the interest of the railroad corporation in the amount wrongfully paid to Hiram Blow & Co. on the third car? In *Stearns et al. v. Grand Trunk Ry. Co.*, 148 Mich. 271, 111 N. W. 769, a railroad corporation had wrongfully delivered a car of lumber to Scranton & Co. The owners of the

car of lumber, Andrews & Stearns, sued the railroad on an unpaid balance due them for the lumber. The railroad offered to show that the lumber was of such poor quality that it was not worth the amount sued for. The car wrongfully delivered was one of four cars, and the railroad offered to prove that Andrews & Stearns had been paid by Scranton & Co. in full for the lumber, and there was, therefore, no balance due them. The trial court excluded this testimony; but the Supreme Court of Michigan reversed the judgment and held, very correctly, we think, that Andrews & Stearns could only recover the value of their interest in the car wrongfully converted, and if they had been paid all that was coming to them, before the conversion, they had no cause of action against the railroad. This case in principle is the same as the other case cited. In both it was held that, where a railroad wrongfully delivers merchandise, the owner of the property can collect its full value once. If he collects the whole value from the party to whom the railroad wrongfully delivered it, then he cannot also recover the whole value from the carrier. If he collects only a part from the person to whom the property was wrongfully delivered, he has a cause of action against the carrier for the unpaid balance, but no more.

Judgment affirmed.

### SETTLE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 25, 1910.)

#### 1. CRIMINAL LAW (§ 594\*)—CONTINUANCE—ABSENT WITNESS.

The refusal of a continuance on account of the absence of a witness could not be sustained on the ground that the witness was a non-resident, and there was no certainty that his presence could have been obtained at the next term or any term of court, since Cr. Code Prac. § 153, authorizes a defendant to take the deposition of a nonresident witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1822, 1832; Dec. Dig. § 594.\*]

#### 2. CRIMINAL LAW (§ 595\*)—CONTINUANCE—ABSENT WITNESS.

In a trial for rape of a girl under 16 years of age, defendant was entitled to a continuance to procure the testimony of a physician who officiated at the birth of prosecutrix, and whose testimony would show that she was over such age.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 595.\*]

#### 3. CRIMINAL LAW (§ 595\*)—CONTINUANCE—ABSENT WITNESS.

In a trial for rape, defendant was entitled to a continuance for absence of a witness whose affidavit showed that she would testify that she was a half-sister of prosecutrix and a daughter of the latter's mother; that on a certain date she was at the home of her mother and prosecutrix, when several persons hired prosecutrix and her mother to start the prosecution; that the prosecution was false; that prosecutrix stat-

ed that it was false; and that she was being forced to press it.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 595.\*]

Appeal from Circuit Court, Madison County.

"To be officially reported."

G. W. Settle was convicted of crime, and appeals. Reversed and remanded.

J. Tevis Cobb, A. F. Byrd, and H. C. Hazelwood, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

NUNN, C. J. This is an appeal from a sentence of 10 years in the penitentiary by the Madison circuit court for the offense prescribed in section 1155 of the Kentucky Statutes (Russell's St. § 3773). Appellant pleaded not guilty to the indictment. He really placed his defense on two grounds. The first was that he did not have intercourse with the prosecuting witness, Drucilla Moberly. The other was that she was over the age of 16 years at the time the offense is alleged to have been committed. The establishment of either of these defenses would have authorized the jury to acquit him. It appears in the briefs of counsel that this is the second conviction of appellant for this offense, but this fact does not appear in the record. The record shows that this case was called for trial on the fourth day of the October term, 1909, that the commonwealth announced ready, and that the defendant said that he was not ready for trial. The court then continued the case to the twenty-first day of the October term, 1909, on which date appellant filed two affidavits setting forth reasons which he claimed entitled him to a continuance of the case until the next term. These affidavits set forth the names of many witnesses residing in that county, in Clay and other counties, for whom he had caused subpoenas issued and placed in the hands of the sheriffs of the respective counties to be executed. Some of them had been returned executed in part, and he stated that the witnesses named as absent were absent without any fault on his part. He stated in detail the testimony he expected to introduce by each one of the witnesses and that it was true. If it were true, it was certainly material and important for him in his defense. We will not state the proposed testimony of each of the named witnesses, and will refer to only two of them. Dr. L. S. Halcomb is one, and Rebecca Redman, a half-sister of the prosecuting witness, is the other. In our opinion, the materiality and importance of the two witnesses alone entitled appellant to a continuance of the case, especially, in view of the character of the commonwealth's testimony on the question of the age of Drucilla Moberly. The prosecuting witness testified

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that she was born on April 4, 1893, as she had been told. Her mother testified that she did not remember the date of her birth, but that it was set down in the Bible, and according to it she was born April 4, 1893. Robert Bishop, a relative of theirs, testified that he was at their home in the year 1900, and found that the way Drucilla's age was set down in the Bible she was older than her brother Allen, who was known to be the older; that he changed the date of her birth as it appeared; but was not positive whether he made the "3" or the "9." The Bible was exhibited to the jury and showed that the names of all the children of William and Sarah Moberly that had been born between the years 1880 and 1890; that Allen was born July 10, 1889. All the names were, apparently, written by the same person and at the same time. Drucilla's name and the date of her birth appeared just below that of Allen's, and showed that the last two figures of the year of her birth had been changed and then appeared as 1893. The commonwealth introduced Mrs. Matt Wilson, who testified that she had a child born April 29, 1892, and that Drucilla Moberly was born in the same year and month, but before her child. Mrs. Bell Moberly testified to the same effect. Appellant introduced several witnesses, who testified that the prosecuting witness and her mother stated on different occasions that Drucilla was over 16 years of age, and that she was born April 4, 1890. He also introduced Prof. Marsh, the custodian of the Berea College register, in which the names of the students were recorded as given by them on entering the college. He testified that Drucilla entered the college on September 25, 1905, and that his entry made on that date, as she gave it to him, showed that she was born April 4, 1890. It will thus be seen that the date of the birth of Drucilla was an important and material question for the defense. It was stated in the affidavits for a continuance that appellant could prove by Dr. Halcomb, who lived in the state of Oklahoma, that he was a physician, and, at the time of the birth of Drucilla, was living in Clay county, Ky., and was called to and did wait upon Mrs. Moberly at the time Drucilla was born, and that the physician still had in his possession the visiting list which he kept in Clay county in 1890, and that it showed that Drucilla was born April 4, 1890. It was also stated in the affidavits that, on the fourth day of the term when the case was called for trial and set for the twenty-first day, appellant had an agreement with the commonwealth attorney that they would at once file interrogatories for the purpose of taking the depositions of Dr. Halcomb. These interrogatories were filed and sent to C. B. Dannaway, a notary public, of Olive, Okl., the doctor's place of residence, with the fee for taking them. Before the affidavits of appellant were

completed and filed for a continuance, he received a telegram from Dr. Halcomb stating that the notary public was sick and for that reason the deposition had not been taken, but that he would attend to it soon and forward it. The telegram was made a part of his affidavit for a continuance. Notwithstanding this, the court forced him into trial.

It appears from the record that, soon after the trial and conviction of appellant, the deposition of Dr. Halcomb was received by the circuit court clerk of Madison county. The doctor testified in his depositions to the facts set forth in the affidavits for a continuance and gave the names of persons present at the birth of Drucilla from whom appellant obtained affidavits corroborating the doctor as to the date of her birth, which were filed with appellant's application for a new trial.

The Attorney General says that the court did not err in not continuing the case on the account of the absence of Dr. Halcomb, because he was a nonresident of the state, and there was no certainty that his presence could have been obtained at the next term or any term of court. While this is true, section 153, Cr. Code Prac., authorizes a defendant to take the depositions of a nonresident witness; and in this case the deposition would have been taken and at the trial, but for the sickness of the notary public to whom the papers were sent, and upon his recovery they were taken and sent to the clerk, arriving soon after the trial and conviction.

Appellant also set forth in his affidavit for continuance what he expected to prove by Rebecca Redman, and filed her affidavit, the substance of which was that she lived in Madison county, Ky., in the year 1907; that she was a half-sister of Drucilla Moberly and a daughter of Sarah Moberly; that on a date named she was at the home of her mother and half-sister when several persons came there and persuaded and hired Drucilla and her mother to start the prosecution against appellant; that the prosecution was false and without foundation; that Drucilla told her that the charge made against appellant was false, and that she was being forced to prosecute him. As stated, the affidavits for a continuance presented much other testimony in appellant's defense; but the two witnesses referred to, of themselves, entitled him to a continuance.

It is insisted by appellee's counsel that this evidence, if admitted, would have been simply cumulative. Appellant did not introduce any person who was present at the birth of Drucilla, but, as stated, the effect of his testimony was to show the contradictory statements of Drucilla and her mother. In our opinion this evidence would have been very valuable to appellant on his trial; but, as to what effect it would have had upon the minds of the jurors, we cannot say. The verdict might have been the same, or it might have secured his acquittal, and he was cer-

tainly entitled to an opportunity to procure this evidence.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

### WEST LOUISVILLE BREWING CO. v. SCHAEFER.

(Court of Appeals of Kentucky. Jan. 21, 1910.)

#### 1. MASTER AND SERVANT (§ 65\*)—BREACH OF CONTRACT BY SERVANT—ACTION—PLEADING AND PROOF.

In an action by a brewing company against a former employé for damages, under a traverse of plaintiff's allegations that defendant had managed the business in a careless manner, thereby spoiling beer and rendering it unfit for use, defendant could show that while some of the beer, which had been made by him, had been found to be bad, such condition was brought about after it passed beyond his control, and so was due to the fault of some one else.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 73; Dec. Dig. § 65.\*]

#### 2. MASTER AND SERVANT (§ 65\*)—BREACH OF CONTRACT BY SERVANT—ACTION—EVIDENCE.

Evidence, in an action against an employé for breach of the contract of employment by permitting the product of the brewery to become spoiled, held to sustain a finding that under the contract of employment defendant's authority as head brewer was limited to employes in the brewery proper, and did not extend to all departments of plaintiff's brewery, including the cooling room.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 73; Dec. Dig. § 65.\*]

#### 3. APPEAL AND ERROR (§ 993\*) — VERDICTS — CONCLUSIVENESS—NUMBER OF WITNESSES.

A finding in favor of defendant on an issue will not be set aside because the greater number of witnesses testified thereon in favor of plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3900; Dec. Dig. § 993.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "Not to be officially reported."

Action by the West Louisville Brewing Company against Frank A. Schaefer. Judgment for defendant, and plaintiff appeals. Affirmed.

Joseph E. Conkling and Davis & Davis, for appellant. Burwell K. Marshall, for appellee.

LASSING, J. The West Louisville Brewing Company employed as foreman and superintendent of its plant Frank A. Schaefer, under the following contract: "This contract made this December —, 1905, between the West Louisville Brewing Company, a corporation, and Frank A. Schaefer, witnesseth: That said brewing company hereby employs Frank A. Schaefer as foreman and superintendent of the West Louisville Brewing Company, owned and operated by said company, at a salary of \$35 per week, from October 1, 1905, to March 1, 1906. After March 1, 1906, the salary to be \$50 per

week. The company agrees to furnish said Schaefer his light, water, fuel and house rent free of charge, and in case said Schaefer is compelled to vacate the rooms he now occupies, said brewing company agrees to give him the equivalent of light, water, fuel and house rent in cash at the end of each and every month. Said Schaefer is to have full charge of the brewery and the employes of same, and discharge and hire said employes as in his discretion may seem best. Said work must be done for the best interests of the company. Any and all purchases made by the management must meet with the approval of said Schaefer. It is further agreed that said second party is to make first class marketable beer for said first party, so that no objections to the beer can be made by customers of said West Louisville Brewing Company. In case said Schaefer becomes negligent or careless in his attentions to his duties or falls or refuses to attend to same, then said company may at any time regardless of this contract dispense with his services. This contract expires five years from October 1, 1905. In testimony whereof witness the hands of said West Louisville Brewing Company, by its president (by order of its board of directors) and said Frank A. Schaefer, the day and year above written. West Louisville Brewing Company, T. L. Block, Pres."

Under this contract of employment he worked from the date thereof until —, 1907, when the company discharged him. Shortly after his discharge, the company filed a suit against him, wherein it charged him with having breached his contract to its damage in the sum of \$3,000. The defendant's answer is a traverse. Later, and on the day the case was called for trial, the plaintiff by amended pleading charged that the defendant had managed the company's business in a careless and negligent manner, by letting the vats, hose, pump, and tanks become unclean and sour, thereby spoiling the beer and rendering it unfit for use, to its damage as set out in the original petition. These allegations were likewise traversed, and upon the issue thus formed the case went to trial.

The plaintiff shows, by quite a number of its witnesses, who were customers of the brewery, and many of whom were stockholders in the plant, that at times, while defendant was the master brewer, the beer was bad—so bad that it could not be sold and had to be returned to the brewery. Other employes and officers of the brewery testified to substantially the same state of facts. Defendant testified that the beer, when brewed and turned into the cooling tanks or vats, was all right and properly made, and that while it was true that at times the beer, when barreled and delivered to the trade, was bad, he was in no wise responsible for this condition, and that it was due to no

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fault on his part in its manufacture; that the temperature of the room in which it was cooled and kept was not maintained at an even heat or coolness, and because the temperature was allowed to rise and fall the beer had fermented and soured; that he had frequently complained to the engineer in charge of the machinery which cooled the tanks, and also complained to the officers of the company, telling them in effect that the beer was being soured because the refrigeration was imperfect or poor—that he did so is admitted by both the engineer and an officer of the company. The engineer testified that this trouble was due to no fault of his, but to the use of defective or inadequate machinery. There is a sharp conflict in the testimony as to when the manufacture of the beer is complete. Plaintiff contends that it is not until the beer is cooled, while defendant insists that its manufacture is complete when it is run into the tanks or vats to be cooled. On the evidence and contract the case was submitted to the jury upon proper instructions, of which neither party is now complaining, and the jury found for defendant. Plaintiff appeals and seeks a reversal upon two grounds: First, that the verdict is not sustained by sufficient evidence; and, second, that the court erred to its prejudice in admitting incompetent evidence.

The answer being a traverse, appellant's counsel contends that the appellee should not have been permitted to show that, although the beer was bad, it was due to no fault of his, but to the carelessness of the engineer in charge of the cooling plant. The point made by appellant's counsel, questioning the correctness of the court's ruling upon the admission of the evidence complained of, would be well taken if defendant had admitted that he made bad beer and sought to lay the responsibility therefor upon some other employé at the plant. In other words, if his defense had been a confession and avoidance, he would not have been permitted to introduce evidence to support same unless his answer had been a plea in confession and avoidance. But the defense is that he fulfilled the requirements of his contract, and that, although some of the beer spoiled, it was after it had passed beyond his control and from under his immediate supervision, and so due to no fault of his. Under his answer he would certainly have the right to show this, and the trial court did not err in permitting him to do so. Under his plea that he made good beer, or, rather, denial that he made bad beer, he would be permitted to show that, while some of the beer which had been made by him had been found to be bad, this condition had been brought about after it passed beyond his control, and so due to the fault of some one else.

Some confusion has arisen over the construction of the contract, as to the extent of defendant's authority over the employés at

the brewery, and while, considering the contract by itself, we would have been inclined to hold that his authority extended to and over every employé there, it seems from the evidence that the parties to this contract, or at least one of them, placed a different construction on it, and that the employés in the brewery proper were regarded as being embraced within the terms of the contract, while those in the cooling room were not; and, upon consideration, it is evident that this latter construction is altogether reasonable, for it must be remembered that there are yet other departments of the brewery in which laborers were employed for which there would have been no reason whatever to hold that they should be under the management, direction, and control of the master brewer, as, for instance, the drivers, collectors, and deliverers of ice which was sold by the plant. Now, while all of these laborers were employés of the brewery, it can hardly be contended that there would be any reason for or desire on the part of the company to place them in charge of the master brewer, and, in fact, there would be good reason for holding that such employés were not under his management and direction, because to require him to look after them and their line of business would have been to take just that much time from the business for which he was primarily engaged, to wit, the manufacture of beer. Nor is it difficult to see why, as the master brewer, he would want entire control and management of the employés about the brewery immediately engaged in the manufacture of the beer, since the carrying out of his contract must, in a large measure, depend upon the skill and efficiency of the employés in that department, and not of employés in other departments. The jury seems to have accepted the theory of appellee and placed upon the contract the construction which he gave it, and upon considering all of the evidence, in connection with the contract, we are not prepared to say that they did not reach the right conclusion.

There is likewise a sharp conflict in the testimony as to when the brew becomes beer, or, in other words, as to "when beer is beer." The testimony of the witnesses upon this point is not only conflicting, but far from satisfactory, and, if the investigation were extended, it is altogether probable that the question would rival in importance the governmental problem as to "what is whisky." When compared in its manufacture with the preparation of many drinks and food stuffs, by analogy of reasoning, we would say that the contention of appellee is correct. And again, when looked at from another view point, the theory of appellant is altogether plausible. It is one of those problems that perhaps never can be answered to the satisfaction of all; but, as the jurors who tried this case found in favor of the contention of appellee, we do not feel warranted in hold-

ing, simply because the numerical weight of the evidence is to the contrary, that their verdict should be set aside.

Judgment affirmed.

# NORTONSVILLE COAL CO. v. WHITED.

(Court of Appeals of Kentucky. Jan. 27, 1910.)

## 1. MASTER AND SERVANT (§ 286\*)—INJURIES—ACTIONS — JURY QUESTION — FAILURE TO WARN SERVANT.

In a coal miner's action for injuries by the premature explosion of blasts plaintiff was setting off, whether defendant was negligent in not warning plaintiff of the danger of a premature explosion by the fuse in a blast not lighted becoming ignited from sparks from the blast that went off *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1044; Dec. Dig. § 286.\*]

## 2. APPEAL AND ERROR (§ 1002\*)—INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.

In a coal miner's action for injuries by the premature explosion of a blast, where the evidence was conflicting, *held*, that a verdict for plaintiff was not so flagrantly against the evidence as to require a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Appeal from Circuit Court, Hopkins County.

"Not to be officially reported."

Action by J. W. Whited against the Nortonville Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Belcher & Sparks, for appellant. Waddill & Dempsey, for appellee.

CARROLL, J. The appellee brought this action against the appellant company to recover damages for personal injuries sustained in its mine by the premature explosion of a powder blast. He was seriously and permanently injured, and the jury assessed the damages in his favor at \$1,750. The judgment on the verdict we are asked to reverse for either of two reasons: First, error of the trial court in refusing to direct the jury to return a verdict in favor of the company; and, second, because the verdict is flagrantly against the evidence. No other errors are complained of. The appellee at the time of his injury was about 52 years old. He had been working in the mine some four weeks, but during this time had not made any blasts or observed any being made until the day he was injured, but he had often seen fuse used in blasting rock and other material. The miner whose duty it was to set off the blasts had gone away, and the mine boss came to the place where appellee was loading coal and asked him to do the shooting. Appellee's version of the affair is, in substance, that when the mine boss approached him, and requested that he make the blasts, he told him he did not want to do it and did not know anything about the use of fuse, although he was familiar with the methods of using what

are called squibs; that the mine boss showed him how to fix the fuse and told him there was no danger in its use, and further instructed him that, as several blasts were to be set off in the same room at the same time, if he failed to light the fuse for all the blasts that he should return immediately after the ones lighted had gone off and fire the ones that he had failed to light, before the smoke from the exploded ones had settled down in the mine.

We may observe here that it was shown that, when a powder blast is made, the smoke and fumes go to the top of the room or entry in which the blast is made, and in a few minutes it settles down on the bottom, and when it does so settle it is not safe to come in contact with it. That the mine boss did not tell him that there was any danger of the fuse in a blast not lighted becoming ignited from sparks from the blast that went off, and he (appellee) did not know that this occasionally happened. After receiving the instructions from the boss, he went to the room to which he was directed to go and bored nine holes at the places indicated by the boss. Six of these holes were in the face of the room, and three of them were in the side of it; all being close together. That after the holes were drilled, he prepared them for blasting by putting powder and fuse in the usual way in each one of them, and then he and his two sons lighted the fuse in seven of the blasts and retired a short distance to escape the danger incident to the explosion. That when the seven blasts went off, he at once returned to light the two that had not been fired, as he was instructed to do, and when he went back one of the blasts—the fuse of which had not been lighted—went off, and from the effects of the explosion he received the injuries complained of. He further said that before making the blasts he went to the powder house to get the blasting material, but there were no squibs there, and he was told to take the fuse. His statement that sparks or fire from a blast would occasionally set off a blast that had been prepared with fuse for firing close to it was corroborated by the evidence of other witnesses. The testimony for appellee also conduced to show that fuse was more dangerous than squibs, as squibs could not be ignited by other blasts because squibs were only placed in the holes at the time they were lighted. And so, if he had used squibs in place of fuse, and had prepared nine blasts, but had only lighted seven of them at the same time, there could have been no danger of either of the other two going off because the squibs would not have been in them. The mine boss testified that he selected appellee to make the blasts because appellee told him that he knew how, and denied that he gave him instructions of any kind or character, or told him after set-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ting off some but not all of the blasts to go at once, after the ones he had lighted exploded, and fire the others. The testimony for the company also conduced to show that fuse was safer than squibs, that they had both squibs and fuse at the powder house, and appellee could have gotten either that he called for.

From this outline of the evidence, it will be seen that it was conflicting upon every material issue in the case. If the jury believed the evidence of appellee and his witnesses—and they had the right to do so—the company was guilty of negligence in giving him the instructions he was following when he received the injury, and in failing to warn him after notice of his ignorance of the danger of a premature explosion. This was the real act of negligence complained of. It is upon this that appellee relied, and his own and the other evidence in his behalf made out for him upon this issue a case that entitled him to go to the jury.

A person of ordinary intelligence, as appellee was, might understand how to drill holes and charge them with powder and fuse, fire off the blasts, and that it would be dangerous to remain close to the blasts when they were fired off. But he might not know that there was any probability of other blasts not lighted being discharged by sparks of fire from the ones that had been fired. The evidence is conflicting, but in probability of truth it cannot be said that the preponderance was greatly in favor of either one side or the other. At any rate, the verdict is not so flagrantly against the evidence as to authorize us to interfere.

Wherefore the judgment is affirmed.

#### THOMAS' ADM'R v. MAYSVILLE ST. RY. & TRANSFER CO.

(Court of Appeals of Kentucky. Jan. 26, 1910.)

#### JUDGMENT (§ 891\*)—SATISFACTION—RELEASE OF JOINT TORT-FEASOR.

Where plaintiff recovered judgment against two joint tort-feasors, and elected to collect his judgment against one of them, his cause of action was satisfied, and the other tort-feasor was released though the judgment against the other was larger than the one paid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1703; Dec. Dig. § 891.\*]

Appeal from Circuit Court, Mason County.  
"To be officially reported."

Action by the Maysville Street Railway & Transfer Company against Isaac Thomas' Administrator. Judgment for plaintiff, and defendant appeals. Affirmed.

Allan D. Cole and Thos. R. Phister, for appellant. Worthington & Cochran, for appellee.

HOBSON, J. The Maysville Street Railway & Transfer Company operated street

cars in Maysville, with electricity, which was furnished to it by the Maysville Gas Company by wires connecting its dynamos with the wires of the Street Railway Company. One of the live wires of the Street Railway Company, while thus charged with a high power of electricity, was suffered to hang down in the street, and Isaac Thomas, a negro boy, was killed by it. An action was brought by his administrator to recover for his death, against both companies, on the ground that the loss of his life was due to the negligence of each. On the trial of the case the circuit court, at the conclusion of the plaintiff's evidence, instructed the jury peremptorily to find for the Gas Company; and, the case having been submitted to the jury as to the Street Railway Company, there was a verdict against it for \$5,500. Judgment was entered accordingly. The administrator appealed from so much of the judgment as dismissed his action against the Gas Company; and on the appeal it was determined by this court that the peremptory instruction should not have been given, and the judgment was reversed. See *Thomas' Adm'r v. Maysville Gas Co.*, 108 Ky. 224, 56 S. W. 153, 53 L. R. A. 147. The Street Car Company prosecuted an appeal from the judgment against it, and on this appeal the judgment against it was affirmed. See *Maysville Street Car & Transfer Company v. Thomas' Adm'r*, 60 S. W. 1129, 22 Ky. Law Rep. 1645. On the return of the case to the circuit court after its reversal in this court as to the Gas Company, it was, after some further preparation, tried again, this trial resulting in a verdict and judgment against the Gas Company in the sum of \$5,000. The Gas Company appealed to this court with supersedeas, and the judgment was affirmed with damages. See *Maysville Gas Co. v. Thomas' Adm'r*, 75 S. W. 1129, 25 Ky. Law Rep. 403. After the judgment was affirmed by this court the surety in the supersedeas bond paid it off, and, as he was allowed to do under the statute, took an assignment of the judgment; the plaintiff executing to him the following: "A. M. J. Cochran, having this day paid off in full the judgment of the Mason circuit court, rendered on the 19th day of June, 1902, in the case of S. P. Perrine, Adm'r of Isaac Thomas, Deceased, v. Maysville Gas Company, which judgment, together with the cost in the Mason circuit court and the costs in the Court of Appeals of Kentucky, and interest and damages, amount to the sum of \$8,067.52, the said judgment is now assigned, transferred and delivered to the said A. M. J. Cochran, who is the surety of said Maysville Gas Company on the supersedeas bond executed by it on the appeal from said judgment." After the plaintiff had thus received satisfaction of his judgment against the Gas Company, he

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

took out an execution on the judgment against the Street Railway & Transfer Company, and levied the execution upon certain personal property belonging to that company. It then brought this suit, setting up the facts we have stated, and obtained an injunction enjoining him from proceeding to collect the judgment against it. The circuit court on final hearing having perpetuated the injunction, the plaintiff appeals.

In Black on Judgments, § 782, the rule on the subject is thus stated: "The plaintiff can have but one satisfaction for a joint wrong. And therefore if he recovers a judgment against one of the joint tort-feasors, and obtains satisfaction, that operates as a discharge of the others." To same effect, see note *Abb v. N. P. R. R. Co.*, 92 Am. St. Rep. 885; *Freeman on Judgments*, § 236; 17 Am. & Eng. Encyc. 865; 23 Cyc. 1494. The rule as above quoted was recognized by this court in *Sodousky v. McGee*, 4 J. J. Marsh. 269; and in *United Society of Shakers v. Underwood*, 11 Bush, 265, 21 Am. Rep. 214, the court, after considering at length the authorities on the subject, said: "It thus appears that while the plaintiff may maintain separate actions and recover separate judgments against joint trespassers, and may elect to take the largest sum assessed, or to proceed against the solvent defendant, or, in case no one of them is able or can be compelled to pay the whole judgment rendered against him, may accept part satisfaction from one and still look to the others for such balance as may be necessary to give him full legal compensation for the wrong suffered, yet ordinarily, when he has made his election, he will be concluded by it. His right of action against the other co-trespassers was not barred, nor his claim against them extinguished, by his voluntary action in the premises, but when he determined to enforce the first judgment, and did make it productive, he elected to accept the amount assessed as damages as full compensation for the injury of which he complains, and to treat said judgment and his other collateral concurrent remedies as securities for a claim, the amount of which had been rendered certain by judicial action. To this conclusion it may be objected that the wrongdoers who were not parties to the first action are not bound by the assessment of the value of the bonds converted. This is true; but in such a case the plaintiff may, if he choose, decline to enforce his first judgment and leave the question of the amount to which he is entitled an open one until he sues and recovers against all who are liable to him, and then elect which judgment he will enforce." The rule thus stated was recognized in *Louisville & Evansville Mail Co. v. Barnes*, 117 Ky. 870, 79 S. W. 202 (64 L. R. A. 574, 111 Am. St. Rep. 273), where the court said: "It is a universal rule

of law that joint tort-feasors are jointly and severally liable to the injured party. He may sue any one or all, at his election; but, when he once receives satisfaction for the injury done him from one or more of the tort-feasors, he is barred from proceeding against the other joint tort-feasors."

When the plaintiff collected the amount of his judgment against the Gas Company from the surety in the supersedeas bond, he accepted satisfaction of the judgment. He no longer has a judgment against the Gas Company, for the benefit of it has been assigned to the surety. It is earnestly maintained for him that he may credit the amount so collected on his judgment against the Street Railway & Transfer Company; that he was entitled to collect from the Street Railway & Transfer Company the full amount of the judgment against it, and it will not be prejudiced in any way if this judgment is credited by what he has collected from the Gas Company. There is apparent force in this, but the great weight of authority is otherwise, and cogent reasons support the rule. The plaintiff's cause of action was merged in his judgment. When his judgment was satisfied his cause of action was at an end. To allow him to maintain an action upon a cause of action which is satisfied would be an anomaly. He had his election whether he would collect the judgment against the Gas Company or the judgment against the Street Railway Company. He could not collect both. He made his election, and thus satisfied his cause of action. If the plaintiff has a joint cause of action for a tort against A., B., C., and D., and obtains a judgment against A., which he collects, to allow him, while holding this money, to proceed against B., C., and D. in the hope that he might obtain a larger judgment against one of them, and thus collect the excess, when he would lose nothing if his recovery was smaller, would be to extend greatly this class of litigation, and ignore the maxim that it is to the interest of all that litigation should end. It is a sound rule of public policy that the plaintiff who has in his pocket one complete satisfaction of his cause of action shall not, while retaining this, litigate the cause of action further.

We attach no importance to the fact that the instructions given by the court on the trial of the case against the Street Railway Company were different from those given on the trial of the case against the Gas Company. On the first trial the court did not give an instruction allowing punitive damages; on the second trial he did give such an instruction, but notwithstanding this, on the second trial the verdict was for \$500 less than the first. The cause of action was the same on both trials.

Judgment affirmed.

## LOVELACE v. LOVELACE et al.

(Court of Appeals of Kentucky. Jan. 25, 1910.)

## 1. BILLS AND NOTES (§ 94\*)—CONSIDERATION—ANTECEDENT DEBT.

An antecedent debt due the payee was a good consideration for the execution of a promissory note for the amount of the debt.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-212; Dec. Dig. § 94.\*]

## 2. PRINCIPAL AND SURETY (§ 95\*)—DISCHARGE OF SURETIES—PURPOSE OF EXECUTING OBLIGATION—CREDITOR'S KNOWLEDGE.

If the holder of a note did not know of misrepresentations by the maker to sureties thereon as to the purpose of executing it and took it in good faith in payment of an antecedent debt when the maker represented to the sureties that it was given for another purpose, the sureties would be bound.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 144½; Dec. Dig. § 95.\*]

Appeal from Circuit Court, Wayne County.

"To be officially reported."

Action by F. F. Lovelace against C. B. Lovelace and others. From a judgment for part of defendants, plaintiff appealed. Reversed.

Kennedy & Kennedy and W. R. Cress, for appellant. Duncan & Bell and Walter N. Flippin, for appellees.

**BARKER, J.** The appellant, F. F. Lovelace, was the owner and holder of an overdue promissory note for \$616.10, of which his brother, C. B. Lovelace, was the maker, and the appellees Donlouie and C. W. Hurt were sureties. The note not being paid, this action was instituted against the maker and sureties to recover a judgment for the amount due. The maker, C. B. Lovelace, allowed judgment to go by default. The sureties filed separate answers, alleging a fraudulent conspiracy between C. B. Lovelace and his brother, F. F. Lovelace, by which to induce them to become sureties on the note in question, in order to pay off an antecedent indebtedness due to F. F. Lovelace by C. B. Lovelace, who was insolvent. The fraud consisted in C. B. Lovelace making false statements to the sureties that he desired them to sign the note for purposes other than the payment of an antecedent debt. One of the sureties, Donlouie, claims it was represented that the maker of the note desired to raise funds to enable him to stock and equip a livery stable in the town of Albany, Clinton county, Ky. To the other, C. W. Hurt, it is alleged that the maker represented that he desired to raise money to make the last payment upon a farm he had purchased. Both parties allege that they would not have become sureties for C. B. Lovelace in order to enable him to pay an antecedent debt to his brother. The plaintiff denied all the material allegations of the answers, and a trial resulted in a judgment in favor of the sureties.

As to the question of the evidence adduced upon the trial, it may be dismissed by saying that there was testimony tending to establish both sides of the issues between the parties litigant; and this brings us to the question of the correctness of the legal principles laid down by the trial judge in the instructions given to the jury.

Instruction No. 1, given by the court, is as follows: "You will find for the plaintiff, F. F. Lovelace, in this case, unless you shall believe from the evidence that the note sued on was a pre-existing debt due from C. B. Lovelace to the plaintiff, F. F. Lovelace, and further believe from the evidence that at the time the defendants, Hurt and Donlouie, signed said note as sureties, that they had been made to believe by C. B. Lovelace, and did believe, that said note was being made for the purpose of raising funds for the benefit of C. B. Lovelace for other purposes, and if you believe the latter state of case you will find for them or either of them, although you may further believe from the evidence that F. F. Lovelace was ignorant of the representations made to said defendants by C. B. Lovelace."

This instruction does not correctly state the law governing the issues between the parties to this litigation. The payment of the antecedent debt was a good consideration for a new note, and although C. B. Lovelace may have made false and fraudulent statements to the sureties in order to obtain their signatures, if F. F. Lovelace, the holder, was ignorant of this wrongdoing, and took the note in good faith as a payment for the antecedent debt, then the sureties are liable to him, notwithstanding the false statements of C. B. Lovelace. If, however, F. F. Lovelace had notice of the false statements alleged to have been made by C. B. Lovelace, then the diversion of the note from the purpose for which the signatures of the sureties were obtained releases them from liability. Brandt, in his work on Suretyship and Guaranty ([3d Ed.] vol. 1, § 130), correctly states the rule governing the question at bar: "When a surety signs a negotiable note with the principal for a particular purpose, and it is diverted from that purpose by the principal, and the party taking it has then knowledge of facts sufficient to charge him with notice of such diversion, the surety is not bound. But if the party taking the note has no such notice, express or implied, and takes the note in good faith and for value, the surety will be bound to him notwithstanding such diversion." Nothing in the cases cited by appellees militates against the doctrine here announced. On the contrary, all the cases expressly recognize the rule that the holder of the note must have actual or implied notice of the diversion in order that the sureties may be released. In Rus-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sell v. Ballard, 16 B. Mon. 201, 63 Am. Dec. 523, so much relied on by appellees, it was said: "If a note be purchased by a party, with notice that one of the obligors is a surety merely, and that the sale and purchase will defeat the purpose for which it was executed by him, or will violate any understanding or agreement between him and his principal, then the purchaser will be affected by such notice, and cannot hold the surety liable on the note, or compel him to pay it." In that case it was held that the fact that the note was made payable to a bank put the purchaser, Russell, on notice that it was executed for a purpose other than paying an antecedent debt to him; but in none of the cases cited by appellees is the principle laid down that a surety will be released because of a diversion of a note from the purpose for which it was executed, unless the holder had actual or implied notice of the agreement or understanding between the maker and his sureties. In the instant case, the note was on its face payable to the order of F. F. Lovelace, and appeared perfectly regular. There was nothing to warn him of a diversion or any other wrong done the sureties by his taking the note in payment of his debt.

As the court in the case at bar instructed the jury to find for the sureties if there was a wrongful diversion, although the holder may not have had notice of it, the judgment must be reversed; and it is so ordered.

#### WILLIAMS et al. v. BOLLING.

(Court of Appeals of Kentucky. Jan. 20, 1910.)

##### 1. APPEAL AND ERROR (§ 1009\*)—FINDINGS—CONCLUSIVENESS.

The Supreme Court will not disturb the chancellor's finding upon evidence so conflicting as to leave the mind in doubt.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

##### 2. APPEAL AND ERROR (§ 1009\*)—FINDINGS—CONCLUSIVENESS.

The Supreme Court will not reverse the chancellor's finding based in part upon facts not in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

Appeal from Circuit Court, Ohio County.

"Not to be officially reported."

Action for partnership accounting between K. V. Williams and another and J. B. Bolling. From a judgment allowing certain credits and making certain charges, parties first named appeal. Affirmed.

Heavrin & Woodward, for appellants.

CLAY, C. Appellee, J. B. Bolling, prior to the 12th day of June, 1908, was engaged on his own account in the business of manufacturing patent medicine. Desiring more capital for the purpose of manufacturing the

medicine and placing it properly before the public, he entered into negotiations with appellants, K. V. Williams and E. P. Taylor. In June, 1908, articles of partnership were entered into between appellants and appellee, by the terms of which K. V. Williams agreed to put into the business sufficient capital therefor, and to take the notes of E. P. Taylor and J. B. Bolling each for one-third of the amount so advanced; said notes to be secured by a lien on their respective interests in the business. The articles further provided that the formulas of making the medicine should be the exclusive property of the partnership. The partnership then made a written contract with appellee, Bolling, to make, advertise, and sell the medicine. For such services he was to receive \$40 per month and expenses. As to this contract there is no dispute. As to the second year, appellants contend that the contract with appellee was that the latter should have one-half of the gross sales. Appellee contends that he was to have one-half of the proceeds of the gross sales and his expenses should come out of the other half, while the remainder should be turned over to the company. For the third year, it is the contention of appellants that appellee was to have one-half of the proceeds of the gross sales as his compensation. The testimony for appellee is to the effect that he was to have \$50 per month and expenses.

The evidence heard by the commissioner to whom the case was referred shows that appellant Williams paid into the partnership the sum of \$742.35 and drew out \$188.60, leaving a balance due him of \$553.69. The court held that there was due appellee the sum of \$480 as salary for the first year; for the second year commissions of \$242 and expenses of \$331.82; for the third year commissions of \$369.12 and expenses of \$522.12. At the same time he found that appellee should be charged with the sales for the second and third years, amounting to \$1,224.05, also with \$110 drawn by his wife from the partnership property; leaving a balance of \$611.01 due Bolling. By adding the \$611.01 due Bolling to the \$553.69 due Williams, the court found that the partnership was indebted in the sum of \$1,164.70. Of this sum each partner was to bear one-third, or \$388.23. After giving credit for certain other items, the court found that the partnership was indebted to appellee, Bolling, in the sum of \$249.18, and to appellant Williams in the sum of \$139.15. He found these sums to be due by Taylor, who had not put anything into the firm. The judgment directed that the formulas be sold and the proceeds applied to the payment of the costs of the action and then to the claims of Williams and Bolling; the balance, if any, to be paid by Taylor. From this judgment Williams and Taylor have appealed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellants contend that the court erred in crediting appellee, Bolling, with \$480 in salary; also, in finding anything due appellee for the second year's work. It is further insisted that appellee's evidence shows that for the third year his sales amounted to \$1,120.50, and that the settlement should be made upon this basis, even if the contract was as determined by the court.

Upon the question of what the contract was for the second and third years, the proof is conflicting and such as to leave the mind in doubt, and we shall not, therefore, disturb the finding of the chancellor.

As to the finding on the facts, we find that the witnesses in the case filed various exhibits containing calculations, statements from books, etc. None of these exhibits are in the record before us. It is true that the testimony before us tends somewhat to sustain the contention of appellants, but the various items referred to in the exhibits are not testified to in the depositions by the witnesses who filed the exhibits. The depositions, therefore, are not complete, and a judgment based upon them would be mere guesswork. While it is true that there is evidence of certain settlements made during the first year, the exact character of these settlements and what was included in them does not satisfactorily appear. We will not reverse the chancellor upon his finding of facts where the facts before him are not before us.

For the reasons given, the judgment is affirmed.

#### CITIZENS' LIFE INS. CO. v. RILEY.

(Court of Appeals of Kentucky. Jan. 26, 1910.)

#### INSURANCE (§ 248\*)—REPUDIATION OF POLICY—PAYMENT OF SUBSEQUENT PREMIUMS—EFFECT.

A life policy provided that, if any premium note should not be paid when due, the policy should be void without notice or action of the company. Insured gave his note for one-half of the first premium, and declined to pay it, and in a suit thereon claimed that it had been procured by fraud, and recovered judgment for all that had not been earned by his insurance prior to repudiating the contract. The insurer by mistake continued the policy on its books, and sent insured a formal notice indicating the date on which the next premium would be due, he at that time lying dangerously wounded from a gun shot, and he sent a check for the second premium, which the insurer received on the day he died. *Held*, that the insurer was not liable on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 534-536; Dec. Dig. § 248.\*]

Appeal from Circuit Court, Perry County.  
"Not to be officially reported."

Action by Rebecca Riley against the Citizens' Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

Helm Bruce, E. E. Hogg, P. T. Wheeler, and F. J. Eversole, for appellant. Bailey P. Wooton, Jesse Morgan, Eversole & Eversole, Greene, Van Winkle & Schoolfield, and John C. Eversole, for appellee.

O'REAR, J. This is the second appeal of this case. The opinion on the first appeal is reported in 113 S. W. 439 (Citizens' Life Ins. Co. v. Riley). The judgment appealed from first was one on demurrer adjudging the company's answer insufficient. That judgment was reversed because we concluded that the answer presented a defense to the merits of the suit. The suit is upon a contract of life insurance. The policy, or contract, contains this provision: "If any note or other obligation given for the first year's premium or any part thereof on this policy shall not be paid when due, this policy shall be null and void, without any notice or action of the company, notwithstanding any receipt which may have been given for such premium." The insured paid the agent of the company who negotiated the transaction \$66.50 in cash and executed his note for \$66.50, the remainder of the first year's premium. The agent got 40 per cent. of the first premium as a commission. In July after the contract was made (in April) the agent settled with the company, therein accounting for and paying to the company the 60 per cent. of the first premium which was due it. In October following, the insured declining to pay the note to the agent, suit was brought on the note in the agent's name. The insured defended on the ground that the note had been procured of him by the fraud and misrepresentation of the agent in selling him the policy of insurance now in suit. A counterclaim was also interposed to recover from the agent the cash payment of \$66.50 which had been made to him. The result of the trial was a verdict and judgment for the insured, sustaining his defense to the note as well as his counterclaim. Upon this state of evidence in this suit, the circuit court instructed the jury to find for the plaintiff, the beneficiary in the policy. We think that was error. There should have been an instruction, instead, to find for the defendant, the insurance company. The issue being tried was not whether the agent, Webb, had paid the first premium to the company, but whether the insured, Riley, had paid the first premium. He had not. Of that which he did pay he recovered back all that had not been earned by his protection before he repudiated the contract, and had his note canceled for the remainder. The fact that the company under some mistake of its own continued the policy on its books as in force gave the insured no benefit. He had not done the first thing necessary to give him standing as a policy holder. His situation was not different from that of one

who had never had a policy issued to him by the company. When the time rolled around for the payment of the next premium on the policy because the books of the company showed that the first premium had been settled in full, the customary formal notice was sent to Riley indicating the date the next premium would be due. At that time Riley had been shot, and was lying dangerously wounded. The company knew nothing of his condition. Upon the receipt of the notice Riley sent the company a check for the second premium, which it received on the day he died from the effects of his wound. This last transaction, if not a legal fraud, was at least the result of a mistake on the part of the company as to the status of the insured. Nor was the insured misled by it. He could not acquire the relation of policy holder to the company upon the mistake alone of the latter. Nor was he legally concerned with the fact that the agent, Webb, and the company, had settled on an erroneous basis, by which he was given a false status on the books of the company. His right must rest primarily on his having complied with the contract by paying his premium, failing which he has no right as against the company. If Webb had paid the premium for Riley, or even if Riley had not repudiated Webb's act in the matter, a different case would be presented. *Southern Mutual Life Ins. Co. v. Best*, 8 Ky. Law Rep. 535.

Judgment reversed, and remanded for a new trial.

#### PHOENIX INS. CO. OF HARTFORD v. FLOWERS.

(Court of Appeals of Kentucky. Jan. 26, 1910.)

##### 1. APPEAL AND ERROR (§ 1036\*)—HARMLESS ERROR—DEFECT OF PARTIES.

Where persons had conveyed insured property long before it was burned, and had no interest therein at the time of loss, so that they could not sue on the policy, failure to make them parties to an action on the policy by the transferee of the property who claimed an assignment of the policy was not prejudicial to defendant, and not ground for reversal under Civ. Code Prac. § 134, providing that a judgment shall not be reversed for a defect which does not affect the substantial rights of the adverse party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4069-4071; Dec. Dig. § 1036.\*]

##### 2. INSURANCE (§ 629\*)—ACTION ON POLICY—PLEADING—NAME OF INSURER'S AGENT.

An insurance company is ordinarily presumed to know its own agent, and, if it should be surprised in an action on a policy by proof relative thereto, a continuance may be had, so that it was not error to refuse to require plaintiff to state in his petition the name of the agent with whom he contracted.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1575; Dec. Dig. § 629.\*]

##### 3. INSURANCE (§ 623\*)—ACTIONS—WAIVER OF PROVISION FOR TIME OF SUING.

Where an insurer with prompt notice of loss denies all liability, he cannot complain that

insured did not observe the provision requiring him to wait 60 days after proof of loss before suing.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1551; Dec. Dig. § 623.\*]

Appeal from Circuit Court, Barren County. "Not to be officially reported."

Action by W. T. Flowers against the Phoenix Insurance Company of Hartford. Judgment for plaintiff, and defendant appeals. Affirmed.

Harlin & White, for appellant. Baird, Richardson & Summers, for appellee.

HOBSON, J. W. T. Flowers in July, 1907, bought from the heirs of Robert Meyers a house and lot in Glasgow, Ky.; the vendors representing to Flowers that they had \$500 insurance on the house in the Phoenix Insurance Company. He bought the insurance, and they agreed to transfer it to him. The agent of the company at Glasgow who had authority to issue policies of insurance was notified of this and agreed to the transfer. The record on the books of the agent is as follows: "No. of removal receipt, D1356; Name of assured, Heirs of Robt. Meyers; Term of risk, one year; Commencement of risk, 1907, 7/27; Expiration of risk, 1908, 7/27; Class of building, D; Occupation dwelling; Amount insurance, five hundred dollars; Rate, one. Transferred to W. T. Flowers, purchaser, 9/21/07. Premium, \$5.00." After Flowers had paid for the property he did not get the policy, and what became of it does not appear. He afterwards took out \$1,000 more of insurance on the property in another company, and after this the house burned. The second company paid the \$1,000 called for by this policy; but the Phoenix Insurance Company declined to pay, and this suit was brought. The circuit court to whom the case was submitted without a jury made the following special findings of fact: "The defendant demanding a separation of the law and the facts, the court finds from the evidence the facts to be that the plaintiff's agent represented and stated to plaintiff and otherwise induced him to believe that the defendant had issued and delivered to the Meyers heirs a policy for \$500 on the property, and agreed to transfer the same to plaintiff if he purchased said property; that plaintiff did purchase said property and paid for it the sum of \$2,500, and the defendant's agent afterward by conduct, acts, and declaration induced plaintiff to believe said policy had been transferred to him, and the said policy was issued to the said Meyers heirs and transferred to the plaintiff on the defendant's general agent's books by said general agent at Glasgow, Ky.; that, after this, the defendant's agent held possession of said policy and solicited plaintiff to take out additional insurance on said property, and the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff did with the consent of defendant's agent take other and additional insurance on said property in another company with another agency for \$1,000; that the defendant's agent knew this fact and consented to it, or otherwise by his acts and conduct led the plaintiff to believe, and that plaintiff did in good faith believe, that defendant had consented for him to take out additional insurance for \$1,000 on said property; that defendant's agent consented for said property to be vacated, and to remain vacated for 30 days, and that said property was destroyed by fire without any fault on the part of the plaintiff within said 30 days; that J. W. Jones was general agent for defendant, and V. R. Jones was also an agent for defendant and acted as such, and the defendant held V. R. Jones out as its solicitor and agent, and permitted him to act as such and to conduct its business, and that he was conducting its business as its agent, together with J. W. Jones, and if there was any limitation as to his authority the plaintiff and the public had no notice thereof, and the court finds from the evidence that the plaintiff's property at the time of the said fire was covered by defendant's policy, originally issued to the Meyers heirs, and was worth much more than \$1,500 at the time of said fire, and that the defendant's agent resided in the vicinity thereof and had knowledge thereof, and the plaintiff could and would have obtained other insurance for more than \$1,000 on said property, except he was induced to believe and did in good faith believe from the acts, conduct, and declarations of the defendant's agent that defendant's policy for \$500 was in force for his benefit, and binding on the defendant. The court finds that it was not necessary under the circumstance shown in this case for plaintiff to furnish proof of loss to the defendant under said policy, but that if it was necessary, the defendant's conduct was a waiver thereof before suit, and this action was not prematurely filed. The court finds from the evidence that at the time the defendant's agent did so the plaintiff had no knowledge of the provisions of the defendant's policy and the defendant's agent had full knowledge thereof, but did not disclose same to plaintiff, and, the policy being lost, the court cannot say from the evidence that said policy did or did not have written thereon the privilege to plaintiff to take other and concurrent insurance." On these facts the circuit court entered judgment in favor of the plaintiff for the amount of the policy, and the defendant appeals.

It is insisted for appellant that the circuit court erred in overruling its special demurrer to the petition for want of proper parties plaintiff and defendant. This objection is made because the Meyers heirs were

not parties to the suit, and it is insisted that, as they had not in writing assigned the policy to the plaintiff, he could not maintain an action thereon without joining them with him. The circuit court overruled the demurrer upon the ground that the defendant had transferred the insurance to the plaintiff on its books, and had assured him that he had the insurance, thus, in effect, making a contract with him to insure the property. The defendant had thus prevented him from taking out other insurance, and he had relied upon its representations as to this insurance being valid in his behalf. Whether the circuit court was right in this matter or not we need not determine. The defendant was certainly not prejudiced by it. The Meyers heirs had sold and conveyed the property long before the fire. They had no interest in the property at the time of the fire. They could maintain no action upon the policy, and the bringing of them before the court could not have helped the defendant in any way. Section 134 of the Civil Code of Practice provides that a judgment shall not be reversed for any defect in the proceedings which does not affect the substantial rights of the adverse party. The matter complained of here clearly falls within this provision.

The court did not err in refusing to require the plaintiff to state in his petition the name of the defendant's agent. The defendant ordinarily is presumed to know its own agent, and, if it should be surprised on the trial by proof on a matter of this sort, a continuance may be had. But nothing of this sort was shown or occurred. The transactions were had with V. R. Jones, who was the son of J. W. Jones and attended to the business in his father's absence. Under the custom of doing the business, he was the agent of the company in his father's absence. His father was sick and he was in charge of the office.

The record leaves no doubt that from the time of the fire the defendant denied all liability for the loss. Its conduct after it received the proof of the loss can only be explained upon this ground; and, when it was denying liability altogether, it cannot complain that the plaintiff did not wait 60 days after furnishing it proof of loss before he filed the suit. The company had prompt notice of the loss when the fire occurred, and then by its conduct no less than by what it said, as well as its answer, denied all liability.

The proof is conflicting as to what Flowers intended to do with the house at the time he obtained the vacancy permit. It is not sufficient to show that he practiced any concealment upon the company in obtaining the permit, or that there was anything in the transaction upon which a defense to the policy may be predicated.

Judgment affirmed.

## BROWN'S ADM'R v. OSBORNE.

(Court of Appeals of Kentucky. Jan. 25, 1910.)

## 1. PAYMENT (§ 44\*)—APPLICATION.

Where one makes a payment on an account, a part of which is barred by limitations, and he gives no direction to what items on the account the payment shall be applied, the law authorizes the application of it to the payment of the oldest items on the account.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 123; Dec. Dig. § 44.\*]

## 2. LIMITATION OF ACTIONS (§ 159\*) — PART PAYMENT—ENTRY OF CREDIT.

The mere putting a credit on an open account, unless there is evidence that the amount represented by the credit was paid by the debtor, is not sufficient to stop the running of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 637; Dec. Dig. § 159.\*]

## 3. LIMITATION OF ACTIONS (§ 163\*) — PART PAYMENT—EFFECT.

Where a payment is made by the debtor on an open account before the same is barred by limitations, there is a sufficient acknowledgment of the debt to start the running of the statute anew.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 643; Dec. Dig. § 163.\*]

## 4. LIMITATION OF ACTIONS (§ 163\*) — PART PAYMENT—EFFECT.

Where a debtor at the time of the making of a payment on account has before him the account, or knows what it is made up of, and the amount of it, the payment is an acknowledgment of the entire account and stops the running of limitations up to that time; but the mere making of a payment on an account, consisting of many items, some of which the debtor recognizes as just and others not, is not an acknowledgment of the whole account and does not stop the running of limitations as to the part not paid.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 643; Dec. Dig. § 163.\*]

## 5. LIMITATION OF ACTIONS (§ 163\*) — PART PAYMENT—EFFECT.

Where one indebted for board on an account, no part of which was barred by limitations, made payments thereon, accompanied by the statement that he wanted the payments to go on the account for board, the payments were an acknowledgment of so much of the account as was then due and unpaid, and stopped the running of limitations, and created a new period from which limitations must run.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 643; Dec. Dig. § 163.\*]

## 6. LIMITATION OF ACTIONS (§ 196\*) — PART PAYMENT—EVIDENCE.

An acknowledgment of an indebtedness on account made at the time of payments thereon, and as a part of the same transaction, is competent to show for what purpose the payments are made.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 719; Dec. Dig. § 196.\*]

## 7. LIMITATION OF ACTIONS (§ 157\*) — PART PAYMENT—APPLICATION.

Where one indebted to another on account for money borrowed and for board made payments thereon, accompanied by the statement that the payments should go for the board, the payments did not acknowledge the indebtedness for money borrowed and did not stop the running of limitations thereon.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 634; Dec. Dig. § 157.\*]

Appeal from Circuit Court, Nelson County.  
"To be officially reported."

Action by Opha B. Osborne against Samuel Brown's administrator. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. McKay, for appellant. Kelley & Cherry, for appellee.

CARROLL, J. Samuel Brown, appellant's intestate, died in March 1908, and this suit was brought against his administrator on the following account, which we set out in full for the purpose of illustrating the alleged errors complained of in the trial of the case:

Samuel Brown, Deceased, in Account with Mrs. B. Osborne.

Oct. 10, 1900.	To cash borrowed.....	\$ 6 00
Jan. 10, 1901.	" " " " " " " " " "	12 00
Sept. 1, 1903.	" 32 months' board and washing from January 1, 1901, to September 1, 1903, at \$15 per month .....	480 00
Sept. 1, 1904.	" 2 months' board and washing, July and August .....	30 00
Sept. 1, 1904.	" 2 months' board and washing, July and August .....	30 00
Sept. 1, 1905.	" 2 months' board and washing, July and August .....	30 00
		<hr/>
		\$588 00
	Credits.	
Nov. 10, 1902.	By cash.....	150 00
Aug. 10, 1907.	" 1 sow given to Mason .....	15 00
Aug. 15, 1907.	" 1 cow given to Bessie .....	35 00
		<hr/>
		200 00
	Balance due.....	\$388 00

The answer controverted all the material averments of the petition, and further set up and relied on the five years' statute of limitations as a bar to so much of the account as was due more than five years before the death of the intestate.

The deceased was a bachelor and quite an old man when he died, and Mrs. Osborne was his niece. There was evidence showing that in 1901 Mrs. Osborne loaned him \$12, that he boarded at her house during the time mentioned in the account, and that the charges made were reasonable. It was also shown that the Mason and Bessie mentioned in the account were children of Mrs. Osborne, and that when he gave to them the sow and cow it was for the purpose of getting credit by their value on his board, and that when he paid the \$150 credited on his account he said he wanted it to go as part of what he owed for board, and that on several occasions he said he owed Mrs. Osborne for board and wanted her paid. Virtually no evidence was introduced in opposition to the claim. The court excluded from the consideration of the jury the item of \$6, and instructed them, in substance: (1) That if

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

they believed that Mrs. Osborne loaned the intestate \$12 and furnished him board and lodging and did his washing under an agreement by which she was to be compensated therefor, they should find for her the amount of the money loaned and the reasonable value of the board and washing, not exceeding the amount claimed. (2) That if they believed that any part of Mrs. Osborne's claim was barred by the statute of limitations, they should apply the payments made by the intestate on that part of the account which was barred. (3) That the plea of limitation was not available if the jury believed from the evidence that the intestate, within five years next after that portion of the account sued on that was due more than five years before his death, acknowledged to Mrs. Osborne or her agent his indebtedness. It is insisted by counsel for appellant: (1) That the instructions are erroneous; (2) that the evidence is not sufficient to show a promise or agreement upon the part of the intestate to pay board; and (3) that the greater part of the account was barred by the statute of limitations, and the acknowledgments or payments by the intestate did not prevent the statute from running. The first instruction is criticised on account of the inaccurate use of a few words; but we do not think it possible that the jury could have been misled by these verbal errors, or that they prejudiced substantially or otherwise the rights of the appellee. Except for the credits upon the account, and the acknowledgments made by the deceased that he owed it, a considerable part of the account would be barred by the statute. And so two questions are presented: First, the effect of the payments; and, second, of the acknowledgments.

When a person makes a payment upon an account, a part of which is barred by limitation at the time the payment is made, and there is no direction made by him as to what items on the account the credit shall be applied to the extinguishment of, the law authorizes the application of it to the payment of the oldest items on the account, although these items, except for the payment, would be barred by the statute. This the court in effect directed the jury to do. But the mere putting a credit on an open account or note, unless there is evidence showing that the amount represented by the credit was paid by the debtor on the note or account, will not be sufficient in itself to stop the statute from running. *Hopkins v. Stout*, 6 Bush, 375; *Frazer v. Frazer*, 13 Bush, 397. If the mere entry of a payment as a credit upon an open account or note would of itself have this effect, it would be an easy matter for the creditor, if he felt so disposed, to evade the plea of limitation and stop the statute from running against any note or account that was barred. But, when a payment is made by the debtor upon an open account like this one or a note before it is barred, and this fact is shown by competent evidence, it will

be a sufficient acknowledgment of the debt to stop the running of the statute up to that time, and the period of limitation will then be computed from the date of the payment. *English v. Wathen*, 9 Bush, 387; *Rankin v. Anderson*, 69 S. W. 705, 24 Ky. Law Rep. 647; *Carr v. Robinson*, 8 Bush, 269.

Nor should any distinction be made between the effect of a payment upon an open account like this and a note. An open account is a debt, as well as a note; the only distinction between the two being that one is a promise in writing signed by the debtor, while the other is not. An acknowledgment of the justice of an account will have the same effect as the acknowledgment of the justice of a note. *Ditto v. Ditto*, 4 Dana, 502; *Trousdale v. Anderson*, 9 Bush, 276. And so with reference to a promise to pay either a note or account.

But we think it proper at this point to say that we do not mean to hold that a payment on an account consisting of more than one item or an account containing a charge for more than one particular thing would stop the statute from running as to any part of the account that the debtor did not then know was in existence or that he did not have in mind when the payment was made. The account upon which a payment is made might consist of many items, made up of various things, some of which the debtor may recognize as just and others that he may not, and the mere fact of making a payment on such an account—nothing more being said or done—would not be an acknowledgment of the whole account or stop the statute from running as to the remainder of it not paid, in the absence of evidence that the account was before the debtor at the time the payment was made, or that he at the time knew what the account was for and the amount of it. But if the debtor at the time he makes the payment has before him the account, or knows what it is made up of and the amount of it, no matter how many items it may contain or what they are for, then his payment will be an acknowledgment of the justice of the entire account and have the effect of cutting off the time before the payment was made. In this case the account, except as to the item of \$12 for money loaned, was all due for board. The debtor knew that he owed for board, and, when he made the payments accompanied by the statement that he wanted them to go on his board, the payments were an acknowledgment of so much of the account as was then due and unpaid, and saved from the operation of the statute the antecedent time, and served to create a new period from which it should run. It is true there is no evidence that he knew the exact amount of the account or the sum he was being charged for board, but he did know that he owed an account for board, and it was upon this account that he made the payments. An unqualified and unconditional payment made

upon a debt is the very best evidence of its justice, and has the same effect as would an express acknowledgment that the debt was just or an express promise to pay. It is sufficient to sustain a new action if the debt is barred by the statute at the time the payment is made, or to cut off the time before the payment is made, if the debt is not then barred. At the time the \$150 was paid for board, no part of the account was barred by the statute, and the effect of the payment was to extinguish and satisfy the oldest items on the account for board. The further effect of the payment was to acknowledge that the remainder of the account for board then existing was just, so that, when this credit of \$150 was made, it created a new period from which the statute of limitations commenced to run. In other words, the five-year statute commenced to run from the date of the credit, and not from the date of the indebtedness as set out in the account. The payment cut off and excluded from the period of limitation the time that had elapsed when the new promise was made. *Gilmore v. Green*, 14 Bush, 772. On August 10, 1907, when the sow was given to Mason, and a credit of \$15 obtained upon the board, this payment again created a new period from which the five-year statute commenced to run. And so with the payment made on August 15, 1907. Taking this view of the case, it is manifest that no part of the account was barred by the statute, as the two last payments were made within the five years next before the death of the intestate.

It is not necessary that we should give controlling importance to the acknowledgments of the deceased of his indebtedness for board, or his promise to pay board, as the best evidence of the indebtedness and his acknowledgments of liability therefor are the payments, admittedly made by him. If no payment had been made, there might be some question whether the acknowledgments were sufficient in view of the fact that they were not made directly to Mrs. Osborne or her agent. *Trousdale v. Anderson*, 9 Bush, 278; *Hargis v. Sewell*, 87 Ky. 63, 7 S. W. 557. But these acknowledgments were made at the time of the payments and as a part of the same transaction, and therefore they were competent to show for what purpose the payments were made.

The evidence in our opinion was sufficient to support the petition that the intestate received from Mrs. Osborne the services mentioned in her account, and that he agreed to pay her for them, and that the prices charged are reasonable. But, as to the item for \$12 for money loaned, there is no evidence that the debtor intended to pay it, or that he acknowledged its justice, or that at the time he made the payment he knew of the existence of this item. Therefore to the extent of this item the judgment was erroneous.

But this error is not sufficient to justify a reversal. Upon a return of the case the court will credit the judgment by \$12.

Wherefore the judgment of the lower court is affirmed.

### COFIELD v. KLINE.

(Court of Appeals of Kentucky. Jan. 26, 1910.)

#### 1. ATTACHMENT (§ 302\*) — INTERVENTION OF CLAIMANT.

Where, in attachment, claimant files an intervening petition, and the petition is noted by an order of court as filed, the case should be tried with reference to the claimant's rights; Civ. Code Prac. § 29, allowing such a claimant to become a party.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1076, 1077; Dec. Dig. § 302.\*]

#### 2. ATTACHMENT (§ 306\*) — INTERVENTION OF CLAIMANT—FAILURE TO VERIFY PETITION.

Though Civ. Code Prac. § 29, requires that in attachment an intervening claimant shall verify his petition, when such a petition has been allowed to be filed without objection, the claim should not be dismissed because of failure to verify, where he has not been ruled to do so.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 1097; Dec. Dig. § 306.\*]

Appeal from Circuit Court, Breathitt County.

"Not to be officially reported."

Action by F. E. Kline against S. K. Coffield, in which one Blankenship intervened. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

O. H. Pollard and E. C. Hyden, for appellant. J. J. C. Bach, for appellee.

O'REAR, J. Kline sued Coffield to recover a debt, and caused a general attachment to be levied on certain saw logs as the property of the debtor. Blankenship filed an intervening petition, claiming to have purchased and paid for the logs before the levy of plaintiff's attachment. Blankenship's petition was filed in the clerk's office, and later was noted by an order of the court as filed. He also gave his deposition on his own behalf in the case. The cause was prepared by the plaintiff as against Coffield, but Blankenship was ignored. Inasmuch as he filed his petition, answer, and cross-petition, the case should have been tried with reference to his presence and rights. Appellee says Blankenship was not by order of court allowed to file the pleading. The Civil Code of Practice gives the right to the claimant to so intervene (section 29), and the court would have abused its discretion in refusing him; no laches being shown, and he having appeared in the case before it was prepared for trial (*Murphy v. Cockran*, 80 Ky. 239; *Heaverin v. Robinson*, 21 S. W. 876, 15 Ky. Law Rep. 15). It is true the Code requires the claimant's petition to be verified. So it does certain other pleadings. But, when filed, the practice is to rule the party to verify. One whose pleading has been allowed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to be filed and noted without objection ought not have his claim dismissed on the ground that the pleading is not verified, when there has been no motion against him to that effect.

The plaintiff's petition alleged an unrecorded lien on the logs. Coffield denied the lien. Plaintiff's evidence did not show a lien. On the contrary, it tended to show a purchase by him of the logs. The judgment did not decide the question of contract lien. It merely sustained plaintiff's attachment. But as to that Blankenship's claim was prior, and as the record stands was uncontradicted. The case is not so prepared that we can direct a final judgment. But the judgment sustaining the attachment as against Blankenship's claim was erroneous.

Reversed and remanded, for further proceedings consistent herewith.

#### SMEDLEY et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 27, 1910.)

CLERKS OF COURTS (§ 75\*)—LIABILITY ON OFFICIAL BONDS—STATUTES.

Ky. St. § 4242 (Russell's St. § 6171), prescribes the duty of a county court clerk in collecting money due the state, and the disposition thereof, and provides that, if he fails in these duties, he shall be liable on his official bond with 20 per cent. damages thereon recoverable by an action in the name of the commonwealth. Section 4263 (Russell's St. § 6226) gives the revenue agent authority, when directed by the auditor, to sue in the name of the commonwealth to recover money from delinquent officers, and provides that, where a judgment is recovered, the party in default shall pay 20 per cent. of the amount due the state, in addition to the principal and penalty to be paid to the state, and this shall be paid to the revenue agent who prosecutes the action for his services, but that this penalty shall not be in addition to the penalties in actions in the name of the commonwealth prosecuted by the county attorneys or other attorneys for the commonwealth. *Held*, that a judgment against a county court clerk and his bondsman, in a suit by a revenue officer for a violation of the statute, properly included both the 20 per cent. penalty due the state, under the first section, and that for the benefit of the revenue officer, under the second section.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. § 75.\*]

Barker, J., dissenting.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by the Commonwealth against Hiram Smedley and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Miller & Miller, for appellants. W. M. Husbands, James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

NUNN, C. J. Hiram Smedley was county court clerk of McCracken county, Ky., and his coappellant, the Title, Guaranty & Trust

Company of Scranton, Pa., was his surety. While Smedley was clerk, he collected \$418, which he failed to pay to the commonwealth or account for according to section 4242, Ky. St. (Russell's St. § 6171). W. M. Husbands, the revenue agent for that county, by direction of the State Auditor, instituted this action for the recovery of this money with the penalty prescribed by the section of the statutes referred to. Appellants filed an answer, but failed to state facts therein sufficient to constitute a defense, and a demurrer was sustained to it. It appears from the record that an amended answer was offered, which the lower court also conceived did not state a defense to the action, and refused to permit it to be filed. This amendment is not copied into the record. Therefore we cannot determine whether the lower court erred in not permitting it to be filed. The lower court rendered a judgment for \$418 and 20 per cent. damages, as provided in the section referred to, in favor of the commonwealth, and then adjudged that appellants should pay an additional 20 per cent. for the benefit of the revenue agent for his services in prosecuting the action.

Appellants ask a reversal for the reason, as they claim, they should not be compelled to pay the double penalty. Section 4242, Ky. St., after prescribing the duties of the circuit and county court clerks with reference to the collection of money due the state and the disposition of it, concludes as follows: "If any clerk shall fail to perform the duties required of him in this section, he shall be liable on his official bond, with twenty per cent. damages thereon, which may be recovered by action in the name of the commonwealth in any court of competent jurisdiction." As will be observed, this penalty of 20 per cent. is due the commonwealth, and it is entitled to this penalty upon the default of the clerk. The clerk owes it to the commonwealth by reason of the statutes. There is no provision of the statutes authorizing the auditor or any other officer to pay any part of this penalty or of the principal sued for to the auditor's agent for his services in the prosecution of the action, nor could he legally receive any part thereof. It is provided by section 4263, Ky. St. (Russell's St. § 6226), that the revenue agent shall have authority, when directed by the auditor, to institute suits in the name of the commonwealth to recover money from delinquent officers, and in all such suits in which a judgment is recovered the party in default shall be adjudged to pay an amount equal to 20 per cent. of the amount due the state in addition to the principal and penalty to be paid to the state, and this shall be paid to the revenue agent who prosecutes the action and recovers the judgment for his services in so doing. This statute is explicit in its terms. The \$418 and the 20 per cent., as provided in the

first section referred to, were recovered for the commonwealth, and the last section expressly provides that there shall be another 20 per cent. added which shall go to the revenue agent who prosecutes the action for his services. This is seemingly a hardship upon delinquent officers, but it was enacted for the purpose of making them diligent and prompt in the performance of their duties, and the last 20 per cent., the one in favor of the revenue agent, was to save the state from having to pay an attorney to prosecute the delinquent officer, as it had done for many years before the passage of the last-named section of the statutes.

Appellants contend that the following part of the last-named section prohibits the adding of the last-named penalty, to wit: "The penalties herein provided for shall not be in addition to the penalties in actions in the name of the commonwealth prosecuted by the county attorney or other attorneys for the commonwealth." This has no application to the case before us. It means that when the county or other attorney represents the commonwealth, in connection with the revenue agent, in an action against a defaulting officer or individual, and when, by statute, a per cent. or penalty is added which is directed to be paid by the delinquent for the benefit of the county or other attorney, in such case the penalty provided in section 4263 for the benefit of revenue agents cannot be added in addition to the other penalties named.

For the reasons stated, the judgment of the lower court is affirmed.

BARKER, J., dissenting.

#### BURNS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 26, 1910.)

##### 1. HOMICIDE (§ 308\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where there was evidence that deceased was helplessly drunk, and that accused, after disarming him of a pistol, could have kept out of his way or disarmed him of a small pocket knife, and thereby avoided the killing, the giving of instructions as to murder was not error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 644; Dec. Dig. § 308.\*]

##### 2. HOMICIDE (§ 231\*)—EVIDENCE—SUFFICIENT—MALICE.

Malice may be proved by inferring it from the circumstances attending the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 479; Dec. Dig. § 231.\*]

##### 3. HOMICIDE (§ 11\*) — MALICE — "MALICE AFORETHOUGHT."

On a trial for murder, it is proper to advise the jury that "malice aforethought" means a predetermination to do the act of killing without a legal excuse, and it is immaterial as to what time before the killing such a determination was formed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 16; Dec. Dig. § 11.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4304-4306; vol. 8, p. 7714.]

##### 4. HOMICIDE (§ 13\*)—MURDER—"IMPLIED MALICE."

"Implied malice" is such as arises or may be inferred from the intentional doing of an unlawful or wrongful act with a wrongful purpose.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 18; Dec. Dig. § 13.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3433, 3434; vol. 8, p. 7682.]

##### 5. HOMICIDE (§ 301\*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

Where there was no evidence that deceased made or intended an attack on another, a charge confining defendant's right to kill in his own defense was proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 633; Dec. Dig. § 301.\*]

Appeal from Circuit Court, Clay County.

"To be officially reported."

Alex Burns was convicted of murder, and he appeals. Affirmed.

D. K. Rawlings and H. C. Eversole, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, J. The appellant, Alex Burns, with a pistol shot and killed Abe Gilbert at the residence of Joseph Hignite, on Bullskin creek in Clay county. The indictment returned shortly thereafter by the grand jury of Clay county, against appellant for the homicide, charged him with the crime of murder, and on the trial the jury by their verdict found him guilty as charged, and fixed his punishment at confinement in the penitentiary for life. He was refused a new trial by the circuit court, and has appealed.

The facts were that the day before the homicide appellant and Gilbert, both of whom then lived in Owsley county, the former on Bullskin creek and the latter on Squabble creek, met at Wm. Baker's on Longest creek in Breathitt county, where they obtained several quarts of whisky. Some time in the afternoon they left Baker's, and went to the residence of a brother of Abe Gilbert, in Owsley county, where they remained a short time, and then went to the home of Abe Gilbert, arriving there in the night. After midnight they concluded to go to Joseph Hignite's in Clay county, and at once started, reaching Hignite's about or shortly before daylight. Hignite was a cousin of Gilbert, and his wife an aunt of appellant. Upon getting to Hignite's appellant and Gilbert called him to the door, and at his request they alighted from their horses and entered the house. At that time appellant was considerably under the influence of liquor, and Gilbert very drunk. As soon as they got into the house Gilbert pulled a bottle of whisky from his pocket, and proposed that the three take a drink. He and appellant drank from the bottle, but Hignite only pretended to do so. After some conversation between the parties all three of them left the house, at Hignite's suggestion, to put the

horses of the visitors in the stable and feed them. The horses were, however, turned into a pasture near the house, and the men then returned to the house to await breakfast, and on the way another drink was taken from the bottle by appellant and Gilbert, but Hignite, as before, only made a pretense of drinking.

After a short stay in the house appellant and Gilbert again went out, followed by Hignite, and Gilbert then insisted upon going to a cabin on Hignite's farm, about 100 yards from the latter's house, to see, as he said, one Isaac Gipson, who was occupying the cabin upon a previous visit made by Gilbert to Hignite. Hignite told Gilbert that Gipson no longer lived in the cabin, and that it was then unoccupied, but the latter persisted in going to the cabin, and was followed by appellant and Hignite. Upon getting to the cabin Gilbert called Gipson's name and knocked on the door. Finding the cabin empty, he again started with appellant and Hignite to the latter's house, soon stopping, however, while he and appellant, the latter partaking sparingly, took another drink from Gilbert's bottle. By that time Gilbert was so intoxicated as to be scarcely able to walk. Seeing that Gilbert was or would soon be helpless, Hignite suggested to appellant, who was far less intoxicated than Gilbert, and able to walk without apparent difficulty, that he get from Gilbert the bottle of whisky. This appellant succeeded in doing without apparent trouble, and gave the bottle to Hignite, who immediately left them for the purpose of hiding the bottle in, or behind, a nearby stable. When Hignite got to the corner of the stable he turned and looked at appellant and Gilbert to ascertain if they were watching him, intending that they should not see him conceal the bottle. Upon turning, he discovered that they were upon their knees and engaged in a struggle. He then saw appellant take a pistol from Gilbert, and at once get upon his feet with the pistol in his hand, and hurriedly step 15 or more feet from Gilbert. At that juncture Gilbert slowly staggered to his feet, and, commencing to draw a small knife from his pocket, said to appellant, "I want Clabe's pistol"; Clabe being his son of whom he had the day before borrowed the pistol. Seeing the attitude of the parties, Hignite told appellant to run out of the way, and then told Gilbert to come to him. Gilbert at first seemed to respond to Hignite's request by starting as if to go to him, but immediately turned in the direction of appellant, and with the knife in his hand staggered towards him. About that time Hignite saw appellant present the pistol as if about to shoot, and, being himself somewhat in line with Gilbert, and fearing for his safety if appellant shot at Gilbert, he stepped behind the stable, immediately following which he heard the report of the pistol, and, looking around the corner of the stable, saw Gilbert lying on the ground.

Hignite then went to Gilbert, and finding him wounded, and as he believed, dying, called from the house a physician, Dr. Thompson, who happened to be spending the night with him. Thompson at once saw the dying man, and examined his wound, but could do nothing to relieve him. When Hignite got behind the stable, the building obstructed his view, so that he did not again see appellant or Gilbert until after the former discharged his pistol, but when he last saw them Gilbert was apparently staggering in the direction of appellant with the small pocket knife in his hand, and the latter was standing with the pistol presented as if about to shoot; the parties being then about 15 feet apart.

The facts thus far related appear mainly from the testimony of Hignite, but are undisputed by appellant, who, however, testified as to certain alleged additional facts he claimed were unknown to Hignite, such as that Gilbert became angry at him for depriving him of the bottle of whisky, and attempted to draw a pistol, which appellant took from him, and in the struggle over which they fell to the ground; that after getting the pistol he removed some of the cartridges from it, and was engaged in removing others when Gilbert got upon his feet and started toward him with a drawn knife in his hand; that he repeatedly commanded Gilbert to stop, and backed away from him as he did so, but that Gilbert continued to advance until within 5 or 6 feet of him, whereupon he shot Gilbert believing it necessary to do so to save his own life. It is not clear from the evidence whether appellant shot Gilbert with his own pistol, or with the one he had just taken from Gilbert, but the evidence showed that appellant was then armed with his own pistol, and that it was his habit to carry a pistol.

The foregoing statement presents practically all the evidence furnished by the record, except that several witnesses testified as to conversations with appellant shortly after the homicide, in which he said he was 15 yards or feet from Gilbert when he shot him, all of which statements he denied. It should also be remarked that several persons testified as to appellant's good character, but they admitted upon cross-examination that they had known nothing of him for 3 years previous to the homicide, as during that time he had been in the regular army of the United States, and absent from Kentucky. It is also proper to say that the record shows appellant to have been 28 years of age, and Gilbert 45, at the time of the homicide; that Gilbert was a small man, and appellant above the average in both weight and height, and much the superior of Gilbert in physical strength. It should further be observed that the record fails to show the existence of any ill feeling between appellant and Gilbert prior to the homicide.

The grounds upon which appellant sought a new trial, and now asks a reversal, are:

(1) That the court did not properly instruct the jury; (2) that an instruction as to murder should not have been given; (3) that the instruction as to self-defense did not correctly state the law; (4) that the verdict was not supported by the evidence.

As to the first of these grounds it is sufficient to say that the instructions so admirably state the law applicable to the facts of this case that we insert them in the opinion.

"No. 1. Gentlemen of the jury: If you believe from the evidence beyond a reasonable doubt that the defendant, Alex Burns, of Clay county, Ky., and before the finding of the indictment herein on the occasion mentioned in the evidence, willfully and feloniously shot at and wounded Abe Gilbert in the body, with a pistol loaded with powder and leaden balls, or other hard and explosive substances, so that he then and there immediately died, not in his necessary, or reasonably apparent necessary, defense, then you ought to find him guilty; guilty of willful murder as charged in the indictment herein, if you believe from the evidence beyond a reasonable doubt that such shooting and killing was done willfully and feloniously and with malice aforethought; guilty of voluntary manslaughter included in the indictment herein, if you believe from the evidence beyond a reasonable doubt that such shooting at and killing was done in sudden heat and passion, or in sudden affray and without previous malice.

"No. 2. If you find the defendant guilty of willful murder, as charged in the indictment herein, you will fix his punishment at death or confinement in the penitentiary of this state for life, in your discretion according to the proof. If you find the defendant guilty of voluntary manslaughter included in the indictment herein, you will fix his punishment at confinement in the penitentiary of this state for a period of not less than 2 nor more than 21 years, in your discretion according to the proof. If you find the defendant not guilty, you will say so, and no more.

"No. 3. If you believe from the evidence that at the time the defendant shot and killed Abe Gilbert, if he did so, he believed, and had reasonable grounds to believe, that he was then and there in immediate danger of death, or the infliction of some great bodily harm at the hands of the said Abe Gilbert, and that it was necessary, or was believed by the defendant, Alex Burns, in the exercise of a reasonable judgment to be necessary, to shoot at and kill the said Abe Gilbert, in order to avert that danger, then you will acquit the defendant, upon the grounds of self-defense and apparent necessity.

"No. 4. If you have a reasonable doubt from the evidence of the defendant having been proven guilty, you will find him not guilty. Or, if you believe from the evidence beyond a reasonable doubt that he has been proven guilty, but have a reasonable doubt from the evidence as to whether he has been

proven guilty of willful murder as charged in the indictment herein, or of the lower offense, voluntary manslaughter, included in the indictment herein, you will find him guilty of such lower offense, voluntary manslaughter, and fix his punishment as stated in instruction No. 2, above, for voluntary manslaughter.

"No. 5. The words 'willful' and 'willfully' as used in the indictment and the instructions herein mean intentional, not accidental or involuntary. The word 'feloniously' as used in the indictment and the instructions herein means proceeding from an evil heart or purpose, done with the deliberate intention to commit a crime. The phrase 'with malice aforethought' as used in the indictment and instructions herein means a pre-determination to do the act of killing without a legal excuse, and it is immaterial as to what time before the killing such a determination was formed."

It is insisted for appellant that the evidence furnished no ground for the instruction as to murder, and that it was necessarily prejudicial to appellant. While the evidence presents many of the earmarks of a killing in a sudden affray or in sudden heat and passion, and we would be better satisfied to affirm a verdict and judgment for voluntary manslaughter, with such punishment as might have been inflicted upon appellant for that crime, we cannot say that the verdict finding him guilty of murder is wholly without support from the evidence. At most the homicide was unnecessary, and therefore inexcusable. There was evidence upon which the jury might have rested a conclusion that the deceased was so intoxicated as to render him helpless, and, after appellant took the pistol from him, harmless, and that had appellant taken the advice of Hignite and kept out of deceased's way after disarming him of the pistol, the latter in his drunken and helpless condition could not have kept his feet long enough to get to him with the small pocketknife in his hand, or if he had done so, that appellant, who was greatly his superior in physical strength, and was not himself sufficiently intoxicated to interfere with his walk or movements, could have disarmed him of the knife, or with a blow of his fist felled him to the ground, and thereby obviated the killing. If such a conclusion on the part of the jury as we have indicated was warranted by the evidence, the same facts may in their opinion have authorized the inference that the killing was done with malice, and, if so, it was their province to declare it murder. "The mode of proving malice is by inferring it from facts and circumstances attending the killing." *Roberson's Criminal Law*, § 178; *Farris v. Commonwealth*, 14 Bush, 370; *Rogers v. Commonwealth*, 96 Ky. 28, 27 S. W. 813, 16 Ky. Law Rep. 199; *Kriel v. Commonwealth*, 5 Bush, 373; *Salisbury v. Commonwealth*, 79 Ky. 433; *Ball v. Commonwealth*, 81 Ky. 664.

While it would not have been proper for the trial court to instruct the jury what acts, if any, on the part of appellant, connected with or resulting in the homicide, would authorize an inference or inferences of malice, it was proper to advise them, as was done by instruction No. 5, that "malice aforethought, as used in the indictment and instructions herein, means a predetermination to do the act of killing without a legal excuse, and it is immaterial as to what time before the killing such a determination was formed." The evidences of express malice, as well as the facts from which malice may be implied, are easily recognized. Express malice usually manifests itself in previous or contemporaneous threats by the wrongdoer of death or harm to his intended victim, or declarations or acts indicative of his ill will toward, or desire to inflict injury upon, him. Implied malice is such as arises or may be inferred from the intentional doing of an unlawful or wrongful act with a wrongful purpose. For example, the use by one of a deadly weapon in the unlawful taking or attempted taking of human life, or in unlawfully inflicting, or intending to inflict, upon another bodily injury, is an act from which malice is implied or may be inferred. More broadly stated, malice will be inferred from the intentional doing of any wrongful act which the perpetrator knows will necessarily cause injury to another, or which he intends shall cause injury to another, though such injury may not in fact result. We cannot say that there was in this case an entire absence of facts or circumstances from which malice on the part of appellant in taking Gilbert's life could be inferred. If, as the jury obviously found, the killing was unnecessary and inexcusable, the act was either murder or voluntary manslaughter. It may be that appellant's own testimony convinced the jury that they ought not to find him guilty of voluntary manslaughter, for he did not claim to have acted in sudden heat and passion in taking Gilbert's life, or that it was done in a sudden affray. On the contrary, his sole defense was that the killing was done in the protection of his life and person from danger, real or apparent, at Gilbert's hands.

We are not called upon to speculate as to the reasons upon which the jury rested their conclusion that appellant was guilty of murder, but it is probable that they rejected his plea of self-defense because convinced by the evidence, beyond a reasonable doubt, that he was in no danger from the knife of Gilbert, and had no grounds, real or apparent, to believe himself in such danger when he shot him, and that, instead of taking from Gilbert the pocketknife, as the drunken and helpless condition of the latter would have permitted of his doing, or of securing his safety by following the advice of Hignite to get away from Gilbert, whose helplessness should have appealed to his sympathy and protection, he

deliberately and unnecessarily shot and killed him, which act, the jury must have concluded, manifested such a wanton and reckless disregard of human life as proved it to have been the result of malice, however suddenly conceived in the mind of the slayer. Notwithstanding appellant's complaint of error in the instructions, his counsel only criticize the instruction as to the law of self-defense. The objection made to that instruction was that it confined appellant's right to shoot and kill Gilbert to his own defense, whereas, it should, according to the contention of counsel, have told the jury that if Hignite, instead of appellant, was the object of Gilbert's attack, appellant would have had the same right, under the circumstances predicated in the instructions, to shoot and kill Gilbert in defense of Hignite that he would have had to do so in his own defense. The trial court committed no error in giving the instruction in the form it now presents. If it had been given as contended for by appellant, it would have been misleading to the jury and prejudicial to the commonwealth, as there was no evidence whatever tending to show that Gilbert made or intended an attack upon Hignite. Neither Hignite nor appellant intimated anything of the kind, and they were the only persons who could have known of such attack, had it been made.

A careful examination of the record convinces us that the rulings of the trial court are free from error. If the jury should have found appellant guilty of voluntary manslaughter, instead of murder, the mistake is one that should appeal to executive clemency as a ground for commutation of his punishment; but, as we cannot say there was no evidence whatever upon which to rest the verdict finding appellant guilty of murder, the mistake, if any, is one we are without power to correct.

Wherefore the judgment is affirmed.

#### ESTILL COUNTY v. BOARD OF TRUSTEES OF ESTILL COLLEGIATE INSTITUTE OF IRVINE.

(Court of Appeals of Kentucky. Jan. 14, 1910.)

#### 1. COLLEGES AND UNIVERSITIES (§ 6\*)—SEMINARY PROPERTY—DISPOSITION.

The power given to the trustees of the county seminary incorporated by act of February 13, 1864 (Acts 1863-64, p. 373, c. 306), by which they were given power to hold, transfer, and determine the use of the corporate property, authorized them to convey the seminary property to an educational corporation formed by a religious society.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 13-15; Dec. Dig. § 6.\*]

#### 2. COLLEGES AND UNIVERSITIES (§ 6\*)—SEMINARY PROPERTY—DISPOSITION.

Where seminary property, conveyed for the use of a religious society on condition that the trustees of the seminary should have part of the fund in case of sale, is ordered to be sold in a mechanic's lien suit, a petition by the county

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to be made a party, stating the necessary facts, may be filed so that the question whether the fund coming to the trustees vests in the graded common school district, as provided in Ky. St. § 4484 (Russell's St. § 5762), or in the county court for the benefit of the common schools in the county, as provided by section 323 Ky. St. (Russell's St. § 2306), may be settled in the suit. [Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 13-15; Dec. Dig. § 6.\*]

Appeal from Circuit Court, Estill County.  
"Not to be officially reported."

Action by the Farmers' Bank of Estill against the Board of Trustees of the Estill Collegiate Institute of Irvine. From a judgment refusing to allow Estill County to be made a party, the County appeals. Affirmed.

Chas. W. Friend, for appellant.

HOBSON, J. By an act approved February 10, 1798, certain vacant lands were set apart for the use of seminaries of learning throughout the different parts of the state. 2 Moorhead & Brown, Dig. p. 1001. By other acts from time to time it was provided that the vacant lands in any county might be located, and that the trustees of the seminaries in the several counties of the state might sell and convey them to purchasers. See 2 Moorhead & Brown, Dig. pp. 1003-1008. By an act approved January 26, 1815 (Laws 1814-15, p. 269, c. 193), it was further provided that the moneys arising from the sale of these lands might be invested by the trustees in bank stock, until used for the erection of buildings. See 5 Lit. 163. By an act approved January 13, 1831, certain persons were appointed commissioners to settle with the trustees of the Estill Seminary lands, and receive from them all sums of money in their hands properly belonging to the seminary, the money when received to be expended by the commissioners in building a seminary of learning in the town of Irvine, and purchasing a lot of ground not exceeding one acre for that purpose. See Acts 1830-1831, 1st Sess., p. 77, c. 468. By an act approved November 26, 1831, the commissioners were empowered to sell and convey all lands belonging to the seminary, and the county court was authorized to fill any vacancies occurring in the office of commissioner. See Acts 1831, 1st Sess., p. 41, c. 616. By an act approved January 28, 1841, all money which resulted from the sales of vacant lands in Estill county, or which might thereafter accrue from such sales, was appropriated for the use of Estill Seminary, and the county court was required to cause the same to be paid to the treasurer of the seminary to be used by the trustees as other funds belonging to it. See Acts 1840-41, p. 154, c. 161. By an act approved February 13, 1864, Estill Seminary was incorporated. This act, among other things contained these provisions:

(1) "That M. M. Price, Harrison Moore,

Robt. W. Smith, John Park, Ansel Daniel, Wm. J. Clark, E. D. Stockton, and D. B. Scholl, and their successors, be and they are hereby constituted a body politic and corporate, by the name and style of the 'Estill Seminary' in the town of Irvine, Kentucky; and as such shall have perpetual succession, with full power to acquire, hold, and transfer real and personal estate, make contracts, sue and be sued, plead and be impleaded in their corporate capacity; to make such by-laws, rules, and ordinances as may be necessary for their government, not contrary to the constitution and laws of this state or the United States. Said trustees shall have power over all the business concerns of said seminary. They may appoint a president, treasurer, clerk and other officers if necessary.

(2) "That as many as four of said trustees, meeting in pursuance to their own rules, shall be a quorum for transacting business. Said trustees shall have power to employ a principal, and such assistant teachers, male or female, as they may deem necessary. They shall have the power to fill vacancies that may happen in said corporation, and may have power to remove from office any member of the board of trustees, a majority of all the trustees concurring.

(3) "All the estate, money, or property now belonging to, or which may hereafter be acquired by, said corporation, by devise, gift, or otherwise, shall be used in such manner as the trustees by their corporate action may determine." See Acts 1863-64, pp. 373, 374, c. 806.

In the year 1905, the trustees of Estill Seminary conveyed the seminary property to the Estill Collegiate Institute, a corporation formed under the direction of the Evangelistic Committee of the Synod of Kentucky, the plan being that the grantee was to erect new buildings on the lot and run a school there; and it was stipulated in the deed, among other things, that, if the committee ceased to conduct such a school, then the land and all the buildings erected thereon were to revert to the parties contributing to build the school in the rate of the amount of their contributions a large number of persons having contributed to erect said buildings, that the lot described in the deed was to be valued at \$1,500, and that the trustees of Estill Seminary in their corporate capacity should have such part of the whole fund arising from the sale, if the lot should be sold, as \$1,500 bore to the whole price. The deed was properly recorded, and Estill Collegiate Institute erected new school buildings upon the lot; but it failed to pay the contractor for the erection of the buildings, and executed to him a note for \$2,000, which was secured by a mechanic's lien upon the property. He assigned the note to the Farmers' Bank of Estill. The bank brought

this suit to enforce its lien. The trustees of Estill Seminary filed an answer setting up the conditions of the deed, and praying that their rights be protected. W. T. B. Williams & Son, bankers, filed an answer in which they set up a claim for \$1,802 for brick which went into the building. In this condition of the pleadings, the court entered an order for the sale of the property, reserving in the judgment for future adjudication all questions as to who would be entitled to the proceeds. The property was sold for \$4,250. The sale was reported to the court and confirmed. At this stage of the proceedings, Estill county tendered its petition asking that it be made a party to the action, and that its petition be taken as its answer. In the petition it set out the facts we have stated in regard to the legislation under which Estill Seminary was created and charged that within recent years the property had ceased to be used as a public institution to which all taxpayers of the county could have access; that the buildings formerly used as seminary buildings had been torn down and new buildings erected; and that the deed from the trustees of the seminary to the Estill Collegiate Institution was void for want of authority in the trustees to make it. The circuit court refused to allow the petition to be filed, but allowed it to be made a part of the record, and refused to allow Estill county to be made a party to the action. From this judgment, Estill county appeals.

It is manifest from the act of February 13, 1864, that the trustees created by that act were given power to acquire, hold, and transfer real and personal property, and to have all power over the business concerns of the seminary. It was further provided by that act that the estate, money, or property then belonging to or thereafter acquired by the corporation should be used in such manner as the trustees might determine. The broad powers thus conferred upon the trustees authorized them to sell and convey the seminary property to the collegiate institute, and the circuit court properly so held.

Section 4484, Ky. St. (Russell's St. § 5762), provides: "The title of all common school and all county seminary property, the county court and the board of trustees of said seminary consenting, in the limits of any graded common school district organized under the provisions of this law, shall be, and the same is hereby, vested in the board of trustees of said graded common school district, and they are hereby empowered to sell and convey the same, or to use the same for graded common school purposes, as to them shall seem best; but when county seminary property shall be appropriated all pupils of the county shall be permitted to attend such school at such reduced tuition from what is ordinary as shall be equitable and make good to them their interest in said seminary

property. Section 323, Ky. St. (Russell's St. § 2306), also provides: "If any society holding lands shall dissolve, the title to such land and appurtenances shall vest in the trustees of the county seminary in which the land may lie, for the use of such seminary; and if there be no such seminary, then in the county court, for the benefit of common schools in the county."

If a graded common school district has been organized in Irvine, Ky., and the county court and the board of trustees of the seminary consent, any fund coming to the trustees from the sale of the property may be turned over to the graded common school district; but, if no such consent is made, then the fund will pass under section 323, and vest in the county court for the benefit of the common schools in the county, if it appears that the seminary contemplated by the acts of the Legislature cannot be maintained by the trustees, and a condition exists bringing the case within the operation of section 323. If the county presents a petition to be made a party for this purpose stating the necessary facts, the circuit court will allow it to be filed, so that the whole matter may be settled in this action.

Judgment affirmed.

#### STEPHENS v. GRAVIT.

(Court of Appeals of Kentucky. Jan. 25, 1910.)

#### 1. MALICIOUS PROSECUTION (§§ 24, 33\*)—ACTIONS — ELEMENTS OF ACTION — WANT OF PROBABLE CAUSE.

That plaintiff in an action for malicious prosecution was acquitted in the prior criminal prosecution would not require a verdict for him in absence of a further showing that the criminal case was instituted against him maliciously and without probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 50, 69; Dec. Dig. §§ 24, 33.\*]

#### 2. MALICIOUS PROSECUTION (§ 20\*)—ACTIONS — DEFENSES.

Defendant in an action for malicious prosecution may show as a defense that he acted prudently, and had reasonable grounds to believe that plaintiff was guilty of the offense charged.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 26-28; Dec. Dig. § 20.\*]

#### 3. MALICIOUS PROSECUTION (§ 22\*)—ACTIONS — DEFENSES—ADVICE OF COUNSEL.

That defendant acted on the advice of a magistrate in instituting the prosecution would not be a defense to a suit for malicious prosecution, though the advice of a competent attorney would be a defense.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 45-48; Dec. Dig. § 22.\*]

#### 4. MALICIOUS PROSECUTION (§ 56\*)—ACTIONS — PRESUMPTIONS.

Where there was no evidence that a magistrate, on whose advice a criminal prosecution was instituted, was a competent practicing attorney, or learned in the law, it cannot be pre-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sumed that he was either, so as to constitute a defense to an action for malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Dec. Dig. § 56.\*]

**5. MALICIOUS PROSECUTION (§ 64\*)—ACTIONS — SUFFICIENCY OF EVIDENCE — WANT OF PROBABLE CAUSE.**

In an action for malicious prosecution for arresting plaintiff and another for horse stealing, evidence held to warrant a finding that the arrest of plaintiff was malicious, and without probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Dec. Dig. § 64.\*]

**6. MALICIOUS PROSECUTION (§ 69\*)—EXCESSIVE DAMAGES.**

A verdict for \$500 in an action for malicious prosecution by having plaintiff arrested for stealing a horse was not excessive.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 15; Dec. Dig. § 69.\*]

Appeal from Circuit Court, Graves County.  
"To be officially reported."

Action by Clarence Gravit against W. H. Stephens. From a judgment for plaintiff, defendant appeals. Affirmed.

Speight & Dean, for appellant. Webb & Seay and James T. Webb, for appellee.

**CARROLL, J.** This action was brought by the appellee, Gravit, against the appellant, Stephens, for malicious prosecution. Upon a trial before a jury the damages were assessed at \$500, and judgment entered accordingly. A reversal is asked for errors in instructing the jury, and because the verdict is excessive.

It appears that Stephens, who was a farmer living in Tennessee, sold a horse to one Grover Handley, whose parents lived in Kentucky, but who was at the time a farm hand in Tennessee. In payment for the horse Handley gave Stephens his interest in a crop of tobacco, and also agreed to work for him 2½ months; the price of the labor being estimated at \$50. Stephens claimed that in the contract, which was verbal, he retained a lien on the horse to secure the payment of the \$50, and that the horse was to remain in his possession until this amount was paid or the work done. Handley agreed that he bought the horse for the price mentioned, but denied that Stephens retained any lien on the horse or that it was to remain in his possession until paid for. After Handley had worked for Stephens about a week, he concluded that he wanted to ride or drive the horse to his father's, and with Gravit and other boys he went to Stephens' pasture where the horse was, and took him to a neighbor's place. A little later in the day Handley, in company with Gravit, who was assisting him with the horse, started on his way to his father's. Gravit only went a short distance, returning to his home in Tennessee. On the following day Stephens received information that Handley without his knowledge or consent and with the as-

sistance of Gravit had taken the horse out of the state, and was not going to pay for him or return to finish the work he agreed to do. After obtaining this information, he went to a justice of the peace in Tennessee and laid before him the facts for the purpose of getting his advice as to whether or not a warrant should be issued for the arrest of Handley and Gravit. The magistrate, after hearing Stephens' statement of the contract and the evidence of others as to Handley's intentions, concluded that Handley and Gravit in taking possession of the horse and removing him out of the state committed the crime of horse stealing, and he issued a warrant for the arrest of each of them on this charge. Gravit, upon his arrest under the warrant, gave bond for his appearance at an examining trial before the magistrate, and a few days afterwards was tried and discharged.

The evidence is very satisfactory that, if Stephens had a lien on the horse or was to retain its possession, Gravit did not know it, and also that he did not know that Handley had any intention, if he did have, of taking the horse away without paying Stephens or returning to do the work he agreed to do. Stephens in his answer denies that he acted maliciously or without probable cause, and set out the information on which he acted. He further averred that, before obtaining the warrant, he stated fully to the magistrate in whose judgment and discretion he had confidence all the facts concerning the case, and in procuring the warrant to be issued acted upon his advice. It is now the contention of his counsel that Stephens had probable cause, based on reasonable information, to believe that Gravit had committed the crime of horse stealing, and that, as he had laid all the facts before the magistrate and was advised by him to have the warrant of arrest issued, the jury should have been instructed to return a verdict in his favor.

In actions for malicious prosecution, the mere fact that the plaintiff had been acquitted or discharged on the trial of the prosecution is not in itself sufficient to authorize a judgment in his favor in a civil suit to recover damages for malicious prosecution. In addition to producing evidence of his arrest and acquittal of the charge, he must also introduce testimony conducing to establish that the criminal prosecution instituted against him was malicious and without probable cause. *Lancaster v. Langston*, 36 S. W. 521, 18 Ky. Law Rep. 299; *Jones v. L. & N. R. Co.*, 96 S. W. 793, 29 Ky. Law Rep. 945. On the other hand, the defendant may introduce evidence showing, or conducing to show, that he acted with prudence and discretion, and had reasonable grounds to believe that the plaintiff was guilty of the offense for which he was arrested. *Meyer v. Louisville, etc. Ry. Co.*, 98 Ky. 365, 33 S. W. 98, 17 Ky. Law

Rep. 945; Ahrens & Ott Mfg. Co. v. Hoehner, 106 Ky. 692, 51 S. W. 194, 21 Ky. Law Rep. 299; Metropolitan Life Ins. Co. v. Miller, 114 Ky. 759, 71 S. W. 921, 24 Ky. Law Rep. 1561; Anderson v. Columbia Finance & Trust Co., 50 S. W. 40, 20 Ky. Law Rep. 1792. He may also show that before instituting the prosecution he consulted with a competent practicing attorney and placed before him a full and fair statement of all the facts, and was advised by him to have, or that he might safely have, the criminal proceeding instituted. If he does this, and the attorney advises that an offense has been committed, the client may safely act on his advice and will be protected, although an acquittal may follow. Farmers' & Traders' Tobacco W. Co. v. Gibbons, 107 Ky. 611, 55 S. W. 2, 21 Ky. Law Rep. 1348; National L. & A. Ins. Co. v. Gibson, 101 S. W. 895, 31 Ky. Law Rep. 101, 12 L. R. A. (N. S.) 717; Tandy v. Riley, 80 S. W. 776, 26 Ky. Law Rep. 98; Gatz v. Harris, 121 S. W. 463. But the fact that Stephens laid all the facts before a magistrate and acted upon his advice was not sufficient to constitute a defense. The general rule, and the one that we approve, is that it is necessary to lay the facts before, and obtain the advice of, a competent practicing attorney; in other words, a person learned in the law. Newell on Malicious Prosecution, p. 310; 26 Cyc. 31; 19 Am. & Eng. Ency. of Law, 687. There is no evidence that the Tennessee squire was a competent practicing attorney or learned in the law, and, in the absence of such evidence, we cannot presume that he was either.

The trial court permitted all the evidence offered by either party that shed any light up-

on the issues involved to go to the jury. Stephens was permitted to relate all the information upon which he acted and to give his reasons for believing that he was justified in having the warrant of arrest issued. If Stephens carefully and fully investigated the facts connected with the taking of the horse, and in good faith had reasonable grounds based on sufficient evidence to warrant a person of ordinary judgment and reasonable discretion to believe that his horse had been stolen, he had the right to obtain a warrant for the arrest of the guilty parties. But all this was put in issue by Gravit, and it was for the jury to say from the evidence under proper instructions whether the facts and circumstances were sufficient to justify a man of ordinary prudence and reasonable discretion in believing in good faith that the offense had been committed. In view of the fact that the advice of the magistrate did not afford Stephens any protection, the instructions given were more favorable to Stephens than the law authorized. The jury should not have been told that the advice of the magistrate constituted a defense. The jury, after hearing all the evidence, came to the conclusion that the arrest of Gravit was not only malicious, but without probable cause, and we cannot say that the evidence did not warrant them in so finding. If the testimony introduced in behalf of Gravit was true, the jury had the right to believe there was little excuse for his arrest. It is quite a serious matter to be arrested on the charge of horse stealing, and we do not feel authorized to say that the verdict was excessive.

Wherefore the judgment is affirmed.

## JOHNSTON et al. v. TOWNSEND, Secretary of State.

(Supreme Court of Texas. Jan. 23, 1910.)

## 1 CORPORATIONS (§ 18\*)—INCORPORATION—CHARTER.

Rev. St. 1895, art. 642, subd. 14, permits the incorporation of a corporation for the transaction of any manufacturing or mining business and purchase and sale of such goods, wares, and merchandise used for such business. The statute also requires the preparation of a charter setting forth the purpose for which the corporation is formed. *Held*, that a proposed charter stating, "The purpose for which this corporation is formed is the transaction of a manufacturing and mining business and the purchase and sale of goods, wares and merchandise used for such business," was too indefinite, since it might be interpreted as meaning the authorization of the pursuit of both businesses.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 18.\*]

## 2 CORPORATIONS (§ 14\*)—PURPOSES—STATUTORY PROVISIONS—CONSTRUCTION.

Rev. St. 1895, art. 642, subd. 14, authorizing the formation of a corporation for the transaction of any manufacturing or mining business, and the purchase and sale of such goods, wares and merchandise used for such business, while giving the right to incorporate for a business consisting of manufacturing and mining, does not authorize incorporation for two businesses—one of manufacturing and the other of mining.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 16-22; Dec. Dig. § 14.\*]

Original petition by H. G. Johnston and others for mandamus against W. B. Townsend, Secretary of State. Writ refused.

O. L. Jester, for relators. R. V. Davidson and Jewell P. Lightfoot, Atty. Gens., Wm. El. Hawkins, Asst. Atty. Gen., and C. A. Leddy, Special Asst. Atty. Gen., for respondent.

**WILLIAMS, J.** This is an application for a mandamus to compel the respondent to file a charter of incorporation, which he refuses to do on the ground that it is for the formation of a corporation for two purposes—manufacturing and mining—which, he contends, cannot be combined in one charter. The purpose is thus stated in the proposed charter: "The purpose for which this corporation is formed is the transaction of a manufacturing and mining business and the purchase and sale of goods, wares and merchandise used for such business." The right so to incorporate is asserted under subdivision 14, art. 642, Rev. St. 1895, as follows: "The transaction of any manufacturing or mining business and the purchase and sale of such goods, wares and merchandise used for such business." It is the contention of the relators that the mention of both manufacturing and mining in one subdivision of the statute authorizes the formation of corporations for both purposes without any limitation, which contention is based upon certain expressions in the opinion of this court in *Ramsey v. Tod*, 95 Tex. 624, 69 S. W. 133, 33 Am. St. Rep. 875. On the other hand, re-

spondent contends that manufacturing and mining are distinct businesses, the transaction of which by one corporation is not authorized by the provision referred to permitting an incorporation for the one "or" the other.

We do not fully agree with either contention. It must be remembered, as was pointed out in *Ramsey v. Tod*, that another provision requires that the charter state "the purpose" of the incorporation. It is also to be noted that that for which an incorporation is authorized by subdivision 14 is the transaction of "a business"—not of two or more businesses. Either mining or manufacturing may be a business by itself. The two may be wholly distinct from and unrelated to each other. A charter authorizing both without restriction would contain a statement, not of the purpose, but of the purposes, and would empower the corporation to transact, not a business, but businesses. Instances of this are a business of mining for gold and another of manufacturing cottons, of mining for coal and of manufacturing shoes. Regardless of the use of alternative language in subdivision 14, we think the character of the statutory provisions is such as to exclude the construction that the transaction of two distinct businesses of mining and manufacturing are here provided for. On the other hand, there may be a business consisting of both manufacturing and mining, in which the operations are so related to each other as to constitute an entirety. The products of the mine may be sold in their crude state, or may be manufactured into many different articles, and these may be sold or devoted to their various uses. This might justly be treated as the transaction of a manufacturing and mining business, and come within the language of the statute. We do not think that the use of the conjunction "or" was intended to prevent an incorporation for that or any other one business, although it consist partly of mining and partly of manufacturing.

If other subdivisions are examined, it will be found that in some of them the general character of the purpose which may be promoted by a corporation is expressed by words closely related in meaning, but used disjunctively, in order apparently to describe fully the kind of undertaking meant, rather than to require a critical distinguishing of them in the drawing of charters. In the second subdivision we have authority for incorporating "any undertaking" which is "benevolent, charitable, educational, or missionary." Was it meant that there should be a severe discrimination between several kinds of undertakings described by these different words, that the missionary undertaking should not be incorporated if it should be also a benevolent or an educational undertaking, or that the benevolent undertaking

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

should not include the charitable or the missionary? While we do not intend by pursuing this line of reasoning at length through the various subdivisions to decide questions not before us, we think we risk nothing in saying that words indicative of the kind and character of a business meant are sometimes used disjunctively in this statute to include any business or undertaking which is described or defined by one or all of such words, and that this is true of subdivision 14. To further illustrate from the second subdivision a missionary undertaking is also a benevolent one, and usually, if not always, an educational one. An educational one need not be either benevolent, charitable, or missionary, but it may possess all those qualities. Evidently an incorporation is allowed by this subdivision for any undertaking that comes within the meaning of all or either of these words. It does not follow that several undertakings which in their natures are separate and distinct may be included as one. So, we think, "a business" may properly be incorporated as a manufacturing and mining business, but two businesses, one of manufacturing and the other of mining, cannot be made one, because the statute does not so provide. The legislative intention that the business should be a unit is further shown by the fact that in subdivision 14 there is no general authority for the purchase and sale of goods, but only an authority for the purchase and sale of those "used for such business."

A charter must specify the purpose for which the corporation is to be created. This should be done with sufficient clearness to enable the Secretary of State to see that the purpose specified is one provided for by the statute, and to define with some certainty the scope of the business or undertaking to be pursued. The charter tendered in this case is so general and indefinite in its language that while it might apply to one business, such as we have mentioned, consisting of both manufacturing and mining, with the purchase and sale of goods, etc., used for it, it might also be taken to authorize the transaction of two businesses, one of manufacturing and another of mining, with the further power of purchase and sale incident to each. And it appears to be the purpose of the relators to use the charter for the carrying on of what we regard as two distinct businesses. We may look to this as illustrative of the capacities for use of that which it is sought to have the respondent file, although we do not think that questions as to what may be done under a charter ordinarily arise when it is proposed to have one filed. It is proper and important to see that the purpose of a charter is so expressed as to carry out the intention of the Legislature in making that requirement; for it is by a compliance with it that the public, as well as those specially interested in corporations, are to be protected against the assumption

of powers not granted. It appears from the petition that the relators who are also the proposed incorporators have heretofore acted as partners in mining for oil, gas, and water, and have manufactured their own tools and equipment and devices used in that business, and have invented and received patents on some which were new. They have been able to manufacture more of these than they have needed in doing their own work, and have been engaged in selling them, and the manufacturing business which they wish to incorporate is that of making these tools, devices, etc., for sale to others. Such manufacturing has heretofore been a part of the business which, as individuals, they had a right to conduct, but it by no means follows that it with all else that is proposed for the corporation is only one business of mining and manufacturing such as one corporation may follow. It seems plain that the business of manufacturing for sale, tools, etc., for mining is as distinct from the business of mining as the business of manufacturing for sale farming implements would be from farming. In order to hold that the statute allows the incorporating for two such purposes, we should have to hold that it authorizes the incorporation of one company for distinct businesses of manufacturing and mining, which, as we have already said, is not true. And, as the charter offered can be interpreted as meaning and is intended to mean that it authorizes the pursuit of both businesses, we think the respondent had the right under the law to refuse to file it until the doubt as to its scope should be removed by a more specific statement of the purpose.

As we have before indicated, relators rely on some expressions in the opinion in *Ramsey v. Tod*, for their contention that charters are authorized without limitation for all the purposes mentioned in any one subdivision of the statute. What was really held was that the subdivision of the statute showed the legislative intent that there should be no uniting of purposes mentioned in different subdivisions, although related to each other, and only those mentioned in the same subdivision were capable of being joined in one charter. It certainly was not meant that all of those mentioned in any subdivision could be united in every case, regardless of the way in which they might be related to or connected with each other. It will be seen that the effort in that case was to incorporate businesses which would have had a close and natural connection with each other, viz.: (1) "The purchase and sale of goods, wares and merchandise, and agricultural and farm products"; and (2) "the accumulation and loan of money in carrying out said purpose." It thus appears that the latter purpose would have been wholly dependent on the results of the first. The holding was that because of the fact that these purposes were treated by the statute as separate they could not be made one as

sought, notwithstanding the dependence of one upon the other. With this in mind, it is easy to understand what was said as to those purposes mentioned together in the subdivisions. They were treated by the statute itself as if they could be united and hence they may be; but this does not mean that they must be held in every instance to constitute "a business" the transaction of which is "the purpose" of the incorporation, although wholly distinct from and unrelated to each other. The court in *Ramsey v. Tod* had no occasion to determine the conditions essential to incorporating when only those things mentioned in a single subdivision were in question. We have endeavored to show how mining and manufacturing may be combined under subdivision 14 and restrict our decision to that.

The legislation enacted since the decision referred to was made by which, relators claim, the declarations in that opinion concerning the right to incorporate under the subdivisions was impliedly approved, has no bearing on the question that we can perceive. Acts 1903, p. 227, c. 138; Acts 1905, p. 28, c. 24; Acts 1905, p. 73, c. 53; Acts 1907, p. 294, c. 152. Those statutes merely authorize the chartering of corporations for named purposes which before had been mentioned in separate subdivisions, and to that extent modified the pre-existing rule declared by this court. They did not repudiate the dicta as to chartering under one subdivision, nor do we do so. On the contrary, we hold that the right is given by subdivision 14 to incorporate for "a business" consisting of manufacturing and mining, but not for two businesses—one of manufacturing and the other of mining.

Mandamus refused.

#### KRUEGEL v. RAWLINS et al.

(Supreme Court of Texas. Jan. 12, 1910.)

COURTS (§ 475\*)—OWNERSHIP OF JUDGMENT—JURISDICTION TO DETERMINE.

The question of the ownership of a money judgment as between adverse claimants could be determined by a court other than that which rendered the judgment, and such determination would be binding upon the parties to the action to determine ownership.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 475.\*]

2 APPEAL AND ERROR (§ 984\*)—PRESUMPTIONS—PRESUMPTIONS TO SUSTAIN JUDGMENT.

All presumptions, consistent with the record, must be indulged to support the judgment below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781; Dec. Dig. § 984.\*]

Application for Writ of Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Herman Kruegel against A. B.

Rawlins and others. Judgment for defendants, after which the Court of Civil Appeals affirmed the judgment (121 S. W. 216), and plaintiff applies for writ of error. Writ refused.

Herman Kruegel, pro se.

**WILLIAMS, J.** This was an action by plaintiff in error against Rawlins and the sureties on his bond as clerk of the district court of Dallas county and against Charles F. Bolanz and J. P. Murphy for damages for the refusal of the clerk to issue execution on a judgment of the district court of the Fourteenth district in favor of plaintiff in error against said Bolanz and Murphy. Judgment was rendered against the plaintiff because of another judgment, which is thus stated in the statement of facts: "The defendants offered in evidence the judgment of the district court of the Forty-Fourth judicial district of Texas holding session in said Dallas county, rendered on the 26th day of March, 1904, in the case of Chas. F. Bolanz v. Herman Kruegel et al., No. 22,468, in which judgment it was decreed and adjudged that the ownership of said judgment of Herman Kruegel v. Murphy & Bolanz, No. 12,634, rendered in the district court of the Fourteenth judicial district of Texas, on March 17, 1894, for \$1,318.60, had been divested out of said Kruegel, and that he did not own said judgment; and the said Kruegel, his agent and attorneys, and H. W. Jones, the then district clerk of the district courts of Dallas county, and his deputies and successors in office and their deputies, and J. Roll Johnson, sheriff of said Dallas county, and his deputies and successors in office and their deputies, were enjoined from issuing or levying any execution for said Kruegel upon said judgment rendered on March 17, 1894, by the district court of the Fourteenth judicial district of Texas, holding session in Dallas county, in said cause No. 12,634, Herman Kruegel v. Murphy & Bolanz."

This was held by the district court and the Court of Civil Appeals to be a bar to this action. The objection made to this holding is that it was not within the power of one district court finally and perpetually to enjoin the issuance of execution upon the judgment of another district court, and that the judgment is void.

It will be seen from the above statement that the record does not show what was the nature of the action in which the judgment thus attacked was rendered, nor who were all the parties to it. For all that appears it may have been an action by Bolanz against Kruegel and some other persons, claiming to be the owners of the judgment and the right to the money due upon it, to have determined the questions thus in controversy. Such an issue between such adverse claimants could,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

we think, be determined by another court than that which rendered the judgment against Bolanz and Murphy, and the determination thereof would be binding upon the parties to such an action. We must presume, as far as may be done consistently with the record, that the judgment was such as to support the action of the courts below; and it would not entitle plaintiff in error to a reversal, even if we should hold that one court cannot, by an injunction laid only upon the officers of another court of equal jurisdiction, deprive the latter of the power to control its own processes and to execute its own decrees. The district court merely held that the clerk had no right or authority to issue an execution for Kruegel. That would be true if the court by the judgment relied on by the defense, with proper parties and issues before it, determined that Kruegel was not entitled to control the process on the judgment sued on. What would be the effect of a judgment by which one court merely undertook to deprive the officers of another of the power to issue and execute its process in favor of a party entitled thereto by its judgment we need not decide, since we cannot see from the record that that is the question upon which this case depends.

Writ of error refused.

#### STATE v. SCHWARZ.

(Supreme Court of Texas. Jan. 28, 1910.)

COURTS (§ 91\*)—DECISIONS OF COURT OF CRIMINAL APPEALS—CONCLUSIVENESS.

Where the Court of Criminal Appeals declared the local option election in certain districts void, and the state and county accepted the decision, and licenses were issued for the sale of liquor for many years, the decision is conclusive upon the civil courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 326; Dec. Dig. § 91.\*]

Certified Questions from Court of Civil Appeals of Second Supreme Judicial District.

Suit by the State of Texas against William Schwarz to restrain defendant from engaging in the business of liquor selling. From a judgment refusing an injunction, the state appeals. Questions certified to the Supreme Court by the Circuit Court of Appeals. Questions answered.

W. E. Murphy, County Atty., B. E. Mitchell, and Robt. E. Cofer, for the State. J. T. Adams, Stuart & Bell, and Davis & Thomason, for appellee.

BROWN, J. On the 18th day of July, 1903, the commissioners' court of Cooke county designated, by metes and bounds which embraced seven justice precincts in said county, a subdivision of said county within which an election should be ordered to determine whether or not the sale of intoxicating liquors should be prohibited therein. One justice pre-

dict was omitted. The commissioners' court ordered the election to be held on the 8th day of August, 1903. The election was held in the manner provided by law. A majority of the votes cast were in favor of prohibiting the sale of intoxicating liquors within the designated territory. Returns of the election were made in due form, and the result ascertained and published, putting into force in said territory the law prohibiting the sale of intoxicating liquors in said subdivision. No contest of said election was then or has since been had. Within a short time after the law went into effect, Ed Heyman was in due form charged with the violation of said law. He procured from Hon. W. L. Davidson, Presiding Justice of the Court of Criminal Appeals, a writ of habeas corpus, which was made returnable to the regular term of that honorable court, and on the 20th day of January, 1904, the Honorable Court of Criminal Appeals discharged said Heyman from custody, holding the election void. Ex parte Heyman, 45 Tex. Cr. R. 532, 78 S. W. 349. From that time until the institution of this proceeding, the state, county, and towns in said county have issued licenses to persons permitting them to sell intoxicating liquors without regard to said election, and the state, county, and towns have collected the license taxes for selling such liquors within said territory at such places as had not been prohibited by previous elections. The state, by the county attorney of Cooke county, presented to the judge of the district court for that county a petition for an injunction to restrain the appellee from pursuing the occupation of selling intoxicating liquors within said territory. The injunction was refused, and the state appealed. The Honorable Court of Civil Appeals certified to this court these questions:

"First. In view of section 2 of the act of the Thirtieth Legislature (Acts 1907, p. 448), amending article 3397, Revised Civil Statutes, and providing that all local option elections theretofore held shall be conclusively presumed to be valid and binding, unless contested within 60 days from the date the act took effect, will the defendant be heard to assail the validity of the election in this proceeding?

"If the foregoing question be answered in the affirmative, then—

"Second. Is the decision of our Court of Criminal Appeals in Ex parte Heyman, supra, binding upon our civil courts?

"If the second question be answered in the negative, then—

"Third. Assuming the allegations of facts both in the petition and answer to be true, was the local option election alleged for any reason invalid?"

We answer the second question in the affirmative, which renders answers to the other questions unnecessary.

The practical effect of the decision of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Court of Criminal Appeals in the Heyman Case was to annul the election therein in question. This result has been recognized by the state, the county, and its towns. That court had jurisdiction of the subject-matter at the time, and there is not and was not any court in this state with authority to revise its decision. The Heyman Case was decided in January, 1904, and in the succeeding June the case of Commissioners' Court of Nolan County v. Beall, 98 Tex. 104, 81 S. W. 528, came before this court. In that case the question of the binding force of the decision of the Court of Criminal Appeals on the civil courts was carefully considered and answered in the affirmative.

We cannot better express our reasons for the affirmative answer given than to quote from the opinion in the Nolan County Case as follows: "We are of opinion that the questions certified belong to a class which fall within the peculiar jurisdiction of the Court of Criminal Appeals, and in which this court should follow the decisions of that court. \* \* \* The local option laws of this state depend wholly for their enforcement upon the infliction of the penalties prescribed by the statute through the procedure provided for that purpose by our Code of Criminal Procedure. The prosecutions thereunder must be instituted and tried in the courts having criminal jurisdiction. Therefore we are of opinion that our local option statutes are strictly and essentially criminal laws, and, as such, primarily subject to the decisions of the criminal courts as to their validity and construction. Appeals lie in criminal cases to the Court of Criminal Appeals as the court of last resort. Their decisions are final upon the questions determined by them, and settle the law in purely criminal matters, at least as to all inferior courts over which they exercise appellate jurisdiction. In like manner the decision of the Supreme Court is final and authoritative over questions not involving the criminal laws. Such is the constitutional prerogative of the two courts. Neither is in any manner subordinate to the other. Yet there are criminal cases which may incidentally involve a question of civil law, and civil cases in which in like manner points of criminal law call for solution. For example, in a prosecution for theft, a question of the title to property may be raised. So, in a suit to recover damages for false imprisonment, a question may arise as to the right to make an arrest under the provisions of our Code of Criminal Procedure, which is a question of criminal law."

The independent jurisdiction of the two courts of last resort and the conflict are clearly stated in the Nolan County Case as follows: "Such being the jurisdiction of the two courts of last resort, and since, under the rule of the common law, the decisions of such courts are authoritative and controlling upon other courts, it occurs to us that when the amended judiciary article of our

Constitution was framed and adopted—separating, as it does, the jurisdiction of the two courts of final resort, by giving to the one jurisdiction of criminal cases only, and to the other civil jurisdiction alone—it was not contemplated that there would result a conflict of decision in the two courts which there was no provision for reconciling. On the contrary, we are of opinion that it was considered that, upon questions of criminal law which might arise in the Supreme Court, that court would bow to the decisions of the Court of Criminal Appeals, and that upon those of civil law the latter would accept the rulings of the Supreme Court."

This court did not agree to the construction placed upon section 20 of article 16 of the Constitution by the majority of the Honorable Court of Criminal Appeals in that case, but concluded to follow it as the best solution of the conflict. This case is based upon the same state of facts as the Heyman Case, and the principle upon which the doctrine of stare decisis rests furnishes a sound reason for the adherence of this court to the Nolan County Case. *Burns v. Ledbetter*, 56 Tex. 284. The decision of the Honorable Court of Criminal Appeals practically annulled the local option election in Cooke county. The result was accepted by all parties, and for years the state and county have acted upon that decision. Rights have been acquired under it, and to revive that election now might involve men in serious prosecutions and subject them, perhaps, to heavy penalties for acts performed under the authority of the state. We believe that the decision in the Heyman Case should be held to settle the result of that election.

Since the decision of this court in the Nolan County Case was made, the Legislature has enacted a law by which the violation of such laws may be enjoined by a proceeding on the part of the state whereby the power to enforce the local option laws is conferred upon the civil courts. Acts 1907, p. 156, c. 77. The Thirtieth Legislature passed an act by which all contests of election must be prosecuted in the district court. Acts 1907, p. 447, c. 8. Subsequent to the enactment of those statutes the case of *Griffin v. Tucker*, 118 S. W. 635, came before this court on certified questions which called for a construction of the same section of the Constitution as the Heyman Case. Judge Williams carefully reviewed the authorities, and this court held that under the changed conditions in the future this court will not follow the decision of the Court of Criminal Appeals on this question, closing with this specific statement of the future action of this court: "Much more might be said upon the question, but we have sufficiently indicated the reasons which induce us reluctantly to disagree with the views of the majority of the Court of Criminal Appeals. \* \* \* Ordinarily this court follows the construction given to penal statutes by the Court of Criminal Appeals, since the enforcement of such statutes must

be in accordance with such construction; but the decision of questions coming within the scope of cases of contested elections is intrusted to the civil courts, and must be in accordance with their own construction of the controlling constitutional and statutory provisions."

**CHARLTON, County Treasurer, v. COUSINS,**  
State Superintendent.

(Supreme Court of Texas. Jan. 19, 1910.)

**1. STATUTES (§ 122\*)—SUBJECTS AND TITLES—  
"COUNTY TREASURER"—"COUNTY TREASURY."**

The provision of Laws 1909, p. 17, c. 12, providing that the terms "county treasurer" and "county treasury," as used in all provisions of law relating to school funds, shall be construed to mean the county depository, is not subject to the objection that it is not within the title of the act entitled, "An act putting into effect the constitutional amendment adopted by the people at the last general election, relating to public schools, by amending sections 50, 57, 58, 60, 61, 63, 65, 66, 76, 77, 78, 80, 81, and 154, and adding 154a, of chapter 124 of the Acts of the Regular Session of the Twenty-Ninth Legislature, relating to school districts and school funds."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 175; Dec. Dig. § 122.\*

For other definitions, see Words and Phrases, vol. 2, p. 1668.]

**2. SCHOOLS AND SCHOOL DISTRICTS (§ 10\*)—  
OFFICERS—STATUTES.**

Laws 1909, p. 17, c. 12, provides that the terms "county treasurer" and "county treasury," as used in all provisions of law relating to school funds, shall be construed to mean the county depository. *Held*, that the provision is not invalid on the ground that in substituting the depository for the treasurer in the exercise of the powers and performance of the duties in relation to school funds, the statute constitutes the depository an officer, which cannot be done consistently with the Constitution inasmuch as a county depository may be a corporation incompetent to hold office, there being nothing in Const. art. 7, §§ 1, 5, and article 16, § 44, requiring the school fund to be kept in the custody of the county treasurer or other officer.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 13; Dec. Dig. § 10.\*]

**3. SCHOOLS AND SCHOOL DISTRICTS (§ 10\*)—  
CUSTODY OF FUNDS—STATUTES.**

The provision is not invalid on the ground that it allows national banks to become depositories, and that the assumption of the duties of the position are beyond the powers of a national bank.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 13; Dec. Dig. § 10.\*]

Mandamus by James Charlton, as County Treasurer of Harris County, to compel R. B. Cousins, State Superintendent of Public Instruction, to issue to relator a certificate showing the amount of money apportioned by the Board of Education to Harris County, as its share of the available school fund. Mandamus refused.

George L. Charlton, for relator. J. P. Lightfoot, Atty. Gen., J. T. Sluder, Asst. Atty. Gen., and J. W. Brady, Asst. Atty. Gen., for respondent.

**WILLIAMS, J.** The relator, as county treasurer of Harris county, seeks to compel the respondent, as State Superintendent of Public Instruction, by mandamus to issue to relator a certificate showing the amount of money apportioned by the board of education to Harris county as its share of the available school fund. The respondent denies the right of relator to the certificate for the reason that the act of the Thirty-First Legislature requires that it be issued to the county depository. Laws 1909, p. 17 et seq. c. 12. Relator concedes the statute so requires, but denies its validity. The provision thus attacked is the proviso of section 154a (page 22) "that the terms county treasurer and county treasury as used in all provisions of law relating to school funds shall hereafter be construed to mean the county depository," which has the effect, if valid, to substitute the depository for the treasurer as the one to receive the certificate in question.

The first contention is that the provision is not within the title of the act, which is as follows: "An act putting into effect the constitutional amendment adopted by the people at the last general election, relating to public schools, by amending sections 50, 57, 58, 60, 61, 63, 65, 66, 76, 77, 78, 80, 81 and 154, and adding 154a, of chapter 124 of the Acts of the Regular Session of the 29th Legislature, relating to school districts and school funds, repealing all laws and parts of laws in conflict herewith, and declaring an emergency." The view of counsel seems to be that, as the act is one to put in force a constitutional amendment, its provisions must be confined to the points of difference between the amended and the amending provision to those features of the new provision; in other words, which are changes from the old. But this is an inadmissible view for two reasons: First, the amendment consists of an entire provision, which provides, among other things, for the raising of funds for the support of the public schools, and an act intended for the putting of such a provision into practical operation may well contain provisions for the raising, safe-keeping, and application of such funds. Second, the title of the act does not stop with the language relied on, but states that the putting in force is to be accomplished by the amendment of another act, relating to school districts and school funds. This is as full and clear a statement of the subject of the act as could well be expected to be given in brief and general form, and those provisions concerning the custody of the funds are as proper to that subject as any in the statute.

The next contention is that the provision

in question is invalid because, in substituting the depository for the treasurer in the exercise of the powers and performance of the duties in relation to the school fund, it, in effect, constitutes the depository an officer, which cannot be done consistently with the Constitution, inasmuch as a county depository may be, and in this instance is, a corporation incompetent to hold office. The county treasurer is an officer, made such by the Constitution and laws, but it does not follow that the depository, in taking his place to perform the duties required in connection with the school fund, also becomes an officer. That depends on the nature of those duties. There is nothing in the Constitution which requires that the school fund be kept in the custody or under the management or control of the county treasurer or of any officer. Article 7, §§ 1 and 5; article 16, § 44. Any agent or employé such as the Legislature may provide for may be intrusted with the performance of the service as well as an officer. When we look to the provisions of the law defining the services or duties formerly to be rendered by the treasurer, but now to be rendered by the depository in handling the school fund, we find that all are such as can be rendered by an agent or employé—that they are such as may properly be made incident to a mere depository of funds. They are too many and too lengthy to be inserted or discussed in detail, and we merely state our conclusions.

It is also said that the statute allows national banks to become depositories, that the depository of Harris county is a national bank, and that the assumption of the duties of the position are beyond its powers. Undoubtedly national banks may receive funds on deposit, and may handle and must properly account for them. The provisions of the statutes under which these funds are to be received may be taken as the statement of the terms upon which the deposits may be made, which terms are accepted in the assumption of the relation. They are only such as look to the proper disbursement of and accounting for the moneys deposited—such as a bank might make with any other depository.

It may be true that the Legislature has not the power to prescribe rules to operate as laws to govern the management of the business of national banks; but it does not follow that the Legislature may not prescribe terms upon which its officers, charged with the administration of public affairs involving the management of public funds, may so deposit those funds as to make them yield a revenue, and at the same time secure their safe-keeping, their lawful disbursement, and a proper accounting for them; and we do not see that this involves anything that national banks may not voluntarily undertake. Certainly nothing has been shown to justify

this court in declaring the statute in question to be in conflict with any provision of the Constitution.

Mandamus refused.

### McKNIGHT v. STATE.

(Court of Criminal Appeals of Texas. Dec. 1, 1909. Rehearing Denied Jan. 19, 1910.)

JURY (§ 68\*)—DRAWING JURY—OFFICERS WHO MAY ACT.

Where there was no willful violation of the statute requiring the jury commission to draw a jury panel, there was no error in forcing one to be tried before a jury summoned by the sheriff under the direction of the court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 284; Dec. Dig. § 66.\*]

Appeal from Nacogdoches County Court; C. D. Mims, Judge.

Toss McKnight was convicted of theft, and he appeals. Affirmed.

Ingraham, Middlebrook & Hodges, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of misdemeanor theft, and his punishment assessed at a fine of \$50 and six months' imprisonment in the county jail.

1. The first ground of the motion for a new trial insists that the affidavit and information charge no offense against the laws of the state of Texas. The information is in the usual stereotyped form.

2. The third ground of the motion for new trial complains the court erred in failing and refusing to sustain appellant's motion to quash panel of the jury, because the same was not drawn by a jury commission as by law required, and because said panel was summoned by the sheriff the first day of court, and because the defendant was compelled and forced to try case before a jury not drawn as by law required. The bill of exception presenting this matter shows that appellant moved to quash the panel of jury summoned by the sheriff under direction of the judge of said court, with which appellant was tried, on the ground, as stated, that the jury commissioners had not selected the jury. The bill of exceptions does not show that it was not a matter of clear inadvertence or oversight that brought about the failure to draw a jury. The statute says, if for any cause the jury is not selected, the sheriff may summon the jury. This question has been directly passed on by this court, and held that, where there was not a willful violation of the terms of the statute in failing to have jury commissioners appointed to select jurors, this would excuse the drawing of the jury by commissioners. We accordingly hold there was no error in forcing appellant to be tried before the jury complained of in this case.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We have carefully reviewed all of appellant's assignments of error, and, finding nothing in the record authorizing a reversal of the case, the evidence being sufficient, the judgment is affirmed.

### BETTS v. STATE.

(Court of Criminal Appeals of Texas. Dec. 8, 1909.)

#### 1. HOMICIDE (§ 142\*)—INDICTMENT—VARIANCE—NAME OF PERSON OTHER THAN ACCUSED.

There is not a variance between an indictment giving the name of the murdered person as Rozella Betts, and evidence that her name was Eva Rozella Betts, usually called Eva, but sometimes Rozella.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 254; Dec. Dig. § 142.\*]

#### 2. INDICTMENT AND INFORMATION (§ 132\*)—ELECTION BETWEEN COUNTS—NECESSITY.

There is no merit in the contention that the court should have required an election between the counts, one of which charged defendant with the homicide, the other that he and another conspired to kill deceased; the issue of homicide alone having been submitted to the jury, and their consideration having been restricted to that count.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 438-447; Dec. Dig. § 132.\*]

#### 3. HOMICIDE (§ 159\*)—EVIDENCE—SYSTEMATIC CRUEL TREATMENT.

Evidence on a prosecution for murder of defendant's daughter, two or three years old, that he severely whipped her at times with a leather belt and with a quirt, and that she had sores on her body therefrom, introduced to show systematic and cruel treatment out of all proportion to what would be correct punishment, and ill will and malice of defendant, was properly admitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 297; Dec. Dig. § 159.\*]

#### 4. HOMICIDE (§ 291\*)—CAUSE OF DEATH—INSTRUCTIONS—EVIDENCE.

It was error to submit, as a predicate for conviction on a prosecution for murder of defendant's child, that he whipped her with a belt; the evidence being that he had not whipped her therewith for two months, and all the evidence excluding the idea that her death was caused thereby.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 596; Dec. Dig. § 291.\*]

#### 5. HOMICIDE (§ 286\*)—INTENT—NATURE OF INSTRUMENT—INSTRUCTIONS.

The court having submitted, as a predicate for conviction in a murder case, the whipping of deceased by defendant with a belt worn by him, which was not a deadly weapon, it should have charged Pen. Code, art. 717, declaring that the instrument by which a homicide is committed is to be considered in judging of intent, and, if it be one not likely to produce death, it is not to be presumed that death was intended, unless from the manner in which it was used such intention evidently appears.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 586-591; Dec. Dig. § 286.\*]

#### 6. CRIMINAL LAW (§ 775\*)—ALIBI—INSTRUCTIONS.

The evidence showing that defendant had not been with deceased for an hour or two before her death, and certain of the evidence be-

ing that her death was caused by strangulation, the requested charge that, if deceased died under such circumstances, the jury should acquit, should have been given, though one that, if the jury failed to find defendant was present at the time of the child's death, they should acquit, one on alibi, was given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1833-1837; Dec. Dig. § 775.\*]

#### 7. HOMICIDE (§ 291\*)—CAUSE OF DEATH—INSTRUCTIONS.

There being evidence that the death of deceased, defendant's child, was caused by a blow on the head, and there being no direct evidence that defendant struck her, but only evidence of systematic cruel treatment, and the fact that a hair brush with the handle broken off was found in the room where the child died, a charge to acquit if the child's death was caused by such a blow, and it was inflicted by other means than at the hands of defendant, should be given.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 596; Dec. Dig. § 291.\*]

Appeal from District Court, Erath County; W. J. Oxford, Judge.

T. M. Betts appeals from a conviction. Reversed and remanded.

Chandler & Pannill, Martin & George, and N. A. Rector, for appellant. F. J. McCord, Asst. Atty. Gen., and J. B. Keith, for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, his punishment being assessed at a term of 40 years in the penitentiary.

The facts, briefly stated, show that appellant was a school teacher, and the father of two children. The child charged to have been murdered was his little daughter, some two or three years of age, whose name was alleged in the indictment to be Rozella. The evidence shows she was usually called Eva, but that her name was Eva Rozella Betts. There is a variance claimed between the allegation and the indictment on account of this evidence. The witnesses, however, testified that her name was Eva Rozella, generally called Eva, though sometimes called Rozella. We are of opinion that under the authorities this did not constitute a variance.

1. The indictment contained two counts; the first charging appellant with the homicide, and the second charging that he and his wife conspired to kill the child. It is contended the court should have quashed the indictment, or required the state to elect upon which count it would proceed. We are of opinion there is no merit in this contention, for the court submitted alone the issue of homicide, and restricted the consideration of the jury to that count. This was legally sufficient. Parks v. State, 29 Tex. App. 597, 16 S. W. 532. The authorities cited by appellant are not applicable to the question here presented.

2. It is also insisted the court committed error in admitting quite a lot of testimony

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

from various witnesses to the effect that appellant was very cruel to his daughter, in that he whipped her severely at times with what the witnesses called a "waist belt." This was a belt worn by appellant around his body, and had a buckle on one end, with which it was fastened to the other end when he wore it. There is also some evidence to the effect that he may have used a quirt in whipping the child. We are of opinion, under *Hall v. State*, 31 Tex. Cr. R. 565, 21 S. W. 368, the court did not err in admitting this character of testimony. It was introduced to show the systematic and cruel treatment was out of all proportion to what would be correct punishment. The evidence, also, in this connection, shows that she had sores about her body produced by reason of these severe whippings. This was introducible for the purpose of showing the ill will, malice, and cruel treatment on the part of appellant towards his child.

3. Exception was reserved to the court's charge, because it submitted, among other things, as predicate for a conviction, the fact that appellant whipped his child with the waist belt. We are of opinion this was error. It is shown by the state's testimony that he had not chastised the child with the belt for about two months. One of the state's witnesses testified that she took the belt away from appellant something like two months before the death of the child and put it in her trunk, and appellant had not since had access to it. This, therefore, could not form a predicate for a conviction; and it may be further stated that the physicians who testified in regard to the probable cause of the death excluded all idea that the whipping did it. Three physicians examined the body of the child in the morning directly after its death, and came to the unanimous conclusion that the child had died from strangulation, smothering, or asphyxiation. In the evening of the same day they made an autopsy, and two of the physicians came to the conclusion that the child died from the effects of a blow upon the head, and the state introduced evidence to the effect that there was a hair brush with the handle broken off in the room where the child is said to have died. The theory of two of the physicians was, and their statements were to the effect, and such was their conclusion, that from a blow on the head there had been caused an effusion of blood on the brain, which produced the death. There was, therefore, no evidence in this record to justify the court in submitting the theory that the whipping produced death, and, therefore, it could not have been the cause of the death. In fact, there is no evidence showing that such was the case, and all the evidence excludes the idea that the child came to its death by means of the whipping.

It is contended, also, in this connection, by appellant, that, having given this charge with reference to the whipping, the court should

have charged article 717 of the Penal Code, which is as follows: "The instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears." Having given the charge criticised, we are of opinion the court should have given in charge the above-quoted article. The belt was not a deadly weapon, nor one ordinarily likely to produce or bring about death. Therefore, having given the charge with reference to the homicide by means of the whipping, the court should have instructed the jury with reference to this particular article. This was not done. There was error, therefore, in giving that portion of the charge criticised, as well as error in failing to give article 717 of the Penal Code in connection with charge given.

4. The evidence for the state conclusively shows that appellant was not present at the time his child died, but was absent, and had been for some time, an hour or two, following his avocation of teaching school. The witness Lena Jones testified she went into the room where the child was, and it was then dying; that appellant was not there, but was absent, as above stated, attending to his duties as teacher of the negro school. The court charged the jury in this connection that if they should fail to find that appellant was present at the time of the child's death, they would acquit. In other words, a charge on alibi was given. The physicians testified that from their examination in the morning the child died from strangulation or choking. In the evening, after the autopsy, two of the physicians changed their minds about the cause of the death, and said it was produced from effusion of blood on the brain caused by a bruise on the head. The other physician maintained, and so testified, that the child died from strangulation or smothering. Under these circumstances, the criticism of the court's charge is, we think, correct. The jury should have been instructed pertinently and affirmatively that if the child died from smothering, or choking, or strangulation, they could not convict. Appellant, as before stated, had been absent from the house where the child was found dying an hour or two. Therefore, if the child came to its death by being choked, strangled, or smothered, appellant could not be responsible for its death. In this connection, appellant asked a special charge in specific language that, if the child died under the circumstances stated, the jury should acquit, which was refused, and exception also reserved to the refusal to give such charge.

Upon another trial the court should also charge the jury affirmatively that, if the child came to its death by falling out of the bed and striking its head upon the floor, and

we would say, in a general way, further, to charge the jury that if the blow was inflicted upon the head, or such injury caused, by other means than at the hands of appellant, they should acquit, if they should find that the child came to its death by reason of such blow or hurt. The evidence is more circumstantial than otherwise that the child was struck by a hair brush. No one testifies such was the case, and the inference is only deducible from the fact that a hair brush was found in the room with the handle broken off.

From what has been said above, it is deemed unnecessary to go further into a discussion of the various exceptions and criticisms of the charge. What has been said sufficiently indicates how the case should be tried, and the charges given with reference to the evidence found in the record.

For the errors indicated, the judgment is reversed, and the cause is remanded.

#### CHANCEY v. STATE.

(Court of Criminal Appeals of Texas. June 9, 1909. Rehearing Denied Jan. 26, 1910.)

#### 1. ROBBERY (§ 17\*)—INDICTMENT—ALLEGATIONS—TAKING OF PROPERTY—TAKING AGAINST WILL.

Under White's Ann. Pen. Code, art. 856, punishing one who by assault or violence, or putting in fear of life, etc., fraudulently takes from the person or possession of another any property with intent to appropriate it to his own use, it is unnecessary that an indictment for robbery allege that the property was taken against the person's will, where it alleged that it was acquired by assault and violence, and by putting in fear of bodily injury, etc.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 22, 23; Dec. Dig. § 17.\*]

#### 2. CRIMINAL LAW (§ 1118\*)—APPEAL—RECORD.

Where the record on a criminal appeal did not show whether an application for a continuance was a first or second application, and the application stated that accused made "this his first or second application for a continuance, as might be determined by the court," the appellate court cannot hold that the application was a first application.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1118.\*]

#### 3. CRIMINAL LAW (§ 595\*)—CONTINUANCE—MATERIALITY OF TESTIMONY.

Where, in a robbery prosecution, the application for a continuance to procure the testimony of another, who was previously acquitted for the same crime, showed that such person was not with accused on the night of the robbery, and that if accused committed the robbery, he knew nothing of it, the desired testimony was not material, so that a continuance was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1323-1327; Dec. Dig. § 595.\*]

#### 4. CRIMINAL LAW (§ 596\*)—CONTINUANCE—IMPEACHING TESTIMONY.

Proposed testimony, which was the same as that of the witness sought to be impeached, was not impeaching testimony so as to author-

ize a continuance in a criminal case to procure it for that purpose.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 596.\*]

#### 5. CRIMINAL LAW (§ 448\*)—OPINION EVIDENCE—QUESTIONS OF LAW.

Where, in a prosecution for robbery, the sheriff who made the arrest testified that the person, alleged to have been robbed, charged accused to his face of getting his money, a question to witness whether he did not know that it was material whether accused denied the accusation was properly excluded, as calling for witness' opinion on a question of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. § 448.\*]

#### 6. CRIMINAL LAW (§ 1170½\*)—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE—PREJUDICIAL EFFECT.

Any error in excluding the question was not sufficiently important to authorize a reversal of a judgment of conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3129; Dec. Dig. § 1170½.\*]

#### 7. CRIMINAL LAW (§ 1120\*)—APPEAL—EXCEPTIONS—EXCLUSION OF EVIDENCE.

Where the bill of exceptions to the exclusion of testimony does not show what witness' answer would have been, or the ground of the objection to the question, or the purpose for which it was offered, the trial court's action in excluding the testimony cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.\*]

#### 8. CRIMINAL LAW (§ 392\*)—PROSECUTIONS—ADMISSION OF EVIDENCE.

In a robbery prosecution, the subpoenas and attachment for a witness, to procure whom accused applied for a continuance, which was denied, as well as testimony that such witness was present at a former term of court, was not admissible in evidence; accused's diligence to procure the attendance of the witness not being material on trial before the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 852; Dec. Dig. § 392.\*]

#### 9. CRIMINAL LAW (§ 1171\*)—APPEAL—HARMLESS ERROR—ARGUMENT.

In a robbery prosecution where the evidence showed, and accused admitted, that some one ran from behind a car and struck the person robbed, a statement by the district attorney in argument that a certain person was the man who assisted accused in committing the robbery could not have prejudiced accused; it being immaterial whether any one, or if any one, assisted in committing the robbery if accused was guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.\*]

#### 10. CRIMINAL LAW (§ 823\*)—INSTRUCTIONS.

In a robbery prosecution, the court instructed that all persons are principals who act together in the commission of an offense, and, though the efficient act accomplishing the crime was that of some one of them alone, accused would be guilty, and further gave a correct charge under the evidence that, keeping the prior instructions in view, if the jury found from the evidence, beyond a reasonable doubt, that accused alone, or acting as principal with another, fraudulently took money from another without his consent, with intent to deprive him thereof and appropriate it to accused's use, they should find accused guilty of robbery, but if they had a reasonable doubt as to his participation as principal in the robbery, they should acquit.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

*Held*, that accused could not have been prejudiced by the first part of the charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995; Dec. Dig. § 823.\*]

**11. CRIMINAL LAW (§ 1090\*)—APPEAL—BILL OF EXCEPTIONS.**

In absence of a bill of exceptions to the introduction of testimony, the Court of Criminal Appeals cannot consider any error with reference thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2816; Dec. Dig. § 1090.\*]

**12. CRIMINAL LAW (§ 1159\*)—APPEAL—CONCLUSIVENESS—CONFLICTING EVIDENCE.**

A verdict of guilty, on conflicting evidence, is conclusive on appeal, and the Court of Criminal Appeals can only determine whether accused was tried according to law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Appeal from District Court, Angelina County; James I. Perkins, Judge.

Falvey Chancey was convicted of robbery, and he appeals. Affirmed.

E. J. Mantooth and Johnson & Edwards, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This is an appeal from a conviction for robbery.

The indictment charges robbery by assault and violence, and follows the language of the statute. Article 856, White's Ann. Pen. Code. Appellant made a motion in the court below to quash the indictment because it omitted to charge that the property was taken against the will of said Harris. It is true that the form of indictment for robbery by assault as laid down in section 1464, White's Pen. Code, uses the term against the will of the party robbed. However, we are of opinion that this allegation is unnecessary. The language of the article above quoted is as follows: "If any person by assault, or violence, or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use he shall be punished," etc. Now the indictment alleges that the property was taken by assault and violence, and by putting in fear of life or bodily injury, with the fraudulent intent and without the consent of the owner, to deprive the owner of the value of and to appropriate it to the use and benefit of the appellant. We think to use the words "against the will" of the party would be surplusage, where the indictment alleges that the property was acquired by assault and violence. We, therefore, hold that the bill of indictment is a valid indictment, and that it is not necessary to allege that the property was acquired against the will of the party.

On the trial of the case, before announcement of ready on the part of appellant, he made an application for a continuance, which

was by the court overruled. Appellant reserved a bill of exceptions to this action of the court, and the motion is now before us to be considered on this appeal. The bill of indictment in this case was returned in the district court of Angelina county on May 5, 1905. The defendant was not brought to trial until the October term, 1907. We are not advised by anything in the record as to whether this was appellant's first or second application for a continuance. He says in his application that he makes this his first or second application for a continuance, as may be determined by the court. In the state of the record we cannot hold that this was the first application for a continuance. However, whether it is the first or second application, we do not think the testimony of the witness McDonald, for whose testimony the application is sought, was in any way material to the appellant in the trial of the case. Without reference to the diligence the appellant asked for a continuance to secure the testimony of the witness J. C. McDonald, by whom he expected to prove that the said McDonald will testify that he had been indicted for this identical robbery, and had been acquitted; that he would swear that he was not present at the time that John Harris, the party alleged to have been assaulted, was robbed; that he did not see or know that a robbery had been committed, or that one was going to be committed; that he did not discuss the question of robbing said Harris before or after the robbery with the defendant; that he had no connection with said robbery whatever; that if said defendant robbed, or assisted in robbing, the said John Harris, the said witness knew nothing about it. Appellant further in said motion set out the testimony of the said McDonald as given by him in the trial of himself for said robbery, and he claims that this testimony was material to his defense. Without setting out the testimony as disclosed by the said motion it will only be sufficient to state that the said McDonald on his trial testified that, on the night of March 15, 1905, he was afoot, going out of the town of Lufkin to a sawmill situated some mile and a half or two miles north of Lufkin; that after he had crossed the Cotton Belt Railroad close to some box cars standing on the side track, he heard some one groaning, and he walked out to where he located the noise and saw a man lying on the ground, who afterwards turned out to be the John Harris who claimed to have been robbed; that he assisted the said Harris to get up and supported him as he walked to his camp; that when the said Harris first came to himself the said Harris told him (McDonald) that he had been run over and knocked down by a car, and that another man who was with him had been killed. McDonald further testified that after he had carried Harris to his camp,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which was located but a short distance, the said John Harris immediately took hold of McDonald, called to his wife to bring his pistol, and accused the said McDonald of assisting in robbing him. The said McDonald further testified that he did not know that the said Harris had been robbed until this accusation had been made against him when they got to his camp; that he was not with the party that robbed the said Harris, knew nothing about it; did not know whether Falvey, the appellant, or any one else had robbed him; had had no talk with Falvey on that night before or after the robbery; had not been in company with the said Harris or the said Falvey before the robbery and knew nothing about it.

On the trial of the case the witness Harris testified that he was in the town of Lufkin on that night. That he had arrived in the town a few days before that, was camped out some 500 or 600 yards north of the business portion of the town. That he was a horse trader, and had mules for sale. That he had gone down in town after supper to see a man by the name of Simms to sell him a mule. That he got in company with the appellant, who was running a livery stable or barn, and that the appellant told him that he would perhaps buy a horse or two, or a mule, from him. He remained in company with the appellant until about 1 o'clock. That he went into several saloons with the said Falvey, and took some drinks. While walking around they passed by a boy playing some kind of a musical instrument, when appellant remarked that that boy was a dangerous character, and that he was afraid of him. When John Harris started to his camp and spoke of going, appellant remarked that he lived in a little white house opposite to where Harris' camp was situated, and that he was afraid of that boy, and that he would like to have Harris' company home. Shortly after this appellant and the said Harris started out toward his camp. Here the witness Harris says: "We walked right on up to the Green Rock saloon, turned around the corner, right along the side of the Green Rock saloon until we come to the wagon crossing, and we crossed the railroad, and when we got to the last track, or next to the last track, we turned up the railroad along a string of cars, and as we got to the end of these cars, appellant remarked, 'Let's cross over and get in the path.' We crossed over the railroad, walked out about 20 feet from the end of the car. The appellant was on the left side of me as we walked up there, and as we walked out to the path appellant looked over his right shoulder, and says, 'There he is now,' and as he did he laid his hand on my shoulder. I looked, and didn't see nobody at the end of those cars, and when I turned that throwed my right side next to appellant, and I turned and looked, and when I did this I saw a man, and it looked as though he was just raising from

the end of the car, and as he did I looked back at appellant to see what he was doing standing there—if he expected trouble or something. I supposed that he had made same preparation to protect himself, but he still stood there holding my shoulder. When I looked back this man advanced, and was right on us with a stick or a piece of iron; I could not tell which. It looked like the big end of a broom handle, and about 16 or 18 inches long, and instead of striking at Chancey, as I supposed he would, he struck at me, and I threw up my left hand and caught the lick between the shoulder and elbow, and as I did that, defendant grabbed me around the waist from the back, and then this other man struck again, and struck me over the left shoulder, and the next lick he struck me over the right shoulder and during all this time defendant and me were in a scuffle. I was trying to get my arm around his neck, and the next lick he struck me on top of the head, and defendant either threw me, or the lick knocked me so that I fell, and as I fell Chancey fell with his knees—to the best of my recollection—his head was turned toward my feet, and as he did that, that man hit me a heavy blow right on the left side of the head and dazed me. As we fell, it seems as though defendant fell with his knees on me. Just as we went on the ground, I felt defendant's hands go in my pocket, and that was all I remembered, just kind of dazed. Defendant put his hands in both of my pockets, turned both pockets wrong side outward; he got from me \$85." This is a sufficient statement of the testimony of the immediate transaction. However, the witness further testified that when he was coming to himself he saw a man standing over him, who afterwards turned out to be McDonald. The witness says he grabbed this man by the pants legs and said to him, "They run that car over us didn't they?" and he says, "I don't know," and the witness remarked: "What become of the other man; did they kill him?" and he says: "I don't know; I didn't see no other man." Harris further testified that this man assisted him to camp, and after he got to his camp he accused this man of being one of the men that robbed him. He gave as a reason why he said to McDonald when he first came to him about the cars running over them was because he thought McDonald was one of the men that robbed him, and that he made that remark to create the impression that he did not know what he was doing, so that he would throw McDonald off of his guard.

We have set out so much of the testimony in the record for the purpose of showing that in no view of the case could the testimony of McDonald be material. The application shows, as well as the proof on the trial of the case, that McDonald was not with Falvey that night, was not present when Harris was robbed—that is, the defendant proposed to prove that by McDonald—and the testi-

mony of McDonald attached to the application for a continuance shows that. Hence in no view of the case could the said McDonald's testimony have been material. But it may be said that this testimony was material to impeach Harris as to what he said to McDonald when he came to himself on the night in question. Harris, however, admitted that he made the statement to McDonald about the cars running over them, and in fact the testimony of McDonald as set out in the application for a continuance coincides with the testimony of Harris as to what took place after McDonald came to him while he was lying on the ground, and what was done and said after McDonald had assisted Harris to the camp. We, therefore, hold that the testimony was not material, and that the court below did not err in overruling the application for a continuance.

The second bill of exceptions in the record discloses that when the witness Watts, who was sheriff of the county, and who had been placed upon the stand by the state in his examination in chief, testified that the witness Harris accused Falvey to his face of getting his money, and said to the sheriff: "You need not search McDonald; Chancey has got my money." The appellant on cross-examination asked the witness Watts if defendant did not deny getting the money or robbing Harris, when the defendant then propounded to Watts the following question: "Q. Do you not know that it was material whether Chancey denied or did not deny it?" The state objected to this question, and the court sustained the objection, as it was simply the opinion of the witness as to whether it was material or not. We think that this was the opinion of the witness that was elicited on a question of law, and was not an effort to elicit any fact in the case. If error, however, it would not be of sufficient importance to authorize a reversal of the case.

The third bill of exceptions we think is without merit. This was because the court excluded from the jury a conversation had by the witness Clayton with the defendant's attorney Mantooth. The exception fails to disclose what would have been the witness' testimony, or for what purpose it was introduced. In the absence of what the answer of the witness would be, or the grounds of the objection to the testimony, or the grounds upon which it is offered, this court cannot reverse the action of the court below.

The fourth bill of exceptions is to the action of the court in refusing to allow the defendant to offer in evidence the subpoenas and attachment for the witness McDonald, and further to show by the witness Watts, sheriff of the county, that McDonald was present at a former term of court. For what purpose this testimony was offered before the jury we are not advised. If it was a question affecting the diligence of the defendant to secure the attendance of said wit-

ness, this was a matter addressed to the court on the application for a continuance, and could not possibly have any bearing upon any issue before the jury.

The fifth bill of exceptions is to the language of the district attorney in arguing the case to the jury, in which the district attorney stated to the jury that there was no mistake about the fact that McDonald was the man that assisted appellant in robbing Harris. The defendant claims that this was highly prejudicial to his rights, and prejudiced his case before the jury. We cannot see how appellant was prejudiced thereby. That somebody ran out from the car and struck Harris is proved beyond question. The appellant himself admitted that. Who this man was, the record does not disclose. Appellant himself said he did not know who he was. Whether it was McDonald, or whatever name the imagination of the district attorney may have pictured, would be wholly immaterial. We think there is no merit in this exception.

Counsel in his motion for a new trial complains of the charge of the court, wherein the court in the sixth paragraph of his charge directed the jury that all persons are principals who are guilty of acting together in the commission of an offense, and although the act which directly accomplished the crime was the act alone of some one of the parties, then the defendant would be guilty. Appellant claims that this charge is erroneous because the act was not the act of one party alone, but that the defendant and some other person, McDonald or some one, acted with him. We are of opinion that, whether the defendant alone, or in company with somebody else, committed the offense, he would be equally guilty, and we are not advised as to how this charge was injurious to appellant. The court instructed the jury as follows: "Now, keeping foregoing instructions in view, if you find from the evidence beyond a reasonable doubt that the defendant alone, or acting as principal with another or others, did, in Angelina county, state of Texas, on or about the 15th day of March, 1905, by assault or violence upon John Harris, fraudulently take from the person of said John Harris one or more \$20 bills, or any one or more of such bills of either of said denominations, and that the bill or bills so taken were money of the United States of America and of some value, and that said bill or bills so taken belonged to said John Harris, and were so taken without his consent, and with the intent of defendant to deprive the owner of said bill or bills of the same, and to appropriate said bill or bills so taken, in whole or in part, to his, defendant's own use, you will find the defendant guilty of robbery, and assess his punishment at confinement in the penitentiary for life or for any term of years, not less than five years. If you believe John Harris was robbed at the time and place,

and of the property as alleged in the indictment, but have a reasonable doubt of defendant's participation as a principal in such robbery, or if, upon the whole case, you have a reasonable doubt of the guilt of the defendant, you will find the defendant not guilty." We think this charge covers the law of the case as made by the testimony, and that the court's charge was as favorable to the defendant as the facts would authorize, and we cannot see how the appellant was prejudiced by the charge of the court.

The eighth ground of the motion for new trial complains that the court erred in limiting the purpose of the evidence offered by the state that the defendant had been by complaint charged with the offense of robbery in another case, on the ground that said testimony was illegal and the charge should have excluded same. We do not find any bill of exceptions in the record to the introduction of this testimony. In the absence of a bill we cannot consider the same.

The only remaining question is as to the sufficiency of the testimony. While it is true that the defendant took the stand and denied any guilty participation in this crime, yet the testimony for the state points directly to him most positively as one of the guilty parties. The jury, who are, by the law, made the judges of both the credibility of the witnesses and the weight to be attached to their testimony, have passed upon the appellant's case. They have said he was guilty. We could not, without invading the province of the jury, hold otherwise. We can only pass upon the question as to whether he has had a trial according to the provisions of the law, and, after a most careful review of all the questions raised, we find no error that would authorize us to set aside the verdict in this case; and, believing that defendant has had a fair and an impartial trial, we have nothing to do but to affirm the judgment, which is accordingly done.

#### MUSE v. ABEEL.

(Court of Civil Appeals of Texas. Dec. 22, 1909. Rehearing Denied Jan. 26, 1910.)

##### 1. MASTER AND SERVANT (§ 217\*)—ASSUMPTION OF RISK.

A servant, though knowing of defects in appliances operated by him, may recover for injuries resulting therefrom, where he did not know of the danger in the use of the appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 575; Dec. Dig. § 217.\*]

##### 2. MASTER AND SERVANT (§ 288\*)—ASSUMPTION OF RISK—QUESTION FOR JURY.

Whether a servant injured by a defective appliance operated by him knew of the danger because of the defect known by him held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

##### 3. TRIAL (§ 139\*) — WITHDRAWAL OF CASE FROM JURY.

To authorize the court to take a question from the jury, the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn therefrom.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by J. A. Muse against Alfred Abeel. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Eason & Dilworth, for appellant. Sleeper, Boynton & Kendall, for appellee.

RICE, J. Appellant, while working for appellee in removing ice from the tank where it was frozen to the storage room, was injured by reason of one of the cans of ice falling from the crane then operated by him onto his foot. The negligence alleged consisted in the furnishing for use by appellee of an insufficient chain and crane for the performance of this work. The defense relied upon was contributory negligence and assumed risk. After the evidence was all in, the court instructed a verdict for appellee on the ground that appellant had assumed the risk, and judgment was rendered in accordance therewith.

Appellant insists that the court erred in charging the jury that the plaintiff, when he accepted employment from the defendant and undertook the work in which he was engaged while injured, assumed the risk of injury because of any defects in the machinery used by him in performing his duties, which were known to him, or which he must necessarily have known of in the discharge of his duties, insisting by his proposition thereunder that knowledge of the defect does not necessarily carry with it a knowledge of danger, and that therefore, if the appellant has knowledge of the defect or is charged with knowledge of it because the same is obvious, but is ignorant of the danger incident to and attending the defect, he is not precluded from recovering damages incurred by reason of such defect.

The evidence discloses that appellant's duty under his employment was to remove, by means of a crane and a chain attached thereto, the ice from the tank where it was frozen to the storage room. It clearly appears that the chain so used was an old, rusty, and defective one; that it had broken on several occasions prior to the accident while ice was being removed from the tank to the dump; that it had frequently been mended by appellant and others by the use of hay baling wire under the direction of appellee. It was also shown that there was some defect in the construction of the crane by reason of which it would suddenly stop when being operated.

These defects were known to both appellee and appellant; but there is evidence going to show that, while appellant knew of these defects, he did not know of and appreciate the fact that it was dangerous to use the appliances in such condition. The evidence further showed that these cans of ice weighed 300 pounds; that the device used in hoisting them from the tank to the dump would sustain at least 3,000 pounds; that by far the greatest strain upon the chain and appliances so used was at the very time the ice was being lifted out of the tank, but, after clearing the same, then the pressure was only that of the can itself, to wit, 300 pounds; and appellant testified that he thought that, the chain being sufficiently strong to raise the ice from the tank, it would certainly sustain the weight of the cans after that time. The injury was occasioned by the breaking of the chain and the falling of the ice therefrom after the ice can had been lifted from the tank and while appellant was pushing the same towards the dump, from which it was to be transported into the vault. It is true that there was testimony going to show his knowledge of the danger in this respect, both from circumstances and from the direct statement of the witness who testified that he had knowledge of the danger in operating the appliance so furnished him in the condition that it then was. His own testimony, however, negated his knowledge of danger from its use in such condition; but this, in our opinion, raised an issue on an important question, which it was the duty of the court to submit for the consideration of the jury.

We think the law is well settled by numerous decisions that, notwithstanding a party may know of defective machinery or appliances then being operated by him, but if he did not know of the danger in their use, then, and in that event, he would not be precluded from recovery. It is said in *G. & S. A. Railway Co. v. Smith et al.*, 24 Tex. Civ. App. 130, 57 S. W. 1001, that: "When a servant enters the employment of the master, he has the right to rely upon the assumption that the machinery, tools, and appliances with which he is called upon to work are reasonably safe, and that the business is conducted in a reasonably safe manner. He is not required to use ordinary care to see whether this has been done. He does not assume the risk arising from the failure of the master to do his duty, unless he knows of the failure and attendant risks, or, in the ordinary discharge of his duty, must necessarily have acquired the knowledge." Later, in the same case, the court says: "It has been repeatedly held that a knowledge of the defect does not necessarily carry with it a knowledge of danger, and that therefore, if the employé had knowledge of the defect, or was charged with the knowledge of it because obvious, but was ignorant of the danger inci-

dent to and attending the defect, he is not precluded from recovering damages incurred by reason of such defect." This proposition of law is well supported by the authorities cited in the opinion, as well as the following: *Railway v. Smith*, 24 Tex. Civ. App. 127, 57 S. W. 999; *Railway v. Hughes*, 22 Tex. Civ. App. 134, 54 S. W. 284; *Railway v. Lempe*, 59 Tex. 20; *Hynson v. Railway*, 107 S. W. 626; *Railway v. Crum*, 35 Tex. Civ. App. 609, 81 S. W. 73; *Railway v. Hannig*, 91 Tex. 350, 43 S. W. 508; *Railway v. Adams*, 114 S. W. 454; *Cyc.* vol. 26, p. 1196 et seq.

We are inclined to believe that the evidence raised an issue as to whether or not appellant knew of and appreciated the danger incident to the operation of the appliance under the circumstances existing at the very time and place where the accident occurred; and, without intimating any opinion as to the probative force thereof, we think it was at least sufficient to require the court to submit the issue thus raised, by appropriate instruction, for the consideration of the jury; and, failing so to do, there was error, because to authorize the court to take the question from the jury the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn therefrom. See *Lee v. Railway*, 89 Tex. 588, 36 S. W. 63; *Choate v. Railway*, 90 Tex. 88, 36 S. W. 247, 37 S. W. 319; *Bonn v. Railway*, 82 S. W. 809. In the last case cited it is held, as shown by the syllabus, that "in an action for injuries to a servant by the negligence of his master the court can direct a verdict only where the facts are such, as a matter of law, that no recovery can be had under any view that could be properly taken of the evidence."

For the reasons indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

DEAN et al. v. FURRH et al.

(Court of Civil Appeals of Texas. Jan. 13, 1910.)

1. TRESPASS TO TRY TITLE (§ 35\*)—PLEADING—PROOF.

Though in trespass to try title the controversy on the trial was, in the main, one merely as to the boundary lines between parts of a survey, owned, respectively, by plaintiff and defendant, the effect of defendant's plea of not guilty was to require plaintiff to prove that he had title to the land he sought to recover.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 50; Dec. Dig. § 35.\*]

2. EVIDENCE (§ 372\*) — DOCUMENTARY EVIDENCE—WILLS.

Sayles' Ann. Civ. St. 1897, art. 2312, as amended by Act April 23, 1907 (Gen. Laws 1907, p. 308, c. 165) providing that every instrument permitted or required by law to be recorded, and which has been so recorded, after being proved or acknowledged as provided by law at the time of its registration, or every in-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

strument which has been actually recorded for 10 years, in the book used for recording of such instruments, whether proved and acknowledged in such manner or not, shall be admitted in evidence, without the necessity of proving its execution, etc., did not authorize the admission of a will as evidence, in the absence of a judgment probating it.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 372.\*]

### 3. WILLS (§ 421\*)—COLLATERAL ATTACK.

The verity of a duly probated will may not be attacked in a collateral proceeding.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 904-910; Dec. Dig. § 421.\*]

### 4. EXECUTORS AND ADMINISTRATORS (§ 138\*)—SALE OF LAND—AUTHORITY.

Where a testator desired that the county court assume no other control over his estate than to probate his will and record an inventory of the property, and expressly exempted the executors from giving bonds, and authorized them to sell at their discretion any of testator's land, the executors might sell without qualifying as such by giving bonds, and without being directed by the probate court to sell.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 560-575; Dec. Dig. § 138.\*]

### 5. EXECUTORS AND ADMINISTRATORS (§ 124\*)—SALE OF LAND—STATUTORY PROVISIONS.

Under the express provisions of Sayles' Ann. Civ. St. 1897, art. 1990, a less number than all of the executors who have qualified cannot by deed convey title to testator's land.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 496-507; Dec. Dig. § 124.\*]

### 6. ADVERSE POSSESSION (§ 116\*)—STATUTE OF LIMITATIONS—INSTRUCTIONS.

Where plaintiff and those under whom he acquires title, during the 5 years necessary to toll the statute, pay all taxes chargeable against the land, an instruction that under such statute it is not necessary to show that all taxes during said time were paid by the party claiming by adverse possession was inaccurate and misleading.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 116.\*]

Appeal from District Court, Harrison County; W. C. Buford, Judge.

Action by John W. Furrh and others against E. W. Dean and others. From the judgment said Dean and another appeal. Reversed and remanded for new trial.

The suit was by appellee Furrh against appellants Dean and wife and appellees M. J. Whelan and the Missouri, Kansas & Texas Railway Company, to try the title to 50 acres of the J. W. Croft survey in Harrison county, and for damages alleged to have been caused to appellee by appellants cutting timber growing thereupon. The petition was in the form ordinarily followed in such actions, but in addition to the usual allegations averred title to be in appellee by virtue of the 5 and the 10 year statute of limitations. Appellants answered by a plea of not guilty, and set up title in themselves to the land under said 5 and 10 year statute of limitations. Appellee Whelan answered by a general denial, a dis-

claimer of any interest in the land, and specially that under a purchase thereof from appellants he had cut timber on the land of the value of \$28.62, which he tendered in court for such disposition as the court might make of same. The railway company answered by a plea of not guilty, and adopted as its own the allegations in the answer of appellee Whelan. The verdict of the jury was in favor of appellee Furrh, and against appellees Whelan and the railway company for the sum of \$13.12 as the value of timber cut by them on the land. On this verdict the court rendered a judgment in favor of Furrh against Dean and wife for the land in controversy, and in favor of Furrh against Dean and his wife, Whelan, and the railway company, for the sum of \$13.12 as the value of the timber cut, and for costs. Dean and wife alone appeal.

F. H. Prendergast, for appellants. Beard & Davidson, for appellees.

WILLSON, C. J. (after stating the facts as above). While it seems from the record the controversy on the trial in the main was one merely as to the boundary lines between parts of the Croft survey owned, respectively, by Furrh and the Deans, the effect of pleas of not guilty interposed by defendants in the suit was to require the plaintiff (Furrh) to prove that he had title to the land he sought to recover. *Gaffney v. Clark*, 118 S. W. 606. As links in his chain of title he offered, and the court over appellants' objection admitted as evidence (1) the will of H. M. Hood, Sr., dated April 10, 1864, naming his wife, Mary M. Hood, and A. B. Stone and T. C. Hood as executors, and empowering them at their discretion to sell any of the testator's real estate in Harrison county; and (2) a deed dated December 26, 1865, from Mary Hood and T. C. Hood, as executors of said will, to F. M. Hearne, which Furrh contended conveyed the land in controversy. The objection urged to the admission of the will as evidence was that it did not appear ever to have been probated as was required by law. The decree, if one was made, establishing the will and admitting it to probate, was not offered as evidence. The rule seems to be that "without the probate, the will itself as a title to property \* \* \* cannot be received as evidence." *Abbott's Trial Ev.* § 59, p. 139; *Ochoa v. Miller*, 59 Tex. 461. Appellants contend, however, that without the probate the will was admissible under the provisions of article 2312, Sayles' Ann. Civ. St. 1897, as amended by the act approved April 23, 1907 (Gen. Laws, p. 308, c. 165). As so amended, said article declares that "every instrument of writing which is permitted or required by law to be recorded in the office of the clerk of the county court, and which has been, or hereafter may be so recorded, after being proved

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

or acknowledged in the manner provided by the laws of this state in force at the time of its registration, or at the time it was proved or acknowledged, or every instrument which has been or hereafter may be actually recorded for a period of ten years in the book used by said clerk for the recording of such instruments, whether proved or acknowledged in such manner or not, shall be admitted as evidence in any suit in this state without the necessity of proving its execution; provided no claim adverse or inconsistent to the one evidenced by such instrument shall have been asserted during that ten years; provided, that the party to give such instrument in evidence shall file the same among the papers of the suit in which he proposes to use it, at least three days before the commencement of the trial of such suit, and give notice of such filing to the opposite party or his attorney of record; and unless such opposite party, or some other person for him, shall, within three days before the trial of the cause, file an affidavit stating that he believes such instrument of writing to be forged. And whenever any party to a suit shall file among the papers of the cause an affidavit stating that any instrument of writing, recorded as aforesaid, has been lost, or that he cannot procure the original, a certified copy of the record of any such instrument shall be admitted in evidence in like manner as the original could be," etc.

We do not think the effect of the statute quoted was to render admissible, as a muniment of appellee Furrh's title, a certified copy from the probate records in the office of the county clerk of Hood's will. The purpose of the Legislature in amending article 2312 as indicated appears to have been, as recited in the emergency clause of the amendatory act, "to relieve persons whose titles to their lands have been clouded by insufficient acknowledgments and proofs taken and made by ignorant and incompetent officers." Evidently the Legislature had in mind such instruments as deeds, bonds for title, mortgages, etc., the execution of which could be proved before notaries, court clerks, and other officers, who could not be assumed always to be familiar with the requirements of the law in regard to the proof of such instruments, and whose official acts were evidenced by their certificates indorsed upon or attached to the instruments, and did not have in mind such an instrument as a will, the execution of which could be proved only in an open court before an officer who, it could be assumed, was familiar with the requirements of the law, and whose act was required to be evidenced by an order or judgment entered of record. The provisions of the article as amended furnish further evidence that it is not applicable to a will, or copy of a will, offered as evidence. For instance, to dispense with proof of the execution of the instruments referred to in the statute, the party who wishes to use same must have filed

it "among the papers of the suit in which he proposes to use it." Such a requirement indicates that the Legislature had in mind an instrument over which the party desiring to use it might have a right of possession and control. As to a will filed for probate he could have no such right, for the law requires that it shall, after it has been so filed, remain in the office of the county clerk. Sayles' Ann. Civ. St. 1897, arts. 1885, 5331. Again, the statute provides that by filing an affidavit that an instrument it refers to was forged the party contesting its admission as evidence may put the other party on proof of its execution. If a will has been duly probated, such an affidavit would not require a party desiring to use it as evidence to offer other evidence of its execution. An attack of that character on a will duly probated could be made only by a suit brought for the purpose. Its verity could not be attacked in a collateral proceeding. Halbert v. De Bode, 28 S. W. 58. Until it has been duly probated it is not admissible as evidence of title (Ryan v. Ry. Co., 64 Tex. 239; Sayles' Ann. Civ. St. 1897, art. 5352), and therefore it could not be rendered admissible, as a deed could be, when attacked as a forgery, by proof collaterally that it was duly executed. Again, by the terms of the statute, a copy of a deed is not admissible as evidence without proof of its execution, in the absence of an affidavit by the party offering the copy that the original has been lost or cannot be procured by him, whereas a copy of a will and its probate duly certified is admissible in the absence of such an affidavit. Sayles' Ann. Civ. St. 1897, art. 5352. For the reasons suggested, we think the court erred in holding that the statute referred to authorized him to admit the will as evidence in the absence of the judgment probating it.

The admission as evidence of the deed from the executors to Hearne was objected to, on the ground that it did not appear that they had authority to convey the testator's title to the land. Recitals in the will declared it to be the testator's desire that the county court take no other action, and assume no other control over his estate, than to probate his said will and record an inventory of the property belonging to his estate. By the terms of the will the executors were exempted from giving bonds as such. They were expressly authorized to sell at their discretion any of the testator's lands situated in Harrison county. Each of them qualified by taking the oath prescribed by law for executors. Such being the facts as shown by the record, we overruled appellants' contention that the will was not an independent one, and therefore that the executors must have qualified as such by giving bonds, and have been directed by the probate court to do so, before they could sell land in Harrison county belonging to the testator. Giddings v. Butler, 47 Tex. 540.

But appellants' further contention that, it

appearing that each of the executors had qualified as such, the title of the Hood estate did not pass by the deed of two only of them must be sustained. That a less number than all of the executors who have qualified cannot by their deed convey the title of their testator to land seems to be the rule. Sayles' Ann. Civ. St. 1897, art. 1990; Hart v. Rust, 46 Tex. 556; House v. Kendall, 55 Tex. 43; Wright v. Dunn, 73 Tex. 295, 11 S. W. 330; Eskridge v. Patterson, 78 Tex. 419, 14 S. W. 1000.

The instructions of the court submitting as an issue for the jury a question as to appellee Furrh's title to the land by virtue of the 5-year statute of limitations, are complained of on the ground that the evidence did not raise such an issue, and on the further ground that, if it did, the instructions were erroneous. The contention must be sustained on each of the grounds stated. There was no evidence tending to show that appellee Furrh had paid taxes on the land as required by said statute. The charge of the court, in so far as it instructed the jury that "under the 5-year statute of limitations it is not necessary to show that all taxes during said time were paid by the party claiming under the plea," obviously was an inaccurate and misleading statement of the law. Doubtless the court meant to tell the jury that it would be a sufficient compliance with the requirement of the statute if it appeared from the evidence that Furrh and those whose title he had acquired, during the 5 years necessary to toll the statute, had paid all taxes chargeable against the land.

Complaint is made of the following portion of the court's charge: "If plaintiff bought the land by field notes showing metes and bounds, and was in actual possession of the land, occupying the parts under the Hood inclosure, the law would extend his possession to the boundaries of his deed, but if you find that at said time the land on the Croft survey, except that in the Hood inclosure, was in actual possession of the defendants, inclosed by a fence and claimed by them, then plaintiff could not recover the same under the statute of limitations." The part of the Croft survey claimed by appellants consisted of 400 acres described as in the shape of an "L," and not described by metes and bounds. On the ground urged by appellants, to wit, that it appeared without dispute that they were in actual possession of a part of the land claimed by them, we do not think the portion of the charge above quoted is objectionable. But we are unable to see its applicability to any feature of the case made by the evidence. The land owned by appellee Furrh, the plaintiff below, was conveyed to him by deeds made in July, 1905. He commenced his suit by a petition filed September 25, 1905. It would seem that a question as to his right to claim to the boundaries

of his deed by limitation did not arise by virtue of his actual occupancy during a period of two months of a part of the land it described.

The eighth and eleventh assignments are overruled. The others in effect have been disposed of by what has been said.

For the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

**MISSOURI, K. & T. RY. CO. OF TEXAS v. GILBERT et al.**

(Court of Civil Appeals of Texas. Jan. 12, 1910.)

**1. TRIAL (§ 252\*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.**

In an action for flowage alleged to have been caused by the embankment of defendant's railroad, it was proper to refuse to charge that if the plaintiffs' crops were damaged by the acts of plaintiffs in causing embankments to be formed at the turn-rows and not from any act or want of care of defendant, the jury should find for defendant, where there was no evidence of any embankment at the turn-rows, but only a slight rise in the ground on defendant's right of way along the edge of plaintiffs' field caused by the growth and decay of grass and weeds.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 601, 602; Dec. Dig. § 252.\*]

**2. TRIAL (§ 260\*)—INSTRUCTIONS—REQUEST—MATTERS COVERED BY CHARGE GIVEN.**

In an action for flowage of plaintiffs' land during certain seasons for two different years, where there was no evidence that the rainfall was unusual except in the second year, and the court charged that, if the damage for that year was caused by an unusual rainfall, such as could not have been foreseen and provided against by the use of ordinary care by the defendant, then the damages caused by this unusual rainfall should be deducted from any damages due from defendant's negligence, it was proper to refuse as already covered, a charge that, if the damage was caused by extraordinary rainfall which could not have been reasonably anticipated and provided against, the verdict should be for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 656, 657; Dec. Dig. § 260.\*]

**3. DAMAGES (§ 112\*)—MEASURE OF DAMAGES—INJURIES TO GROWING CROPS.**

In an action for injuries to growing crops, the measure of damages was properly stated as the difference between the reasonable market value of the crops that would have been raised but for the injury, less the reasonable value of additional work or expense that would have been necessary in raising such additional amount of crops, and the reasonable market value, at the time of their maturity, of the crops actually raised.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281-283; Dec. Dig. § 112.\*]

Appeal from Williamson County Court; T. J. Lawhon, Judge.

Action by J. J. Gilbert and another against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiffs, defendant appeals. Affirmed.

Spell & Nickels, for appellant. J. V. Morris, for appellees.

RICE, J. This was an action to recover damages, brought by appellees against appellant on account: First, of injuries to their growing crops resulting from overflows, alleged to have been caused by failure on the part of appellant to provide sufficient culverts and sluiceways to carry off the surface water falling upon a certain tract of land adjoining the right of way, belonging to appellee Gilbert, which was being cultivated on shares for the years 1906 and 1907 by Coker, a tenant of Gilbert; and, second, to recover for damages caused by fire to a certain portion of the crop grown on said premises during the year 1907, which it is alleged was allowed to escape from a passing train of appellant, it being alleged that combustible material was allowed to accumulate on its right of way.

Appellant, after a general demurrer and general denial, specially alleged that the land in question was low and seepy; that the injuries resulted on account thereof, and not from any act on its part; and, further, that the injury, if any, was caused by the action of plaintiffs in erecting an embankment along the east boundary of said tract of land and near to and parallel with the right of way fence of appellant, 8 or 10 inches in height, and in throwing up turn-rows through said tract of land, which embankment and turn-rows interfered with the flow of the surface water thereover, and prevented the same from going upon the right of way of the defendant, and from being carried off; and further alleged that the sluices and culverts along the right of way of its railway were sufficient to carry off all surface water falling upon or coming upon the right of way, except that due to unusual and unprecedented floods and rains; and that the injury suffered by plaintiffs, if any, was due to such unusual and unprecedented floods. And denied that it had allowed combustible or inflammable material to accumulate upon its right of way, and alleged that its engines were all equipped with proper appliances for the prevention of the escape and spread of fire, and that the same were in good order and condition and properly operated. There was a jury trial and verdict and judgment for appellees, from which this appeal is prosecuted.

Appellee Gilbert, as shown by the proof, owned a tract of 62 acres of land fronting 1,100 varas on the west side of the right of way of appellant (whose road ran about north and south at this point), through which, in a southeasterly direction, ran two depressions, into which the water falling upon this tract and other tracts northwest of it flowed prior to the construction of the railroad into Donahue creek, and were sufficient for the ample drainage of said land. The railway company threw up a dump and embankment extending along the west side of the land across these depressions, with but one sluiceway, which the evidence shows

was not sufficient in times of ordinary rains to drain the land, whereby the water was caught against said dump or embankment of the railway and was caused to back up and stand over the lands of appellees, from which the crops planted thereon in the years 1906 and 1907 were damaged.

There is evidence to the effect that fire escaping from the engines of appellant on June 7, 1907, destroyed certain grain and grass which had been mowed on the land of appellees near the right of way, and that the fire was first seen burning on the right of way. So that the evidence, in our judgment, was sufficient to sustain the verdict as to both issues. But appellant contends by its first assignment that the court erred in refusing to give its special charge No. 2 to the jury, to the effect that if they believed that the plaintiffs' crops were damaged, as alleged, during the years 1906 and 1907, but that such damage was due to the acts of plaintiffs in causing levees or embankments to be formed at the turn-rows in plaintiffs' field or along a string of fence on the east side of plaintiffs' field, and not from any act of the defendant or want of care on its part in the matter of constructing sluices and culverts, then they would find for the defendant, unless they found for plaintiffs on some other issue of negligence raised by the pleadings. We have carefully examined the record in this case and failed to find any evidence which would warrant this charge. It is true that there is evidence to the effect that the ground was some four to eight inches higher immediately under and along the right of way fence of appellant, and that this had the effect to stop the water and prevent it from running upon the right of way until it rose above this slight elevation; but there is absolutely no evidence showing, or tending to show, that this condition was brought about by the plaintiffs; but, on the contrary, there is proof to the effect that along the fence the ground is usually higher, by reason of the fact that weeds and grass were allowed to grow there, which, in time, raises the land. And this condition, if any inference is to be drawn at all from the facts in evidence, would be due, in our judgment, to the acts of defendant in allowing grass and weeds to grow upon the right of way. Besides, it was on the land of the company, over which plaintiffs had no control, and for which they were in no way responsible. We therefore think that the charge was properly refused.

Appellant likewise complains of the refusal of the court to give its special charges Nos. 8 and 13, to the effect that if the damages complained of by plaintiffs were caused by an extraordinary and unprecedented rainfall, which could not have been reasonably anticipated and provided against, then to find for the defendant. The evidence did not show any unusual or extraordinary rainfall in 1906. There was, however, some evi-

dence which tended to support this phase of the case occurring in 1907, but these requested charges did not limit the jury in their inquiry in this respect to that particular year, and for this reason may have been properly refused. But, be this as it may, the court did, at the request of appellant, give special charge No. 14, to the effect that if plaintiffs' damage, if any, for the year 1907, was caused by extraordinary and unusual rainfall, such as could not have been foreseen and provided against by the use of ordinary care on the part of the company, then they would deduct the damages caused by such unusual and unprecedented rainfall, if there was such, for said year, from any damages that they might find from the evidence plaintiffs suffered by reason of the negligence of the defendant, as set forth in the other issues of negligence in their pleading. We think this charge was sufficient and amply submitted the defense as to this phase of the case, and we therefore overrule this assignment.

The court gave the following charge as to the measure of damages: "If, under the foregoing instructions, you find for the plaintiffs, you will assess the damages, if any, as follows: You will first ascertain the reasonable market value, if any, at Bartlett, Tex., at the time of their maturity of the crops of millet, oats, corn, and cotton, that plaintiffs would have made on the premises in question during the years 1906 and 1907, respectively, if defendant had provided the necessary sluices, culverts, or ditches on its right of way, if you find they were not so provided. From this amount you will deduct the reasonable market value at Bartlett, Tex., at the time of their maturity of the crops of millet, oats, corn, and cotton actually raised by the plaintiffs on the premises in question during the years 1906 and 1907, respectively. From the balance, if any there be, you will further deduct the reasonable value of additional work or expense, if any, that plaintiffs would have performed in cultivating, gathering, preparing for market, and marketing the additional amounts of said oats, millet, corn, and cotton, if any, that would have been raised during said years, but for defendant's failing to construct the necessary sluices, culverts, or ditches, if you find defendant did so fail to construct them, and, after making said deductions, the balance so found by you, if any, you will assess as plaintiffs' damages, if you find they are entitled to damages."

The above charge is assailed by appellant on the ground, as it contends, that the measure of damages to the crops of plaintiffs in this case was the value of said crops immediately before the infliction of the injury and their value immediately after the infliction of the injury, without reference to the real value of the crops at any other period. The evidence shows that the injury complained

of was to the growing crops; and the charge, in our judgment, conforms to the suggestion made by Chief Justice Gaines in the case of *International & Great Northern Railroad Co. v. Pape*, 73 Tex. 501, 11 S. W. 523, in which it is said, as shown by the syllabus: "It seems that the most satisfactory means of arriving at the value of a growing crop is to prove its probable yield under proper cultivation, the value of such yield when matured and ready for sale, and also the expense of such cultivation, as well as the cost of its preparation and transportation to market. The difference between the value of the probable crop in the market and the expense of maturing, preparing, and placing it there will, in most cases, give the value of the growing crop." There was sufficient predicate in the proof in this case to warrant, in our judgment, the giving of the charge complained of. We therefore overrule this assignment.

Finding no error in the proceedings of the court below, the judgment is in all things affirmed.

Affirmed.

#### FLORENCE et al. v. CHOICE et al.

(Court of Civil Appeals of Texas. Jan. 6, 1910.)

#### APPEAL AND ERROR (§ 79\*)—JUDGMENT APPEALABLE—FINAL JUDGMENT.

Where the issues were whether plaintiff had a landlord's lien on goods and was entitled to have it foreclosed and to enjoin a special constable from selling the goods on execution issued against the alleged tenant, and the judgment determined that as against the constable plaintiff was entitled to an injunction, and that as against the constable "et al." plaintiff was entitled to have the lien foreclosed and to costs, it was not a final judgment and appealable because it did not dispose of the controversy between the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 484; Dec. Dig. § 79.\*]

Appeal from District Court, Gregg County; W. C. Buford, Judge.

Action by Joe Choice against Vernon Florence and another in which Boon Williams appeared and answered. From a judgment granting some relief to plaintiff, defendants Florence and Barton appeal. Affirmed.

The suit was by appellee Choice against appellants Florence, as a special constable, and P. E. Barton, to enjoin them from selling a bale of cotton belonging to appellee Boon Williams, on which Choice claimed to have a landlord's lien, levied upon by virtue of an execution issued on a judgment against said Williams. By a supplemental petition Choice sought to make Williams a party defendant and to have the lien asserted foreclosed. Williams answered, praying that the cotton be awarded to Choice "in extinguishment of his rent for the year 1908." The judgment from which appellants prosecute their appeal was as follows: "On the 14th

day of May, A. D. 1909, came on to be heard the above styled and numbered cause, and the plaintiff appeared in person and by attorney, and the defendant by attorney, and all parties announced ready for trial. A jury being waived, the matters of fact as well as law were submitted to the court. The pleadings being read, the testimony of the witnesses and argument of counsel being heard, the court took the matter under advisement, and on this the 24th day of May, A. D. 1909, is of the opinion that the plaintiff Joe Choice should recover and have foreclosure of his landlord's lien as herein prayed, and defendant Florence be perpetually enjoined from disposing of the bale of cotton sued for, same being liable for rent due to plaintiff by the tenant Boon Williams upon which he is entitled to have his landlord's lien. It is therefore ordered, adjudged, and decreed that Joe Choice, the plaintiff, do have and recover judgment of defendant Vernon Florence et al., and that he have judgment foreclosing his landlord's lien on the bale of cotton described in plaintiff's petition and admitted to be held by defendant Vernon Florence, and for costs for which let execution issue."

F. B. Martin, for appellants. M. L. Cunningham, for appellees.

WILLSON, C. J. (after stating the facts as above). The issues made by the pleadings were: (1) Did appellee Choice have a landlord's lien on the cotton; and, if he did, was he entitled to have it foreclosed? (2) Was said Choice entitled to an injunction restraining appellants Florence and Barton from selling the cotton on an execution issued on the judgment against Boon Williams? The judgment determined that as against Florence Choice was entitled to relief by an injunction, and that as against Florence "et al." he was entitled to have such a lien foreclosed and to recover the costs of the suit. It did not dispose of the controversy between Choice and Barton, as to whether the former as against the latter was entitled to relief by an injunction or not, and only by construing the words "et al." as referring to Barton and Williams can it be said as to them to have disposed of the other issues in the case. Such being the judgment, the question arises: Is it a final one, so as to give this court jurisdiction of the appeal? We think it is not. "When the whole of the matter in controversy is finally disposed of, as to all the parties," said the Supreme Court in *Simpson v. Bennett*, 42 Tex. 241, quoting from the opinion of the court in *Martin v. Crow*, 28 Tex. 614, "then there is a final judgment, and not before, from which an appeal or writ of error can be taken." And see *Stewart v. Lenoir*, 31 Tex. Civ. App. 470, 72 S. W. 619; *Davis v. Martin*, 15 Tex. Civ. App. 62, 53 S. W. 599; *Holloy v. Duke*, 43 Tex. Civ. App. 529, 86 S. W. 1090; *Rhone v. Ellis*, 30 Tex.

80; *Whitaker v. Gee*, 61 Tex. 218; *Railway Co. v. Smith*, 58 Tex. 76; *Railway Co. v. Scott*, 78 Tex. 360, 14 S. W. 791.

The appeal is dismissed.

#### TAFT et al. v. WARD.

(Court of Civil Appeals of Texas. Dec. 15, 1909. Rehearing Denied Jan. 12, 1910.)

##### 1. TRIAL (§ 136\*)—QUESTIONS FOR JURY.

Where a case made by the evidence is one purely of fact, it is for the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 318-327; Dec. Dig. § 136.\*]

##### 2. BOUNDARIES (§ 8\*)—MANNER OF ASCERTAINING.

Any facts which tended to show the actual footsteps of the surveyor in making the different subdivisions that compose the respective blocks could be used to ascertain the boundaries of the blocks, which were merely the boundaries of the outside subdivisions, and, where no mark could be found designating and fixing the lines of the outside subdivisions, they could be fixed by marked corners and footsteps around inside surveys to which they were tied by the field notes.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 8.\*]

##### 3. BOUNDARIES (§ 3\*)—MANNER OF ASCERTAINING—FOOTSTEPS OF SURVEYOR.

Where footsteps of the surveyor are found and identified, they must control, and all classes of calls must yield to them.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 25-29; Dec. Dig. § 3.\*]

##### 4. BOUNDARIES (§ 3\*)—MANNER OF ASCERTAINING—CALLS—WHEN REJECTED.

Calls for the corners of adjoining surveys must be rejected when they conflict with the actual work of the surveyor.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 25-29; Dec. Dig. § 3.\*]

##### 5. BOUNDARIES (§ 3\*)—LOCATION OF TRACT OF LAND—USE OF CALLS ON OTHER LAND.

It is only in the absence of other means of identification that known calls in other surveys can be appealed to, to locate a tract of land.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 3.\*]

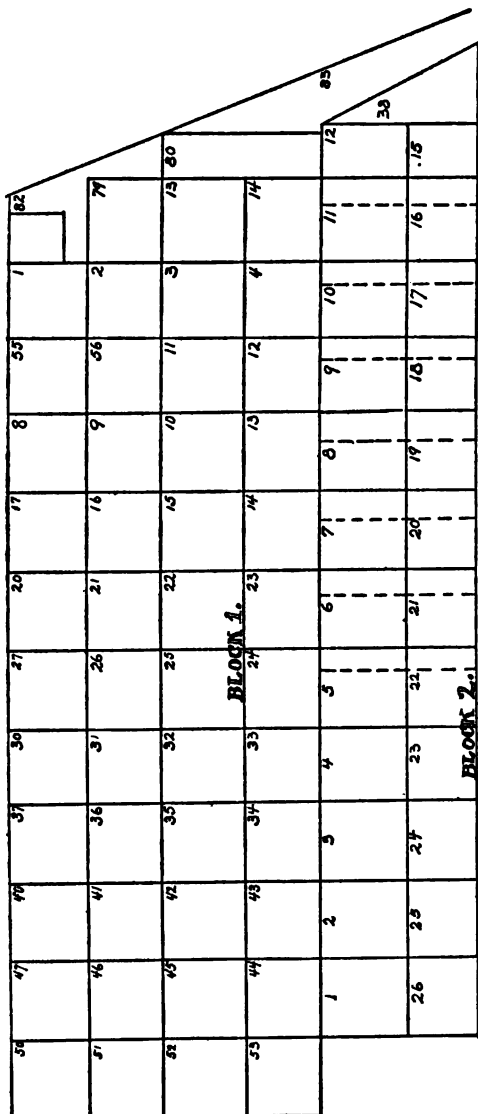
Appeal from District Court, Dimmit County; J. F. Mullally, Judge.

Trespass to try title by Anna S. Taft and another against S. C. Ward. Judgment for defendant, and plaintiffs appeal. Affirmed.

F. Vandervoort and Ogden, Brooks & Napier, for appellants. Eugene A. Moore and N. A. Rector, for appellee.

FLY, J. This suit was instituted by appellants against appellee in the form of trespass to try title, but really is a contest as to the boundary line between surveys 15, 37, 46, and 54, block 2, Texas & New Orleans Railroad, and survey No. 38, not patented, in same block, and survey No. 83, not patented, known as "A. M. Fore survey." The case was tried by jury and the boundary located as claimed by appellee, and the latter was awarded damages in the sum of \$25.

The following plat will assist in arriving at a full understanding of the controversy between the parties:



The controversy is over the location of the boundary lines between surveys 15, 37, 46, and 54, in block 2, owned by appellants, and survey 38, out of the same block, and survey 83, A. M. Fore, a school section, located by virtue of an alternate land certificate; appellants claiming that the boundaries of the inside surveys, which should fix the boundaries between the parties, are where the solid lines appear on the plat, and appellee that they are along the dotted lines, 380 varas to the west of the solid lines. Surveys 36, 46, and 54 lie on the south of 15, and do not appear on the plat. The surveys of blocks 1 and 2 were made by the same surveyor near the same time, and the map or plat of the surveys made by him show that the lines

of the different surveys running from the north to the south are continuous and unbroken lines through the two blocks. Appellants own lots 15, 37, 46, 54, 55, 70, 75, and 78 in block 2, and all the lots to the westward of them, except survey 16, which is state land. Survey 38 and 83 are school sections, and were awarded appellee on his application to purchase by the Commissioner of the General Land Office on December 17, 1907.

The only well-defined and established point in block 1 is the northeast corner of survey 1, at which the original surveyor began to survey the subdivision of that block. The beginning corner of block 2 is established and is the northeast corner of survey 1, in that block, and it calls for the eastern corner of survey 44, in block 1. Survey 2, in block 2, begins at the same corner as does survey 1, designating it as the east corner of survey 44, in block 1. It is tied by its field notes to survey 1.

Surveys 1 to 14, inclusive, in block 2, adjoin surveys 44, 43, 34, 33, 24, 23, 14, 13, 12, 3, and 4, in block 1, and the north lines in the first-named surveys correspond, by the calls in the field notes, with the surveys named in block 1, and are tied to them. There is nothing to mark the common line between blocks 1 and 2.

Kuechler, who surveyed the two blocks originally, did not make any starting point for the whole of either, but he began with survey 1 in each block and tied the other surveys in each block to survey 1. In surveying block 2 he began with survey 1, in that block, and tied it to survey 44 in block 1 as he tied all of the surveys in block 2 to the adjoining lots in block 1. The uncontroverted evidence showed that in 1898 all of the original corners on the south line of the northern tier of surveys numbered from 1 to 10, inclusive, were found except the common corner of 8 and 9 and the southeast corner of survey 10. Those corners are on the dotted lines on the plat, which are claimed by appellee to be the true location of the lines and corners. Other marked corners of a number of other surveys in block 2 were found on the ground, all tending to carry out the theory of appellee. From a statement of the facts hereinbefore made, it is apparent that it was the intention of Kuechler, the original surveyor, to run the lines of the surveys in block 1, extending in a northerly and southerly direction, straight through block 2, so as to make the surveys in block 2 conform in course and distance to those in block 1, but that in making the actual survey he did not make them so conform. In other words, there is a direct and positive conflict between the evident intention and desire of the surveyor as expressed in his maps and plats and the calls in the different surveys and his actual survey and footsteps on the ground, as shown by marked corners. It

is not questioned that the different subdivisions of block 2 were actually made upon the ground, nor that the marked corners of the different surveys found on the ground were made by the original surveyor. The case made by the evidence was one purely of fact, and therefore peculiarly one for the decision of a jury.

Appellants have presented their case in the trial court, as well as in this court, on the theory that there were surveys of the two entire blocks, the lines around the blocks having been run by the surveyor and then subdivisions of the blocks made with reference to the outside lines of the blocks. The theory is not supported by the facts. There were no surveys made of the blocks except incidental to and arising from making a number of surveys, and then designating a certain number of such surveys block 1, and those remaining block 2. The outside lines of the blocks are fixed by the actual survey of the different tracts composing them. A different case would be presented if the blocks had been laid off and then subdivided.

Any facts tending to show the actual footsteps of the surveyor in making the different subdivisions that compose the respective blocks could be used to ascertain the boundaries of the blocks, which are merely the boundaries of the outside subdivisions, and, if no marks can be found designating and fixing the lines of the outside subdivisions, they could be fixed by marked corners and footsteps around inside surveys to which they are tied by their field notes. If footsteps of the surveyor are found and identified, they must control, and all classes of calls must yield to them. As said in *Stafford v. King*, 30 Tex. 257, 94 Am. Dec. 304: "The surveyor may fall into error in making out the field notes, both as to course and distance (the former no more than the latter), and the Commissioner of the General Land Office may fall into a like error by omitting lines and calls, and mistaking and inserting south for north, east for west. And this is the work of the officers themselves, over whom the locator has no control. But, when the surveyor points out to the owner rivers, lakes, creeks, marked trees, and lines on the land for the lines and corners of his land, he has the right to rely upon them as the best evidence of his true boundaries, for they are not liable to change and fluctuations of time, to accident, or mistake, like calls for course and distance; and hence the rule that when course and distance, or either of them, conflict with natural or artificial objects called for, they must yield to such objects. \* \* \* The identification of the actual survey, as made by the surveyor, is the desideratum of all these rules. The footsteps of the

surveyor must be followed, and the above rules are found to afford the best and most unerring guides to enable one to do so."

Appellants do not deny that a number of marked corners of different surveys of block 2 were found, but it is insisted that the outside lines of the outside surveys on the east of the block should be fixed by the marked corner of survey 1 in block 1, and that it should be used to fix, not only the outside lines of block 1, but also of block 2. We see no reason for attaching more dignity to the marked northeast corner of survey 1 in block 1 than to the well established corners of a number of surveys in block 2 in fixing the boundaries of the latter surveys. While the surveys of the two blocks were made within a few days of each other, they were separate surveys, and the marked corners of the one block cannot be used to fix the corners and lines of the other when the latter was an actual survey and that survey cannot be totally disregarded in order to follow lines run from the corner of another survey. The lines of the outside tier of surveys of block 2 are not found on the ground, and must be determined from known lines of the surveys either of block 1 or block 2, and, where a number of marked corners are found on block 2, we think in constructing the outside lines of the block those corners, rather than those of another block or survey in another block, should be given the preference. Whatever may have been the intention of the surveyor as to the continuity of the lines through the two blocks must give way and be subordinate to the actual survey. No extra dignity can be conferred upon the initial corner of the first survey in block 1, nor any undue influence given to the intention of the surveyor when they clash with his actual work upon the ground of block No. 2. The calls for the corners of adjoining surveys must be rejected when they conflict with the actual work of the surveyor. *Koenigheim v. Miles*, 67 Tex. 113, 2 S. W. 81. It is only in the absence of other means of identification that known calls in other surveys can be appealed to locate a tract of land. *McAninch v. Freeman*, 69 Tex. 445, 4 S. W. 369; *Booker v. Hart*, 77 Tex. 146, 12 S. W. 18.

Appellants have no cause to complain of the action of the court in refusing to instruct the jury to return a verdict for appellants. It would have been error to have so done, and the evidence is ample to sustain the finding in favor of appellee.

The charge complained of was the statement of an abstract rule of law, but it could not have injured appellants.

There is no error in the judgment, and it is affirmed.

**MILLAR v. WARD.**

(Court of Civil Appeals of Texas. Dec. 15, 1909. Rehearing Denied. Jan. 12, 1910.)

**PUBLIC LANDS (§ 176\*)—SCHOOL LANDS—PATENT—CONCLUSIVENESS.**

A patent to school land which calls for corners marked on the ground by a surveyor, cannot be attacked by subsequent purchaser of school land on the ground of mistake in establishing the boundary, for the state only may inquire into matters affecting a patent not involving the power of the officer to grant it.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 176.\*]

Appeal from District Court, Dimmit County; J. F. Mullally, Judge.

Action between J. S. Millar and S. C. Ward. From a judgment for the latter, the former appeals. Reversed and rendered.

F. Vandervoort and Ogden, Brooks & Napier, for appellant. Eugene A. Moore and N. A. Rector, for appellee.

**JAMES, C. J.** This case comes on appeal to this court in company with another, styled *Anna S. Taft v. S. C. Ward* (this day decided) 124 S. W. 437, to which we make reference for a plat illustrating the block containing the surveys involved in the present case.

Survey No. 12 in said block 2 and survey No. 38 in same block are the ones concerned. Both were of the school lands of the state, and represented sections of 640 acres as originally intended and put in by the surveyor. Questions have arisen respecting the boundaries or positions of these sections, and likewise other sections in block 2 involved in the cause just referred to, as will appear from the opinion in that case. It would seem that blocks 2 and 1 were originally surveyed by Mr. Kuechler at practically the same time. One of his original corners is the northeast corner of survey 1 in block 1 which is found and identified. But he made and called for corners in connection with certain of the interior sections in block 2, a number of which are found, and these, when consulted in order to find the border sections of block 2 on the east side of the block (such as sections 12 and 38), do not place them precisely on the ground, where a survey from the tree at the northeast corner of survey 1 in block 1 would place them.

In 1808 the county surveyor assisted by the former county surveyor made a survey to ascertain the eastern boundary line of block 2 for the purpose of arriving at the boundaries of survey 12 in that block which had been purchased by C. L. McDonald. They worked from said tree at the northeast corner of block 1 to ascertain the block line of blocks 1 and 2, and accordingly arrived at the boundaries of said section 12, marked the corners thereof, and put iron pipes at the corners, and these are the corners by which the survey was patented to McDonald, the patent

calling for these iron pipes. This patent was in fact issued upon corrected field notes of the survey made by Barker, the county surveyor, in 1905, he adopting the corners that had been made by Denman. These field notes, upon which the patent was issued for survey 12, fixed its northern and southern lines by these corners at 1,932 varas in length, and its eastern and western lines at 2,060 varas. The patent corners are marked on the ground and are easily identified. The survey as patented contained 705 acres. Survey or section 38 in block 2 is adjoining No. 12, and the latter as patented may be said to embrace a part of the latter (which conflict is the subject of this suit) if the position of these surveys is fixed by consulting certain recently discovered interior found corners in block 2. The defendant Ward, after survey 12 had been patented as aforesaid to McDonald, applied to purchase section 38, and he contends that he is entitled to have these two surveys adjudicated as being as they were in fact located by the original surveyor, and that he has the right to go behind the patent and have corrected what he claims to have been a mistake, in so far as the patent covers land originally in 38. Appellee admits that such a question is ordinarily one that can only be raised by the state against the holder of patented land, but insists that this rule does not apply to school lands. That it does apply to school lands, and in view of a similar state of facts, has been expressly held by the Court of Civil Appeals, Third District, in *Frontroy v. Atkinson*, 45 Tex. Civ. App. 324, 100 S. W. 1023.

Why the rule does not apply in this case we are at a loss to see. The land covered by the two surveys was all school land and subject to sale. There is no question made concerning the power of the state or Commissioner to sell and patent the surveys. If there was a want of such power, we could say that the patent conferred no title, and that consequently a subsequent claimant could take advantage of the defect. *Bryan v. Shirley*, 53 Tex. 460. But in all cases in which the question has arisen, in respect to school land, or other land, where the power to grant existed, it has been held that a person whose claim has its origin subsequently cannot question the prior patent, for fraud in obtaining it, or for any other irregularity. In fact, where the power to make the grant existed, no person, not having a prior title or equity has ever been allowed, in this state, to question a patent. We are not cited to any statute which restricted the power of the state or Commissioner of the General Land Office in regard to school lands, to the granting of a particular section, as the same was actually made by the surveyor who originally made and platted the same. Such a provision would be inadvisable, if not impracticable, as questions of boundary are generally perplex-

ing, and the Commissioner could not be expected to determine such a matter with precision, for a jury or court might resolve the matter differently. It is contemplated that he may make mistakes as other persons.

The eastern boundary of this block, as it now appears, was left by Mr. Kuechler in confusion. As the two sections in question were on or at the east line of the block as platted by him, nothing was more natural at the time Denman made his survey than for him to fix their position on the ground by ascertaining this east line from the tree referred to. The interior corners of block 2 have been since found. There was nothing more natural than for the subsequent surveyor or who made the corrected field notes for No. 12, for the purpose of a patent for the same, to come to the same conclusions that Denman did; and nothing was more natural than for the Commissioner to follow the latter's notes. This may have resulted in a mistake in the true boundaries of No. 12, but the fact is that it was thus sold to and paid for by McDonald and patented to him. We see no better standing for one who asserts only a subsequently arising claim to a part of the same land, on the ground of a mistake on the part of the Commissioner in granting the patent, than for one who would seek to attack it for fraud.

We, therefore, regard it as wholly immaterial where the true original lines of No. 12 were intended to be. There is no mistake as to what land was patented for No. 12, and the land so patented, all of which represented school land which no other person had any right or interest in at the time, was placed beyond the reach of subsequent applicants, upon the well-settled principle that only the state has the right to inquire into matters affecting the patent, which do not involve the power of the officer to grant the patent.

Upon the clear and undisputed facts which control the rights of these parties the judgment is reversed, and judgment rendered in favor of the appellant for the land.

Reversed and rendered.

### PARRISH v. ADWELL.

(Court of Civil Appeals of Texas. Jan. 1, 1910.)

#### 1. PARTNERSHIP (§ 158\*)—REPRESENTATION TO PARTNER—RIGHTS ACQUIRED BY FIRM.

In proceedings to restrain defendant from re-engaging in the photograph business, where the issue, as to whether plaintiff was induced to purchase the business on the faith of defendant's promise to D., plaintiff's partner, that he would not re-engage in the business, was raised by the evidence, if plaintiff and D. had agreed to become partners before the purchase, and D. was acting for the partnership, and defendant's representations induced the trade, he was bound by them, whether plaintiff was present when they were made or not.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 292; Dec. Dig. § 158.\*]

#### 2. TRIAL (§ 203\*)—ISSUE RAISED BY EVIDENCE—DUTY OF COURT TO INSTRUCT THEREON.

When the evidence affirmatively raises an issue which constitutes a defense, such defensive matter should be presented by the court to the jury, especially when requested by special charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 478; Dec. Dig. § 203.\*]

#### 3. TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

In proceedings to restrain defendant from re-engaging in the photograph business, the defense being that he sold the business to plaintiff's partner alone and not to the firm, and that he did not sell the good will nor agree not to re-engage in the business, and plaintiff did not claim that he negotiated the sale, but that his partner did, acting for the firm, and the issue was as to representations made by defendant at the time of the sale, a charge, at defendant's request, that before the jury could find for plaintiff they should believe from a preponderance of the evidence that defendant at the sale and as a part of the contract agreed not to re-engage in the photograph business in the city as long as the firm remained in the business, sufficiently presented the issue, and it was not error to refuse a special charge requested by defendant that if defendant promised or stated to plaintiff's partner that he would not re-engage in the photograph business in the city, and the promise was made subsequent to the sale, defendant should recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

#### 4. EVIDENCE (§ 267\*)—HEARSAY—ADMISSIBILITY.

In proceedings to restrain defendant from re-engaging in the photograph business, evidence that plaintiff's partner told him that defendant had agreed not to re-engage in business as long as plaintiff's firm was in the business in the city, where plaintiff testified that he was induced to purchase the business relying on the faith of defendant's statements to his partner, was not mere hearsay, but was admissible for the jury to determine whether the statement induced him to act.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1080; Dec. Dig. § 267.\*]

#### 5. INJUNCTION (§ 130\*)—CONTRACT NOT TO RE-ENGAGE IN BUSINESS—QUESTION FOR JURY.

Whether defendant did or did not make the statement to plaintiff's partner was for the jury.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 297; Dec. Dig. § 130.\*]

#### 6. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where plaintiff's partner was allowed to testify, without objection, that he told plaintiff of a statement made by defendant which was not contradicted, it was not reversible error to allow plaintiff to testify that his partner told him of the statement made by defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4165; Dec. Dig. § 1051.\*]

#### 7. INJUNCTION (§ 128\*)—EVIDENCE—SUFFICIENCY.

In proceedings to restrain defendant from engaging in the photograph business, evidence held sufficient to support a jury finding in favor of plaintiff.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 278; Dec. Dig. § 128.\*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Suit for injunction by S. V. Adwell against

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

J. W. Parrish. Judgment for plaintiff, and defendant appeals. Affirmed.

Ivy, Hill & Greenwood, for appellant. Morrow & Smithdeal, for appellee.

RAINEY, C. J. This is an injunction suit brought by appellee to enjoin the appellant, Parrish, from engaging in the photograph business in the town of Itasca, Hill county. Plaintiff's petition alleged, in effect: That Parrish prior to January 1, 1908, was doing a photograph picture business in said town. That plaintiff and one Donoho formed a co-partnership, and on about August 25, 1907, they bought from said Parrish his photograph business and good will, and it was agreed and understood that Parrish should run the business until January 1, 1908, and that said Parrish would not re-engage in said business in said town so long as the plaintiff or Donoho should conduct said business. That about August 25, 1908, Donoho retired from said partnership, and plaintiff acquired all of his rights, etc., and continued said business. That said Parrish, about October 24, 1908, established and was conducting in said town a separate photograph business of his own in violation of his agreement with plaintiff, and an injunction was prayed for restraining him from continuing in said business. Parrish answered denying that he sold to the partnership of Donoho & Adwell, that he made a sale to Donoho alone, that Adwell was not known in the trade, and that he did not sell his good will, nor agree not to re-engage in such business in the said town of Itasca as long as same was conducted by them or either of them. A trial resulted in a verdict and judgment for plaintiff as prayed for, and Parrish appeals.

Complaint is made of the giving, at plaintiff's request, of the following charge: "If you believe from the evidence that Donoho told Adwell, before Adwell agreed to trade, that Parrish had agreed not to go into the business of photography in Itasca again so long as Donoho and Adwell were engaged therein, and further believe that said statement was one of the inducements to Adwell to make said trade, and further believe from the evidence that Parrish had so promised the said Donoho, then and in that event you will find for the plaintiff." There is a conflict in the evidence as to whether Adwell was a partner of Donoho at the time the purchase was made, and as to whether there was an agreement that Parrish would not re-engage in the business as long as Donoho or Adwell were conducting such a business in Itasca. There was evidence tending to show that Adwell and Donoho were partners at the time of the purchase, and that Parrish agreed not to go into the business again as long as Donoho or Adwell continued therein. Adwell testified that: "We were to get possession of the property on the 1st of January. I had a conversation with Parrish the day

we settled up, about the 1st of January, when we finished paying him the money. I told him, if I thought he would ever come back here in business against us, that I would not have the gallery at all, would not give him anything for it, and he said: 'I will never do it. I told you I would not, and I propose to be a man of my word.' There was evidence that about the 10th of August, 1907, Donoho told Adwell that Parrish had agreed not to re-engage in the photograph business at Itasca, and on the faith of Parrish not so doing Adwell agreed to purchase. The issue was raised by the evidence, and if Donoho and Adwell had agreed to become partners before the purchase, and Donoho was making the trade for the partnership, and Parrish made such representations which induced the trade, it was binding, whether or not Adwell was present at the time.

Complaint is made of the court's refusal to give a special charge requested by appellant as follows: "Gentlemen of the Jury: If the defendant Parrish promised or stated to Mr. Donoho that he, said Parrish, would not re-engage in the photograph business in Itasca, but if said statement or promise was made subsequent to the contract of sale to said Donoho, the defendant should recover, and in case you so believe you will return a verdict for defendant." The proposition under the above is: "When the evidence positively and affirmatively raises an issue which constitutes a defense, such defensive matter should be presented by the court to the jury, especially when requested by special charge." The proposition is correct, but at the request of appellant the court gave the following charge: "You are charged that before you should find for the plaintiff you should believe from a preponderance of the evidence that defendant, J. W. Parrish, at the time of his contract of sale to Mr. Donoho, as a part of his contract of sale, agreed not to re-engage in the photograph business in Itasca so long as said Donoho and Adwell remained in such photograph business." The defense pleaded by appellant was that he sold alone to Donoho and not to Donoho & Adwell, and did not sell his good will, nor agree not to re-engage in the business in Itasca as long as Donoho & Adwell were in such business. Plaintiff did not claim that he negotiated the transaction, but conceded that the trade was made with Donoho, but made for Donoho & Adwell. The issue then being as to the representations made by Parrish to Donoho at the time the negotiations were had, the giving of appellant's special charge sufficiently presented the issue, and there was no error in refusing the special charge, the refusal of which is complained of.

Complaint is made to the admission of Adwell's testimony that Donoho told him that Parrish had agreed not to re-engage in business so long as he or Donoho continued the photograph business in Itasca. The

ground of objection being that it was hearsay, and not binding on Parrish, Adwell's testimony shows that he was induced to make the trade relying on the faith of Donoho's statement to him. This testimony was admissible for the jury to determine whether or not the statement induced him to so act, and then it was for the jury to determine whether or not Parrish made such statement to Donoho.

Again, the admission of said testimony is not reversible error, as Donoho, without objection, testified he made said statement to Adwell, which is not contradicted. There was no error in the admission of said testimony.

We have considered the other assignments of error complaining of the charge of the court and have found no reversible error therein.

On the main issues the evidence was conflicting; but there is sufficient evidence to support the finding of the jury, and the judgment is affirmed.

#### BALDWIN v. HASKELL NAT. BANK.

(Court of Civil Appeals of Texas. Dec. 13, 1909.  
Rehearing Denied Jan. 19, 1910.)

#### ALTERATION OF INSTRUMENTS (§ 7\*) — MATERIALITY.

A note payable with interest from maturity, contained a blank space after the word "maturity," and the payee after execution filled up such space by writing therein the word "date," so that the note called for interest after "maturity date." *Held*, that the alteration was not a material change which would prevent recovery on the note.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 34-39; Dec. Dig. § 7\*]

Appeal from District Court, Haskell County; Cullen C. Higgins, Judge.

Action by the Haskell National Bank against J. L. Baldwin. Judgment for plaintiff, and defendant appeals. Affirmed.

Helton & Murchison, for appellant. H. G. McConnell and Gordon B. McGuire, for appellee.

FISHER, C. J. This is a suit by appellee against appellant to recover on a note executed by appellant to appellee for the sum of \$2,050. The note, when executed, provided for interest from maturity. After the word "maturity" there was left a blank space, which the appellee after execution filled up by writing the word "date," so that the note when sued upon called for interest from maturity date.

The appellant, by a plea of non est factum, raised the question that the word "date" was written in the note by the appellee without his consent, and constituted a material alteration. The appellee replied to the effect that this change was made by the consent of appellant. On this issue there

was a conflict of evidence. Upon the trial of the case the court held that the addition of the word "date" was not a material change or alteration, that "maturity" and "maturity date" mean the same thing, and thereupon instructed the jury to return a verdict for appellee. The effect of the ruling was that the change was not a material alteration, and that the note drew interest from maturity. This is the sole question in the case, although there are assignments of errors raising the question in different forms. Of course, it is conceded that, if this was a material alteration, the appellee could not recover on the note. If it was not material, it did not affect its legal status, and the judgment below was correct. We have not been able to appreciate any difference between the expression "maturity" and "maturity date," and we are of the opinion that the trial court correctly construed both expressions to mean the same thing. If that is true, the addition of the word "date" did not alter in any manner the legal effect of the paper, and, consequently, was not a material change.

We find no error in the judgment, and it is affirmed.

Affirmed.

#### WHITSETT v. CARNEY.

(Court of Civil Appeals of Texas. Jan. 5, 1910.)

#### 1. SALES (§ 454\*)—"ABSOLUTE SALE"—"CONDITIONAL SALE."

A sale is "absolute" which has been completed, while a "conditional sale" is one which takes effect on the performance of a condition, though an absolute sale may be subject to a condition subsequent, as where there is complete change of title subject to be defeated by the non-performance of some annexed condition; the true criterion for determining whether a sale is absolute or conditional being the intent of the parties, to be discovered from their express declarations, and, where this is not possible, from all circumstances of the case, as well as from their declarations, if any.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 454.\*]

For other definitions, see *Words and Phrases*, vol. 1, p. 42; vol. 2, pp. 1408-1410.]

#### 2. SALES (§ 454\*)—ABSOLUTE SALE.

A contract, whereby plaintiff, in consideration of \$11 per head to be paid by defendant, sold to the latter all plaintiff's cattle in a certain county, giving defendant authority to enter plaintiff's pasture at any time and take therefrom any cattle he might choose, and further providing that plaintiff should deliver to defendant, on a certain date, all cattle remaining in the pasture for which defendant was to pay such sum per head, was an absolute sale passing the title of all the cattle to defendant.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1324-1334; Dec. Dig. § 454.\*]

#### 3. CONTRACTS (§ 237\*)—DISCHARGE.

A contract, in order to operate a discharge in whole or in part of an earlier contract, must be supported by a valuable consideration.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1119-1122; Dec. Dig. § 237.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**4. SALES (§ 89\*)—DISCHARGE.**

Plaintiff sold all his cattle in a certain county to defendant at a stipulated price per head, agreeing that defendant might enter plaintiff's pasture, take any cattle he might choose on paying therefor the specified sum per head, and that plaintiff should deliver to defendant, on a certain day, all cattle remaining in the pasture. Therefore plaintiff signed an agreement reciting that he had sold to defendant all of his cattle for a specified sum, for which sum defendant gave plaintiff his check. Subsequently plaintiff offered to return the check to defendant, stating that the latter could not pay him for the cattle until he knew how many plaintiff had, and on defendant's refusal to take the check plaintiff destroyed it. *Held*, that the money evidenced by the check was simply payment for so many head at the original contract price, leaving the balance unpaid for at the original contract price, and was no new consideration, and there being no evidence that defendant was obligated, under the new agreement, to gather the cattle, or that plaintiff was released from gathering them, there was no consideration for the new contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 259; Dec. Dig. § 89.\*]

Appeal from District Court, Bee County; James C. Wilson, Judge.

Action by Dan Carney against Taylor Whitsett. From a judgment for plaintiff, defendant appeals, and plaintiff files a cross-assignment of error. Reformed and rendered.

Chambliss & Baker, for appellant. G. E. Pope, for appellee.

NEILL, J. Carney sued Whitsett for \$1,151, an alleged balance of the purchase money due on the sale of 346 head of cattle, made by the former to the latter on January 3, 1906. The defendant, by his answer, alleged that on April 27, 1906, after the contract sued on was made, another sale of the same cattle was made by the plaintiff to him, and that he had fully paid for them in accordance with its terms. In replication the plaintiff pleaded that the first sale conferred upon and vested in defendant title to all the cattle; that he was liable thereon for the purchase price per head agreed upon by the parties when they were sold; that there was no consideration for the alleged second sale; and that, if any such sale was made, it was without consideration and void. He also alleged that if such sale was made it was procured by fraud, or was entered into by mutual mistake as to the number of the cattle sold, and that the number so far exceeded that contemplated by the parties as to render the defendant liable to him for the value of the number exceeding such mistaken estimate. The case was tried without a jury, and, on findings of fact and law by the trial judge, judgment was rendered for the plaintiff for the sum of \$900. From the judgment defendant has appealed, and plaintiff has filed a cross-assignment of error.

The evidence shows that on January 3, 1906, plaintiff owned 346 head of cattle,

which were then in his pasture, consisting of something over 2,000 acres in Live Oak county, Tex., which were all the cattle he owned in said county; that on said date plaintiff, in consideration of \$11 per head, to be paid before the cattle were taken from the pasture, by a written instrument of that date, reciting the consideration stated, sold defendant all of said cattle. The writing contains the following language: "I, Dan Carney, for and in consideration of the sum of \$11.00 per head to be paid by Taylor Whitsett, have and by these presents do bargain and sell to said Whitsett all my cattle in Live Oak County, \* \* \* to have and to hold to the said Whitsett, his heirs and assigns." It further stipulates that Whitsett shall have the authority to enter into Carney's pasture at any time and gather and take therefrom any cattle he might choose, provided he would pay for them before removed therefrom \$11 per head; that Carney should gather and deliver to Whitsett at his (Carney's) ranch on May 1, 1906, all the cattle remaining in the pasture, for which Whitsett was to pay him the consideration per head before mentioned; that on April 26th defendant entered plaintiff's pasture, gathered 226 head of the cattle, and next day bobbed their tails and turned them loose there; that before they were turned loose defendant proposed to plaintiff to buy the remnant of the cattle, and it was agreed between them that the defendant should have the remnant for \$200, and in accordance with the agreement plaintiff signed the following agreement: "Live Oak County, Texas, April 27, 1906. This is to certify that I have this day sold to Taylor Whitsett all of my cattle branded thus, D. R., for the sum of \$2,686, twenty six hundred and eighty-six dollars. The title to said stock I warrant and defend. [Signed] Dan Carney."

When this instrument was signed, defendant executed and delivered plaintiff his check for \$2,686. In some way this check got in the hands of one Ira Hinton of Oakville, who, on May 1st, informed plaintiff that he had mailed it for collection. Whereupon plaintiff caused Hinton to withdraw the check from the mail and deliver it to him. He then carried the check to the defendant and offered to return it to him, stating that he (defendant) could not pay him for the cattle until he knew how many cattle plaintiff had. The defendant refused to receive the check, whereupon plaintiff, in his presence, destroyed it. That on May 3, 1906, defendant and one Sutton, to whom the former had in the meantime sold the cattle, went to plaintiff's place to gather them, and within the next two days gathered 318 head; and, under direction of defendant, Sutton then drove them away. A few days afterwards, 28 head more of the cattle were gathered in and carried from plaintiff's pasture at the instance

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

of Sutton, making a total of 346 head which defendant acquired by virtue of the sale to him by the plaintiff. That after the cattle had been taken from the pasture by Sutton, under defendant's directions, as above stated, defendant caused plaintiff to be paid the sum of \$2,655, which he accepted in part payment for the cattle. That when the written agreement herein last recited was signed by the plaintiff, the defendant had prior thereto made some investigation as to the number of cattle remaining ungathered, and thought that there were about 30 head of them, and plaintiff thought there were only a few head more, and the agreement was made under such belief, and that had it not been for such mistaken belief the agreement would not have been entered into.

The trial judge's conclusions of law are: (1) That upon the execution of the contract of January 3, 1906, title to all the cattle owned by plaintiff in Live Oak county passed to and vested in the defendant; (2) that the contract of April 27, 1906, for the purchase of the remnant of plaintiff's cattle, was without consideration to support it and void; (3) that the contract last referred to was executed under a mutual mistake of the parties as to the number of cattle remaining ungathered, and that the excess in the number over the contemplation of either party was so gross as to entitle the plaintiff to equitable relief against such mistake, and (4) that plaintiff, under the facts and law, was entitled to recover of the defendant the sum of \$900, with interest at 6 per cent. per annum from May 5, 1906. The contention of the appellant is that the trial court erred in all these conclusions.

If the contract referred to in the first conclusion vested title in defendant to all the cattle, then, in order for him to escape paying the plaintiff \$11 per head for each of them, it was incumbent upon him to prove that he was in some way relieved from fully discharging such obligation. This he sought to do by showing that a new contract was made between him and the plaintiff, which, as to the cattle remaining ungathered, was in lieu of the first, and that he had discharged his obligation under it. The principal questions, therefore, to be determined are: (1) Was the effect of the first contract to vest title in the defendant to all the cattle? And (2) if such was its effect, was there any consideration to support the subsequent agreement by which it is claimed by the appellant the former was, as to the ungathered cattle, abrogated?

The essential element of bargainings concerning sales is the agreement or assent of the parties to the present or future transfer of the title to a chattel, either designated or afterwards to be ascertained. A sale is "absolute" which has been completed or perfected, while a "conditional sale" is one which takes effect or is to become complete on the performance of a condition. An ab-

solute sale, however, may be subject to a condition subsequent, as when there is a complete or perfect change of title, subject to be defeated by the nonperformance of some annexed condition. The true criterion of determining whether a sale is absolute or conditional is the intention of the parties, to be discovered, when possible, from their express declarations, and, where this is not possible, to be gathered from all the circumstances of the case, as well as from their declarations, if any. *Mechem on Sales*, §§ 4, 6, 477. See, also, *Hopkins v. Partridge*, 71 Tex. 606, 10 S. W. 214; *Loeb v. Crow*, 15 Tex. Civ. App. 537, 40 S. W. 506; *Brewer v. Blanton*, 66 Tex. 532, 1 S. W. 572; *Boaz v. Schneider*, 69 Tex. 128, 6 S. W. 402. Tested by the rule stated, we have no doubt that the contract first made was an absolute sale, and passed to and vested the title of all the cattle in defendant, and rendered him liable to the plaintiff for all of them at the contract price of \$11 per head.

Having thus disposed of the first question stated, we will now proceed to a determination of the second. It is an elementary principle that, in order to operate as a discharge in whole or in part of an earlier contract, the later contract must be supported by a valuable consideration. The money evidenced by the check which the defendant handed to plaintiff when the second agreement was made was not such a consideration as would give it any support. It was simply a payment for so many head of cattle at the original contract price, and left the number of cattle, over and above what was paid for, for which defendant was liable under the former contract at the rate of \$11 per head, unpaid for. Therefore, if defendant acquired title to them under the second contract, instead of under the first, it was without paying or obligating himself to pay any consideration whatever for them. This demonstrates that, if there were no other consideration, the so-called "new contract" was a nudum pactum, pure and simple. No other consideration is expressed in the new agreement, nor contemplated by the parties when it was made. We cannot, in view of this, ingraft an essential ingredient of a contract from the action of the parties after the agreement was made, for this would be making a contract for them which is beyond the power of any court. Therefore, as the evidence does not show that defendant was obligated under the new agreement to gather the cattle, or that plaintiff was released from gathering, it cannot be said, from the fact that defendant or his assignee did gather them, that the new contract was supported by a consideration entering into it that plaintiff was to be released from gathering the animals, and the expenses, if any, thereof placed upon the defendant.

The first contract having passed the title to all the cattle, and there being no con-

sideration to support the new one, plaintiff was entitled to recover the difference between the total value of the cattle, estimated at \$11 per head, and what he had actually received in payment, which difference is \$1,151, with interest thereon from May 5, 1906, at the rate of 6 per cent. per annum. And it is for such sum the judgment should have been rendered in the court below instead of the sum there adjudged.

This renders it unnecessary to consider the assignments arising from the theory that, even if there were a consideration to support the subsequent agreement, still the mistake of the parties as to the number of cattle was so great as to render the defendant equitably liable to plaintiff for the value of the cattle exceeding the estimated number. We will say, however, that on this theory the evidence shows the plaintiff was liable to the defendant in the amount adjudged by the trial court.

We therefore overrule all of appellant's assignments of error, sustain the cross-assignment of the appellee, and increase the judgment in favor of the plaintiff against the defendant so that it shall be for the sum of \$1,151, with interest thereon from May 5, 1906, at the rate of 6 per cent. per annum.

Reformed and rendered.

#### INTERNATIONAL & G. N. RY. CO. v. ROGERS.

(Court of Civil Appeals of Texas. Jan. 1, 1910.)

##### 1. APPEAL AND ERROR (§ 216\*)—RESERVATION OF GROUNDS OF REVIEW—INSTRUCTIONS—REQUESTS.

A party cannot complain that a charge is not sufficiently definite, where he did not request one more specific.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 628; Dec. Dig. § 216.\*]

##### 2. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action against an initial and connecting carriers for injuries from delay in shipment of live stock, the jury found against the initial carrier alone, it was a finding that all the delay occurred upon that road; and any error in refusing to charge that it was a presumption of law that the injury was inflicted by the last carrier was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.\*]

Appeal from Hays County Court; Ed. R. Kone, Judge.

Action by M. W. Rogers against the International & Great Northern Railroad Company and others. From a judgment against the International & Great Northern Railway Company, it appeals. Affirmed.

S. R. Fisher, J. H. Tallichet, S. W. Fisher, and King & Morris, for appellant. Will G. Barber and T. C. Johnson, Jr., for appellee.

KEY, J. Appellee brought this suit against appellant and two other railway companies, seeking to recover damages alleged to have been caused by delay in the shipment of 120 head of beef cattle from Kyle to Ft. Worth, Tex. The defendants answered by general demurrers and special exceptions, general denials, and special pleas setting up the limitation of liability of each defendant to damages caused by its own negligence. There was a jury trial, which resulted in a judgment in favor of appellee against appellant for \$408.85. The other two defendants were held not to be liable, and no judgment was rendered against them.

The first two assignments of error complain of the charge of the court in reference to the measure of damages; the contention being that it authorized a double recovery, and that as to the two head of cattle lost in transit, while the charge informed the jury that the measure of damage would be the market value of the two head of cattle, it did not specify market value at any particular place. Both objections are overruled. Considering the entire charge together, we do not think the jury could have understood it as authorizing a double recovery. As to the other objection, there is no positive error in the charge, and, if it was not as specific as appellant desired, a more specific instruction should have been requested.

The third assignment complains of the action of the court in refusing a special charge to the effect that it was a presumption of law that the injury to the cattle was inflicted by the last carrier. It has been held that the presumption referred to is not one of law to be given in charge by the court. *Bibb v. Railway*, 37 Tex. Civ. App. 508, 84 S. W. 663. But, whatever may be the correct rule on that subject, we hold that no reversible error was committed in failing to so charge in this case. It is true, appellant was the initial carrier, and the shipment was delivered at its destination by one of the other defendants; but the verdict of the jury finding appellant liable, and that the other defendants were not liable, is equivalent to a specific finding that all the delay complained of occurred upon appellant's road. Therefore, if error was committed in refusing the requested instruction, the verdict renders such error harmless, because it, in effect, finds that the other carriers exercised proper care and diligence, and that appellant alone caused all the delay complained of.

In view of the court's charge and of the special charges given at appellant's request, we hold that no error was committed in refusing to give the requested instructions referred to in the other two assignments.

No reversible error has been shown, and the judgment is affirmed.

Affirmed.

**RADLEY et al. v. KNEPFLY.**

(Court of Civil Appeals of Texas. Nov. 27, 1909. Rehearing Denied Jan. 15, 1910.)

**1. MUNICIPAL CORPORATIONS (§ 603\*)—ORDINANCES—FIRE ESCAPES—REASONABLENESS OF ORDINANCE.**

The sole power of Dallas City to require the construction of fire escapes on buildings being derived from its charter, it cannot exceed the authority there given, and section 71 of the charter, authorizing it to require the construction of suitable fire escapes on lodging houses, did not authorize an ordinance (section 99) requiring all rooms above the second story of lodging houses to be provided with more than one way of escape from fires, at opposite ends of the room, and leading to fire escapes on the outside of the building or to stairs inside.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1334; Dec. Dig. § 603.\*]

**2. MUNICIPAL CORPORATIONS (§ 121\*)—ORDINANCES—VALIDITY—REASONABLENESS.**

Whether an ordinance is void as being unreasonable is a question for the court under the evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 121.\*]

**3. MUNICIPAL CORPORATIONS (§ 603\*)—ORDINANCES—BUILDING ORDINANCES—FIRE ESCAPES—REASONABLENESS.**

The lodging house in question was a three-story corner building, with an alley in the rear, having a solid wall three stories high on the west side, and a fire escape on the south end. The evidence showed that it was unusual to have more than one fire escape on such a building, and that it was impracticable to so construct the third floor rooms of a building of such width, not situated on a corner, so as to provide each room with more than one way of escape from fire, at opposite ends of the room leading to fire escapes. *Held*, that an ordinance requiring the third floor of such buildings to be constructed with two hallways, or one hallway and a porch running throughout the building, or a fire escape at each window, would, as to inside buildings, be unreasonable and void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1334; Dec. Dig. § 603.\*]

**4. MUNICIPAL CORPORATIONS (§ 603\*)—ORDINANCES—CONSTRUCTION—FIRE ESCAPES.**

Under an ordinance requiring buildings of a certain kind to have one or more fire escapes, as directed by the building inspector, unless he deemed fire escapes unnecessary, the building need not be provided with more than one fire escape where notice of such requirement is not given the owner by the inspector.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1334; Dec. Dig. § 603.\*]

**5. INNKEEPERS (§ 10\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.**

In an action against a lodging house keeper for death, alleged to have been caused by defendant's failure to provide adequate fire escapes, evidence *held* to show that decedent was familiar with the condition of the building as to fire escapes when he was injured.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 16; Dec. Dig. § 10.\*]

**6. INNKEEPERS (§ 10\*)—CONTRIBUTORY NEGLIGENCE.**

One, having the time and opportunity to learn of the condition of a lodging house as to fire escapes, by voluntarily remaining in the

building assumed the danger of any failure to provide adequate escapes.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 15; Dec. Dig. § 10.\*]

**7. INNKEEPERS (§ 10\*)—ACTIONS—SUFFICIENCY OF EVIDENCE—PROXIMATE CAUSE.**

In an action against a lodging house keeper for death, claimed to have been caused by failure to provide adequate fire escapes, evidence *held* to show such failure was not the proximate cause of decedent's injuries.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 16; Dec. Dig. § 10.\*]

Appeal from District Court, Dallas County.

Action by Hattie Radley and others against Magdalene Knepfly. From a judgment for defendant on a directed verdict, plaintiffs appeal. Affirmed.

M. L. Morris and Crow & Donalson, for appellants. Carden, Starling & Carden and McCart, Bowlin & McCart, for appellee.

**BOOKHOUT, J.** This action was brought by Hattie Radley, the wife, and Guy Radley, Lindon Radley, and Elsie Radley, the children of R. F. Radley, deceased, plaintiffs in the court below, and appellants here, to recover damages resulting from the death of R. F. Radley, deceased, caused by a fire in the Knepfly building, owned by defendant, appellee, at the corner of Main and Poydras streets, in the city and county of Dallas, Tex., alleged to have resulted from the negligence of appellee in failing to provide said building, or the third story thereof, used as a lodging house, with suitable and proper fire escapes, as required by the ordinances of the city of Dallas. The trial was before a jury, and the court, after the evidence was all in, directed a verdict for defendant, and the jury so found, and judgment was entered thereon for defendant. Plaintiffs filed a motion for a new trial, which was overruled by the court, to which ruling they excepted and gave notice of appeal, and have perfected their appeal to this court.

R. F. Radley and John R. Minor, Jr., were linotype operators, and worked at night at the Dallas News. They usually went to bed about 4 o'clock in the morning. They both occupied the same room, which was on the third floor of the building, at the southwest corner of Main and Poydras streets in the city of Dallas, known as the Knepfly building. On January 9, 1906, a fire occurred in the building, causing Radley to jump therefrom, resulting in injuries which produced his death.

The only provisions of the charter of the city of Dallas bearing upon the subject of fire escapes are as follows:

"Sec. 70. To regulate the size and manner of construction of doors and stairways of theaters, tenement houses, audience rooms, public halls, and all buildings used for the gathering of a large number of people, wheth-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

er now built or hereafter to be built, so that there may be convenient, safe and speedy exit in case of fires.

"Sec. 71. To require the construction of suitable fire escapes on or in hotels, lodging houses, factories and other buildings, whether now built or hereafter to be built."

The city ordinances (omitting parts not relevant) as pleaded and read in evidence are as follows:

"Sec. 99. \* \* \* And every hotel, family hotel, apartment house, boarding house, lodging house, clubhouse, or tenement house, in which persons reside or lodge above the second story \* \* \* shall be provided with the proper ways of egress or means of escape from fire, sufficient for the use of all persons accommodated, assembled, employed, lodged, or residing in such buildings, and such ways of egress and means of escape shall be kept free from obstruction, in good repair, and ready for use at all times, and all rooms above the second floor in such buildings shall be provided with more than one way of egress or escape from fire, placed as near as practicable at opposite ends of the room, and leading to fire escapes on the outside of such building or to stairways on the inside, provided with proper railings.

"Sec. 100. In addition to the foregoing means of escape from fire, all such buildings as are enumerated in preceding sections of this ordinance as are more than two stories in height shall have one or more fire escapes on the outside of said building, as may be directed by the building inspector aforesaid, except in such cases as said building inspector may deem fire escapes to be unnecessary in consequence of adequate provisions having been already made for safety in the event of fire, and in such cases of exemption the said building inspector shall give the owner, lessee, or occupant of said building a written certificate to that effect, and his reason therefor. \* \* \* [Then follows in this section a specification for the construction of such fire escapes.]"

Had the city council power under its charter to enact section 99 of its ordinances above set out? Section 71 of the charter does confer power on the city to require the construction of suitable fire escapes on lodging houses. Section 70 of the charter confers on the city power to regulate the size, number, and manner of construction of doors and stairways in theaters, tenement houses, audience rooms, public halls, and all buildings used for the gathering of a large number of people. This section confers power on the city to regulate the number, size, and manner of construction of fire escapes on such buildings as are therein named, but lodging houses are not named therein. Appellants contend that section 71 of the charter confers on the city power to require the construction of fire escapes on lodging houses, and that this power carries with it the authority to require everything essential to make such authority

effective to subserve the purpose intended to protect the public from loss of life by fire. Section 99 of the ordinances, in stipulating that all rooms above the second floor of lodging houses, "shall be provided with more than one way of egress or escape from fire placed as near as practicable at opposite ends of the room leading to fire escapes on the outside of the building or to stairways provided with proper railings," embraces a requirement which the city, under the terms of the charter, was not authorized to make. This requirement was not essential to the construction of a proper fire escape. The city derives its power to require the construction of fire escapes from its charter, and it cannot exceed the authority therein conferred. *Vosburg v. Mayor*, 77 Tex. 568, 14 S. W. 195; *Gabel v. Houston*, 29 Tex. 343.

The next question is, Was the ordinance unreasonable, and therefore void? This was a question for the decision of the court, after hearing the evidence. *Austin v. Cemetery Co.*, 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114. It was shown that the building where the fire occurred is on a corner. Main street runs along its front, and Poydras street along its east side. There is an alley in the rear, and a solid wall three stories in height on the west side. There was a fire escape on the south end, which was in good order at the time of the fire. There was evidence, by men experienced in building in Dallas, that they never had known of more than one fire escape on a three-story building such as this was. The evidence showed that it was impracticable to so construct the rooms on the third floor of a building 25 feet wide, not situated on a corner, so as to provide each room with more than one way of egress or escape from fire, placed at opposite ends of the room leading to the fire escapes on the outside of the building. If appellants' construction of the ordinance is correct, then the third floor should have been constructed with two hallways, or one hallway and a veranda or porch running the entire length of the building, or a fire escape at each window. It is clear that such construction would, as to inside buildings, destroy the value of all stories above the second, and amount to a practical confiscation of the same. The ordinance is oppressive and unreasonable, and therefore void. *Cooley, Const. Lim.* pp. 280-283, and note 1 (7th Ed.) p. 281; *Dillon, Munic. Cor.* (4th Ed.) §§ 321, 322. Section 100 of the building ordinance, copied above, does require the erection of one or more fire escapes on all such buildings as are enumerated in the preceding sections. Lodging houses more than two stories in height are among the buildings so enumerated, and are required to be equipped with one fire escape. If more than one is desired, then notice of such requirement must be given the owner by the building inspector. There being no contention that such notice was given, this ordinance was complied with by having the

building equipped with one fire escape; and hence, there was no violation of this ordinance.

The facts as to how R. F. Radley sustained the injuries causing his death are shown by the evidence of John R. Minor, Jr., who testified, among other things, as follows:

"That he knew R. F. Radley in his lifetime, and on and for over a month prior to January 9, 1906, he and Radley occupied the same room in the Knepfly building, located at the southwest corner of Main and Poydras streets, in the city of Dallas, Tex. I had been in the building over a year, and Radley had started on his second month at the time of the fire. I rented the room we occupied, No. 2, from Lewis, Collins & Hernischel, agents of defendant, and I paid them, or their bookkeeper, the rent of same; Radley paying me his half of same. We had been there six or eight days on the second month when the fire occurred. There are seven rooms on the third floor; five on the east side, and two on the west side. The hall is on the west side mostly. The stairway is located in the southwest corner, and the only fire escape to the building at the south end of the hall, beyond where the stairway starts down the third floor, and passes under the window leading to the fire escape. Radley was at the time a strong man physically, and in good health. We occupied the same bed, situated in the northwest corner of the room. There were three doors to the room—one in the center on the west side, opening in the hall, one on the south side, and one on the north side, near the east wall of the building—a double bay window on the east side, and a window in the southwest corner, opening into the hall. The north and south doors were of glass in the upper half and wood in the lower half. At the time of the fire Radley knew the condition of the building as to fire escapes. He and I had never discussed the subject. On the morning of January 9, 1906, I first waked up and discovered the fire in the Knepfly building. It seemed to be confined to the hallway and third floor and the second floor. I immediately waked Radley up. I got up and sat on the floor to put on my shoes, and saw smoke coming under the hall door in three little curls, and I then halloed to Radley the building was on fire; to get up. I then ran to the bay window, and broke out the north glass with a small hammer and punched out the screen with my hand, and saw smoke coming from the second story, and the wind blew it in my face. Just as I turned round Radley opened the hall door and the flames shot in, and I threw my hands to my face to protect myself. Radley came staggering back, and I ran and caught him and carried him to the north window. I did not hear him say a word after he got up and before he jumped. He had picked up his clothes, and threw them around him and his coat

around his shoulders. I had on a suit of underwear, but no shoes. I did not notice if he had on his shoes. We had no notice of any fire except smoke and heat, but when the hall door was opened, it was a solid mass of flames in the hall coming up the stairway, and into our room when our door was opened. Our hall door was within four or five feet of the top and banister of the stairway. When our door was opened a man could not have gone either to the fire escape or stairway and get out alive. Mr. Radley appeared to be suffering and badly burned on the exposed parts, hands and face, when I helped him to the window sill, a foot or two above the floor, and he jumped." On cross-examination he testified: "When Radley opened the door it blew back with such force as to throw Radley halfway across the room. I could not say if he was burned fatally or not. From the time I got up to the time we jumped was about one minute. The first floor of the Knepfly building was then occupied by the Gaston National Bank, the second by lawyers and an architect, and the third used for rooming or lodging purposes only. I thought Radley was so badly burned that he might have died from the burns only; that was my opinion when I helped him to the window."

Under this evidence the following questions arise: (1) Was R. F. Radley at the time of the fire familiar with the condition of the third floor of the building as to fire escapes? (2) If defendant was negligent in failing to equip the third floor of the building with proper fire escapes, did R. F. Radley have time to make use of a fire escape after discovering the fire; in other words, can it be said that such failure, if there was a failure, was the proximate cause of his injuries? The evidence shows that Radley had been occupying a room on the third floor of the building five or six weeks. There were seven rooms and a hallway on this floor, with a stairway leading from the southwest corner of the building to the hallway. There was a fire escape in the rear end of the building, leading to the third floor. Radley knew that this fire escape was on the building, and had seen the witness Minor go out on the same to try and locate a former fire. In fact the testimony of Minor, which was not contradicted, is that Radley knew the condition of the building as to fire escapes. When we consider the length of time that Radley had occupied a room on the third floor of the building, in connection with testimony of the witness Minor, it is clear that previous to and at the time he was injured he was familiar with the condition of the building as to fire escapes. Having had time to ascertain the condition of the building as to fire escapes, and to secure another room and move thereto, by voluntarily continuing in the building he took the hazard of the failure to provide it with fire escapes (if there was a failure in

this respect). *Armaindo v. Ferguson*, 37 App. Div. 160, 55 N. Y. Supp. 769; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Huda v. American Glucose Co.*, 154 N. Y. 474, 48 N. E. 897, 40 L. R. A. 411. Again, under the evidence, in our opinion, it clearly appears that the failure, if there was such, to properly equip the building with fire escapes was not the proximate cause of the injuries to R. F. Radley. The only evidence as to the means used by Radley to escape from the fire is the testimony of the witness Minor. He says that after Radley opened the hall door the fire blew back with such force as to throw him halfway across the room, and he thought Radley was so badly burned that he might die. He then caught him and carried him to the window, and he jumped. This all took less than a minute.

The appellants urged that the defendant was negligent in failing to provide a fire escape on the front of the building, as well as its rear, and argue that, had there been a fire escape on the front of the building, by going from room No. 2 through rooms 3, 4, and 5 he could have reached the same and avoided the fire. There were doors leading from room 2 to room 3, and from room 3 to room 4, and thence to room 5, which opened on Main street. These rooms were occupied by tenants, and the doors locked. But it is insisted that these doors at the top were made of glass which could be easily broken. Considering the injuries Radley received from the fire when he opened the hall door, and the time which elapsed from the time that he awoke and the time he jumped from the building, which was less than one minute, it seems clear that, had there been a fire escape on the Main street end of the building, Radley could not have reached it in time to have avoided the injury. It seems therefore clear that the failure to erect a fire escape on the Main street end of the building was not the proximate cause of the injuries to Radley.

It follows from the foregoing remarks that the court did not err in instructing a verdict for defendant, and the judgment is affirmed.

#### BEAVERS et al. v. BAKER.†

(Court of Civil Appeals of Texas. Nov. 27, 1909. Rehearing Denied Jan. 8, 1910.)

#### 1. STIPULATIONS (§ 18\*)—OPERATION—STIPULATIONS AS TO ISSUES—ELIMINATING ISSUES.

In an action by a grantee of a lot adjoining defendant's lot acquired from the same grantor through a prior conveyance to recover a strip claimed as a part of plaintiff's lot, a stipulation at trial that defendant, by purchase from one having an option on her lot from the grantor, acquired all the option holder's interest, and acquired the property described in the grantor's deed to her, being made merely to close any dispute that defendant acquired all of the option holder's interest in the lot, did not require a

verdict for defendant, as the issues remained whether defendant's deed conveyed the land in controversy, and, if so, whether plaintiff had notice thereof when he purchased.

[Ed. Note.—For other cases, see Stipulations, Dec. Dig. § 18.\*]

#### 2. TRIAL (§ 253\*) — INSTRUCTIONS IGNORING ISSUE.

In an action by a grantee of a lot adjoining defendant's lot acquired from the same grantor by a prior conveyance to recover a strip claimed as a part of plaintiff's lot, a charge requiring a finding for defendant in case of fraud or mistake in the description in her deed, was properly refused as ignoring the issue whether plaintiff had notice thereof when purchasing.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 253.\*]

#### 3. APPEAL AND ERROR (§ 1057\*)—HARMLESS ERROR — EXCLUSION OF EVIDENCE — FACTS SHOWN BY STIPULATION.

In an action between adjoining lot owners to recover a strip claimed by plaintiff as a part of his lot, objection to the exclusion of testimony that, when defendant purchased the option rights acquired by her from the parties' common grantor, the option holder represented that the lot was of a certain depth, was obviated where the parties stipulated at trial that defendant acquired all the option holder's interest in the lot.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.\*]

#### 4. VENDOR AND PURCHASER (§ 243\*) — BONA FIDE PURCHASER—EVIDENCE — ADMISSIBILITY.

No fraud or mistake as to the description of a lot conveyed to a prior grantee could affect the rights of a subsequent grantee of an adjoining lot from the same grantor, unless he had notice thereof when purchasing, so that, in an action by the later purchaser against the prior grantee to recover a strip claimed as a part of his lot, evidence that the option holder, through whom the prior grantee acquired her right to purchase, stated that the lot had a certain depth, was immaterial.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 243.\*]

#### 5. VENDOR AND PURCHASER (§ 242\*)—BONA FIDE PURCHASER—BURDEN OF PROOF.

Ordinarily, the burden is upon a subsequent grantee to show that he is a bona fide purchaser for value without notice of a prior grantee's title; Rev. St. 1895, art. 4640, making all unrecorded conveyances void as to subsequent purchasers for value without notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. § 242.\*]

#### 6. VENDOR AND PURCHASER (§ 242\*)—BONA FIDE PURCHASER — BURDEN OF SHOWING NOTICE.

In an action by a grantee of a lot adjoining defendant's lot, acquired from the same grantor through a prior conveyance, to recover a strip claimed as a part of plaintiff's lot, defendants conceded that the description of the lot in their deed and option contract, by reference to a certain plat, was insufficient to give them the legal title to the strip in controversy, it showing the strip as a part of plaintiff's lot, but alleged that such reference was placed in the deed by fraud or mistake, and prayed that the deed be corrected so as to give them title to the strip. Held that, while ordinarily the burden was upon a subsequent grantee to show that he was a bona fide holder without notice of a prior grantee's title, under the circumstances the burden was upon defendants to show

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

fraud or mistake in the description in their deed, and that plaintiff had notice thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. § 242.\*]

**7. VENDOR AND PURCHASER (§ 235\*)—BONA FIDE PURCHASERS—RIGHTS.**

The equity of a bona fide purchaser without notice of title in another by a prior conveyance will be protected only to the extent of his payment of the purchase price by cash, or negotiable promissory notes; the giving of non-negotiable notes not being payment within the rule.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 575; Dec. Dig. § 235.\*]

**8. APPEAL AND ERROR (§ 901\*)—REVIEW—BURDEN OF SHOWING ERROR.**

The burden is upon appellant to show error in rejecting a charge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3670; Dec. Dig. § 901.\*]

**9. TRIAL (§ 252\*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.**

In an action by a subsequent bona fide purchaser of a lot adjoining defendants' lot without notice of defendants' title to a part of plaintiff's lot, to recover such part, where there was no evidence that plaintiff's payments for his lot by cash or negotiable notes equaled the value of plaintiff's lot excluding the strip claimed by defendants, so as to exclude plaintiff, as subsequent bona fide purchaser, from further protection, a requested charge based on that theory was properly refused as not raised by the evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 252.\*]

Appeal from District Court, Tarrant County; Irby Dumklin, Judge.

Action by J. A. Baker against Sophia Beavers and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Martin & Smith, for appellants. J. C. Miller and Copps, Cantey, Hanger & Short, for appellee.

CONNER, C. J. On September 21, 1906, appellee, Baker, instituted this suit to recover all of lot 13 in block 59 of the city of North Ft. Worth, Tex., "as per map of same recorded in volume 63, pages 149, 150, of the Deed Record of Tarrant County." Appellant Sophia Beavers owns lot 6 immediately west of said lot 13, and as part of said lot 6 had fenced about 30 feet, as appellee alleges, of the west end of said lot 13, and hence the suit. The trial resulted in a verdict and judgment for appellee, of which appellants complain.

The facts, substantially, are: That the city of North Ft. Worth was duly incorporated under the provisions of chapter 11, tit. 18, Rev. St. Tex. 1895, as amended in chapter 131, p. 193, of the Acts of 1897, on the 12th day of November, 1902, at which time the proceedings, together with a plat of the incorporated territory, including said block 59, was duly recorded "in Deed Record of Plats, volume 106, pages 64, 65, 70, and 71, Tarrant county, Tex." The plat here refer-

red to shows that lot 6 is about twice the depth of lot 13, but fails to show in feet the exact width or depth of either lot, and it also fails to show that there was any alley platted between the lots. Thereafter, on the 29th day of December, 1902, the North Ft. Worth Townsite Company executed a lease of said lot 6, block 59, to J. G. Beavers, which, among other things, conferred upon Beavers an option of purchase. The lot in the lease was described merely as "lot 6, block 59, in North Ft. Worth, according to the plat thereof on record in the office of the clerk of the county court of Tarrant county, Tex." It was formally admitted that Sophia Garbutt, now Sophia Beavers, acquired by purchase all of the rights and interest to said lot 6 that had been conferred upon J. G. Beavers by the contract above mentioned, and it is undisputed that later she exercised the option given to Beavers and purchased lot 6 from the North Ft. Worth Townsite Company, receiving deed therefor on November 4, 1903. The deed, however, described the lot in the same terms as it was described in the Beavers contract, viz., "as lot 6, in block 59, in North Ft. Worth, according to the plat thereof on record in the office of the clerk of Tarrant county, Tex." The deed was duly recorded June 9, 1906. Beavers testified, without contradiction, that, at the time of the contract with him for the purchase of lot 6, the agent of the townsite company exhibited a printed map, incorporated in the record, which shows lot 6 to have a depth of 140 feet, and that the lines of the lot were actually so pointed out to him. This printed map presents block 59 substantially the same as the map hereinbefore referred to, except that the printed map by figures denotes that lot 6 has a frontage west of 50 feet with parallel lines extending east to a depth of 140 feet. Sophia Garbutt later and prior to the institution of this suit intermarried with said J. G. Beavers, and both, as also the townsite company, are parties herein.

Appellee, Baker, claims lot 13, block 59, by virtue of a deed executed by the president of the North Ft. Worth Townsite Company on the 16th day of August, 1906, and recorded on the 18th day of that month. The deed recites "the consideration of four hundred dollars, payable \$15.00 in cash, and a promissory note providing for the payment of \$5.00 per month, with interest at the rate of eight per cent. per annum," and thus describes the lot: "Lot 13, in block 59, of the town of North Ft. Worth, as per map or plat of same recorded in volume 63, page 149, of the Deed Record of Tarrant County, Tex." The map referred to in this deed is one that was made and duly recorded by the "North Ft. Worth City Company of Ft. Worth, Tex., by N. Harding, receiver," on the 2d day of

October, 1894, and shows that lot 13 has an east frontage of 50 feet, extending back about 90 feet to an alley, and that lot 6 fronts west with an eastern extension 100 feet to the same alley; the width of the alley not being shown. It is undisputed that the North Ft. Worth Townsite Company is the grantee and successor of the North Ft. Worth City Company, and the authority of Harding, as receiver, is not questioned.

The court thus submitted the issues: "Gentlemen of the Jury: If, from the evidence, you find that at the time the written contract between the North Ft. Worth Townsite Company and J. G. Beavers, for the purchase of the property therein described, was entered into, it was agreed by and between Mr. Hopkins, representing said company, and said J. G. Beavers, that the lot referred to in said contract was 140 feet in depth, and if you further find from the evidence that to give said lot that depth would include the property in controversy, and that the map referred to in said contract showed the lot to be of that depth, or that at the time plaintiff purchased the lot described in his deed introduced in evidence he had notice of any fact which would have put a person of ordinary prudence upon inquiry that would, if pursued, have lead to a discovery of said understanding and agreement by and between said Hopkins and said Beavers, if you find there was such an agreement, then you will return a verdict in favor of defendants J. G. Beavers and Sophia Beavers, as against their codefendant, North Ft. Worth Townsite Company, and as against plaintiff. The burden is upon the defendants to sustain by a preponderance of the evidence the affirmative of the issues submitted to you in foregoing portions of this charge, and, if they have not discharged that burden, you will return a verdict in favor of the plaintiff for the property sued for and described in his petition, and also in favor of defendant North Ft. Worth Townsite Company on the cross-bill against it by defendants J. G. Beavers and Sophia Beavers. You are the exclusive judges of the credibility of the witnesses, of the weight of the evidence, and of the facts proved."

The verdict and judgment was for appellee, and appellants have assigned a number of errors. We cannot uphold the contention that the agreement in the trial to the effect that Sophia Garbutt, by purchase, acquired all of the interest in lot 6 J. G. Beavers had at the time he sold to her, and that Mrs. Garbutt acquired from the North Ft. Worth Townsite Company the property described in the deed of the company to her, required the peremptory instruction requested in appellants' favor. These agreements were evidently intended to only close dispute as to the fact, otherwise undisputed in the record, that Mrs. Garbutt acquired from Beavers all of the interest in lot 6 he had secured by

virtue of his contract with the townsite company, and all of the interest the company conveyed by the deed to her. There yet remained the question of whether, as against appellee, the deed in fact conveyed the land in controversy, and, if so, whether appellee had notice thereof. The court therefore properly rejected the peremptory instruction. Special charges Nos. 1, 2, and 3 required a finding for appellants in event there was either fraud or mutual mistake in the descriptive recitation of her deed regardless of whether appellee had notice thereof. The charges were therefore properly rejected as ignoring this issue. The objection to the exclusion of the testimony shown in bills of exceptions Nos. 1, 2, and 3, to the effect that at the time Beavers sold to Mrs. Garbutt he represented the lot to have a depth of 140 feet, is obviated by the fact that it is agreed that she acquired all of the interest held by Beavers, and the court in effect so assumed in his charge. The charge also destroys the force of the further suggestion that the evidence was relevant to appellants' plea for a correction of the deed to Mrs. Garbutt. Whatever the right as between Mrs. Garbutt and the townsite company, it could not affect appellee, unless he had notice at the time of his purchase of the fraud or mistake, and the instruction was to the effect that appellants were entitled to recover if appellee had such notice.

The remaining questions present more difficulty, perhaps. In the ninth assignment it is insisted that the court's charge is erroneous in placing the burden of proof upon appellants. It is true that ordinarily the burden is upon the subsequent vendee of land to show that he is a bona fide purchaser for value without notice of the title of a prior grantee (see Rev. St. 1895, art. 4640; *Watkins v. Edwards*, 23 Tex. 448); but, as applied to the circumstances of this case, we are of opinion that the court's charge is correct. Appellants proceeded upon the theory that the map or plat to which the contract of Beavers and the later deed to Mrs. Garbutt referred was not the controlling plat, and that said deed without correction was insufficient to vest in Mrs. Garbutt the legal title to any part of the land in controversy. In appellants' answer they specially pleaded that the recitation in the deed from the townsite company to Mrs. Garbutt, viz., "as shown by the map now of record in the county clerk's office of Tarrant county, Tex.," was placed in the deed "either by mutual mistake of the parties or placed therein by defendant (the townsite company) in order to defraud and deprive her (Mrs. Garbutt) of a portion of the property she bought and paid for, and for that reason she says that to this extent the recital in said deed is incorrect," and appellants prayed for reformation and correction of the deed so as to show title to the land in controversy. It therefore be-

ing in effect admitted that the controlling map was the one to which reference was made in appellee's deed, he became invested with the legal title to lot 13, which according to the map included the land in controversy, and could hence be denied a recovery only by proof of the special defense made, the burden of doing which rested upon appellants. In other words, appellee was in the attitude of holding the legal title as against which appellants offered a title in equity and sought enforcement of the appropriate equitable remedy. Appellants were therefore required to not only prove their equitable title, but also to show that the holder of the legal title had notice thereof. *Halbert v. De Bode*, 40 S. W. 1011, and cases therein cited on this point, page 1018.

Error is assigned to the rejection of the following charge requested by appellants, viz: "You are charged that if defendant Beavers bought a lot 50 by 140 feet and that he sold his contract to Mrs. Sophia Garbutt (now Sophia Beavers), and that plaintiff bought said lot 13 partly on credit and partly for cash, and that there is enough of said lot 13 left outside of the land in controversy to compensate him for the cash paid, if any is shown to be paid by the evidence, then and in that event you will find for defendants Beavers." Possibly the facts, if fully developed, would have entitled appellants to the relief indicated in the charge quoted, for the rule is that one setting up the equity of a bona fide purchase without notice of the prior title can be protected to the extent only of his payment of purchase price, and the making of a nonnegotiable note is not payment. *Evans v. Templeton*, 60 Tex. 375, 6 S. W. 843, 5 Am. St. Rep. 71. The execution, however, of negotiable promissory notes for the purchase money, is held in this state to be such payment as entitles a person, not otherwise precluded, to the protection of the rule. *Tilman v. Heller*, 78 Tex. 597, 14 S. W. 700, 11 L. R. A. 628, 22 Am. St. Rep. 77; *Watkins v. Spruill et al.*, 8 Tex. Civ. App. 427, 28 S. W. 356; *Cameron v. Romele*, 53 Tex. 238; *Dodd v. Gaines*, 82 Tex. 429, 18 S. W. 618. As we have seen, the burden of proof was on appellants below to establish their equity, and now here to show error in the court's rejection of the charge, and we are of opinion that they have failed to discharge such burdens. In the statement under the assignment under consideration, nothing appears save a copy of the rejected charge. The record otherwise shows that appellee paid cash and gave promissory notes for the remainder of the purchase price for lot 13; but there is nothing to show the value of that part of lot 13 not in controversy in this suit. If that part of lot 13 that would remain after excluding the land claimed by appellants equals in value appellee's cash payment, or if the promissory notes given by appellee

were nonnegotiable, appellants should have so shown. Otherwise we are unable to say that the evidence raises the issue and that the court committed reversible error in rejecting the special charge quoted.

We conclude that all assignments of error should be overruled, and the judgment should be affirmed.

# MILLER v. DALLAS CONSOL. ELECTRIC ST. RY. CO.

(Court of Civil Appeals of Texas. Jan. 1, 1910.  
Rehearing Denied Jan. 15, 1910.)

## ATTORNEY AND CLIENT (§ 101\*)—SETTLEMENT BY ATTORNEY—VALIDITY—FRAUD.

Plaintiff, having a claim against defendant for injuries to his wife, made a written contract with a firm of attorneys assigning to them one-half interest in the claim, and empowering them to compromise the claim or bring suit as they deemed proper. They settled the claim and received the sum agreed upon. Later plaintiff refused to accept the settlement and discharged the attorneys. It was not shown that defendant intended in any way to defraud plaintiff or knew that his attorneys were doing so. *Held*, that the settlement was binding, although executed by the attorneys with intent to defraud plaintiff.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 209; Dec. Dig. § 101.\*]

Appeal from District Court, Dallas County; J. C. Roberts, Judge.

Action by Charles L. Miller against the Dallas Consolidated Electric Street Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

William H. Clark and Fitzhugh & Smith, for appellant. Baker, Botts, Parker & Garwood, Walter H. Walne, and Finley, Knight & Harris, for appellee.

TALBOT, J. This suit was instituted by the appellant, Charles L. Miller, against the appellee, to recover damages for personal injuries alleged to have been inflicted upon his wife, Mrs. Clara Miller, on July 3, 1906, while she was a passenger on one of appellee's street cars, through the negligence of its servants in charge of said car. It is alleged, in substance, among other things, that plaintiff's wife boarded the car, paid her fare, and notified the conductor that she desired to get off at the intersection of Vera and Bryan streets; that when the car reached Vera street the conductor caused it to be stopped to allow Mrs. Miller and other passengers to alight; that while Mrs. Miller was in the act of stepping from the car to the ground, in the exercise of due diligence and care for her own safety, defendant's agents and servants negligently and without warning caused the car to be suddenly moved with a violent jerk, which threw her to the ground seriously and permanently injuring her. The defendant answered by general and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

special demurrers, a general denial, contributory negligence, and specially that the plaintiff authorized and directed his attorneys and agents, Martin & Fagan, a firm of lawyers, composed of W. P. Martin and J. J. Fagan, to compromise and settle his claim against the defendant for the damages sustained by him or by his wife in the accident causing her injuries, or to bring suit therefore, as they deemed fit and proper; that said authority and direction to so compromise said claim or bring suit for said damages was given in a written power of attorney properly signed and acknowledged by the plaintiff on July 5, 1906, and was coupled with an assignment of one-half interest in plaintiff's cause of action to the said Martin & Fagan, in consideration of legal services rendered and to be rendered by them; that in pursuance of said authority, and acting within the scope of the same, in addition to verbal authority given them, the said Martin & Fagan did compromise and settle plaintiff's said claim for \$100, which sum was by defendant paid to said attorneys. In reply to the defendant's plea of settlement, the plaintiff admitted that he executed the contract or power of attorney referred to in defendant's answer, but averred that, if the settlement set forth in said answer was made by the defendant and his attorneys Martin & Fagan, the same was the result of a conspiracy entered into between them to cheat and defraud plaintiff out of his claim; that plaintiff, upon being informed of defendant's offer of \$100 in satisfaction of his claim, refused to accept it, and thereafter, when told by his said attorneys that they had settled with defendant for \$100, and that he (plaintiff) was bound by their action, denounced their conduct as fraudulent and then and there discharged them; that plaintiff has not received anything in payment or settlement of his claim herein sued on, and has never executed and delivered to defendant any release of his said claim for damages; and that, if defendant has ever received from said Martin & Fagan the release as alleged by it, the same was received after it knew that plaintiff had refused to allow them to settle for \$100, and of plaintiff's refusal to so settle with defendant itself, and after it knew that said Martin & Fagan had been by him discharged.

The contract or power of attorney pleaded by the defendant in bar of plaintiff's right to recover in this suit was introduced in evidence, and is as follows: "State of Texas, County of Dallas. Know all men by these presents, that I, C. L. Miller, of the county and state aforesaid, for and in consideration of legal services rendered and to be rendered by Martin & Fagan, a firm of lawyers composed of W. P. Martin and J. J. Fagan, have bargained, sold, assigned and transferred and set over to the said Martin & Fagan, and by these presents do bargain, sell, assign and transfer to the said Martin & Fagan, a one-half interest in my cause of action against

the Dallas Consolidated Electric Street Railway Company, said cause of action having arisen of injuries sustained by my wife on the 3d of July, 1906, as the direct and proximate result of the negligence of said company, and I further give my said attorneys the right to compromise, settle or bring suit for said cause of action as they may deem fit and proper. [Signed] C. L. Miller." The execution of this contract was acknowledged by Miller on the 5th day of July, 1906, before a notary public of Dallas county, Tex., who duly certified the fact according to law.

Upon the conclusion of the evidence, the court instructed the jury to return a verdict for the defendant, which was done, and judgment was entered accordingly. From this judgment the appellant prosecutes this appeal, and assigns as error the action of the trial court in withdrawing the case from the jury and instructing a verdict for appellee. The evidence was sufficient to show that appellant's wife was seriously injured through the negligence of appellee's servants, substantially as alleged, and that by reason thereof he sustained damages, probably in a larger amount than that for which his claim was compromised and settled; but the legal effect of the written contract of employment entered into between the appellant and his attorneys, Martin & Fagan, was to confer upon said attorneys a power coupled with an interest in appellant's claim or cause of action, and appellant cannot avoid the contract of settlement entered into and executed by them with appellee on the ground that such settlement was made on the part of said attorneys to defraud him, in the absence of testimony tending to show that appellee participated in the fraud or had knowledge of the same. The question then is: Was the evidence adduced and relied on by appellant in support of his plea that the settlement made by his said attorneys was in fraud of his rights, and that such fraud was participated in by appellee or known to it, so lacking in probative force that it became the duty of the court, as was done, to instruct a verdict in appellee's favor?

We have very carefully considered all the testimony bearing on the question, which is too voluminous to quote in this opinion, and conclude that it must be answered in the affirmative. That the evidence was sufficient to warrant a finding by the jury that appellant's said attorneys, in making the settlement in question, were actuated by improper motives, or intended thereby to defraud appellant, may be conceded; but the record will be searched in vain, we think, for any substantial testimony authorizing the conclusion that appellee, or its agents who acted for it, participated in the fraud, if any, of said attorneys, or had any knowledge whatever of the same at the time such settlement was agreed on and became binding. On the contrary, it appears by the undisputed testimony, we think, that appellee entered into

a definite agreement with appellant's attorney's, Martin & Fagan, to settle the claim sued on, which could have been enforced by appellant, upon the faith of the written contract entered into between him and said attorneys, whereby he assigned to them a one-half interest in said claim and empowered them to compromise and settle the same or to bring suit thereon as they deemed fit and proper. The agent of appellee who made the settlement testified, practically without contradiction, that at no time when the negotiations were pending for the settlement did he ever see appellant; that in making the settlement he acted upon the power of attorney executed by appellant; that after the agreement of settlement was made he drew up a release on the forms of appellee and delivered it to Mr. Fagan of the firm of Martin & Fagan; and that, after the check for \$100 in satisfaction of the claim had been drawn, he was informed by Mr. Fagan that appellant declined to deliver the release. He further testified that up to and at the time he drew the release, July 16, 1906, which was some time after the settlement had been agreed to, he did not know there was any disagreement whatever between appellant and his attorneys in reference to the settlement of the case; that he did not know, until two weeks after the agreement to settle the case had been made, that appellant had undertaken to discharge Martin & Fagan; that at the time the check was delivered to Martin & Fagan in settlement of the claim there had been no notice whatever that appellant had undertaken to discharge said attorneys and cancel his power of attorney to them.

That appellant, upon being informed of said contract of settlement, objected thereto and refused to deliver to appellee the release requested and the fact that the settlement was not finally consummated by paying over the money until after such objection of appellant, does not materially affect the question. The contract of settlement which had, previous thereto, been entered into between appellee and appellant's said attorneys, was one of mutual obligation, could have been enforced by appellant, and was therefore binding upon him. The case is distinguished from the case of *Railway Co. v. Miller*, 21 Tex. Civ. App. 609, 53 S. W. 709, Id., 24 Tex. Civ. App. 393, 60 S. W. 259. In that case the evidence showed that the railway company's agent, at the time he made the settlement, knew that the attorney with whom the same was made had been discharged, and knew, or must have known, that said attorney was acting in bad faith with his former client. In the present case the settlement was agreed to and became binding before any attempt was made to discharge the attorney with whom it was made, and without any knowledge on the appellee's part that appellant and his attorneys disagreed about the same,

or that appellant was unwilling to accept the amount agreed on. Nor were the circumstances shown such as to warrant the jury in concluding that appellee conspired with said attorneys to defraud appellant, or knew of any such purpose on the part of said attorneys, if there was any such purpose. On the contrary, we hold that the evidence so conclusively established that appellee did not conspire with appellant's attorneys to defraud him, and that the circumstances shown were so lacking in probative force to show knowledge on appellee's part of any intention on the part of appellant's attorneys to defraud him, that ordinary minds seeking to do justice could not reach different conclusions from it.

This disposes of the controlling question arising on the appeal, and other assignments need not be discussed. We have examined them with due care, and conclude that neither of them discloses reversible error.

The judgment is affirmed.

#### TRABUE v. COOK.

(Court of Civil Appeals of Texas. Jan. 6, 1910.)

##### 1. APPEAL AND ERROR (§ 547\*)—NECESSITY FOR BILL OF EXCEPTIONS—OVERRULING MOTION FOR CONTINUANCE.

An error in overruling a motion for a continuance will not be considered on appeal where rule 55 for district and county courts (67 S. W. xxiv), providing that "upon application for continuance \* \* \* when sought to be complained of as erroneous, must be presented by a bill of exceptions," has not been observed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2427-2432; Dec. Dig. § 547.\*]

##### 2. APPEAL AND ERROR (§ 216\*)—GROUNDS OF REVIEW—REQUEST FOR INSTRUCTIONS.

In an action on a promissory note, the failure of a trial court to submit to the jury the question whether defendant executed the note as a surety only, and an issue as to the payment of usurious interest, does not furnish a reason for reversing the judgment where no requests for instructions supplying the omissions were made to the trial court and refused.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216; Trial, Cent. Dig. § 627.]

##### 3. BILLS AND NOTES (§ 122\*)—CHARACTER OF LIABILITY—SURETIES.

Where a note is executed by two persons whereby they jointly and severally promise to pay a sum specified, and one signs it as an accommodation to the other, he is liable as a maker, and not a surety, so far as the payee of the note is concerned.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 239; Dec. Dig. § 122.\*]

##### 4. BANKS AND BANKING (§ 270\*)—TRANSACTIONS WITH NATIONAL BANKS.

Where two persons execute a note to a national bank and one of them pays usurious interest thereon, the other cannot take advantage of such payment in an action by the bank to collect the note, as the party paying the interest or his legal representatives alone have a right of action to recover the penalty for receiving such

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

interest, and such payment cannot be set up as an offset or defense in an action brought by the bank on the note.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1031, 1032; Dec. Dig. § 270.\*]

**5. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR — OVERRULING EXCEPTIONS TO ANSWER.**

In an action on a promissory note by a national bank, overruling an exception to an answer setting up the payment of usurious interest is not prejudicial, where the court fails to submit, as a matter affecting the bank's right to recover, the payment of usurious interest as alleged in the answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4101; Dec. Dig. § 1040.\*]

**6. BANKS AND BANKING (§ 270\*)—EVIDENCE — PRESUMPTIONS.**

In an action by a national bank to collect a note, evidence held sufficient to authorize the presumption of payment of usurious interest.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1023-1053; Dec. Dig. § 270.\*]

**7. BILLS AND NOTES (§ 537\*)—ACTIONS—INSTRUCTIONS.**

In an action by a national bank to collect a note, where it was shown that the note sued on was the last of successive renewals of a note made nearly five years before, and that the transaction to the date of the execution of the note in suit was usurious, and that the note sued on was merely a substitute for others covering the transaction, the court was justified in refusing to peremptorily instruct the jury on the admissions of defendant which eliminated all questions from the action except one of usury and its effect on the note to find for plaintiff the interest as stipulated for in the note.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 537.\*]

**8. BANKS AND BANKING (§ 270\*)—USURY.**

An accommodation maker of a note given to a national bank can set up the defense of usury to defeat the recovery of interest.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1031, 1032; Dec. Dig. § 270.\*]

Appeal from District Court, Panola County; W. C. Buford, Judge.

Action by J. W. Cook against R. E. Trabue. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. D. Quest, doing business under the name of Quest & Co., and appellant, R. E. Trabue, executed and delivered to appellee, cashier of the First National Bank of Carthage, their note whereby they jointly and severally promised 60 days after its date to pay to the order of appellee, cashier, \$950, interest thereon from the maturity thereof at the rate of 10 per cent. per annum and 10 per cent. on the amount thereof unpaid at its maturity as collection fees. The note was executed by Trabue as an accommodation to Quest, the indebtedness evidenced by it being the latter's alone. Quest died intestate, it seems, leaving the note unpaid. The suit as commenced by appellee was against Quest's widow and heirs and appellant. It was afterwards dismissed as to the widow

and heirs, and prosecuted against appellant alone. The trial was before a jury. Appellant, having admitted that appellee had a good cause of action as set forth in his petition, except so far as it might be defeated in whole or in part by the facts of his answer constituting a good defense which might be established on the trial, the court instructed the jury to find in favor of appellee for the principal of the note and attorneys' fees, and submitted to them as the only issue in the case a question as to appellee's right to recover the interest stipulated for in the note. On this issue he instructed the jury to find for appellant if they believed appellee had "charged, collected, received or contracted in writing or verbally to receive from defendants interest on the principal sued for amounting to more than 10 per cent. per annum." The jury having found in appellee's favor as instructed by the court and against him on the issue submitted to them, a judgment was accordingly rendered in appellee's favor for the use of the bank for the amount only of the principal of the note and 10 per cent. thereon as attorney's fees.

Brooke & Woolworth, for appellant. W. R. Anderson, H. N. Nelson, and F. H. Prendergast, for appellee.

WILLSON, C. J. (after stating the facts as above). When the cause was called for trial, appellant presented a motion to continue it in order that he as administrator of the estate of Quest might be made a party to the suit. The action of the court in overruling the motion is made the basis of the first, sixth, and seventh assignments. But the matter is not so presented here as to authorize us to review it. The rules require that rulings of the trial court "upon applications for continuance \* \* \* when sought to be complained of as erroneous must be presented by a bill of exceptions." Rule 53 for district and county courts (67 S. W. xxiv); *Scalf v. Graves*, 31 Tex. Civ. App. 667, 74 S. W. 796; *Railway Co. v. Kirby*, 108 S. W. 499; *Railway Co. v. Long*, 32 Tex. Civ. App. 40, 74 S. W. 60. The ruling complained of is not so presented in the record.

The portion of the court's charge purporting to state the admission made by appellant to obtain the right to open and conclude in presenting his evidence and in arguing the case, complained of in the second and third assignments, clearly was erroneous, and as clearly was harmless to appellant. The only matter set up in the answer and constituting a defense as against any part of appellee's cause of action was that the contract sued upon was usurious. Whether it was usurious or not was submitted to the jury, and their finding was in appellant's favor.

Complaint is made of the failure of the trial court to submit as an issue for the jury

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a question as to his having executed the note as a surety merely, and of the refusal of the court also to submit as an issue for the jury a question as to payments of usurious interest alleged to have been made by Quest on notes of which the one sued upon was a renewal. If the omission of the court in the particulars complained of should be said to be erroneous, it would not furnish a reason for reversing the judgment. It is well settled that error cannot be predicated upon a mere omission in the court's charge, when, as was the case on the trial below, an instruction supplying such omission was not requested and refused. *Steger & Sons Piano Mfg. Co. v. McMaster*, 113 S. W. 337; *Railway Co. v. Votaw*, 81 S. W. 133; *Weatherford Machine & Foundry Co. v. Tate*, 109 S. W. 408; *Railway Co. v. Smith*, 24 Tex. Civ. App. 127, 57 S. W. 1000; *Telegraph Co. v. Seals*, 45 S. W. 965; *Schwartzman v. Cabell*, 49 S. W. 115; *Reynolds v. Weinman*, 40 S. W. 570. But the court did not err in failing to submit as issues for the jury the matters referred to. As to the bank, appellant was liable as a maker of, and not as a surety on, the note. 2 Dan. on Neg. Instruments, §§ 1335, 1336. As to the other question, whether Quest had paid usurious interest on the debt evidenced by the note sued on or not, was not a matter which concerned appellant. Quest or his legal representatives, and they alone, had a right of action for a recovery of the penalty denounced against the bank for receiving such interest; but neither they nor appellant could set up such payment as an offset or defense in the action brought by the bank on the note. It has been expressly and repeatedly so held with reference to such payments made to a national bank. *Barnet v. Bank*, 98 U. S. 555, 25 L. Ed. 212; *Stephens v. Bank*, 111 U. S. 197, 4 Sup. Ct. 336, 28 L. Ed. 399; *Huggins v. Bank*, 6 Tex. Civ. App. 33, 24 S. W. 926; *Bank v. Gentry*, 56 L. R. A. 674, note.

What has been said disposes of the assignments presented by appellant. Cross-assignments filed by appellee are yet to be considered. The first of these complains of the action of the court in overruling an exception made to appellant's answer, in so far as it set up that usurious interest had been paid by Quest on contracts covering the indebtedness sued upon. The ground of the exception was that, the suit being by a national bank, the rights of the parties were to be measured by the federal statute, which denied to a party who had paid usurious interest a right to set same up as an offset or defense against a recovery by the bank of the principal sum. *Barnet v. Bank* and *Stephens v. Bank*, *supra*. In failing to submit as a matter affecting appellee's right to recover the payment of usurious interest as alleged in the answer, the court gave effect to the exception. Therefore it is apparent that appellee's rights were in no way prejudiced by the court's failure to sustain his exception.

In the second of the cross-assignments complaint is made of the refusal of the court to peremptorily instruct the jury to find for appellee, in addition to the principal sum and attorneys' fees, interest as stipulated for in the note. But we think the court did not err in refusing to so instruct the jury. On the contrary, we are inclined to think he might have told them that the note in suit was usurious, and therefore that appellee was not entitled to recover any of the interest he sued for. If the evidence did not authorize such an instruction, it made as an issue for the jury a question as to whether the transaction was usurious or not. The note sued upon, dated September 26, 1907, was the last of successive like renewals made at intervals of 60 days of a similar note made by Quest and appellant November 1, 1902. It may be conceded that the evidence did not show that interest in excess of that allowed by law was paid on the indebtedness after the date of the note in suit; and it may be conceded that there was no direct evidence showing that at the time the note sued upon was made there was an understanding or agreement between the bank and Quest that the latter should pay interest on the debt in excess of the lawful rate. But it was established by uncontroverted testimony that from the date of the original note in 1902 to the date of the note in suit Quest paid interest on the debt at a rate in excess of that the bank was entitled to demand and receive, to wit, at the rate of 12 per cent. per annum; and it was not shown that the taint of usury thus attaching to the transaction was ever expurgated. Appellee, the cashier of the bank during all that time, testified that he did not know what rate of interest he had charged Quest, that he might have charged 12 per cent., and he added: "I will say that sometimes I never charged him over ten." There being no evidence to the contrary, that interest in excess of the lawful rate was paid by Quest because he had agreed with the bank to pay it should be inferred to be true from the fact that he did pay it. A. & E. Ency. Law (2d Ed.) p. 482. We have therefore a transaction evidenced by an original and renewal notes unquestionably usurious from its inception to the date of the note in suit. And we have as evidencing the same transaction the renewal note sued upon. "The mere change of securities for the same usurious loan to the same party who received the usury, or to a person having notice of the usury," said the Supreme Court of the United States in *Walker v. Bank*, 3 How. 71, 11 L. Ed. 498, "does not purge the original illegal consideration, so as to give a right of action on the new security. Every subsequent security given for a loan originally usurious, however remote or often renewed, is void." And see 29 A. & E. Ency. Law (2d Ed.) p. 517; *Stanley v. Westrop*, 16 Tex. 206; *Davis v. Garr*, 55 Am. Dec. 397, note. "When it is shown that the obligation in suit was given

as a substitute or renewal of one that was usurious, the presumption arises that the usurious taint entered into it also, and the burden is upon the creditor to show the expurgation of the usury." 29 A. & E. Ency. Law (2d Ed.) p. 532, citing *Stanley v. Whitney*, 47 Barb. (N. Y.) 586. And see *Lee v. Peckham*, 17 Wis. 383; *Mitchell v. Napier*, 22 Tex. 120. The evidence being uncontroverted that the transaction to the date of the execution of the note in suit was usurious, and uncontroverted that that note was merely a substitute for others covering the transaction, we think, in view of the rules indicated by quotations made from authorities cited above, that the court properly refused the instruction requested.

It did not appear that any of the usurious interest received by the bank on the debt was paid by appellant. It was all paid by Quest, and in accordance with a verbal understanding it seems between himself alone and the bank. It is argued that, having neither paid nor contracted to pay such interest, appellant has no right to complain. As an accommodation to Quest he had jointly with the latter bound himself to pay the debt evidenced by the contract rendered usurious as to Quest by the verbal agreement entered into between said Quest and the bank. On grounds indicated by what has been said above Quest could have defeated a recovery by the bank of the interest claimed. To deny to appellant a right to defeat such a recovery against himself would be to say that as such a maker he stood in a worse position than that occupied by Quest, for whose benefit exclusively the loan was made. We do not think such a result of the transactions between the parties should be tolerated. It is held generally that an accommodation maker can set up the defense of usury to defeat the recovery of interest. 21 A. & E. Ency. Law (2d Ed.) p. 392, and authorities there cited; 1 Brandt on Suretyship and Guaranty, § 258; *Roberts v. Coffin*, 22 Tex. Civ. App. 127, 53 S. W. 599. And it has been held that the forfeiture of interest denounced by the federal statute attaches to an instrument evidencing an usurious transaction inheres in it, and therefore that a defense against a recovery of such interest is not a personal one. "Being without right to demand interest," said the court, "the offending bank cannot recover interest from any one." *Danforth v. Bank*, 48 Fed. 275, 1 C. C. A. 62, 17 L. R. A. 622.

The judgment is affirmed.

#### FREEMAN v. COSTLEY.

(Court of Civil Appeals of Texas. Jan. 5, 1910.)

#### 1. CARRIERS (§ 358\*)—PASSENGERS—EJECTION—NONPAYMENT OF FARE.

One who refuses to pay his fare when requested by the conductor may be ejected, though

he afterwards offered to pay his fare when the train was stopped to eject him, as the conductor need not then accept it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1434, 1435; Dec. Dig. § 858.\*]

#### 2. CARRIERS (§ 356\*)—PASSENGERS—FARES.

If a ticket held by a passenger was worthless, he was not entitled to ride thereon, and could be ejected, though he believed in good faith that he was entitled to ride on the ticket.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1409, 1410, 1423-1432; Dec. Dig. § 856.\*]

#### 3. ARREST (§ 62\*)—NECESSITY OF WARRANT—MISDEMEANOR.

A violation of Pen. Code, art. 1010h, making it a misdemeanor to board a train without any lawful business, with intent to obtain a free ride, would not justify the arrest of the offender without a warrant, so that, in an action against a railroad company for unlawful expulsion and wrongful arrest, an instruction that plaintiff's expulsion would be lawful if he was attempting to violate the statute when ejected was properly refused.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. § 144; Dec. Dig. § 62.\*]

Appeal from District Court, Travis County; Chas. A. Wilcox, Judge.

Action by S. L. Costley against Thomas J. Freeman, Receiver. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

S. R. Fisher, S. W. Fisher, and King & Morris, for appellant. James H. Robertson and Robertson & Robertson, for appellee.

RICE, J. This was a suit by appellee against appellant, as receiver of the International & Great Northern Railroad Company, for the recovery of damages for an alleged unlawful expulsion from the cars of defendant while a passenger, and for an alleged unlawful arrest claimed to have been procured by the conductor of said train. Besides a general demurrer, general denial, and special exceptions appellant answered by special plea to the effect that, on the occasion of appellee's ejection from the train, he was endeavoring to ride upon a ticket that had expired, and was of no value, and that he refused to produce a valid ticket or pay his fare when demanded by the conductor, and that appellee, with the knowledge that said ticket was invalid, refused to pay his fare with intent to defraud the defendant, and that he was therefore properly and lawfully ejected. There was a verdict and judgment for the appellee, from which the appellant prosecutes this appeal.

On the morning of the 5th of April, 1908, appellee purchased a round-trip ticket from Manchacca to San Antonio, which ticket was good for that day only. He rode to San Antonio thereon, and on the morning of the 6th boarded appellant's train to return, expecting to pay his fare from Manchacca to Austin. Upon being informed by the conductor when taking up tickets that his ticket was worth-

less, appellee declined to pay his fare, whereupon the conductor stopped the train, and backed the same into the station at San Antonio, ejecting appellee therefrom, and directing a policeman to arrest and take him in charge, which was accordingly done. It likewise appears from the evidence that the appellee, after the train had been stopped, and while backing into the station, offered to pay his fare, according to his statement to the conductor, who refused to receive it. These facts were substantially set up in appellee's petition, to which appellant addressed a demurrer, which was overruled. This ruling of the court is assigned as error. We are inclined to believe that the exception was well taken to that part of the petition which undertook to predicate the right of recovery upon the action of the conductor in ejecting appellee from the train. As we understand the law, a person who has refused to pay his fare cannot recant and offer to pay his fare while being expelled from the train, and thereby become entitled to ride thereon. It is within the discretion of the conductor to accept the fare when so tendered, but he is not compelled to do so. So in this case we think, if it be a fact that appellee refused to pay his fare or tender a valid ticket when demanded by the conductor, and on account of said refusal the conductor was compelled to stop the train with the view and for the purpose of ejecting him therefrom, then no right of action exists on the part of appellee for this refusal by the conductor to accept the proffered fare under the circumstances mentioned. 6 Cyc. 554, 555; *Pennington v. Philadelphia, Wilmington & Baltimore R. R. Co.*, 18 Am. & Eng. Ry. Cas. 310, and authorities there cited; *Davis v. Kansas City Ry. Co.*, 53 Mo. 317, 14 Am. Rep. 457; *People v. Jillson*, 3 Parker, Cr. R. (N. Y.) 234; *State v. Campbell*, 32 N. J. Law, 309; *O'Brien v. B. & W. Corp.*, 15 Gray (Mass.) 20, 77 Am. Dec. 347; *Hibbard v. N. Y. & Erie R. R. Co.*, 15 N. Y. 455; *L. N. G. & S. R. R. Co. v. Harris*, 9 Lea (Tenn.) 180, 42 Am. Rep. 668; *Stone v. Chicago & N. W. R. Co.*, 47 Iowa, 82, 29 Am. Rep. 458; *Thompson's Carriers of Passengers*, p. 22.

We also think that the court erred in the third paragraph of its charge to the jury, wherein it submitted the issue of appellee's good faith in undertaking to ride upon the ticket in question, because the law seems to be that, if the ticket was worthless and did not entitle appellee to ride thereon, and he should refuse, after being notified, to pay his fare, the conductor would have the lawful right to eject him from the train, no matter what may have been his actual belief as to his right to ride thereon. The law charges him with a knowledge of what his ticket shows, and he is bound to take notice thereof; so that he could predicate no right of recovery on this branch of the case, as the con-

ductor would be in the lawful discharge of his duty in expelling him under the circumstances indicated. See *G., C. & S. F. Ry. Co. v. Henry*, 84 Tex. 678, 19 S. W. 870, 16 L. R. A. 318; *Same v. Riney*, 41 Tex. Civ. App. 398, 92 S. W. 54; *G., H. & S. A. Ry. Co. v. Turner*, 23 S. W. 83; *I. & G. N. R. R. Co. v. Best*, 93 Tex. 344, 55 S. W. 315; *Ry. Co. v. McDonald*, 2 Willson, Civ. Cas. Ct. App. § 163; *Carpenter v. Railway*, 121 U. S. 474, 7 Sup. Ct. 1002, 30 L. Ed. 1015; *De Milley v. T. & N. O. Ry. Co.*, 91 Tex. 215, 42 S. W. 540; *T. & N. O. Ry. Co. v. De Milley*, 41 S. W. 147; *Ry. Co. v. Powell*, 13 Tex. Civ. App. 212, 35 S. W. 841; *Ill. Cent. Ry. Co. v. Marlett*, 75 Miss. 956, 23 South. 583.

Appellant requested a special charge, based upon article 1010h of the Penal Code, to the effect that if appellee was undertaking to violate said article, and was ejected by the conductor on account thereof, his expulsion would be lawful, and to find for defendant. We think this charge was properly refused, because, while said article makes it a misdemeanor for any person to board a train without intending to become a passenger thereon, and with no lawful business, with intent to obtain a free ride without consent of the persons in charge of said train, still this would not justify the arrest of appellee without warrant, as appears from the evidence was done in this case, for which reason this charge was properly refused.

We do not believe there is any merit in the remaining assignments, and they are therefore all overruled; but, for the errors indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

#### MAGERSTADT v. MARTIN.

(Court of Civil Appeals of Texas. Dec. 15, 1909. Rehearing Denied Jan. 26, 1910.)

##### 1. PLEADING (§ 214\*)—GENERAL DEMURRER.

In determining the sufficiency of a pleading against a general demurrer, the allegations must be taken as true, and every reasonable intent indulged in favor of its sufficiency.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

##### 2. VENDOR AND PURCHASER (§ 265\*)—VENDOR'S LIEN — DISCHARGE — LIABILITY OF SUBSEQUENT PURCHASER.

The petition alleged that plaintiffs owned a 160-acre tract and certain lots, and executed a note secured by a trust deed on the land and lots, and thereafter sold the 160-acre tract to another, who agreed, in addition to the other considerations, to pay \$600, to be credited on the mortgage note. Such grantee thereafter conveyed the tract to M., who took with knowledge of his grantor's agreement to pay the amount on the note. Thereafter the beneficiary assigned the note, and the trust deed securing it, to M., who afterwards sold the 160-acre tract, and executed to his grantee, without plaintiff's knowledge or consent, a release of the trust deed on the tract. *Held*, that M. took the tract charged with both the mortgage lien and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff's subsequent vendor's lien for the \$600 purchase money, and the transfer to him of the note and trust deed did not release the tract from the subsequent vendor's lien, so that he was bound to credit the note with \$600.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 700-712; Dec. Dig. § 265.\*]

Error from District Court, Bexar County; Arthur W. Seeligson, Judge.

Action by Charles Magerstadt against George M. Martin. Judgment dismissing the petition, and plaintiff brings error. Reversed and remanded.

Geo. Powell, for plaintiff in error. Frank H. Wash and W. W. Walling, for defendant in error.

NEILL, J. Charles Magerstadt and his wife, Wilhelmina, sued George M. Martin, and alleged substantially in their petition:

That on March 24, 1905, and prior thereto, they were the owners and in possession of a certain 160-acre tract of land, specifically described in their petition, situated in Atascosa county, of the value of \$1,600, and that at the same time they owned and possessed lot No. 5 and the two varas of lot 6 in block No. 70, city block No. 707, in the city of San Antonio, of the value of \$3,000. That on the last-named date, the plaintiffs executed their certain negotiable promissory note, payable three years after date, to E. Haarmann, with interest from date at the rate of 8 per cent. per annum, payable annually. That the note stipulated that, if default was made in payment of the interest when due, the principal should become due at the option of the holder. That it appeared from the face of the note that it was secured by a deed of trust on the tract of land and lot described in their petition. That the deed of trust referred to in the note was executed by plaintiffs contemporaneously with the execution of the note to J. E. Webb as trustee for the benefit of E. Haarmann, and contained the following stipulations and powers:

"Now, should said note be paid according to its terms and the other conditions of this instrument be fulfilled, then these presents are to become void and to be released at the cost of the grantors, their heirs, executors and administrators; but if the said note be not paid at maturity (and the same is at the option of the holder to mature upon default in the payment of any installment of interest, or upon failure of mortgagor to pay taxes when due, or to keep the premises properly insured, as required by law), then, or at any time thereafter, the said trustee shall upon demand, verbally or otherwise, made by the payee of said note or any installment thereof, proceed to sell said property at public sale, to the highest bidder, for cash before the courthouse doors of Bexar and Atascosa counties, Texas, the properties as re-

spectively situated, previous notice of the time, place and terms of sale of the property to be sold having first been given at the time of sale, as is required by law in cases of judicial sale, and after which sale shall execute to purchaser a general warranty deed to such property in the name of said grantors and apply the proceeds of sale to pay the expenses of sale, including said advertisement and ten per cent. for the trustee, and then to pay said debt in full, paying over whatever balance remains to the said Wilhelmina Magerstadt for the use of herself, her heirs, executors and administrators."

That on July 5, 1905, plaintiffs, for and in consideration of love and affection and other considerations hereinafter stated, sold and conveyed to W. B. Martin and his wife, Matilda F., all their right, title, and interest, including their equity of redemption, in and to the 160-acre tract of land in Atascosa county. That thereafter, on February 23, 1907, W. B. Martin and his wife, in consideration of \$800, recited in their deed of that date, sold and conveyed to George M. Martin said 160-acre tract, and that said grantee caused the deed thereto to be recorded in the record of deeds of Atascosa county. That on May 24, 1907, E. Haarmann, in consideration of \$1,311.50, paid her by George M. Martin, sold and transferred to him said note for \$1,200, and assigned to him the deed of trust made to secure the same, which transfer and assignment were duly recorded in Atascosa and Bexar counties.

That on May 25, 1907, in consideration of \$800, George M. Martin sold and conveyed to A. D. Leak all his right, title, and interest in said 160-acre tract, and on said date executed to Leak a release of the deed of trust on the said tract made to secure said note, and that Martin's act of executing the release left the lot and premises in San Antonio the only security for said note. That said release was executed and recorded without the knowledge or consent of plaintiff, and is a cloud on his title to his above-described property in San Antonio, in that it is alone charged as security for said \$1,200 note, and that plaintiff is in equity entitled, as against George M. Martin, to such pro rata credit on said note as the 160-acre tract stands in proportionate value to plaintiff's land in Bexar county.

That plaintiff sold and conveyed said 160 acres subject to the lien therein created by said deed of trust, receiving no cash or valuable consideration therefor from his vendees, he having deeded it to them charged with the lien created by said deed of trust, and became liable to pay on the \$1,200 note such sum of money as would represent the value of the land, or the pro rata value thereof as said 160 acres stood to the value of plaintiff's said property in Bexar county,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and that George M. Martin took title to the same charged with said mortgage lien, and became liable to pay the value of the land as a credit on the \$1,200 note, knowing at the time plaintiff in the sale to W. B. Martin and wife had received no valuable consideration therefor, which land is of the value of \$1,600, and yields an annual income of \$200. That George M. Martin is the owner and holder of said note, and that, though he has released the lien upon the 160 acres, he has failed to credit said note with any amount whatever on account of said tract, and that the sale of the land and release of said lien has placed the same beyond plaintiffs' control, or of the trustee in the deed of trust.

That plaintiff's land in San Antonio has been sold, and that \$1,500 of the proceeds of the sale has been deposited in the registry of the court subject to the final decision in this case, and that plaintiff is ready and willing to pay into court the balance of the \$1,200 note after the proper credit is allowed upon the same by George M. Martin because of his sale and release of the 160-acre tract of land, and that he tenders into court \$650, the balance due on the note, principal and interest, after a credit of \$600 thereon, which is the reasonable pro rata or proportionate sum due from George M. Martin upon said 160 acres of land, to be credited to plaintiff as afore stated. That at the time of the sale by plaintiff of the 160-acre tract to W. B. and Matilda F. Martin, for the express consideration of love and affection, it was stipulated and agreed between plaintiffs and them that they should pay as much as \$600 as an independent consideration on the lien to be credited on said note then held by E. Haarmann for \$1,200 against said land, and George F. Martin had full knowledge of said agreement with plaintiffs and their said vendees, and became bound thereby, and took and accepted title to said land with full knowledge of said stipulation and agreement.

The petition concludes with a prayer that so much of the sum claimed to be due on the note as the value of the 160 acres released bore at the time of the execution of the mortgage to the value of both parcels of land included in said deed of trust, not to exceed \$600, be abated, and that plaintiffs have a decree against defendant for the value of said 160 acres of land on May 25, 1907, the date of its sale and release from the lien by him, and that same be decreed as a credit on the note, not to exceed \$600, and the note be decreed satisfied.

The defendant interposed a general demurrer and a number of special exceptions to the petition, among which is that the petition fails to state how there could be an independent consideration for a lien, and fails to allege when and in what manner W. B. and Matilda F. Martin promised to pay said \$600, or fails to show any such payment was to be made, and fails to allege any facts charging defendant with said promise. The

defendant also answered by a general denial, and by plea in reconvention sued plaintiffs on the note described in their petition, and asked judgment for the amount due thereon.

The plaintiffs, by a supplemental petition, after interposing a general demurrer and denial to defendant's plea in reconvention, answered the same as follows: "Specially answering herein, plaintiffs say that defendant, George M. Martin, is not entitled to recover any sum herein greater than \$650, as follows: \$600 balance principal due on the note set up in defendant's answer, and interest thereon to March 24, 1908, for this: That heretofore, on March 24, 1908, plaintiffs tendered to George M. Martin, in terms of law, \$650, as follows: \$600.00, balance due on the promissory note set up in defendant's answer, and \$50 interest due on the same to March 24, 1908, and that said tender of money was made to the defendant from moneys deposited in the registry of this court, to wit, from the \$1,500 now deposited in this court. That said tender was made in terms of law, and in legal tender money of the United States of America, and this tender was made as aforesaid, prior to and on the due date of said note, to wit, March 24, 1908, wherefore on said date said note became, and was in all respects paid off and discharged, and no attorney's fees accrued thereon or became due or payable, there being no sum due upon said note which had not been duly tendered to the defendant for his acceptance, and that there was no sum as attorney's fees due on the said note prior to or on the 24th day of March, 1908, wherefore the defendant is not entitled, in law nor in equity, to receive and collect from plaintiffs any sum as attorney's fees, or any greater sum as principal and interest of said note than \$650, heretofore tendered to the defendant as aforesaid, and this they stand ready to verify, wherefore they pray that the defendant take nothing by reason of his pretended cause of action, and they again tender in court \$650, the balance of principal and interest on the said note due March 24, 1908, and pray, as in their original petition, that they be discharged, and that the fund in this court, save and except \$650, be directed by this court to be paid over to the plaintiffs, and they pray for general and special relief in the premises."

The general demurrer and the special exception, above recited, to plaintiffs' petition were submitted to and sustained by the court, and upon plaintiffs declining further to amend their petition was dismissed without prejudice. And no jury having been demanded, all matters in controversy, as well of fact as of law, were submitted to the court, which, having heard the evidence upon the defendant's plea in reconvention, rendered judgment for him in the sum of \$1,451.85, with interest from the date thereof at the rate of 10 per cent. per annum, and costs of suit. It was further ordered that

the clerk of the court, upon demand of defendant, pay to him out of the \$1,500 deposited by agreement of the parties the amount of the judgment recovered, and, after paying the costs of suit out of the same, if any remained, to pay it to the plaintiffs. This writ of error was sued out by the plaintiff Charles Magerstadt.

The first assignment of error complains of the court sustaining the special exception to plaintiffs' petition. While there is much in the petition that does not go towards showing they are entitled to the relief prayed for, and therefore subject to special exception, still the question remains: Was the petition good as against the general demurrer? In testing the strength of a pleading against such an objection all its allegations must be taken as true, and every reasonable intendment in its favor must be indulged. In view of this principle we will test the sufficiency of plaintiffs' petition.

It will be noticed it alleges that when plaintiffs sold the 160-acre tract to W. B. Martin and wife, such vendees, in addition to the meritorious consideration recited in their deed, agreed to pay as much as \$600, to be credited on the note then held by E. Haarmann, secured by the mortgage on the two pieces of property. The effect of this agreement was an obligation on the part of Martin and wife to pay plaintiffs that much money on their debt. When this obligation was created, how did the matter stand between all the parties? It is obvious that the original mortgagee, E. Haarmann, still had her lien on both pieces of land, unaffected by such transaction between her mortgagors and the Martins. It is equally clear that plaintiffs, as against W. B. Martin and wife, had a vendor's lien on the 160-acre tract, subject to E. Haarmann's superior mortgage lien, for the unpaid purchase money of \$600, which they had agreed to pay and have credited on said note. This being the attitude of these parties in relation to the lands covered by the mortgage when the defendant, George F. Martin, on February 23, 1907, purchased the 160 acres from W. B. Martin and wife with knowledge on his part of the agreement between W. B. Martin and wife regarding the payment of the \$600 as a part of the purchase money of the land, and that that sum had not been paid, he stood in the same attitude towards Mrs. Haarmann and plaintiffs that his vendors did from the date of the conveyance of the land to them until they conveyed it to him. That is to say, the 160-acre tract was charged with the prior mortgage lien of Mrs. Haarmann and the subsequent vendor's lien of plaintiffs for the \$600 purchase money, which W. B. Martin and wife had promised to pay plaintiffs to be credited on the note. But, as is seen from the allegations in plaintiffs' petition, on May 24, 1907, after George

F. Martin purchased the land, Mrs. Haarmann assigned both the note and deed of trust made to secure the same to him for value. Did this release the 160-acre tract from the subsequent vendor's lien thereon in favor of plaintiffs for the \$600 which W. B. Martin and wife agreed to pay as a credit on the note, of which the defendant had notice when he purchased? We think not. For when the note and mortgage were assigned to him equity and good conscience required that he credit the note in plaintiffs' favor with the \$600, which was a lien on the land of which he had notice when he purchased the same. This is what plaintiffs prayed the court to require him to do. Therefore we conclude that it was error to sustain the general demurrer to their plea.

For which error the judgment of the district court is reversed, and the cause remanded.

### GOODWIN v. WALKER.

(Court of Civil Appeals of Texas. Jan. 13, 1910.)

#### 1. APPEAL AND ERROR (§ 1091\*)—INTERMEDIATE COURTS—PRESUMPTION—JURISDICTION.

It cannot be assumed on appeal from the district court in probate matters that the proper procedure on appeal from probate court was had so as to give the district court jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4304-4306; Dec. Dig. § 1091.\*]

#### 2. APPEAL AND ERROR (§ 512\*) — RECORD — SHOWING JURISDICTION.

Appeal from the district court in probate matters will be dismissed for want of jurisdiction; the record not affirmatively showing the district court obtained jurisdiction by proper appeal from the probate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2326; Dec. Dig. § 512.\*]

Appeal from District Court, Gregg County; W. C. Buford, Judge.

Proceeding between J. N. Goodwin, administrator, and Angus Walker, guardian. From an adverse decision, Goodwin appeals. Dismissed.

F. B. Martin, for appellant. Lacy & Bramlette, for appellee.

LEVY, J. This appeal is by an administrator against a decision in administration proceedings in respect to property of the estate, made by the district court. There does not appear in the record either a decree of the probate court, or a transcript from the probate court in relation to the proceedings appealed from, or any notice of appeal by the administrator from any probate order, to enable us to see how or when proceedings got into the district court, or whether there was ever such a proceeding in the probate court, or how or whether the district court

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

acquired jurisdiction, if at all. This court is not warranted in assuming that the proper procedure on appeal by an administrator has been complied with so as to confer upon and give to the district court the necessary jurisdiction to determine the proceedings. Because it is not made to affirmatively appear in the record before us that the jurisdiction of the district court over the cause or proceeding ever attached, or that an appeal from the probate court was ever made and perfected to the district court, we are of the opinion that this court is without jurisdiction to entertain the appeal, and that it should be dismissed. Unless it is made to appear that the jurisdiction of the district court had attached, an appeal from the decision of the district court in such proceedings confers no jurisdiction upon the appellate court. *Hearn v. Cutberth*, 10 Tex. 217; *Timmins v. Bonnor*, 58 Tex. 554.

The appeal was ordered dismissed.

#### BROOKS et al. v. PAYNE et al.

(Court of Civil Appeals of Texas. Dec. 24, 1909.  
On Motion for Rehearing, Jan. 13, 1910.)

#### 1. EXECUTORS AND ADMINISTRATORS (§ 135\*)—CONVEYANCE UNDER ORDER OF COURT—CONTRACT OF DECEDENT—VALIDITY.

A deed by an administratrix, executed under order of the probate court, is invalid where made in execution of a contract between the decedent, who was a colonist, to transfer half of his land under a headright certificate if the grantee would furnish the money to enter the land and survey it, as such contract was in contravention of an express statute forbidding a colonist to alienate his land before the final title was extended, and the county court at the time that the order was issued had no authority to decree specific performance of a contract for the conveyance of land.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 553, 554; Dec. Dig. § 135.\*]

#### 2. TRESPASS TO TRY TITLE (§ 41\*)—WEIGHT OF EVIDENCE.

In trespass to try title by those claiming under the holder of a headright certificate, evidence held not to require a finding by the trial court that the holder of the headright, after he received his title, either expressly ratified an original contract with a surveyor by which the surveyor was to pay the expenses of entering the land, and survey it in consideration of the transfer of one-half of the land to him, or in consideration of the services rendered by the surveyor under the contract, the benefit of which accrued to and was accepted by him, verbally or by deed which has been lost, conveyed to the surveyor half of the league of land.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.\*]

#### 3. EXECUTORS AND ADMINISTRATORS (§ 376\*)—SALE BY ADMINISTRATRIX—ESTOPPEL OF HEIRS.

The erroneous belief by the heirs of the holder of a headright certificate that a transfer of the certificate by the administratrix of the holder under order of the probate court was valid, and subsequent acquiescence for a time, was not sufficient to create an estoppel against such

heirs from asserting title to the land, where the transferees did not take possession of the land, and did nothing to their injury in reliance on such acquiescence.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1540; Dec. Dig. § 376.\*]

#### 4. EXECUTORS AND ADMINISTRATORS (§ 380\*)—SALE BY ADMINISTRATRIX—RETURN OF CONSIDERATION.

The heirs, under such circumstances, were not required to return the consideration paid for the transfer, as a condition precedent to asserting the invalidity of such transfer.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1550½; Dec. Dig. § 380.\*]

#### 5. TRESPASS TO TRY TITLE (§ 41\*)—WEIGHT OF EVIDENCE.

Evidence, in such action, held insufficient to compel a finding by the trial court that a valid order of sale was made by the probate court, and that the deed by the administratrix was made in accordance therewith.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.\*]

#### 6. HUSBAND AND WIFE (§ 273\*)—COMMUNITY PROPERTY—POWER OF SURVIVING WIFE TO CONVEY.

The power of a wife to act as survivor of the community in transferring community property independent of the probate court ceases when she qualifies as administratrix of the estate of her deceased husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1019-1021; Dec. Dig. § 273.\*]

#### 7. HUSBAND AND WIFE (§ 273\*)—COMMUNITY PROPERTY—POWER OF SURVIVING WIFE TO CONVEY LAND.

A wife, as survivor of the community, has no power to transfer community property by deed for the purpose of carrying out an unenforceable contract between her deceased husband and another.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1018, 1019; Dec. Dig. § 273.\*]

#### 8. ESTOPPEL (§ 28\*)—BY DEED—PERSONS ESTOPPED.

Where a wife, as administratrix of the estate of her husband, conveys property by deed in fee simple and warrants the title not only against herself as administratrix and her heirs, etc., but against the claim or claims of all persons whatsoever, her heirs will be estopped to claim any interest in her half of the land conveyed.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 68; Dec. Dig. § 28.\*]

#### 9. TRESPASS TO TRY TITLE (§ 38\*)—BURDEN OF PROOF—RETURN OF CONSIDERATION.

In trespass to try title to half of the land entered under a headright certificate to plaintiffs' ancestor, which certificate was conveyed by the administratrix of the ancestor under an invalid order of court, if defendants are entitled to recover the consideration paid for the land, the burden is on them to show the amount of such consideration.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 53; Dec. Dig. § 38.\*]

Appeal from District Court, Sabine County; W. B. Powell, Judge.

Action by B. R. Payne and others against John H. Brooks and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

John H. Broocks and Greer & Minor, for appellants. Oliver J. Todd and Yancey Lewis, for appellees.

**PLEASANTS, C. J.** This is an action of trespass to try title to a tract of 1,578 acres of land, a part of the William Roberts head-right league in Sabine county. The appellees, who recovered in the court below, are descendants of William Roberts, the original grantee, and claim by inheritance. The appellants claim under David Brown, and the only fact issue in the case is whether said Brown acquired the title of William Roberts and his wife, Sarah Roberts. The trial in the court below without a jury resulted in a judgment in favor of appellees for a portion of the land claimed by them; such portion being a part of the undivided one-half of the land owned by William Roberts, and the community interest of the wife of said Roberts in the land being adjudged to appellants.

As before stated, the land in controversy is a part of a league granted (by the government of Mexico) to William Roberts. The title was extended on November 12, 1835. William Roberts died in the latter part of the year 1836 or early in 1837. His widow, Sarah Roberts, procured letters of administration upon his estate from the probate court of San Augustine county in the spring of 1837, and acting under an order of said court, which will be hereinafter set out, she conveyed the south half of the league, including the land in controversy, to David Brown on August 8, 1837. The application of Sarah Roberts, upon which the order above mentioned was granted, is as follows:

"The Republic of Texas, San Augustine County.

"To the Honorable Wm. McFarland, Chief Justice & Judge of the Probate Court Holding Session in and for the County and Republic Aforesaid.

"The petition of Sarah Roberts administrator upon the estate of William Roberts deceased represents unto your Honor that the said William Roberts, in his lifetime agreed and contracted to & with one David Brown, for him the said David Brown to clear out of the land office the land to which he, the said William Roberts was entitled as a settler & Citizen and he the said David Brown having located surveyed and paid the office fees in obtaining a title from Government for his the said William Roberts land—and he the said William Roberts having died before making a title to the said David Brown—your petitioner, administrator as aforesaid, therefore petitions your honor for leave to make & execute a title to the land to which the said David Brown is entitled to—to him the said David Brown.

"Your petition prays for such other and

further relief as in duty bound will ever pray &c.

"27th March, A. D. 1837.

"E. W. Cullen, Atto. Pro. Pettr."

Upon this petition were file marks, indorsements, and orders as follows:

(Back of petition.)

"Let the order of Sale be granted as prayed for in petition. 27th March, 1837.

"Wm. McFarland, C. J. C. C."

"Filed March 27th, 1837.

"S. W. Blount, Clk."

(File marks in two places.)

(Probate Papers, San Augustine County, Texas.)

"It is ordered by the court that an order be granted to Sarah Roberts, Admr. on the Estate of William Roberts, deceased, to make a title to one-half league of land to David Brown as prayed for in the petition." (Not dated.)

Following this petition and order, there is found upon the probate minutes of said county court the following:

"Probate Court, March Term, 1837. March 29th, 1837. It is ordered by the court that an order be granted to Sarah Roberts, Admr. on the estate of William Roberts, deceased, to make a title to one-half league of land to David Brown, as prayed for in the petition."

On August 8, 1837, Sarah Roberts, as administratrix of the estate of William Roberts, conveyed the south half of the league to David Brown, describing the land conveyed by metes and bounds. This deed, which was duly recorded on the 18th day of August, 1837, omitting the description of the land, is as follows:

"Republic of Texas, San Augustine County.

"This indenture made and entered into in this eight day of August in the year of our Lord one thousand eight hundred and thirty-seven, 1837, Sarah Roberts, administratrix of William Roberts, deceased, of the county and republic aforesaid by virtue of an order of the honorable probate court of said county and David Brown, of the other part, also of the county and republic aforesaid, witnesseth that for and in consideration of the sum of two thousand dollars of good and lawful money in hand paid by the said David Brown to the said Sarah Roberts, administratrix as aforesaid at & before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, the said Sarah Roberts, doth bargain, sell, alien and convey and by these hath bargained, sold, aliened and conveyed unto the said David Brown his heirs and assigns (here follows description of the land), and for the said David Brown to have and to hold said half league of land together with all and singular the rights, members and appurtenances thereunto belonging or in anywise appertaining, unto the said Brown, his heirs and assigns forever in fee simple, and I the said Sarah Rob-

erts, administratrix of the said William Roberts, dec'd, do forever warrant and defend the right, title, interest and claim of the said David Brown, his heirs executors, administrators and assigns to the aforesaid half league of land or bargained premises, not only against myself, the said Sarah Roberts, administratrix, my heirs, executors, administrators and assigns, but against the claim or claims of all persons whatsoever.

"In testimony whereof, I, the said Sarah Roberts, administratrix as aforesaid, hath hereunto set my seal and hand on the day and year above written, delivered in the presence of (interlined in the fifth, seventeen, twentieth, twenty-first, seventy-ninth lines all with Sarah instead of Mary Roberts).

her  
"[Signed] Sarah X Roberts,  
mark

"Administratrix of Wm. Roberts, Dece'd."

The appellants by mesne conveyances hold whatever title was acquired by David Brown to the south half of said league.

In addition to the foregoing statement, we adopt the following findings of fact filed by the trial judge:

"The court finds: That from all of the facts and circumstances of the case that David Brown was an English deputy surveyor under the Mexican government, and in said capacity made and returned the original English field notes upon which the title to the William Roberts headright survey, the land in controversy, issued. That David Brown and William Roberts, prior to the issuance of the title to said Roberts' headright, entered into some sort of agreement, either oral or written, by which David Brown was to locate and pay the office fees for said Roberts upon his headright survey, and was to receive in return therefor a one-half interest in said league. That in pursuance of said contract David Brown, an English or deputy surveyor, located, surveyed and returned the English field notes to said league upon which title was extended by the Mexican Government on November 12, 1835, and that David Brown paid all expenses and official fees in locating and titling said land. That said William Roberts established his home on said headright, and on the north one-half thereof, where he lived until the time of his death, which occurred in the latter part of 1836, or the first of 1837.

"That Sarah Roberts, as administratrix, on the 8th day of August, 1837, executed and delivered, in accordance with the orders of the court hereinbefore referred to, a certain administratrix's deed purporting to convey to said David Brown the south one-half of William Roberts' headright, by metes and bounds, which deed was signed by Sarah Roberts as administratrix by attaching her mark thereto, and the court finds that said deed was executed in accordance with the foregoing orders of the court, and none other, and that no consideration of any kind was paid by

the said David Brown to the said estate further than the performance of a contract recited in her petition, which deed is a part of the record herein, and is hereby referred to for a more perfect statement of its contents. That said Sarah Roberts, the surviving widow of William Roberts, resided on the north one-half of said league until her death, which occurred some time between 1845 and 1856, and that she, said Sarah Roberts, believed until the time of her death that the probate court had authority to order her to make title to David Brown, and that she had conveyed him a good title by her deed as administratrix.

"That the taxes were rendered and paid upon said league as shown by the comptroller's certificates which are contained in this record, and are hereby referred to for a more perfect statement as to their contents, which in substance shows that the widow of William Roberts and her heirs and vendees have assessed and paid taxes on the north half of the league ever since 1846 up to the present time, and that they have never rendered or paid on the south one-half of the league, and that David Brown and his vendees have practically rendered and paid taxes on the south one-half of said league since 1846 to the present time. That the heirs of said William Roberts and Sarah Roberts have taken no action relative to the land in controversy, or any part of the south half, and most of them who have had knowledge of the deed to Brown, at least until the last two or three years, supposed the title to be valid in said David Brown, and his assigns, and the said heirs took no action whatsoever with reference to the said land in the way of taking possession of the same, or paying taxes on same, or asserting acts of ownership over the same.

"The court further finds, with reference to the land in controversy in this suit: That it is open timbered land, and has never been in the possession of any one, and no open, visible, notorious acts of ownership other than making deeds and rendering same for taxes, and payment of taxes, so far as they are shown to have been paid, have been exercised over same by David Brown, or those claiming under him. That while Sarah Roberts and her heirs, and the heirs of William Roberts, have since the date of the death of William Roberts down to the time of filing this suit taken no legal proceeding to cancel or avoid said administratrix's deed, they have nevertheless made no assertion to David Brown, or any of those claiming under him, that they did not claim the land in controversy; nor have they induced any of the purchasers under Brown to make purchase under said Brown title in any way whatsoever; nor are Brown, or those claiming under him, shown to have relied on any acts or words of plaintiffs or interveners in making purchases. That while some of the probate papers of San Augustine county have been

lost, and others have been carelessly kept, the said petition of said Sarah Roberts to be allowed to transfer one-half of the headright of her deceased husband to David Brown, as above mentioned, and the order indorsed upon said petition, and the said order recorded upon the minutes of the court which referred to the petition and the deed to said Brown reciting the said order, have at all times been of record or on file in San Augustine county, Tex., since 1837 until the present time.

"And the court further finds: That none of the probate minutes of San Augustine county have been lost, or destroyed, but that same are intact. That the petition to make the deed to one-half of the land was not among the file papers of the estate, and was not found until discovered by the abstractors amongst other papers in the clerk's office, and that the said petition was not of record in the clerk's office, when Broocks bought the land in controversy; but the order or judgment of the court and said petition and the deed made by virtue of said petition were of record when Broocks and his vendors bought. That said David Brown from the time of the issuance of the title to the time of the death of the said William Roberts lived at the town of San Augustine, about eight or nine miles from the place of residence of said Roberts; but whether said Brown and said Roberts saw each other during that period of time, or whether said David Brown was at his home or absent during that time, or whether William Roberts was absent or at his home during that time, there is nothing in the record upon which the court can find or conclude. That shortly after the deed from Sarah Roberts, administratrix, was executed and delivered to David Brown, said Brown made deed to said property to William Kerr, and that same was sold through various mesne conveyances, and passed into the defendants here; but there is no proof in the record that the plaintiffs or interveners herein had any actual knowledge of the said conveyances of the south half of said league, except the deed from Sarah Roberts, administratrix, to David Brown, and as to that deed I find that the widow, Sarah Roberts, and all of the adult children, knew of the deed, but that they, nor either of them, knew the legal effect of the same, but thought it conveyed title to David Brown to the south half of the league."

The oath and bond of Sarah Roberts as administratrix was filed on May 4, 1837. David Brown was one of the sureties upon this bond. The inventory of the estate was filed December 6, 1837. This inventory only shows \$50 cash in hand of the administratrix.

If, as found by the trial court, the deed from Mrs. Roberts to Brown was made under the order of the probate court directing her to make such conveyance in fulfillment of the contract between Brown and William Roberts recited in the application of Mrs.

Roberts for said order, such deed conveyed no title. The contract was in contravention of an express statute which forbade a colonist to alienate his land before the final title was extended, and was therefore unenforceable; and, in addition to this, the county court at that time had no authority to decree specific performance of a contract for the conveyance of land, and therefore the order directing a conveyance for the purpose of carrying out said contract, and the deed, executed thereunder, were void. *Houston v. Killough*, 80 Tex. 307, 16 S. W. 56; *McCarty v. Merry*, 59 S. W. 304; *Cope v. Blount*, 38 Tex. Civ. App. 516, 91 S. W. 616. Appellants recognize this as well-settled law, but insist that the trial court should have found in their favor upon other grounds hereinafter discussed.

The first, second, and third assignments which are presented together, assail the judgment on the ground that it is unsupported by the evidence. This contention is presented by the following proposition submitted under said assignments: "The facts from which the inference is to be drawn that William Roberts, after title issued to him, ratified by parol or otherwise his contract with David Brown made prior to receiving his title, are all either admitted or are undisputed, and since they by their overwhelming, preponderating weight lead to the one and only natural conclusion, being conclusive to the point, that Wm. Roberts, after title issued to him, and prior to his death, accepted, with full knowledge of all the facts, the benefits of his former contract with David Brown, and ratified the same by parol or otherwise, said contract being to the effect that he would give Brown one-half of his (Roberts') headright in consideration of Brown's services and expenses to be performed and borne in locating and surveying the league and paying all government and land office expenses and dues for obtaining the title, it follows as a matter of law, after this long lapse of time (over 70 years), when all direct sources of proof are obliterated that there being no dispute as to the facts, and they pointing conclusively, by an overwhelming weight, all to one inevitable conclusion, the court should have reached that one natural conclusion; and therefore this court should find, as a matter of law, or, at any rate, as a fact conclusively established by the admitted and undisputed testimony, that Wm. Roberts did ratify the contract, just as the lower court should have found. The evidence being admitted and undisputed, and conclusive, the question becomes to all intents and purposes, one of law; that is, what conclusion should have flown from the admitted and undisputed facts?"

This proposition is based upon the undisputed evidence which shows that no claim was ever asserted by Mrs. Roberts, or Roberts' children, who lived for a number of years after the death of Wm. Roberts on portions of the north half of the league which

they divided between themselves, to any portion of the south half of the league, and that, in their partition deeds and in subsequent deeds, executed by said children, they recognized and called for the Brown line as located by the deed from Mrs. Roberts to Brown, and the further fact that David Brown's home was in the town of San Augustine, only nine miles from the home of Wm. Roberts, and that Wm. Roberts lived for a year or more after he received his title, and during that time probably transacted business in said town. These facts, it is contended, coupled with other undisputed evidence showing a continuous claim and assertion of ownership of the south half of the league by David Brown, and those claiming under him, required the trial court to find as a fact conclusion that William Roberts, after he received his title to the league, either expressly ratified his original contract with David Brown, or, in consideration of the services rendered by Brown under said contract the benefit of which accrued to and was accepted by him, verbally, or by deed which has been lost, conveyed to Brown the south half of the league.

While the facts stated would have authorized the court to have found in favor of appellants upon this issue, we do not think they compel such finding. The most persuasive of these facts, viz., the continuous claim of Brown and his vendees and the acquiescence of Roberts' children in such claim, is greatly weakened if not destroyed, by the conveyance by Mrs. Roberts under a void order of the probate court. The claim of Brown and the nonclaim of Roberts' heirs can be reasonably explained by the theory accepted by the trial court that all of said parties believed that the order of the court and the conveyance made thereunder were valid and passed the title to Brown.

Under the fourth, fifth, sixth, seventh, and eighth assignments of error, which it is unnecessary to set out or discuss in detail, the appellants insist that the judgment of the court below should be reversed, because the facts shown by the undisputed evidence estop the heirs of William and Sarah Roberts and their descendants from asserting title to the land in controversy against those claiming under David Brown, or at least such facts show such equity in Brown and those holding under him as to require plaintiffs, as a condition precedent to their recovery, to do equity by restoring to defendants who hold under said Brown the consideration paid and received by him under his contract with William Roberts. We agree with the trial judge in his conclusion that the evidence does not raise the issue of estoppel.

The erroneous belief of Roberts' heirs in the validity of the order of the probate court, and the conveyance of Mrs. Roberts thereunder, and their subsequent acquiescence in the claim of Brown and those holding under him, would not in itself deprive them of their legal rights, and the evidence shows no affirm-

ative act on their part which should estop them from now asserting their title. Their mere silence and failure to assert their title sooner would not estop them. There has been no possession of the land by appellants, or those under whom they claim, and nothing has occurred to require a suit to protect their rights. The deeds made by Roberts' children, in which they recognized the Brown line, are not shown to have been seen by appellants, and there is nothing in the evidence to indicate that appellants, or any of those under whom they claim, relied upon the recitals in said deeds, or had any knowledge thereof before they purchased the land in controversy.

Appellees are not in the position of one who sues to set aside a voidable contract under which he is shown to have received benefits, and the rule which requires a plaintiff in such case, as a condition precedent to recovery, to do equity by restoring the benefit received under the contract, has no application. In the case of *Houston v. Kilgough*, supra, which is cited by appellants in support of their contention, the legality of the contract in the performance of which the void deed was executed does not seem to have been questioned. The only infirmity in the title of defendants passed upon in that case was the want of authority in the probate court to decree specific performance of the contract. The right to recover the consideration paid by the defendants' predecessor in title and received by plaintiffs' ancestor under an illegal and unenforceable contract does not seem to have been in the mind of the judge who wrote the opinion in that case, nor does it appear that the question of burden of pleading and proof of such issue was under consideration. In the cases of *Hunt v. Turner*, 9 Tex. 385, 60 Am. Dec. 167, and *Mills v. Alexander*, 21 Tex. 154, the contracts were fully executed, and the apparent legal title vested in the grantors, and in order for heirs of the grantors to recover they had first to cancel the deeds of their ancestor, and the court held that, before they could have the deeds canceled and recover the title to the land, they would be required to return the consideration received by their ancestors for the land. In the present case the contract was executory and does not purport to pass the title. Brown could not have enforced specific performance against Roberts or his estate, and it is not necessary for appellees in this case to set aside the contract to entitle them to recover the land. It seems clear to us that, if no deed had been executed, the contract between Roberts and Brown would have been no barrier to appellees' right to recover on their legal title because it did not vest Brown with any title either legal or equitable. He had no rights under the contract, and his only right against Roberts or his estate would have been limited to compensation for the services rendered by him in locating and surveying the land and obtaining the is-

suance of title thereto to Roberts. The deed executed by Mrs. Roberts being void, and no consideration having been paid therefor by Brown other than the services performed by him under his unenforceable contract, he acquired no rights under said deed. The evidence fails to show that appellants have any right to recover the amount due Brown as compensation for his services, and fails to show what amount was due Brown as such compensation, and it therefore follows that no judgment should have been rendered in appellants' favor on this claim. *McCartey v. Merry*, 59 S. W. 304; *Fuller v. O'Neil*, 69 Tex. 349, 6 S. W. 181, 5 Am. St. Rep. 59; *Wilkin v. Owens* (Sup.) 114 S. W. 104.

This conclusion renders it unnecessary for us to pass upon the illegality of the contract because of the official position held by Brown at the time it was made. The trial court held the contract void on this ground. Appellees contend that this holding is sustained by the case of *Wills v. Abbey*, 27 Tex. 203. We do not think this case as conclusive of the question, because at the time the contract there under consideration was entered into there was a statute prohibiting such contracts.

Appellants' remaining assignments present only two questions which we deem it necessary to discuss. It is urged that the court should have found from the evidence that the deed executed by Mrs. Roberts was not made under the orders of the court before set out, but under a valid order not shown by the record; and that if no valid order of the court can be presumed from the evidence, since it appears that such sale was made for the purpose of discharging a community obligation, she, as survivor of the community, had authority to make such conveyance independent of any order of the probate court. In answer to the first of these contentions, we are of opinion that while the trial court might have found from the evidence that a valid order of sale was made by the probate court, and the deed from Mrs. Roberts to Brown was made in accordance with such order, it seems to us that such finding would have been against the preponderance of the evidence. But, be this as it may, it is clear that the evidence does not compel such finding. The minutes of the probate court are intact, and it appears therefrom that it was the practice in said court, whether it was required by law or not, to enter all orders of this kind in the minutes. The only order appearing in the minutes is the one directing the administratrix to convey the title to Brown in fulfillment of the contract before mentioned. The deed does not refer to any specific order, and it is reasonable to infer that the order referred to in general terms is the one appearing upon the minutes of the court. In addition to this, the inventory returned by the administratrix shortly after the deed

was executed does not show the cash in hand which she should have had, if, as recited in said deed, she had sold the land to Brown for \$2,000 cash. These facts we think fully justified the trial judge in finding that no consideration was in fact paid by Brown for said conveyance, and that the same was made under the order of the court before set out.

As to the second contention, it is sufficient to say that Mrs. Roberts' power to act as survivor of the community independent of the probate court ceased when she qualified as administratrix. *Houston v. Killough*, supra. If the deed was made for the purpose of carrying out the unenforceable contract between Brown and Roberts, as found by the trial court, Mrs. Roberts, as survivor of the community, would have had no authority to make such conveyance. This disposes of all of the material questions raised by appellants, and each of their assignments, all of which have been duly considered by us, is overruled.

Under appropriate cross-assignments, appellees complain of the holding of the trial court that they, as heirs of Mrs. Roberts, are estopped by her deed to Brown from claiming any interest in her half of said land. We do not think the court erred in this holding. The purchasers from Brown had the right to rely upon the recitals and upon the warranty contained in Mrs. Roberts' deed to him, and, as against such purchasers, neither she nor those claiming under her will be heard to say that her deed did not pass her title to the land thereby conveyed. *Corzine v. Williams*, 85 Tex. 506, 22 S. W. 399; *Cope v. Blount*, 38 Tex. Civ. App. 516, 91 S. W. 616.

We are of opinion that the judgment of the court below should be affirmed, and it has been so ordered.

#### On Motion for Rehearing.

In our opinion filed herein on December 24, 1909, in discussing the cases of *Houston v. Killough*, 80 Tex. 307, 16 S. W. 58, *Hunt v. Turner*, 9 Tex. 385, 60 Am. Dec. 167, and *Mills v. Alexander*, 21 Tex. 154, we say: "In the case of *Houston v. Killough*, supra, which is cited by appellants in support of their contention, the legality of the contract in the performance of which the void deed was executed does not seem to have been questioned. The only infirmity in the title of defendants passed upon in that case was the want of authority in the probate court to decree specific performance of the contract. The right to recover the consideration paid by the defendants' predecessor in title and received by plaintiffs' ancestor under an illegal and unenforceable contract does not seem to have been in the mind of the judge who wrote the opinion in that case, nor does it appear that the question of burden of pleading and proof on such issue was under consideration. In the cases of *Hunt v. Turn-*

er, 9 Tex. 385, 60 Am. Dec. 167, and *Mills v. Alexander*, 21 Tex. 154, the contracts were fully executed, and the apparent legal title vested in the grantors, and in order for the heirs of the grantors to recover they had first to cancel the deeds of their ancestors, and the court held that, before they could have the deeds canceled and recover the title to the land, they would be required to return the consideration received by their ancestors for the land."

These statements, as to the scope of the opinion in the case of *Houston v. Killough*, and as to the character of the contract under which the defendants claimed in that case, and also as to the contract involved in the case of *Hunt v. Turner*, are erroneous. While most of the opinion in the case first mentioned is devoted to a discussion of the question of the validity of the order of the probate court under which the deed to defendants' predecessor in title was executed, the validity of the original contract, in performance of which the deed was executed, was expressly passed upon, and the contract held to be void upon the ground that it was prohibited by law. In the *Hunt* Case the defendants claimed under a bond for title, and not under an executed contract of sale. It follows that the statement in our former opinion that the defendants, in each of the three cases mentioned in said opinion, was claiming under contracts which were fully executed, and which vested the defendants with the apparent legal title to the land, is inaccurate, and it may be that the distinction we make in said opinion between the equities of those claiming under an executory contract of sale and those claiming under a deed which passes the apparent legal title is not sound.

But be this as it may, we adhere to the conclusion that, under the authorities cited, the plaintiffs in this case were not required to tender the defendants the consideration received by Roberts under his contract with Brown, and, if defendants were entitled to recover such consideration from plaintiffs, the burden was upon them to show the amount of such consideration. This was the holding of this court in the case of *McCartey v. Merry*, 59 S. W. 304 and a writ of error in said case was refused by the Supreme Court.

If, as contended by the appellants, the evidence in this case is sufficient to authorize the recovery by defendants of the government charges paid by Brown in obtaining the issuance of the title, the one-half of the land awarded defendants in this case is greatly in excess in value of the amount he was so entitled to recover.

At appellants' request, we make the following additional findings of fact: While that portion of Brown's half of the league in controversy in this suit has never been occupied, other portions of said half of the league have been occupied for a number of

years by persons holding under the Brown title, and there have been numerous conveyances of portions of said half of the league by deeds which were seasonably placed of record, and the assertion and claim of ownership by Brown and those holding and claiming under him has been notorious ever since the execution of the deed to him by Mrs. Roberts.

After a careful consideration of the able motion for rehearing filed by appellants' counsel, we have concluded to adhere to our former decision of the questions presented, and the motion is overruled.

Overruled.

#### PEARCE v. CARRINGTON et al.

(Court of Civil Appeals of Texas. Dec. 15, 1909. Rehearing Denied Jan. 19, 1910.)

#### 1. WILLS (§ 608\*)—CONSTRUCTION—ESTATES DIVIDED—RULE IN SHELLEY'S CASE.

A devise to testator's daughters, and the heirs of their bodies to be born, followed by a clause directing that on the death of either daughter without heirs of her body the property given her shall return to the estate to be divided between the survivors, is within the rule in Shelley's Case, and the daughters take the fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

#### 2. WILLS (§ 191\*)—REVOCATION—MARRIAGE AND BIRTH OF ISSUE.

At common law a will was revoked by testator's subsequent marriage and birth of a child.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 469-478; Dec. Dig. § 191.\*]

#### 3. WILLS (§ 191\*)—REVOCATION—MARRIAGE AND BIRTH OF ISSUE.

Under the common law, the will of a wife encephalic when executed which fails to provide for, or exclude, the unborn child from participation thereunder, is revoked by the birth of the child.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 474; Dec. Dig. § 191.\*]

#### 4. DESCENT AND DISTRIBUTION (§ 47\*)—PRE-TERMITTED CHILD—MARRIAGE AND BIRTH OF ISSUE—"MENTIONED."

Under Rev. St. 1895, art. 5345, providing that a will made when testator had no child living, wherein any child he might have is not provided for or mentioned, shall be void on the birth of a child, etc., when considered in connection with articles 5343 and 5344, relating to posthumous children, etc., the will of a wife, encephalic when executed, which makes a gift of an undivided interest in her estate to persons named, void in case of living issue, born of her body, and which makes no other reference to any after-born child, is void on the birth of the child, who may inherit as though the wife died intestate, for the word "mentioned" means either that provision should be made for the after-born child or that he should be excluded from a participation under the will.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 128; Dec. Dig. § 47.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4476, 4477.]

Appeal from District Court, Travis County; Chas. A. Wilcox, Judge.

Action by James E. Pearce against Lillian

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Carrington, a feme sole, and Mignonette C. Pearce, a minor, and others, for partition of land. From a judgment of partition, defendant, M. C. Pearce, appeals. Reversed and remanded.

A. S. Phelps, for appellant. D. W. Doom and D. H. Doom, for appellees.

RICE, J. This suit was brought by James E. Pearce, as plaintiff, against Lillian Carrington, a feme sole, the appellant Mignonette C. Pearce, a minor, and others, for partition of 1,042 acres of land situated in Travis county.

There are but two questions involved in this appeal; one is as to the proper construction of the will of W. H. D. Carrington, and the other involves the proper construction of the will of Mignonette Carrington Pearce, the wife of James E. Pearce and the mother of the minor, Mignonette. It is contended on the part of James E. Pearce that, by the will of W. H. D. Carrington, his wife Mignonette Carrington Pearce, née Mignonette Carrington, took the fee-simple title to one-half of the land described in the petition, subject to be defeated, however, if she left no child or children surviving her, in which event it would go back into the estate of her father, to be partitioned between the other survivors; and that as she died leaving a child, the estate given to her under the will of her father ripened into an absolute fee, which by her will she bequeathed to her husband. W. H. D. Carrington died in 1887, leaving a will, which was duly probated, but it is only necessary in passing upon the questions involved to quote two items therefrom, to wit, items 2 and 8, which are as follows:

"Item 2. I give and devise and bequeath to my daughters Mignonette Carrington and Lillian Carrington and the heirs of their bodies to be born so much of my plantation on Wilbarger's creek and Gillihans creek as I have not heretofore conveyed by deed of gift to my son Clive Carrington and my daughter Maude Imboden, with the proviso that their mother shall have one-third of the net products until said minors are of age, and after that one-fourth of the products until my said daughters shall marry, or so long as she shall remain unmarried. The said plantation herein devised and bequeathed is to embrace so much of Eislins survey (not given to Clive and Maude as aforesaid) and is my separate and individual property, except about one-half of the improvements made by the community labors. But I desire that all the improvements shall go with the devise and bequest of the land as aforesaid."

"Item 8. I desire and direct that in case of the death of either of my children, daughters or son, without heirs of their body, that the property given them by devise or gift shall return to the body of my estate to be partitioned and divided as aforesaid between the survivors as aforesaid."

Mignonette Carrington mentioned in said will intermarried with the plaintiff, James E. Pearce, on the 2d of June, 1900. There was born to her on the 26th of February, 1902, a child, Mignonette Carrington Pearce, who survives her and is the minor plaintiff for whom this appeal is prosecuted. The last will and testament of Mignonette Carrington Pearce, the daughter of W. H. D. Carrington, was made on the 9th of January, 1902, by which she devised her interest in the property in question to her husband. She died on the 4th of March, 1902, and her will has been duly probated in the county court of Travis county.

The court found in favor of the contention of James E. Pearce, and judgment was entered accordingly, from which this appeal is alone prosecuted by the minor plaintiff, Mignonette C. Pearce, who by her first assignment assails the judgment of the court on the ground that the court erred in holding that the words "the heirs of their bodies to be born," as used in the second section of the last will of W. H. D. Carrington, were words of limitation and not of purchase, and that the contingent or conditional fee granted to Mignonette Carrington Pearce, wife of James E. Pearce, plaintiff, ripened into an unconditional fee-simple title, by reason of the fact that the said Mignonette Carrington Pearce was married at the time of her death and left surviving her an heir of her body, and in not holding that only a life estate was granted unto the said Mignonette Carrington Pearce by the terms of said will; insisting by her proposition thereunder that the words "the heirs of their bodies to be born," as used in the will of W. H. D. Carrington conveyed only a life estate to Mignonette C. Pearce, wife of James E. Pearce, because said words meant children or issue born to the said Mignonette C. Pearce, and only a life estate vested in her and at her death the fee vested in appellant, her child. While, on the other hand, appellees contend that the rule in Shelley's Case applies, and that by reason thereof, Mrs. Pearce, formerly Mignonette Carrington, took the fee-simple title under the will of her father, and thereby had the right to devise her interest in said estate to her husband, as was in fact done by her. So the question for our consideration is whether Mrs. Pearce, formerly Mignonette Carrington, took a fee-simple title or only a life estate under the will of her father. Provisions such as the present have been the fruitful field of much litigation in this state and elsewhere, and similar words to those used in this will have often passed under judicial scrutiny; so that we have many adjudications to guide us in the determination of the question involved, the difficulty usually being in applying the law to the particular facts in hand. As said in Hopkins v. Hopkins, 122 S. W. 15: "The rule in Shelley's Case may be thus stated: If

an estate for life or any other particular estate or freehold, be given to one, with remainder to his heirs, the first taker shall be held to have the fee, and the heirs will take by descent and not by purchase."

It has been held in this state that if the grantee clearly evinces an intention to create a life estate in the first taker, with remainder to the children of the grantee, the grantor's declared intention will control, notwithstanding the use of the words which would, if unrestricted, invoke the operation of the rule in *Shelley's Case*. *Simonton v. White*, 93 Tex. 50, 53 S. W. 339, 77 Am. St. Rep. 824. But it has also been held in *Hancock v. Butler*, 21 Tex. 804, that it is the policy of the courts to so construe an instrument as to pass the greatest estate to the first-named grantee which the instrument is capable of passing by fair construction. Like words to those used in the will under consideration have frequently been held to be within the operation of the rule in *Shelley's Case*, and thereby to convey the fee; and this, we take it, should be the rule here, unless by some other portion of the will it clearly appears that a different intention was evinced by the decedent. There is nothing to indicate such intention, in our opinion, in any part of the will. It is true that by the eighth item it is provided that in the event of the death of either of testator's daughters therein mentioned without heirs, her portion should revert to the body of the estate, and be partitioned among the survivors. In our opinion this language should not be so construed as to have the effect of limiting to the devisees a life estate only, and thus preventing the application of the rule in *Shelley's Case*.

In the case of *Calder v. Davidson* (Civ. App.) 59 S. W. 300, it was held, as shown by the syllabus, that "a deed from a father to his married daughter, reciting that the grantor conveyed certain real estate to the grantee and the heirs of her body by her then husband, in consideration of natural love and affection vested a title in fee simple in the grantee, and not a mere life estate. Justice Gill, in delivering the opinion of the court, saying, among other things: "It is immaterial that the subsequent limitation was to the heirs of her body by a person named. Since it does not appear that the words were used in the sense of 'children,' their legal import would at common law have created a fee-tail special and cannot be given effect. Of latter years the question has seldom been made, except where there was a distinct effort on the part of the grantor to create a life estate in the first taker."

In the case of *Seay v. Cockrell* (Sup.) 113 S. W. 1160, it was held that a devise to the bodily heirs named of testatrix's son, followed by a clause providing that such devisees shall not sell the land which shall on their death revert to their heirs, is within the rule in *Shelley's Case*, for the word "heirs"

is a word of limitation and not of purchase, and the devisees took a fee-simple title. In view of the holdings of our own Supreme Court upon this subject, we are inclined to believe that the court below was correct in its ruling to the effect that Mrs. Pearce, by the will of her father, took a fee-simple title to the property in question, and therefore overrule appellant's first assignment of error. We cite in addition to the cases heretofore referred to in support of this ruling the following: *Rev. St. 1895*, art. 627; *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520; *Hawkins v. Lee*, 22 Tex. 544; *Singletary v. Hill*, 43 Tex. 588; *Lacey v. Floyd*, 99 Tex. 112, 87 S. W. 665; *St. Paul's Sanitarium v. Freeman*, 111 S. W. 443; *Scott v. Brin*, 107 S. W. 565; *Laval v. Staffell*, 64 Tex. 370; *McKee v. McKee* (Ky.) 82 S. W. 451; 16 Cyc. pp. 602, 604, 619, 626; 1 *Washburn on Real Prop.*, 64, subd. 92.

By her second assignment appellant urges that the court erred in holding that the will of Mignonette C. Pearce was valid and vested title to one-half of the land described in the petition in the plaintiff, James E. Pearce, and in holding that article 5345 of the Revised Statutes of 1895 was not applicable to said will, in this—that said will having been executed before the birth of the child Mignonette Carrington Pearce, and she not having been provided for, or her name mentioned in said will, the court should have held the same to have no effect during her life and was void. By her proposition thereunder she insists that the statutes are mandatory, and appellant having been born after her mother had executed her will, and there being no mention of or provision for appellant in said will, the same is of no effect and is void.

Mrs. Pearce's will was executed on the 9th of January, 1902. Appellant was born on the 24th of February, 1902. Item 4 of said will is as follows: "I bequeath my one-fourth interest in the homestead lot of my father's estate, lots 7, 8, and 9 in block 108 in the city of Austin, to my mother. In case of her death previous to my own, to my two sisters, Lillian and Maude. This section is to be null and void in case of living issue born of my body." By a subsequent section of her will she bequeathed to her husband, James E. Pearce, amongst other things, her interest in the land described in the petition. The effect of appellant's contention is that her mother's will does not become operative as against her because she was born since the will was executed, and as she contends, she was not mentioned nor provided for therein. The question for determination, therefore, is whether or not the will of her mother was thereby revoked. This is an open question in this state, and we have been unable to find where the exact point now before the court has ever been passed upon in any other jurisdiction.

At common law the change in conditions of the testator, such as marriage and birth of a child, would, by implication of law, revoke a will. *Morgan v. Davenport*, 60 Tex. 230; 4th Kent, p. 616 et seq.; vol. 30 (2d Ed.) Am. & Eng. Ency. Law, p. 643 et seq.; Theobald on Wills, p. 40; American Digest, Cent. Ed., vol. 49, §§ 468 to 489 inc.; *Hart v. Hart*, 70 Ga. 764; *Chicago, B. & Q. R. Co. v. Wasserman* (C. C.) 22 Fed. 872. Statutes in many of the states have been enacted bearing upon this subject, and in our own state we find the following provisions relating to posthumous children:

"Art. 5343. When a testator shall have children born and his wife enceinte, the posthumous child, if unprovided for by settlement and pretermitted by his last will and testament, shall succeed to the same proportion of the father's estate as such child would have been entitled to if the father had died intestate, towards which portion the devisees and legatees shall contribute proportionately out of the parts devised and bequeathed to them by such last will and testament.

"Art. 5344. If a testator having a child or children born at the time of making his last will and testament shall, at his death, leave a child or children born after the making of such last will and testament, the child or children so afterborn and pretermitted shall, unless provided for by settlement, succeed to the same proportion of the father's estate as they would have been entitled to if the father had died intestate, toward raising which portion the devisees and legatees shall contribute proportionately out of the parts devised and bequeathed to them by such last will and testament, in the same manner as is provided in article 5343.

"Art. 5345. Every last will and testament made when the testator had no child living, wherein any child he might have is not provided for or mentioned, if at the time of his death he shall leave a child, or leave his wife enceinte of a child which shall be born, shall have no effect during the life of such after-born child, and shall be void unless the child die without having been married and before he shall have attained the age of twenty-one years."

In the case of *Chicago, B. & Q. R. Co. v. Wasserman*, supra, we beg to quote from Justice Brewer's opinion, not so much for the purpose of showing what the common law was on this subject, but with the view of showing what has been the trend of judicial decision in this country in the interpretation and construction of statutes passed with reference thereto. That was a case where the testator devised all of his property to his wife who was enceinte but made no mention in his will of his unborn child. The section of the statute of Nebraska then under consideration by the court is as follows: "When any child shall be born after the making of

his parents' will and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate, and the share of such child shall be assigned to him as provided by law as in cases of intestate estates, unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child."

The court among other things says: "How can any intention as to this child be gathered from the will alone; it simply gives everything to the wife; is silent as to children. If I could look beyond the will, my conclusion would be instant and unhesitating. Limited by the statute to the instrument itself, what can be gathered therefrom? It is simply a devise of all property to the wife. No reference is made to children born or unborn. Can I infer from his silence an intention to disinherit? If so, the mere omissions from a will would always stand as proof of an expressed intention. And whatever of apparent hardship there may be in the present case, a fixed and absolute rule prescribed by statute cannot, for such reason alone, be ignored. That the rule was intentionally thus prescribed is evident, not alone from the clear letter of the statute, but also from the history of this question at common law, and the various provisions of the statutes of other states. At common law the will of an unmarried man disposing of all of his property was presumably revoked by his subsequent marriage and the birth of a child. This rule was borrowed from the civil law. (Referring to Justinian for the basis of the rule.) Whether revocation would follow from subsequent marriage alone or birth of a child alone, was perhaps a doubtful question. In *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506, it was held that both must concur; while in *McCullum v. McKenzie*, 26 Iowa, 510, the birth of a child alone was adjudged sufficient. See generally upon this question, 1 Redf. Wills, c. 7; 1 Williams, Ex'rs, c. 3, § 5; 4 Kent, Comm. 421-426. It was also for awhile at least disputed whether such revocation followed absolutely from the subsequent marriage and birth of a child, or was only to be presumed, and the presumption subject to be overthrown by evidence of the testator's intention. Lord Mansfield in *Brady v. Cubitt*, 1 Doug. 39, ruled that the presumption from marriage and the birth of issue, like all other presumptions, 'may be rebutted by every sort of evidence.' See, also, 1 Phillim, 473. Such seems to have been generally the ruling of the ecclesiastical courts. On the other hand in *Holford v. Otway*, 2 H. Bl. 522, Chief Justice Eyre held that 'in cases of revocation by operation of law, the law pronounces upon the ground of a presumptio juris et de jure, that the party did intend to revoke, and that presumptio juris is so violent that it does not admit of circum-

stances to be set up in evidence to repel it.' And in the leading case of *Marston v. Roe*, 8 Adol. & E. 14, by all the judges in the exchequer chamber, it was finally decided that the revocation of the will took place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself. Such being the final solution of the question in the English courts, it cannot be that the purpose of the statute in question was to open the door to any other evidence of intention than those expressly named. On this side of the waters the matter has generally been regulated by statute, with a prevailing tendency to declare that the after-born child takes the same share that it would have done if the father had died intestate; or in other words that the will is absolutely revoked pro tanto unless there is some provision made for such child, or an express intention that it should receive nothing. The statute of Wisconsin is identical with that of Nebraska; and in *Bresee v. Stiles*, 22 Wis. 120, the inquiry as to the testator's intentions was declared to be limited to the language of the will, and the will being silent, the after-born child inherited. See among many cases the following, which show how carefully the courts have enforced the rule of revocation pro tanto in the interest of the child: *Waterman v. Hawken*, 63 Me. 156; *Walker v. Hall*, 34 Pa. 483; *Hollingsworth's Appeal*, 51 Pa. 518. In the first the testator left certain real and personal estate to his widow during her life and widowhood, to revert to his heirs upon her death or marriage, and gave the rest to his father. A daughter born two months after his death was held unprovided for by the will, and recovered the share of the estate she would have taken if he had died intestate. In the second the testator gave his entire estate to his wife, saying in the will, 'having the utmost confidence in her integrity, and believing that should a child be born to us she would do the utmost to rear it to the honor and glory of its parents,' and the same ruling was made. In the last case the will in terms committed any after-born child to the guardianship of his wife, adding 'which guardianship I intend and consider a suitable and proper provision for such child,' and still a similar decision was pronounced. Further citations would seem unprofitable. To sum the matter up, the common-law courts of England finally reached the conclusion that the revocation was absolute upon the happening of marriage and birth of issue, and not dependent upon evidence of testator's intentions. The general tendency of statute law in this country is in the same direction, and courts, as a rule, have carefully protected the rights of the after-born children. The language of the statute is plain and unambiguous. The will makes no provision for this child, does not mention or refer to her, and on its face manifests no intention that

she should be unprovided for. Hence it must be held that she takes the same share in the estate which she would have taken had her father died intestate, to wit, one-half."

We are inclined to adopt the liberal rule of construction which seems to have prevailed in our sister states with reference to this subject, in the absence of any expression by our own courts thereon. Article 5345 of our statute above quoted, we think, rules the present case. It therefore becomes important to determine what is meant thereby. In the case at bar, if it can be held that the will of Mrs. Pearce provided for or mentioned her unborn child, then in that event her will should be sustained. And it is contended by appellees that item 4 above quoted of her will, not only mentions but, in effect, provides for said minor. It will be seen by reference to said section that certain lots in the city of Austin are devised to her mother, and in case of her death previous to her own, then to her two sisters, Lillian and Maude. It is expressly declared, however, that this section shall be null and void in case of living issue born of her body. We think it is clear that by said section no provision is made for said after-born child. It is true that upon the happening of the contingency named the section becomes inoperative, and the result would be that the child would take a part of said property by the laws of descent and distribution; but this, in our judgment, is not such a provision for the benefit of the child as the statute contemplated must be made in the will itself, since whatever benefit comes to her is derived from the statute of descent and not from the provisions of the will. But what is meant by the word "mentioned" as used in the statute? Certainly it was not contemplated that the mere reference by the testatrix in this section of the will to the anticipated birth of a child would meet the requirements of the statute in this respect. If not, then what was intended by its use? It is true that our lexicographers say that the word "mention" means: "The act of mentioning; brief remark or statement about a person or thing; allusion; notice, etc." (Standard Dictionary.) But we think the evident purpose of the lawmakers in the use of this word in this connection was not only that reference should be made to the after-born child, but that it was intended thereby to be used in the sense of excluding the child from a participation thereunder. The law did not intend to do a vain or meaningless thing; and it seems to us that the object and purpose of the statute was that the will should be inoperative as to an after-born child, if the will failed to provide for the child, and by reference to it did not in some way manifest her intention to exclude it from taking anything thereunder. The books say that a child in ventre sa mere is capable of inheriting, provided it is born

alive. Theobald on Wills, pp. 297, 298; Am. & Eng. Ency. Law (2d Ed.) vol. 27, p. 816. It is then just as capable of particular and definite mention as though it had been born, except that it could not be referred to by name; and a failure by the testatrix, we think, under such circumstances, to specifically refer to the fact of her enceinte condition, and to either provide for or exclude such child, is equivalent to pretermittting said child.

It is obvious from what has heretofore been said that under the common law a wife's will, who was enceinte at the time it was made, failing to provide for or exclude the child from participation thereunder, would, by reason of the changed condition, to wit, the birth of the child, thereby be revoked. It is true it has been held in *Morgan v. Davenport*, supra, that we cannot resort to the common law for causes which would operate to revoke a will, since our statute provides for and furnishes the only causes for the revocation of a will in this state; still, we do not think that we are prevented from looking to the common law when we are undertaking to construe and interpret the meaning of the statute itself. But there is a distinction between what the statute may be intended to embrace, and what acts or things may really be embraced thereby. So here, where there is no special provision for the expected child, and where there is no reference to the testatrix's then enceinte condition, but a mere general statement to the effect that a certain item of the will should not be operative in the event of the birth of a child, is not, in our judgment, such a mention as the statute contemplates. The obvious meaning of this statute seems to us to be that where the expected child is unprovided for, and there is likewise a failure to definitely exclude it from participation in the estate by some direct mention, it will as at common law have the effect to revoke and annul the will, and thereby permit the child to inherit from its parent, as though she had died intestate.

Again, is not the mention that is made of the after-born child in the will equivalent to pretermittting said child? It is true, said child's birth may be said to have been contemplated by the testatrix when making the will, but that is all—no provision is made for her by said item of the will, as we have seen, nor is she excluded therefrom, nor does it provide that any particular thing should flow from this allusion to the child. The mention thus made of the child is, therefore, so far as the legal effect is concerned, no more than if she had not been considered at all. Now we think this last section of our statute should be construed in connection with the two preceding articles; and it is evident that the three together were intended by the Legislature to cover the entire sub-

ject of posthumous children. Now the two preceding articles, in effect, provide that posthumous children shall be allowed to inherit upon the concurrence of two things, as therein stated—that is, upon the birth of the child subsequent to the execution of the will which is not therein provided for but which has been pretermitted thereby—that is, not considered, mentioned, or referred to. The fact that the article under consideration which immediately follows these uses the expression that the child, if not provided for therein, must be in fact mentioned in order to make the will effective, would seem to indicate that by the use of the word "mentioned," it was intended that something more than a mere meaningless reference to the child was intended; for if this were not true, the word "mentioned" in this connection, would mean no more than the word "pretermitted" used in the two preceding articles. It is apparent to us that the law-makers intended by the use of the word "mentioned" that the testatrix must in fact so mention or refer to the after-born child as to evince the intent on her part that said child, who was so unprovided for by the will, should take no benefit thereunder.

So believing, we think the court erred in holding that said minor was not entitled to participate in the partition of the land described in the petition, for which reason we think the judgment of the court below should be reversed and the cause remanded, and it is so ordered.

Reversed and remanded.

#### HARTFORD FIRE INS. CO. v. BECTON et al.†

(Court of Civil Appeals of Texas. Dec. 15, 1909. On Motion for Rehearing, Jan. 19, 1910.)

#### 1. DEPOSITIONS (§ 83\*) — SUPPRESSION — GROUNDS.

Depositions could not be suppressed on the ground that a motion to strike out was not passed upon at the term it was filed; the statute expressly authorizing that it be passed upon at the next term.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 83.\*]

#### 2. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—FACTS OTHERWISE SHOWN.

Where the fact sought to be established by depositions was shown by all the evidence so that there was no issue thereon, any error in admitting the depositions was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

#### 3. APPEAL AND ERROR (§ 1060\*)—HARMLESS ERROR—IMPROPER ARGUMENT.

Where, in an action on a fire policy, in which the principal issue was whether plaintiff kept an iron safe in his store and kept his books therein as required by the policy, and the evidence showed that he kept the safe, but made it an issue of fact whether the books were kept

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
† Writ of error denied by Supreme Court.

there on the night of the fire, and the court required a finding for defendant if they were not, remarks of plaintiff's counsel in the opening argument that "if Jesus Christ, the Son of God, should come to earth and take out an insurance policy, and His property was destroyed by fire, these insurance companies would charge Him with burning up his property," could not have prejudiced defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.\*]

**4. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—PREJUDICIAL EFFECT.**

In an action on a fire policy, if testimony by insured's wife that defendant's agent did not offer to return the unearned premium to herself or her husband was not admissible because the premium should have been returned to insured, if to any one, its admission was not reversible in view of her testimony that the premium was not offered to her husband.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

**5. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—PREJUDICIAL EFFECT.**

In an action on a policy covering goods destroyed by fire, any error in admitting testimony that, when witness was at plaintiff's store a couple of weeks before the fire, the goods therein appeared to be worth a certain sum, because the value before the fire was not evidence of the value at that time, was not harmful to defendant, where there was no evidence tending to show that the value of the goods at the time of the fire was less than the amount of the verdict for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.\*]

**6. INSURANCE (§ 662\*)—FIRE INSURANCE—ADJUSTERS—ADMISSION OF EVIDENCE.**

Where, in an action on a fire policy, there was no proof of a custom by the company's adjuster to notify insured before examining the property after the fire, and the policy did not require such notice, it was error to admit evidence that the adjuster did not notify plaintiff's attorney before investigating the loss.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 662.\*]

**7. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—PREJUDICIAL EFFECT.**

Error in admitting testimony, in an action on a fire policy, that the company's adjuster did not give insured's attorney notice when he went to investigate the loss after the fire, was not prejudicial so as to be reversible, even if tending to give the impression of a design to secure a false and favorable statement from insured, where an inference could have been drawn from other testimony that defendant's adjuster gave no notice to plaintiff's attorney.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

Error from District Court, Guadalupe County; M. Kennon, Judge.

Action by J. D. Becton and another against the Hartford Fire Insurance Company. From a judgment for plaintiffs, defendant brings error. Affirmed.

Wm. Thompson and Geo. S. Wright, for plaintiff in error. Ben H. Terrell, A. H. Young, and Dibrell & Mosheim, for defendants in error.

**JAMES, C. J.** This suit was instituted on August 8, 1907, by J. D. Becton, as the assured, on a fire insurance policy in the sum of \$1,600, covering a stock of goods and fixtures belonging to plaintiff in his store at Olmus, Tex., which he alleged was destroyed by fire on or about May 31, 1907.

Defendant answered by demurrers and alleged violations of the policy as follows: (1) That the assured neglected to keep the books as provided in the iron-safe clause, and neglected to keep same in an iron safe at night, or at some other place than the store, and negligently permitted such books as were kept to remain in the store outside of the safe and permitted the same to become. That he neglected and failed since the fire to produce the books and inventories as called for in the contract. (2) That, after the issuance of the policy, the assured sold the entire property, or a large part thereof, and thereafter the property, and particularly a portion described as a stock, was removed from the building, and such stock was sold in bulk and remained in another location and was not injured or destroyed by the fire, which sale defendant was informed and alleges was to one Petit. (3) That there was a mortgage on the fixtures at the time the policy was issued, or was placed thereon after the policy was issued. The answer also pleaded that, after the fire, defendant by letter to the assured denied liability on the policy and offered to return the premium on surrender of the policy; also pleaded that the assured was not the sole and unconditional owner of the property insured, which was one of the conditions.

By supplemental petition plaintiff and his trustee in bankruptcy, Ben Terrell, alleged that defendant's agent agreed to issue a policy without the iron-safe clause and other matters, to which pleading defendant filed a supplemental answer containing exceptions to the above and general denial. Subsequent pleadings were filed, in which defendant pleaded that it was provided in the policy that, if the assured should swear falsely in reference to a loss before or after a fire, it should become null and void, and that Becton did swear falsely in reference to the loss in question, and this was denied by plaintiff. The verdict was for plaintiff for the full amount of the insurance.

The court did not submit anything with regard to the issue whether or not the defendant had waived the iron-safe clause, but, on the contrary, the court assumed the validity of the clause in all of its parts. Hence the first, second, and third assignments are overruled.

The fourth, fifth, and sixth assignments complain of the overruling of defendant's motion to suppress the depositions of Colville, Allensworth, and Holmes. The depo-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sitions were not subject to be suppressed because the motions to strike out were not passed on at the term at which they were filed; the statute expressly authorizing them to be passed on at the next term. Another ground of objection which figures under these assignments is that the notary's certificate on the envelope or envelopes did not have his seal attached to his signature. This, it appears, has been held essential by the Court of Civil Appeals for the Third District in a case not yet officially reported styled *Wisegarver v. Yinger*, 122 S. W. 925. We find it unnecessary, for the reason hereafter stated, to rule on this question. All these depositions appear to have been directed towards showing the goods on hand when the fire occurred. Inasmuch as by all the testimony the value of the goods destroyed was shown to be in harmony with the verdict, and there was really no issue on the subject, an error, if any, in admitting the testimony, was an immaterial one. The same applied to the seventh and eighth assignments, and also to the eleventh, in connection with which we show that appellant's brief does not allege that there was any issue in the evidence concerning the value of the goods on hand at the time of the fire, and hence these assignments fall short of pointing out error, and are therefore insufficient in substance. For this reason alone these assignments should be overruled.

The ninth assignment complains of the following remark of appellee's counsel made in the opening argument to the jury: "If Jesus Christ, the Son of God, should come to this earth and take out an insurance policy and His property was destroyed by fire, these insurance companies would charge Him with burning up his property." Counsel in the proposition say this should reverse the judgment in an action against an insurance company where there is no charge of arson either in the argument of defendant's counsel or in the pleading, and where there is a close issue of fact, and where the court, when such language was objected to at the time, did nothing in the matter. The language by counsel in an argument in any circumstances cannot be commended. The question for us, however, is merely whether or not it probably influenced the jury in deciding what was in issue before them. Appellant, at considerable length, goes into the evidence, and seeks to show, to state the matter briefly, a state of evidence tending to show that Becton had no safe, and also, that he did not have the books in a safe the night of the fire. That Becton had no safe, and could not and would not keep a safe in his store, was indicated in the sworn statements signed by Becton and his wife taken after the fire on an examination by defendant. We will here simply refer to the fact that much testimony was adduced showing that the statement signed and sworn to by Becton

was extracted from him while he was drunk and irresponsible, and that given by his wife she signed through fear of her husband, who required her to do so. We mention this, but do not think it material in this connection. We find that outside of these statements all the evidence by witnesses showed that Becton kept an iron safe in the store. If these witnesses had been only those introduced by plaintiff, an issue might be taken to have fairly existed as to whether their testimony, or the admissions in the sworn statements, represented the truth of the matter. But defendant itself put a witness on the stand, and showed by him that the safe was kept in the store. Now, defendant could not have reasonably expected the jury to find that the safe was not kept, having itself introduced a witness to show that it was there, and all other witnesses testifying to the same fact. Looking at it in a practical way, there was only one way the jury could have been expected to resolve the question, and we think, therefore, it can well be said that there was really no issue before the jury as to the safe being kept.

The other issue referred to by counsel, viz., were the books in the safe that night? was one that clearly did exist, and could have been resolved either way. The court distinctly and expressly charged the jury to find for defendant if the books were not kept in the safe that night. It seems to us that it would be unreasonable to say that the above language of counsel affected, or was calculated to influence, a presumably fair-minded and average jury in the decision of an issue so clearly and decisively submitted to it, concerning a fact with which the remark had not the slightest connection.

We overrule the tenth assignment, for the reason that the evidence it refers to appears to have been immaterial. As briefed, the basis of the assignment is that the policy provided that it shall be canceled at any time by the company by giving five days' notice of such cancellation, and, if this policy shall be canceled, as heretofore provided, or become void or cease, the premium having been actually paid, the unearned premium shall be returned on surrender of this policy. Mrs. Becton's testimony, objected to, was that at the time (in August 1906) of a sale by Becton to Petit she told Tips, defendant's agent, about the sale, and he did not offer to return to her, or her husband, the premium. Now, confining appellant to the proposition in the brief under this assignment, it raises this question only that: "If the unearned premium should have been returned to any one, the proper party for it to be returned to was the assured, J. D. Becton, and testimony to the effect that the agent, Tips, did not offer to return any part of the premium to I. M. Becton, the wife of assured, was immaterial, inadmissible, and misleading, and the court's refusal to sustain defendant's ob-

jection to such evidence on that ground was reversible error." Inasmuch as she answered that it was not offered to herself or her husband, there is nothing of substance in the proposition.

The eleventh complains of testimony by witness Terrell, who stated that he was at plaintiffs' store a couple of weeks or such matter before the fire, and he would say from the size of the house and the way the goods looked on the counter the goods were worth \$3,500. This was objected to because their value two weeks or so before the fire was not proper evidence of the value of the goods there at the time of the fire. In no event could this testimony have been harmful to defendant, unless there was evidence tending to show a less value of the property at the time of the fire than was necessary to justify the verdict for \$1,600. Nowhere in connection with this assignment or otherwise is it pointed out in appellant's brief that there was testimony which raised an issue concerning the value of the goods as being of insufficient value. Unless there was such an issue made by the testimony, the admission of this testimony is not shown to have been prejudicial error, and the assignment is of no force in itself without some such statement connected with it.

The twelfth assignment complains of the admission of Terrell's testimony as follows: "Question. Now, state whether or not you were notified by Mr. Tips, the agent of the company, that this adjuster was going out there to investigate? Ans. I wasn't notified by any one." Appellee claims that it was proper to show that Becton's attorney (who was Mr. Terrell) was not notified of the examination, as a material circumstance, in view of the fact that the evidence shows that the adjuster secured the services of the justice of the peace and of the county attorney and, went out in the country where Becton was, made him beastly drunk, and procured a written statement from him when he was not in a condition to make a rational statement. Appellant in its brief says that the testimony was inadmissible and improper, as it was easily used to influence the jury, and also that the evidence shows that the adjuster who held the examination was Ford, and, if a notice should have been given, Tips, the agent, was not the one to give it. We think the admission of the evidence was improper, no notice being required to the assured's attorney, and there was no proof of such a custom. But it should not cause a reversal unless it was prejudicial. This then is the question. Appellant does not state, but leaves it to be inferred how such testimony might be used to influence the jury. We infer that it might have been so used to create the impression that the omission was in furtherance of a deliberate design to secure from Becton a false and favorable statement. Was not such an inference possible from the other

evidence? Ford testified that he did not know who Becton's attorney was. From this it is certain that Ford gave no notice to Becton's attorney. Becton's attorney was not present, and it was entirely improbable from all the circumstances that Tips notified any attorney. In view of these considerations, we think the judgment should not suffer a reversal for such matter alone.

The thirteenth assignment is overruled. There was no error in refusing to give the peremptory instruction. The uncontroverted evidence did not, as is claimed by appellant, show that plaintiff sold his stock of goods in bulk to Pettit.

The fourteenth is overruled, as the verdict is not contrary to and is supported by the evidence.

The fifteenth and sixteenth are likewise overruled for the reason that the verdict for plaintiff was not ambiguous or uncertain in the fact that the plaintiff in the action consisted of Becton and his trustee in bankruptcy, who was prosecuting and representing the same right.

Judgment affirmed.

#### On Motion for Rehearing.

The first proposition of appellant's motion might be misleading, unless a further explanation is made of the evidence. It may be that the statement of Mrs. Becton that the inventory taken on January 1, 1907, showed \$3,000 worth of stock and fixtures taken with her further statement that the sales averaged from \$30 to \$100 a day and never less than \$30, had a tendency standing alone to show that at the date of the fire in May, 1907, the stock became depleted to below the amount of the insurance, although all the witnesses who testified as to what was on hand then placed the value at about \$3,000. Appellant says that the depositions that were admitted over objection were used to show that the depletion was made up by purchases; and hence their materiality. Had these depositions not been introduced, the evidence on the subject of value at the time of the fire placing it at \$3,000 would nevertheless have been uncontradicted. That testimony necessarily carried the implication that the stock had been kept up.

However this may be, Mrs. Becton was allowed to testify without objection as follows: "It (the inventory) showed that we had on hand January 1, 1907, something like \$3,000, between \$3,000 and \$3,500. Sometimes I would do the buying from that time on, and sometimes Mr. Becton. \* \* \* I kept the books myself, and they showed every day sales, cash sales, credit sales, and my buying—what I bought every day. I mean that I put down on the books all that I sold, whether it was for cash or credit, and the goods that came in the store." The testimony of all the witnesses, some disinterested, showed the goods on hand when the fire occurred at approximately the value

of the inventory of January 1st, and nobody testified to the contrary, and, as there was testimony that was uncontradicted that goods were bought from January 1st on, and the business went on as usual, we fail to see how in view of all this that the statement of Mrs. Becton that the daily sales ran from \$30 to \$100 tended to show the contrary or to raise a conflict in the evidence as to the value of the goods burned.

The motion is overruled.

**GALVESTON, H. & S. A. RY. CO. v. WORD.**  
(Court of Civil Appeals of Texas. Jan. 5, 1910.)

**1. CARRIERS (§ 228\*)—CARRIAGE OF LIVE STOCK—ACTIONS—EVIDENCE.**

Where sheep could not have arrived at their destination in time for the market of the day on which the shipment would have been made had cars been furnished in a reasonable time, evidence of the state of the market on that day was irrelevant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 959; Dec. Dig. § 228.\*]

**2. EVIDENCE (§ 113\*)—RELEVANCY—MARKET PRICE OF LIVE STOCK.**

Where the market price of a delayed shipment of sheep at their destination on a certain date was in issue, a trade publication showing merely a demoralization in the live stock market on that date, and the cause thereof, but containing nothing definite as to the price of sheep, was properly excluded as irrelevant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 260, 260½; Dec. Dig. § 113.\*]

**3. CARRIERS (§ 230\*)—CARRIAGE OF LIVE STOCK—BREACH OF CONTRACT—INSTRUCTIONS—APPLICATION TO CASE.**

Where the sole issue was whether a defendant had furnished cars to a live stock shipper in a reasonable time after demand, a special charge in the language of Gen. Laws, 1907, p. 343, c. 184, that it was defendant's duty to have sufficient cars to meet all demands, was erroneous as calculated to cause the jury to consider that a duty not in issue was important.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. § 230.\*]

**4. TRIAL (§ 228\*)—INSTRUCTIONS—SUFFICIENCY.**

A charge exonerating defendant from liability, if "defendant" was guilty of contributory negligence by failing to exercise ordinary [care] in his shipment, is not rendered misleading by the use of the word "defendant" instead of "plaintiff," and the omission of the word "care"; the meaning being apparent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 509-512; Dec. Dig. § 228.\*]

**5. APPEAL AND ERROR (§ 730\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.**

An assignment of error complaining of the court's failure to submit an issue in a certain manner, though charges were requested, instead of alleging error in respect to the refusal of the charges, is insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013-3016; Dec. Dig. § 730.\*]

**6. CARRIERS (§ 45\*)—CARRIAGE OF GOODS—FURNISHING CARS—INSTRUCTIONS—APPLICATION TO CASE.**

Where a shipper based his action against a carrier upon its failure to furnish cars on a given date alleged to be a reasonable time after a

demand, a charge authorizing a recovery for failure to furnish cars in a reasonable time generally was erroneous as submitting an issue not pleaded.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 45.\*]

**7. TRIAL (§ 260\*)—INSTRUCTIONS—REGULATIONS.**

A charge substantially embodied in one given is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-656; Dec. Dig. § 260.\*]

**8. CARRIERS (§ 217\*)—CARRIERS OF LIVE STOCK—LOSS—CONTRIBUTORY NEGLIGENCE.**

A shipper of live stock is not guilty of contributory negligence in simply having his stock at the point of shipment at what is in fact a reasonable time after a demand for cars.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 961; Dec. Dig. § 217.\*]

**9. TRIAL (§ 191\*)—INSTRUCTIONS—APPLICATION TO FACTS.**

A charge detailing facts which are not all uncontroverted is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.\*]

**10. CARRIERS (§ 230\*)—CARRIERS OF LIVE STOCK—ACTIONS—INSTRUCTIONS.**

Where there was evidence that a panic had affected the live stock market at the destination of a shipment of sheep, delayed by neglect to furnish cars in a reasonable time, and that there was a decline in the sheep market prices on that account, the carrier was entitled to a charge that it was not liable for a fall in the market, if no better prices were obtainable on the day that the shipment would have arrived had cars been furnished than on the date of its arrival.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. § 230.\*]

**11. CARRIERS (§ 230\*)—CARRIERS OF LIVE STOCK—ACTIONS—INSTRUCTIONS.**

Where the carrier was entitled to a charge that, if no better prices were obtainable on the day on which the shipment would have arrived had cars been furnished than on the day of its arrival, the shipper could not recover for a fall in the market, the reference in the charge to the cause of the fall in price which the evidence developed did not vitiate it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. § 230.\*]

**12. CARRIERS (§ 230\*)—CARRIERS OF LIVE STOCK—ACTIONS—INSTRUCTIONS.**

The carrier was not entitled to a charge that it was not liable for a decline in the live stock market, if, owing to a financial panic, there was no readier sale for a shipment on the day on which it would have arrived had cars been furnished within a reasonable time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 962; Dec. Dig. § 230.\*]

Appeal from District Court, Bee County; James C. Wilson, Judge.

Action by R. E. Word against the Galveston, Houston & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Baker, Botts, Parker & Garwood and Proctor, Vandenberge & Crain, for appellant. Dougherty & Dougherty, for appellee.

JAMES, C. J. Plaintiff (Word) sought damages alleged to have been caused him by the failure of defendant to furnish him, at

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Del Rio, Tex., within a time alleged to be a reasonable time, certain cars in which to ship some 1,094 head of sheep from Del Rio to Ft. Worth. Plaintiff alleged that the demand for said cars was made on October 26, 1907, to be furnished October 31st, and by reason of the fact that said cars were not furnished by defendant until November 4th the sheep were held at Del Rio, and while so held awaiting the cars they shrank and lost in weight to a large amount. Also, alleged that by reason of said delay the sheep did not reach Ft. Worth until November 6th, and that the market there had declined to such an extent that plaintiff could not sell same, but was compelled to hold them for 70 days at great expense for feed and care, and that the market value of the sheep on November 6th was much less than it was on the 1st and 2d days of November, being the dates, alleged by plaintiff, that his sheep would have arrived had defendant furnished the cars on October 30th or 31st; all the damages being laid at \$2,500. Defendant interposed demurrers, and plea of general denial, and alleged contributory negligence on the part of plaintiff, also specially plaintiff's damages, if any, were the direct result of his negligence in this: That plaintiff, for a long time prior to this shipment, knew, or in the exercise of common prudence should have known, that owing to the then prevailing money panic, or by reason of the extent of the supply of sheep upon the market at that time, or for both of said causes, there was practically no sale for sheep of said character upon said market, and notwithstanding this he shipped same to Ft. Worth, and that if it be true that at the time his sheep arrived in Ft. Worth there was no market there for them, and he was damaged thereby, the shipment was made with knowledge of such market conditions, and therefore he should not recover. There was another plea which appellant does not consider of sufficient importance, on this appeal, to state in its brief, and which we likewise deem it unnecessary to mention. Plaintiff was given a verdict for \$1,534.50.

We overrule the first assignment of error for the reason that the petition, tested by the terms of the special demurrer, was sufficient. The point elaborated by propositions was not within the terms of the special demurrer.

The second assignment is also overruled. The case as submitted by the court's charge rendered the subject-matter of this special demurrer immaterial.

The third, fourth, fifth, and sixth assignments deal with certain statements or reports contained in the Ft. Worth Daily Live Stock Reporter issued on October 31st, November 1st, and November 2d, 1907. Under no theory of the evidence could the sheep have arrived in Ft. Worth in time for the market of the 31st, and testimony of the state of the market on that date was irrele-

vant. Hence the third and fourth assignments disclose no error. As to the fifth, the portion offered of the said publication of date November 1st contained nothing on the subject of market prices except prices which prevailed on the 31st, the day previous. As to the sixth, the publication, which had reference to November 1st, was as follows: "October, 1907, will long be remembered by handlers of stock as the period in which occurred one of the sharpest declines and most unsatisfactory conditions that has prevailed in the trade during recent years. Along about the middle of the month tightness in the money market and a few bank failures began to disturb financial New York, and soon spread until it engulfed to a lesser degree the entire country. In the live stock trade the flurry in financial circles made much worse conditions that were already bad, and which had been caused, as regards cattle, by excessive marketing here and elsewhere. The situation during the last eight or ten days of the month was one of complete demoralization in the market, and though supplies during the last four days were considerably reduced, more cattle came in than could be moved at much the lowest prices of the year, while hog values touched the lowest level since January, 1906." Except that it shows that the live stock trade was depressed, the extract offered tended to furnish nothing definite as to the market price of live stock on that date. Besides, it had no express reference to sheep.

The seventh assignment refers to the following, from the same Reporter of date November 2d: "The sheep market held up well until Thursday when prices broke a big quarter in sympathy with declines elsewhere. The tightness of the money market caused feeders to be neglected, and some have been here all week, without finding a buyer. Desirable eighty-pound grass wethers sold on Thursday at \$4.80." The Thursday preceding was October 31st, which was not a relevant date. In so far as the foregoing extract has a tendency to throw light on the market as it existed on the 2d of November, it does nothing more than to show a depression, and the cause thereof. The court was not concerned with the cause, but with the fact as to what was the market price of such sheep as plaintiff's, on the proper date in that market, and the publication furnished nothing definite on that issue, and not negating that there was some market for sheep. Publications of this kind, like other forms of evidence, are not admissible unless they are relevant to the issue. The fact to be inquired into being the market price of these sheep at Ft. Worth on a certain date or dates, if the publication offered in evidence does not afford evidence of that fact, there could be no error in excluding it. The fact that on that date the market was depressed or demoralized (there appearing from the publi-

cation that there was some market on the date) would not shed light on what the market value was. Whatever the cause, the question still would be, what that value was at the time.

The eighth assignment complains of the following special instruction given at the request of plaintiff: "You are instructed that it was the duty of the defendant to provide sufficient cars to enable it, with all reasonable dispatch, to perform all of its duties as to all traffic which, with ordinary diligence and foresight, could be anticipated, as a common carrier"—because same is a charge upon the weight of the evidence, and upon an issue not raised by the pleadings, nor by the evidence, and, in effect, assumes that failure to do a certain thing would constitute negligence upon the part of defendant." We think this assignment is well taken. The issue as made was whether or not defendant furnished these cars within a reasonable time. The charge prepared by the court contained a clear presentation of this issue. Negligence of defendant in no other respect was claimed. The giving of the above special charge confused the issue, because it was calculated to cause the jury to consider that a certain duty of railroad companies, which had nothing to do with this case, was important. It is true the language of this special charge is taken from the act of May 1, 1907 (Gen. Laws 1907, p. 343, c. 184); but immediately following it the statute proceeds to say: "And to furnish all necessary and suitable cars and vehicles of transportation for all freight offered or tendered, or to be offered or tendered to it for shipment within a reasonable time after demand made therefor by any shipper of such freight."

It is clear from these provisions that a railroad company, while required to equip itself with cars sufficient to meet the demands of freight upon it, is not required to have at every point on its line a sufficient supply of cars to meet all demands. It is not claimed that these cars were not furnished plaintiff in time, because defendant did not have sufficient cars, but because defendant failed to have them at Del Rio within a reasonable time after the demand for them. The portion of the statute given in charge was inapplicable. The two clauses of the statute relate to entirely different subjects. The duty embodied in the special instruction was to provide itself with sufficient cars, the other was to have sufficient cars for a particular shipment at a particular point within a reasonable time after demand. The very fact that the court charged the duty imposed by the former provision was calculated to impress the jury with its importance as a factor in this case in determining reasonable time. What its effect, if any, upon the jury was, we have no means of determining; but its presence in the charge may have had the effect of leading them to sup-

pose that the failure to deliver the cars at Del Rio on October 30th or 31st was due to the fact that defendant had not complied with the duty to provide itself with sufficient cars, and that, if it had done so, the dates mentioned afforded a reasonable time in which to have had them at Del Rio. The jury should not have been so instructed as to be led to believe that they could consider a failure to perform the duty to provide itself with sufficient cars, as entering into the question of reasonable time; there being no pleading nor evidence of a dereliction in this respect.

We overrule the ninth assignment. The portion of the charge called in question is not subject to the criticisms advanced by the several propositions.

The thirteenth complains of this sentence of the court's charge because its language was confusing and misleading: "If you believe from the evidence that the defendant was guilty of contributory negligence under the circumstances and conditions by failing to exercise ordinary in the shipment of the sheep at the time he shipped the same, you will find for the defendant." The misplaced word "defendant," instead of "plaintiff," was not misleading in view of the whole sentence, and particularly from the latter part of it, from which it becomes apparent that the court had reference to the person who shipped the sheep. The omission of the word "care" was an omission which no ordinary mind in reading the whole charge could fail to supply.

The fourteenth assignment amounts to nothing, as it complains of the failure of the court to submit in a certain manner the issue of contributory negligence, although defendant requested various charges of that kind. The error in refusing requested charges should be alleged in respect to the refusal of the charges themselves.

The fifteenth complains of this portion of the court's charge: "If you believe from the evidence that the plaintiff on or about the time alleged in his petition ordered, through his agent, D. F. Green, from this defendant four double-deck and one single-deck cars for the transportation of sheep from Del Rio to Ft. Worth, Tex., as alleged, and you further believe that defendant failed to furnish said cars within a reasonable time thereafter, and you further believe that such failure, if any, to so furnish said cars, was negligence on the part of defendant, \* \* \* you will find for the plaintiff." Plaintiff had not based his action upon a failure of defendant to furnish the cars in a reasonable time generally, but upon its failure to furnish them on the 30th or 31st of October, which he alleged to be a reasonable time. The allegation was as follows: "That upon receiving said order and demand, as aforesaid, which order and demand in writing as aforesaid, and reduced to writing by the agent of defendant (and de-

defendant is hereby notified to procure the same upon the trial of this cause, or secondary evidence will be offered to prove the same), it became the duty of defendant to furnish said cars either on said 30th or 31st day of October, 1907, said date being within a reasonable time after receiving said order and after the accepting of same, and plaintiff's said order was also notice to defendant company to produce said cars at the specified time; and said defendant company, at the same time, was notified verbally by the plaintiff's said agent that plaintiff would want said cars on said date. That thereby it became the duty of defendant to furnish said cars upon said date; but, in violation of this duty, defendant, its servants, agents, and employes, negligently failed and refused to furnish the said cars until the 4th day of November, 1907, and thereby plaintiff suffered damage, in this: That said sheep, while awaiting the coming of said cars at or near said town of Del Rio, and being held near by, shrank and lost weight to a large amount; and, further, by reason of such delay said sheep did not arrive at Ft. Worth until November 6, 1907, and the market at Ft. Worth for sheep at that time had declined to such an extent that plaintiff could not sell the same, but was compelled to hold said sheep for a period of 70 days, at a great expense to him, for feed and care thereof, and that the market value of said sheep on the 6th day of November, 1907, was much less than it was on the 1st and 2d days of November, 1907, being the date on which plaintiff's sheep would have arrived had defendant furnished to plaintiff cars in which to ship the same."

Plaintiff was confined to the case he pleaded. The issue he tendered was whether or not defendant's duty was to supply the cars on October 30th or 31st. We sustain this assignment because plaintiff was not entitled to recover upon the theory embodied in the court's charge, nor upon any finding except that the dates fixed by the petition constituted a reasonable time. He did not seek recovery for failure to furnish cars upon any later date; and, as appellant says, in the event it was found that said date was not within a reasonable time after the demand, plaintiff had no pleading that would warrant a recovery. Except as affected by the said error, the charge on the measure of damages was correct, which is enough notice to give the sixteenth assignment.

The seventeenth is overruled because it appears that substantially the same instruction, the refusal of which is alleged as error, was embodied in another special charge asked by defendant and given.

The eighteenth assignment is also overruled for the reason that it proceeded upon the theory that it devolved on plaintiff, before he started his sheep to Del Rio, to ascertain when he could obtain cars, and that the failure to do so was negligence on his part de-

feating his recovery. If defendant did not furnish the cars within a reasonable time after demand, and this was negligence on its part, it would be liable, and plaintiff could not be charged with contributory negligence simply from the fact that he had the sheep there at what was in fact a reasonable time after demand.

The facts detailed in the requested instruction which is the subject of the nineteenth assignment were not all uncontroverted; hence it was properly refused.

Under assignments 20 and 21 complaint is made of the refusal of charges which were as follows:

"You are instructed that if you believe from the evidence that from November 1, 1907, until November 6, 1907, inclusive, that, owing to the financial panic prevalent in the fall of 1907, that there was not a ready sale on the Ft. Worth live stock market for the various classes of live stock sold thereon, and that by reason thereof the prices of such stock declined, and if you further believe that the difficulty of making sales was as great on November 1st and 2d as it was on November 6th, and if you believe that for such reasons he could not have made any quicker sales or obtained on said dates any better prices than he could have on November 6th, you will not award plaintiff anything for any damages claimed by him by reason of the fall in the market."

"You are instructed that if you believe from the evidence that, owing to the financial panic, that there was no readier sale for plaintiff's sheep on the 1st and 2d days of November, 1907, you will not allow plaintiff anything by reason of damages claimed by plaintiff for decline in market."

We think defendant was entitled to the first of these charges. There was evidence of a financial trouble, and that it affected the market for stock of all classes at Ft. Worth, and that there was a decline in the sheep market prices on that account. The charge was, in effect, that if plaintiff could not, on that account, have obtained better prices on November 1st and 2d than he could on November 6th, he was not entitled to recover by reason of depreciation in prices. There was some testimony to the effect that there was a gradual decline in the sheep market at Ft. Worth after November 1st owing to said conditions. We may add that, defendant being entitled to have the jury instructed that if no better prices were obtainable on November 1st and 2d than on November 6th, plaintiff could not recover for a fall in the market, the reference in the requested charge to a cause thereof, which the evidence developed, did not vitiate it as a correct instruction.

We think the second of said charges was correctly refused.

We overrule the twenty-second, twenty-third, twenty-fourth, twenty-fifth, and twenty-sixth assignments. The question of ex-

cessiveness of the verdict is not entitled to discussion, in view of a new trial.

The tenth, eleventh, and twelfth are without merit.

Reversed and remanded.

**SANDERS et al. v. NEWTON et al.†**

(Court of Civil Appeals of Texas. Oct. 30, 1909. Rehearing Denied Dec. 11, 1909.)

**1. ARBITRATION AND AWARD (§ 82\*)—EFFECT OF AWARD—CONCLUSIVENESS.**

Where, in an action for a partnership accounting, the defense was that the matters in dispute had been determined by an award of arbitrators, the fact that the jury found a verdict at variance with the award, and that the arbitrators' decision was erroneous, furnished no reason for disturbing the award, if the mistake of the arbitrators was an honest one.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 440-450; Dec. Dig. § 82.\*]

**2. ARBITRATION AND AWARD (§ 78\*)—CONCLUSIVENESS OF AWARD.**

Charges of fraud on the part of arbitrators are not sustained by evidence relating to the merits of the controversy decided.

[Ed. Note.—For other cases, see Arbitration and Award, Dec. Dig. § 78.\*]

**3. ARBITRATION AND AWARD (§ 34\*)—PROCEEDINGS BEFORE ARBITRATORS.**

Where arbitrators adopted as a rule of procedure that neither party to the controversy should be present while any other witness was testifying, but the parties were informed of the rule at the outset and acquiesced therein, it constituted no ground for a vacation of the award.

[Ed. Note.—For other cases, see Arbitration and Award, Dec. Dig. § 34.\*]

**4. ARBITRATION AND AWARD (§ 82\*)—PRESUMPTIONS IN FAVOR OF AWARD.**

Awards of arbitrators chosen by parties to a controversy are final and conclusive as to all matters embraced in the agreement in the absence of fraud, mistake, or misconduct.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 440-450; Dec. Dig. § 82.\*]

Appeal from District Court, Denton County; Clem B. Potter, Judge.

Action by R. E. Newton and others against J. M. Sanders and another. From a judgment in favor of plaintiffs, defendants appeal. Reversed and rendered.

Hopkins & Milliken, for appellants. Bottorff & Gambill, for appellees.

**DUNKLIN, J.** In August, 1904, Newton Bros. entered into a partnership contract with Pinckard and Sanders to engage in the business of ginning cotton for hire. This partnership was terminated in 1907, and in an attempt to settle accounts between the partners, differences having arisen as to the respective interests of Newton Bros. of the one part and Pinckard and Sanders of the other, the parties agreed to an arbitration of those differences. Thomas McGalliard and R. E. Holloway were selected as arbitrators, and the parties agreed in writing to abide

the decision of the arbitrators. The two arbitrators so chosen by the parties selected W. C. Dixon to assist them and this selection was acquiesced in by the parties. After hearing testimony this committee made a written report, in effect, that Newton Bros. were indebted to Pinckard and Sanders in the sum of \$251. As soon as this decision was announced R. E. Newton paid to Sanders the amount due as shown by the decision. Afterwards Newton Bros. instituted this suit for an accounting between them and Pinckard and Sanders, and to recover \$2,500, which plaintiffs alleged was the amount due them out of profits realized from the partnership venture and appropriated by the defendants. As a bar to plaintiffs' right to recover, in addition to a general denial, defendants pleaded the agreement to arbitrate, the decision of the arbitrators, and plaintiffs' ratification of the award by payment of the amount awarded to defendants. By supplemental petition plaintiffs attacked the award of the arbitrators upon numerous grounds, viz., that in making the award the arbitrators acted fraudulently, and with partiality to defendants, or through a gross mistake, or that they were induced to render their decision by fraud practiced upon them by defendants, and upon the further ground that the parties to the agreement were by the arbitrators denied the privilege of being present while other witnesses were being examined, and were thereby deprived of the right of cross-examination of such witnesses. Plaintiffs also pleaded that they had complied with the decision of the arbitrators through a gross misunderstanding thereof on the part of R. E. Newton. All the issues presented by the pleadings as shown above were submitted to the jury. A verdict was returned in favor of the plaintiffs for \$1,400, but a remittitur of \$700 of this amount was entered of record, and from a judgment for the balance defendants have appealed.

After a careful examination of the record we fail to find any evidence even tending to prove that the arbitrators acted fraudulently or through mistake, or that in their decision they were actuated by a spirit of partiality towards any of the parties to the agreement. The testimony of the parties upon the issues which were included in their agreement to arbitrate seems sharply conflicting, but the parties were before the arbitrators, and it does not appear that they were denied the right to testify in full upon all matters of difference. Although the jury found a verdict upon the merits of the controversy at variance with the award, and although the arbitrators may have erred in their decision, that would furnish no reason for substituting the judgment of the court for that of the arbitrators, if the error was an honest mistake. *Morse on Arbitration and Award*, 293-299; 3 Cyc. 736, 737, and authorities

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
† Writ of error denied by Supreme Court January 19, 1910.

cited in 4 Cent. Dig. columns 400, 401. And in the absence of proof of gross and palpable error in the award such charges of fraud on the part of the arbitrators are not sustained by evidence relating to the merits of the controversy decided. *Bowden v. Crow*, 2 Tex. Civ. App. 591, 21 S. W. 612. Nor have we been able to discover any testimony in the record tending to show that any fraud was practiced upon the arbitrators by Pinckard or Sanders to induce them to render the decision that was rendered. The arbitrators adopted as a rule of procedure that neither party to the controversy should be present while any other witness was testifying, but the evidence conclusively shows that the parties were informed of this rule at the outset, and that they acquiesced in it, and thereafter proceeded with the submission of their respective claims. If such action would ordinarily constitute a valid ground to vacate the award, we think plaintiffs' right to complain was clearly waived. *McHugh v. Peck*, 29 Tex. 145; 3 Cyc. 637. Awards by arbitrators chosen by parties to a controversy are regarded with favor in law, and, in the absence of fraud, mistake, or misconduct is final and conclusive as to all matters embraced in the agreement. *Green v. Franklin*, 1 Tex. 497; *H. & T. C. Ry. v. Newman*, 2 Willson, Civ. Cas. Ct. App. § 349; *Dockery v. Randolph*, 30 S. W. 271; 3 Cyc. 808.

The record being as above indicated, the jury should have been instructed to return a verdict in favor of the defendants. This renders it unnecessary to consider other questions presented by appellants in their brief. The judgment of the trial court is therefore reversed, and judgment here rendered in favor of appellants.

### MATTINGLY et al. v. KELLY.

(Court of Civil Appeals of Texas. Dec. 4, 1909.  
Rehearing Denied Jan. 15, 1910.)

#### 1. HOMESTEAD (§ 140\*)—RIGHT OF SURVIVING HUSBAND—REIMBURSEMENT OF EXPENDITURES.

A surviving husband is entitled to the use and occupancy of the homestead, and, so long as it remains his homestead and contributes to the support of his family, he is entitled to the rents thereof as his separate property; and, where he uses the same in paying a community debt, constituting a lien on the homestead, and taxes thereon, he is entitled to reimbursement thereof out of the community estate.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 259, 260; Dec. Dig. § 140.\*]

#### 2. HOMESTEAD (§ 140\*)—RIGHT OF SURVIVING HUSBAND—EXPENDITURES.

The amount paid by the surviving husband for permanent street improvements in front of the premises, after the death of the wife, while the premises constituted his homestead, is properly deducted from the proceeds of a sale of the premises in determining the amount the only

child of the surviving husband and the deceased wife is entitled to receive.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 259, 260; Dec. Dig. § 140.\*]

#### 3. HOMESTEAD (§ 140\*)—RIGHT OF SURVIVING HUSBAND—RENTS AND PROFITS.

Where the surviving husband collected rents from real estate after the same ceased to be his homestead, the only child of the marriage was entitled to a half thereof.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 259, 260; Dec. Dig. § 140.\*]

#### 4. HOMESTEAD (§ 140\*)—RIGHT OF SURVIVING HUSBAND—EXPENDITURES.

Payment by the surviving husband of water rents on the homestead in the possession of tenants paying him rent is for his personal benefit and the community estate is not chargeable therefor.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 259, 260; Dec. Dig. § 140.\*]

#### 5. EXECUTORS AND ADMINISTRATORS (§ 7\*)—INDEPENDENT EXECUTRIX—PAYMENT—EFFECT.

Where an independent executrix, under a will authorizing her to dispose of the estate or any portion thereof, and to have complete power to manage the same, etc., advanced, in her official capacity, money in part payment of a claim of a child of testator by a former marriage, she was entitled to a credit therefor, though more than two or four years had elapsed since such advancement.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 19, 20; Dec. Dig. § 7.\*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by Mrs. Jennie Marie Mattingly and husband against Mrs. Isabella Kelly, executrix of E. T. Kelly, deceased. From a judgment granting insufficient relief plaintiffs appeal, and defendant assigns cross-error. Reversed and remanded.

Crane, Seay & Crane and Head, Dillard, Smith & Head, for appellants. Wm. Poin-dexter and S. E. Padelford, for appellee.

BOOKHOUT, J. This suit was brought by Mrs. Jennie Marie Mattingly and husband against Mrs. Isabella Kelly, executrix of the estate of E. T. Kelly, deceased, to recover a one-half interest in the community estate of E. T. Kelly and his first wife, Jennie Smith Kelly, the father and mother of Mrs. Mattingly. Plaintiffs allege that E. T. Kelly and Jennie Smith Kelly were married in 1886, and lived together as husband and wife until July 9, 1889, when Jennie Smith Kelly died; that during their marriage they acquired a house and lot situated in Dallas; that on September 3, 1895, the house and lot were sold under trust deed for \$2,400, which sum E. T. Kelly received and appropriated to his own use; that from the date of the death of Jennie Smith Kelly, July 9, 1889, to date of sale of said lot, September 3, 1895, E. T. Kelly rented said house and lot to various parties, receiving \$30 per month and in the aggregate \$2,200; that plaintiff, Jennie Marie Mattingly, is the daughter of E. T. Kelly

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and Jennie Smith Kelly, and their only child, and as such is the owner of a one-half interest in the \$2,400 received by E. T. Kelly from the sale of said house and lot, and of the \$2,200 received by him as rents; that on November 7, 1901, E. T. Kelly died in Johnson county, leaving a will, of which defendant, Mrs. Isabella Kelly, was executrix, without bond, and with authority to administer said estate and execute said will independently of any court; that said will was probated, and said Mrs. Isabella Kelly qualified as executrix January 9, 1902, and is still acting as such. Plaintiffs pray judgment for one-half of the \$2,400 received from sale of house and lot, and one-half of the \$2,200 received from rent thereon. The theory of plaintiffs was that the house and lot was the community property of E. T. Kelly and his deceased wife, but not their homestead. The defendant pleaded the statutes of limitation of two and four years, and special defenses, which will be set out hereafter, where necessary to explain this opinion. The case was submitted to the jury on special issues, and upon their verdict the court rendered judgment in favor of appellants for \$429.30, with interest from September 3, 1895, the date of the sale under the deed in trust.

The first and seventh assignments are grouped and presented together, as follows: First. The court erred in deducting from the \$2,052.19, net proceeds of the sale under the deed in trust as found by the verdict of the jury in answer to special issue No. 15, the \$505.95½ paid for interest on notes as found by the jury in answer to special issue No. 8. Seventh. The court erred in not deducting the \$505.95½ paid for interest on notes, as found by the jury in answer to special issue No. 8, from the \$1,424.25 rents collected by E. T. Kelly, as found by the jury in answer to special issue No. 2, instead of deducting the same from the \$2,052.19, net proceeds of the sale under the deed in trust, as found by the jury in answer to special issue No. 15. Under these assignments the proposition is presented that, where the husband, after the death of his wife, rents out the homestead, and uses the money thus received in paying interest upon a community debt which is a lien upon the property, he is not entitled to have the interest so paid treated as a community debt paid out of money which belonged equally to him and the child of his deceased wife. The jury found that out of the rents received by Kelly on the property described in the petition he used \$505.95½ in paying interest upon the unpaid \$833.33½ vendor's lien note. The court in rendering judgment upon this verdict deducted this amount from the \$2,052.19 realized at the trust deed sale, treating it as a payment for which E. T. Kelly's estate is entitled to be reimbursed. The deed from T. J. King and wife to E. T. Kelly, of date March 12, 1887, to the house and lot in controversy recites a consideration of \$3,750; \$1,250 cash, and

three promissory notes for \$833.33½ each, due in one, two and three years, respectively, from date, with interest at the rate of 10 per cent. per annum, payable semiannually. The first note was paid by E. T. Kelly February 3, 1888. The second and third notes were renewed from time to time, and the interest thereon at the rate of 10 per cent. per annum was paid from July 9, 1889, to the 18th of January, 1895, out of the rents received by him for the property during the time it was his homestead. The property was the homestead of Kelly at the time of the death of his first wife, and the jury found that it remained his homestead until December 15, 1893. It being his homestead, he was entitled to the "use and occupancy" of the same, although, instead of actually occupying it with his family, he rented it out temporarily and collected the rent. So long as it was his homestead, and contributed to the support of his family, he was entitled to the rents as his separate property. Having used a part of the same in paying a community debt, which was a lien on the homestead, he was entitled to be reimbursed therefor out of the community estate. *Foreman v. Meroney*, 62 Tex. 723; *Pressley v. Robinson*, 57 Tex. 453.

Was there error in deducting from the \$2,052.19, the net proceeds of the sale under the deed in trust, the \$305.12, paid out for taxes on the house and lot by Kelly after his wife's death, and while it was his homestead? The jury found that E. T. Kelly paid this amount of taxes from the moneys received by him as rents of the house and lot while it was his homestead. These taxes were a lien on the property; and, Kelly having paid the same out of the rents which properly belonged to him, he was entitled to judgment reimbursing him for the same. See authorities cited above.

The jury found in response to special issue No. 12 that Kelly paid, as permanent street improvements in front of said house and lot, after the death of his first wife, and while the property was his homestead, \$282.50. In rendering judgment the court deducted from the \$2,052.19 realized from the sale under the deed in trust this \$282.50 paid by E. T. Kelly for street improvements. Neither the assignment of error nor the proposition thereunder call in question the sufficiency of evidence to sustain the finding of the jury, or the action of the court in deducting the \$282.50 paid for street improvements. We are of the opinion there was no error in this action of the court.

The trial court rendered judgment for appellants in the sum of \$429.30, when the judgment should have been for \$452.22, after deducting from the \$2,052.19, proceeds of the sale under the deed in trust, the several sums found by the jury and the \$27.09 remitted by appellant. Under the theory of the trial court the judgment should have been for \$452.22.

The jury found the total amount of rents

collected by E. T. Kelly to be \$1,424.25, and in answer to special issue No. 1 they found that the property ceased to be the homestead of E. T. Kelly at the date of his second marriage, on or about the 13th or 15th of December, 1893, and in answer to special issue No. 4 they found that of the \$1,424.25, total rents, \$1,082.25 was collected while the property was the homestead, thus leaving \$342 collected after Kelly had abandoned the property as his homestead. The plaintiff was entitled to one-half of this \$342 collected after the property ceased to be the homestead of E. T. Kelly.

We are also of the opinion that the defendant was not entitled to a credit of \$40.30 paid out for water rents on the homestead. This was paid out for his personal benefit, and the community estate was not chargeable for the same. Besides, Kelly presumably received an increased rent on the property by reason of furnishing water, and he should not be permitted to charge the estate with money which he presumably received back in rents from the homestead.

Appellee has cross-assigned error. In her first cross-assignment she contends that the court erred in failing to render judgment in her favor and to give her credit for the sum of \$375.83, found by the jury in her favor in answer to special issue No. 13, as to the amount paid plaintiff by defendant, as executrix of the last will of E. T. Kelly, since his death. Defendant alleged in her answer that since her qualification as executrix of the last will of E. T. Kelly, deceased, and whilst acting as such executrix, and as receiver of the estate of plaintiff, she paid to and on account of plaintiff the several sums of money mentioned in Exhibit J, aggregating \$375.83, except the item of \$200, and defendant sought to have this sum of \$375.83 credited on the claim of plaintiff. The suit was instituted by Mrs. Mattingly, as heir of her mother, against appellee, as independent executrix of the last will of E. T. Kelly, deceased. The petition alleged the death of Kelly, and that he left a will appointing appellee independent executrix, and her qualification as such. Item 7 of the will is as follows: "I hereby constitute and appoint my wife, Isabel Kelly, sole executrix of my last will and testament and direct that she handle, control and manage the estates of my children until they reach the age of twenty-one years, and I authorize and empower my said wife to sell and dispose, whenever she deems it to the best interest of said children, of said property here given to said children, or any portion of the same and make good title thereto, and reinvest the proceeds thereof for the benefit of said children, and in all things to have full and complete power to manage, handle, control, sell and dispose of said children's estate until they reach the age of twenty-one years; pro-

vided that if either of said children shall marry before reaching the age of twenty-one years, my wife may, if she deem it to the best interest of said child, deliver to said child her interest in said estate, or such portion thereof as my wife may think best." The suit being to recover of appellee as executrix of the last will of E. T. Kelly, deceased, and to charge the estate in her hands with the payment of certain demands in favor of plaintiff against said estate, the defendant as executrix was entitled to a credit for the money advanced by her as such executrix to plaintiff, upon, or in part payment of, her claims. Under the powers contained in the will she was authorized to make the advancement out of the estate. The jury found that defendant had advanced to the plaintiff \$375.83, and that only \$10 of this amount was advanced more than two or four years prior to the pleading of the same in this suit. These amounts were, according to the findings, advanced by the executrix in her official capacity as executrix, and we are of the opinion limitation did not run against her in her attempt to have the same set off against a recovery by plaintiffs herein. The evidence does not appear to have been fully developed on this point. The jury having found that \$10 of the amount advanced by the executrix was barred, the judgment does not conform to the verdict, and for this error, it appearing that the other errors could be cured by reforming the judgment, the judgment is reversed, and the cause remanded.

The assignments not discussed do not present reversible error, and the questions presented by the same are not likely to arise on another trial.

#### TEXAS & P. RY. CO. v. MOSLEY.

(Court of Civil Appeals of Texas. Feb. 25, 1900.  
On Motion for a Rehearing, Jan. 27, 1910.)

#### 1. DEPOSITIONS (§ 83\*)—CERTIFICATE—SIGNATURE OF OFFICER—SUFFICIENCY.

A deposition cannot be quashed merely because the certificate was signed by the officer before whom the same was taken, without anywhere stating his official title.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 83.\*]

#### 2. DAMAGES (§ 34\*)—PERSONAL INJURIES—IMPROPER TREATMENT BY PERSON INJURED—EFFECT.

Where one sustaining a personal injury by the negligence of another used ordinary care in treating it, the fact that he improperly treated it did not defeat a recovery of the damages, which would not have been suffered by him but for such improper treatment.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 43; Dec. Dig. § 34.\*]

#### 3. CARRIERS (§ 316\*)—INJURIES TO PASSENGERS—PRESUMPTIONS.

The presumption of negligence of the carrier, arising from proof by a passenger of the derailment of the train and consequent injury

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to him, is one of fact, and may be overcome by proof that the derailment resulted from unavoidable accident, or was an occurrence which could not have been provided against by the highest practicable degree of foresight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1283-1294; Dec. Dig. § 316.\*]

#### 4. CARRIERS (§ 321\*)—INJURIES TO PASSENGER—MISLEADING INSTRUCTIONS.

Where, in an action for injuries to a passenger by the derailment of the train, there was evidence that the wreck was the result of unavoidable accident, a requested charge that, if the wreck was caused by anything other than the negligence of the carrier, the fact that there was a wreck resulting in injury to the passenger was not sufficient to justify a recovery was properly refused, because misleading the jury to believe that they were not authorized to infer negligence of the carrier from proof of the derailment of the train.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.\*]

#### 5. TRIAL (§ 240\*) — INSTRUCTIONS — ARGUMENTATIVE INSTRUCTIONS.

In an action for injuries to a passenger by the derailment of the train, a requested charge that there was no evidence that there was anything the matter with the engine that caused the wreck, and that the jury could not find that any defect in the engine caused the wreck; that if they found for the passenger, it must be on account of something other than the condition of the engine—was properly refused because argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 501; Dec. Dig. § 240.\*]

#### 6. TRIAL (§ 194\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

The instruction was properly refused because it was on the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.\*]

Willson, C. J., dissenting in part.

Appeal from District Court, Harrison County; W. C. Buford, Judge.

Action by Willie Mosley against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed pursuant to the opinion of the Supreme Court (124 S. W. 90), on certified questions.

F. H. Prendergast and W. L. Hall, for appellant. S. P. Jones, for appellee.

**WILLSON, C. J.** On account of injuries suffered by him while a passenger on one of appellant's trains, as the result of a derailment of the car in which he was riding, in an action for damages prosecuted by him, appellee recovered a judgment against appellant. Appellant's motion to quash the depositions of the witnesses Ferguson, Fears, and Dr. Hendricks in reply to written interrogatories propounded to them was overruled by the court, and when offered by appellee said depositions were admitted as evidence in his behalf. The action of the court in this respect is assigned as error. It appears from the motion to quash and the bill of exceptions approved by the court that the depositions had been returned by mail, and that

neither the postmaster nor his deputy at the office where they were deposited in the mail had indorsed thereon that he received them from the hands of the officer before whom they were taken, as required by article 2286, Sayles' Ann. Civ. St. 1897. It further appears from the bill of exceptions that the motion to quash was overruled by the court because he was of the opinion that said article 2286, in so far as it required such an indorsement by the postmaster or his deputy, had been repealed by Act April 12, 1907 (Gen. Laws, p. 188, c. 91). The act referred to amended articles 2282 and 2284 of the Revised Statutes, as same had been amended by Act April 12, 1905 (Gen. Laws, p. 105, c. 76), and added articles 2291a-2291g. The amendments of article 2282, made by Acts 1905 and 1907 referred to, are of no importance, and in determining the question presented by the assignment complaining of the action of the court in overruling the motion to quash the deposition, article 2284, as amended by the act of 1905, after directing the manner, etc., in which the answer of the witness to written interrogatories should be taken, further provided that when the deposition of the witness had been taken as it directed, it should be "forwarded forthwith in one of the ways named in article 2286." One of the ways named in article 2286 was by mail, and it declared that if depositions were returned that way, the postmaster or his deputy mailing the same should indorse thereon "that he received them from hands of the officer before whom they were taken." Article 2284, as further amended by said Act 1907, after directing the manner, etc., in which the answers of the witness should be taken to written interrogatories, required the officer taking them to "certify on envelope inclosing depositions that he in person deposits the same in the mail for transmission, stating the date when and the post office in which the same are deposited for transmission." Articles 2291a to 2291e, added by the act of 1907, relate to the manner, etc., of taking the testimony of a witness by oral examination. Article 2291f has reference to the manner of returning and opening depositions so taken, and, so far as important, is as follows: "Such depositions shall be certified and returned by the officer taking same and opened as is provided for depositions in article 2284 of the Revised Civil Statutes of Texas, 1895, as amended by this act, and as is provided by articles 2286 and 2287 of said Revised Civil Statutes, except that there shall be no requirement that if sent by mail the postmaster or his deputy mailing the same shall make any indorsement thereon." Article 2291g directs that the act "shall be deemed and construed to be cumulative of all laws providing for the taking of depositions by written interroga-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tures and answers." Appellant contends that the effect of the provisions referred to of the act of 1907 was to repeal only as to depositions taken orally the portion of article 2286 requiring the postmaster or his deputy, when the depositions were returned by mail, to indorse thereon the fact that he had received them from the hands of the officer before whom they were taken, and that as to depositions taken in answer to written interrogatories said portion of the article remained in force. Appellee contended and the trial court held that, as amended by the act of 1907, article 2284 provides a method complete in itself, not only for taking depositions in answer to written interrogatories, but also for returning them when taken, and that therefore its effect was to repeal article 2286. We do not think appellee's contention should be sustained. Repeals by implication are not favored by the law. In the absence of an irreconcilable repugnancy between the new and the old acts the new should not be held to operate as a repeal of the old act. 1 *Suth. on Stat. Construction*, §§ 258, 260, 267; *Ry. Co. v. Stoker* (Sup.) 113 S. W. 3. In the respect referred to we think there is not such a repugnancy between article 2286 and article 2284 as amended by the act of 1907. The requirement of said article as so amended that the officer shall certify, on the envelope inclosing depositions taken in answer to written interrogatories, "that he in person deposits the same in the mail for transmission, stating the date when and the post office in which the same are deposited for transmission," is not inconsistent with the requirement in article 2286 that, when such depositions are so deposited by him the postmaster or his deputy "shall indorse thereon that he received them from the hands of the officer before whom they were taken." Whether said article 2284 as so amended should be construed as repealing article 2286 in so far as it authorizes the return of such deposition in any other way than by mail is another question, and one we are not called upon now to determine. In so far as they relate to the particular question before us it is clear, we think, that the two articles are not repugnant to each other. That they may be repugnant to each other in other particulars is no reason why the older article should be held to be repealed in the particular now in question. 1 *Suth. on Stat. Construction*, § 267, and authorities there cited.

Another reason urged by appellant in his motion why the depositions of Dr. Hendricks should be quashed was the failure of the officer who took the answers of the witness to designate the office he held authorizing him to take the depositions. The certificate was: "I, John P. Slaton, the officer before whom the inclosed depositions were taken," etc. The certificate was signed simply "John P. Slaton." The statute did not in terms require the officer to so designate the office

he held, and we think the court properly refused to quash the depositions merely because he failed in his certificate to name the office he held. *Ins. Co. v. Hird*, 4 *Tex. Civ. App.* 82, 23 S. W. 394; *Park v. Bancroft*, 12 *Ala.* 468.

The court instructed the jury that appellee was not entitled to recover damages on account of mental or physical pain, or a diminished capacity to earn money, suffered by him as the result of a failure on his part to use ordinary care in treating and caring for his foot after it was injured, or suffered by him as the result of an act or acts done by him "in relation to his injured foot that an ordinarily prudent person would not have done under the same circumstances." And the court refused to instruct the jury, as requested by appellant: "That if the plaintiff failed to give his foot proper treatment after the injury, and that his failure aggravated the injury, then the plaintiff cannot recover for such aggravated injury, and this whether the plaintiff was negligent in the treatment of his foot or not." Appellant assigns as error the action of the court in so instructing, and in so refusing to instruct, the jury, and in support of its assignment insists that if appellee "treated his foot improperly, and this caused him pain or loss of earning capacity, then the defendant is not responsible for this increased pain, no matter whether the improper treatment was the result of negligence or not." We think the assignment should be overruled. The law is that if appellee used ordinary care, yet nevertheless improperly treated his foot, his right to recover damages which would not have been suffered by him but for such improper treatment would not thereby be defeated. *City of Dallas v. Meyers*, 55 S. W. 742; *Ry. Co. v. Neal*, 33 S. W. 693; *Ry. Co. v. Hagan*, 42 *Tex. Civ. App.* 133, 93 S. W. 1014; *Ry. Co. v. Johnson*, 94 S. W. 163; *Ry. Co. v. O'Brien*, 46 S. W. 389; *Ry. Co. v. Coon*, 69 *Tex.* 730, 7 S. W. 492; 4 *Elliott on Railroads*, § 1806; 6 *Thompson on Neg.* §§ 7209, 7210. Under such circumstances such enhanced injuries are generally regarded as direct results of the original injury. *Ry. Co. v. Doyle*, 25 S. W. 461; *Ry. Co. v. Saxby*, 213 *Ill.* 274, 72 *N. E.* 755, 68 *L. R. A.* 164, 104 *Am. St. Rep.* 218; 4 *Elliott on Railroads*, § 1806, and notes.

By its fifth assignment of error appellant complains of the refusal of the court to instruct the jury, as it requested, that "if the wreck was caused by anything other than the negligence of the defendant, then the fact that there was a wreck, and the plaintiff was injured thereby, would not be sufficient" to justify them in finding for the appellant. Because the carrier as a rule is in a position more easily to explain and account for a derailment of one of its trains than the passenger is, it is generally held that proof by the passenger of the derailment of the car, and of an injury as a consequence suffered by him, raises a presumption that the carrier

was negligent. 4 Elliott on Railroads, § 1634. The doctrine has been declared by the Supreme Court of this state to be "reasonable and sound." Ry. Co. v. Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103. The presumption is one of fact, and is not conclusive. It may be overcome by proof that the derailment was the result of an unavoidable accident, or an "occurrence which could not have been provided against by the highest practicable degree of foresight." 4 Elliott on Railroads, § 1634. In his main charge the court instructed the jury: "If the defendant in operating the train on which plaintiff was riding as a passenger did exercise that degree of care that an ordinarily prudent person would exercise under the same circumstances to provide a reasonably safe track and to furnish reasonably safe equipment, and to run its train at a reasonably safe rate of speed, taking into consideration the nature of its business, then you will find for the defendant, although you may believe that the plaintiff was injured on account of the derailment of said train." From the testimony of the engineer and conductor in charge of the train at the time the wreck occurred, the jury might have believed the wreck to have been the result of an unavoidable accident. The instruction given to them, just quoted above, did not indicate their duty in such an event, nor were they advised as to their duty in such an event by other portions of the court's charge. Had a proper charge supplying the omission been requested, it should have been given. A majority of the court are of the opinion that the charge requested properly was refused because on the weight of the evidence and calculated to mislead the jury, in that they might have construed it to mean that they were not authorized to infer negligence on the part of appellant from proof showing merely that the train was derailed. The writer is of the opinion that the charge refused justly is not subject to the criticism suggested, and that the trial court erred in refusing to give it to the jury.

Appellant asked the court to instruct the jury as follows: "In this case there is no evidence that there was anything the matter with the engine that caused the wreck. Therefore you cannot find that any defect in the engine caused the wreck; and, if you find for the plaintiff, it must be on account of something other than the condition of the engine." We think the instruction properly was refused because argumentative and on the weight of the evidence.

The judgment is reversed, and the cause remanded for a new trial.

#### On Motion for a Rehearing.

Answering a question certified to it by this court, the Supreme Court held that by the provisions of the act of 1907, in returning

depositions "the certificate of the officer taking a deposition 'that he in person deposits the same in the mail for transmission' is substituted for that which was before required, viz., the certificate of the postmaster or his deputy 'that he received them from the hands of the officer before whom they were taken.'" T. & P. Ry. Co. v. Mosley, 124 S. W. 90. As the judgment of the lower court was reversed on the ground alone that he had refused to quash, and admitted as evidence on behalf of appellee, depositions which had not been returned as required by the law in force prior to the time the act of 1907 took effect, the motion for a rehearing is granted, the judgment of this court reversing the judgment of the lower court and remanding the cause for a new trial is set aside, and the judgment of said lower court is affirmed.

#### WESTERN UNION TELEGRAPH CO. v. DOUGLASS.

(Court of Civil Appeals of Texas. Dec. 18, 1909. Rehearing Denied Jan. 22, 1910.)

#### 1. TELEGRAPHS AND TELEPHONES (§ 65\*)—DELAY IN DELIVERY OF MESSAGES—PLEADING AND PROOF.

In an action against a telegraph company for delay in the delivery of a message, whereby a son was prevented from reaching the bedside of his dying mother and attending her funeral, evidence that the son was the oldest child, that the relationship and feeling between himself and his mother were of the best, and that there had never been any trouble between them, was admissible without an allegation to that effect in the petition.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 60; Dec. Dig. § 65.\*]

#### 2. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR—ERRONEOUS RULINGS ON PLEADINGS.

The error, if any, in overruling an exception to allegations of a petition was harmless, where the facts alleged could be proved without the allegation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4098, 4099; Dec. Dig. § 1040.\*]

#### 3. DEPOSITIONS (§ 83\*)—DEFECTS AND OBJECTIONS—SUPPRESSION.

Where there was no appearance from the answers of a witness testifying by deposition that he was trying to evade answering the questions, the remedy of the party believing that the answers were not full enough was to procure a postponement of the case, to enable him to procure a further deposition, and the refusal to suppress the deposition was proper.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 221; Dec. Dig. § 83.\*]

#### 4. TELEGRAPHS AND TELEPHONES (§ 54\*)—CONTRACTS—LIMITATION OF LIABILITY—VALIDITY.

Under Rev. St. 1895, art. 3379, providing that a stipulation in a contract fixing a less period than 90 days for notice of a claim for damages as a condition precedent to the right to sue on the claim is void, a stipulation in a contract for the transmission of a message that the telegraph company will not be liable for damages where the claim therefor is not presented within 60 days after the filing of the message

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for transmission is void, and a sworn answer setting up the stipulation is of no effect.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 42; Dec. Dig. § 54.\*]

### 5. TELEGRAPHS AND TELEPHONES (§ 27\*)—CONTRACTS—VALIDITY—WHAT LAW GOVERNS.

Under the rule that remedies, as distinguished from rights, are determined by the law of the forum, the validity of a stipulation in a contract, made in a sister state for the transmission of a message, that notice of a claim for damages must be presented within 60 days after the filing of the message for transmission is determined by the law of the forum; a statute of limitation being a part of the remedy.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 27.\*]

### 6. EVIDENCE (§ 317\*)—HEARSAY EVIDENCE.

The testimony of a witness, in an action against a telegraph company for delay in delivering a message, that the messenger carried the message to town, and returned and reported that, after making inquiry, he failed to locate the sendee; that the witness did not know of whom the messenger made inquiry except persons named; that the names of others were listed on the back of the message—was inadmissible as hearsay.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174–1192; Dec. Dig. § 317.\*]

### 7. TELEGRAPHS AND TELEPHONES (§ 38\*)—DELAY IN DELIVERY OF MESSAGES—INSUFFICIENT ADDRESS.

Where, in an action for delay in delivering a message, the evidence showed that the messenger who sought to deliver the message in the town was told that he could communicate by telephone with the sendee at the residence of a third person, that he failed to do so, and that the company failed to comply with its rules as to mailing a card to the sendee or sending a return message for a more definite address, that the sender did not address the message to the care of the third person, or advise the company that the sendee was living with the third person, would not defeat recovery.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.\*]

### 8. TELEGRAPHS AND TELEPHONES (§ 73\*)—DELAY IN DELIVERING MESSAGES—NEGLIGENCE—QUESTION FOR JURY.

Where, in an action against a telegraph company for delay in delivering a message, plaintiff pleaded negligence of the company in failing to comply with its rules in failing to mail a card to the sendee, or seek information for a better address from the sending office, and the evidence showed negligence in these respects, and showed that had a card been mailed addressed to the sendee, it would have reached him in time, and that the same would have happened had the sending office been asked for a better address, the issue of negligence was for the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.\*]

### 9. APPEAL AND ERROR (§ 1062\*)—HARMLESS ERROR—WITHDRAWAL OF ISSUES FROM JURY.

Where, in an action against a telegraph company for delay in delivering two messages, sent at different times, announcing the fatal illness of the sendee's mother and her death, preventing the sendee from reaching the bedside of his mother, or attending her funeral, the sendee relied on the failure of the company to observe its rules to mail a card to the sendee, and to seek further information as to his address by communication with the sending office, and the

evidence conclusively showed that the second message was sent too late for the sendee to have gone to his mother's sick bed before her death, or in time for her funeral, so that under the court's charge no damages could be awarded for delay in delivering the second message, the refusal to withdraw all the issues involving the second message was not prejudicial to the company.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4214; Dec. Dig. § 1062.\*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by T. C. Douglass against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

N. H. Fearons and Ramsey & Odell, for appellant. Odell & Johnson, T. M. Wade, and R. S. Phillips, for appellee.

RAINEY, C. J. We adopt the statement of appellant as follows:

Appellee brought this suit against appellant for damages resulting from alleged negligence in the transmission and delivery of the following messages, alleged to have been filed at Russellville, Ala., for delivery to him at Grandview, Tex., to wit: (1) "Russellville, Ala., Nov. 30, 1905, to T. C. Douglass, Grandview, Texas.—Mrs. Douglass dangerously ill, apoplexy. Will wire you again. R. Hopkins." (2) "Russellville, Ala., December 5, 1905, to T. C. Douglass, Grandview, Texas.—Mrs. Douglass died six thirty this evening. We reach Greensboro, Thursday morning with remains. R. Hopkins." Appellee alleged that both messages were delayed both in transmission and in delivery; that at the time he was residing in the country near the town of Grandview, Tex., and that he could have been reached by the exercise of ordinary care. He also alleged that he had the use of a telephone, which was in the residence of one W. T. Singly. Appellee also alleged that the appellant had in force a rule and custom that when the addressee could not be found by the exercise of ordinary care, a postal card notice should be mailed through the United States post office, notifying the addressee of the message, and also that it was the custom of appellant to send back to the sending office a "service message," notifying the sender of the nondelivery of the message, and asking for a better address. Negligence was alleged on the failure of appellant to mail the postal card notice, and also on the failure of appellant to send the "service message" to the sender, asking for a better address. Plaintiff alleged that neither of the messages were delivered to him until about 9 o'clock a. m. on December 6, 1905, and that at the time of the delivery of said messages his mother had died, and that he could not procure a postponement of the funeral of his mother, and was thus deprived of being present at his mother's bedside be-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fore her death, and at her funeral, by reason of which he suffered mental pain and anguish, to his damage in the sum of \$1,900. The appellant answered by general demurrer, special exceptions, general denial, and the following special pleas and answers: (1) That the message and contract was in writing, and that it was stipulated that the message in question would only be delivered free within its delivery limits at Grandview, which was within a radius of one-half mile from its office at said place, and that it had in force at that time at Grandview a reasonable rule and regulation that messages addressed to persons at Grandview would be delivered only within its said delivery limits, and that at the time in question the appellee was residing from five to seven miles in the country from Grandview, Tex. (2) That it was stipulated in the contract that the appellant would not be liable for any suit for damages unless written notice of such claim was given to it within 60 days from the date of the message, that said contract was entered into in the state of Alabama, and that under the laws in force at the time in Alabama this stipulation was binding and enforceable. Appellant pleaded under oath that no written notice of appellee's claim was ever given. (3) Appellant also alleged that, at the time in question, it maintained at Grandview, Tex., certain "office hours," being from 8 o'clock a. m. to 7 o'clock p. m., that the message dated December 5th was not filed with it until after the close of its office hours on December 5th, and that same was delivered promptly after its office opened on December 6th. (4) Appellant also pleaded that the sender of the message was guilty of contributory negligence in failing to advise appellant in the first instance that the plaintiff and addressee in the message resided in the country, and in not guaranteeing to it special delivery charges for such special delivery. Appellant alleged that the said sender of the message, the agent of appellee, knew at the time of filing the message that the appellee resided in the country, etc., and his failure to so notify appellant and pay the special delivery charges was negligence on his part, which proximately contributed to the failure to more promptly deliver the messages. Appellant also alleged that the said sender was guilty of contributory negligence in failing to send the first message in care of W. T. Singly, whom appellant averred was well known in Grandview, and who had a telephone at his residence in the country. The case was tried before a jury, the trial resulting in a verdict and judgment in favor of appellee for \$500.

#### Conclusions of Fact.

That the telegrams mentioned in the foregoing statement were phoned to the office of appellant, were received by it, and were forwarded to Grandview, Tex., on the dates named. On the 6th of December the appel-

lant delivered to appellee the message sent on the 5th of December, but the message sent November 30th was not delivered to appellee until about December 15th following. The appellee lived in the country, about five miles from Grandview, on the same farm with W. T. Singly, whose phone he had use of, and which was connected with Grandview, and by the use of which the appellant delivered, on December 6th, the message of December 5th. Appellant had in force a rule that if the addressee could not be found by the exercise of ordinary care, a postal card should be mailed to the addressee, and it was the custom of appellant to send back to the sending office a "service message," notifying the sender of the nondelivery of the message, and asking for a better address. Neither of these methods was adopted by appellant in this instance. Had it done so as to the message of November 30th, the appellee could, and would, have reached his mother's bedside before her death. Appellant maintained office hours at Grandview from 8 o'clock a. m. to 7 o'clock p. m., and its free-delivery limits were within a radius of one-half mile from its office at Grandview. There was no negligence in the failure to deliver the message of December 5th, but the appellant was negligent in failing to deliver the message of November 30th.

#### Opinion.

Appellant complains that the court erred in not sustaining a special exception to the allegation of plaintiff's petition, as follows: "Plaintiff further alleges that he was the oldest child of his said mother, and that he bore towards her the strongest and most binding ties of love and affection, and that she bore towards him an intense and ardent love, and by reason of his being her oldest son she had in him the greatest confidence, and looked to him for comfort and consolation in distress and hours of need." The evidence admitted under this allegation was: "I am the oldest child of my parents." "The relationship and feeling between myself and my mother was of the best; there had never been any trouble between us." This evidence showed no more special relationship or affection than the law presumes to exist between mother and son, and in such a case as this it was admissible in the absence of such allegation; therefore, if the overruling of the exception can be considered error, no harm resulted to appellant. *Tel. Co. v. Lydon*, 82 Tex. 364, 18 S. W. 701.

Error is assigned to the action of the court in not suppressing the depositions of R. Hopkins. The motion to suppress was based on the ground that the witness failed to answer material portions of the interrogatories, and that the answers made were evasive and incomplete. The following interrogatories and answers show to what the objections relate, viz.: "(6) Is it not a fact that in your former deposition you testified in answer to direct in-

terrogatories as follows: 'On the following morning after Mrs. Douglass was stricken with apoplexy I filed a telegram at the Western Union Telegraph Office in Russellville, Ala., addressed to the plaintiff. This telegram was dated November 30, 1905, copy of which is attached hereto.' Is the statement heretofore made and sworn to by you true? A. Yes; that is the message I phoned to operator. (7) Said interrogatory asked the witness to state if he did not attach to his former answer a copy of the message in question which appeared to be on defendant's regular sending blank, form No. 2, which contains the several printed stipulations pleaded by appellant. A. Yes; the copy contained the same words as message I phoned to operator. (8) If you have stated that the above is a copy of the message as attached by your former deposition, then please state whether the statement made in your former deposition, to the effect that said copy was a true copy of said telegram, is correct or is not correct. A. The copy of telegram attached to former deposition contained the words as phoned to the operator. (9) It is a fact, is it not, that the above is substantially a correct copy of the message that you filed on November 30, 1905, addressed to T. C. Douglass, at Grandview, Tex., is it not? A. Yes; substantially a copy of the message I phoned. (10) Is it not a fact that in your former depositions taken in this case you were asked about said message, and that you testified in answer to the sixth direct question as follows: 'I sent a message stating that Mrs. Douglass was dangerously ill with apoplexy. This message was sent from the telegraph office at Russellville, Alabama? Is it not a fact that you made said answer at said time, and is it not a fact that you swore to the correctness of same, and is it not a fact that it is true? A. Yes; the operator told me that the message had been sent from his office. (11) Is it not a fact that in the first message you sent to T. C. Douglass, on November 30, 1908, you stated in same that you would wire him again, and is it not a fact that you expected to wire Mr. Douglass again, in regard to his mother's condition before requesting him to come to Russellville? A. I sent a telegram to Mr. Douglass to advise him of his mother's condition. I made no request for him to come. Supposed he would come at once if possible. Had he advised me on receipt of the message of November 30th that it was impossible for him to come, I would have kept him posted as to his mother's condition. (12) Is it not a fact that you were in the habit about this time of sending a good many telegrams, both for yourself and for others, especially the people for whom you worked, and is it not a fact that you were well acquainted with the way in which the telegraph company carried on its business, and is it not a fact that you knew that the defendant used message blanks for all its telegrams such as have been heretofore inquired about? A. Yes, the com-

pany I work for constructed a telephone line connecting with the telegraph office, and messages were handled over phone according to arrangement made with them." Each of the interrogatories were answered in the affirmative, with the further statement that the message was phoned in to appellant's sending office, which shows that the witness did not wish to be understood as having written the message on one of appellant's blank forms with printed conditions. There is no appearance from the answers that the witness was trying to evade answering the questions; and, if they were not full enough for appellant's purpose, a postponement of the case should have been sought that further depositions could have been procured. We are of the opinion there was no error in the court refusing to suppress said depositions.

The appellant objected to the admission of proof by plaintiff that the message was, by the sender, phoned into the office, which objection was overruled. The ground of objection was that appellant had sued on a contract for the transmission and delivery of a telegraphic message, that defendant had pleaded under oath that the contract was in writing, and in the absence of a sworn denial by plaintiff denying such plea, parol evidence should not be heard in support of a verbal contract.

Defendant, in its answer, pleaded various stipulations printed upon its blanks, and in the eighth paragraph of its answer it set up that if said contract was made at all, it was in writing, with the stipulation, in effect, that the appellant would not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 60 days after said message was filed with said company for transmission, and, further, that such stipulations are enforceable under the laws of Alabama, and that plaintiff had not within 60 days given notice of his claim for damages, etc. The only affidavit to said answer was made by J. O. Smith, superintendent of the company, and after stating that he was the agent of such company, and authorized to make the affidavit, he further stated "that he had read paragraph No. 8 of the above and foregoing answer, and that the facts therein stated are true and correct," and made no other reference to said answer. The objection to said evidence is not tenable. Rev. St. 1895; art. 3879, provides, in effect, that a stipulation in any contract fixing a less period than 90 days for notice of a claim for damages as a condition precedent to the right to sue on such claim is void. Under this statute the stipulation that notice of a claim for damages should be given within 60 days was void. *Burgess v. Tel. Co.*, 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833. So the answer setting up such stipulation, though sworn to, was of no effect. But appellant insists that said stipulation was enforceable in Alabama, and proof to that effect was made on the trial of this case.

The question then arises, Will said stipulation be enforced in this state, when by the statute of this state it is void? We are of the opinion that it will not. The stipulation is one of limitation, and affects the remedy as distinguishable from the right of the parties. In *Ross v. Ry. Co.*, 34 Tex. Civ. App. 586, 79 S. W. 626, in an opinion by Mr. Justice Bookhout, this court said: "It is a well-settled rule that the remedies as distinguished from the rights of the parties are determined by the law of the forum, and that the statutes of limitation are a part of the remedy, and not of the law affecting the rights." *Gautier v. Franklin*, 1 Tex. 732; *Tel. Co. v. Lovely*, 52 S. W. 563. This being a remedy, the rule in Alabama has no controlling effect as to the stipulation in question. The statutes of this state applying to the plea in question there was no error in admitting the evidence complained of.

There was no error in excluding evidence shown in the following bill of exceptions: "Counsel for defendant offered in evidence the fifth cross-interrogatory and answer of H. A. Briscoe, which said question and answer are as follows: 'Q. How soon after the first message was received did you make an effort to deliver it? State to whom you went and inquired for the plaintiff. Give the names of each, and state what time of day you saw them, and what was said to them with reference to the message and its delivery, and state where the parties were—that is, the particular locality within the town, they were—and what they were doing; state it fully so that the parties to whom you talked may refresh their memory and remember it. A. The messenger carried the first message to town, and, returning, reported that after making diligent inquiry about plaintiff, he failed to locate him. I do not know of whom he made inquiry, except the following persons: C. J. Rootes, R. N. Hill, and Alex Head. The names of the other parties he made inquiry of were listed on back of the message. I do not remember their names. I do not know where these parties were when the messenger approached them.' Whereupon counsel for plaintiff objected, for the reason that the answer was hearsay, which objection was by the court sustained, to which action and ruling of the court in sustaining said objection, etc., defendant excepted," etc. We are of the opinion that the testimony excluded was clearly hearsay, and therefore not legitimate.

Special charge No. 17, requested by appellant, was refused, of which complaint is made. Said charge was to the effect that if Hopkins did not address his message to the care of W. T. Singly, or advise the defendant that Douglass was living on Singly's place in the country, and that a prudent person would have done so, etc., to find for defendant. The court gave a charge on this issue as follows: "You are further instructed that if you find from the evidence that R. Hopkins, who delivered the message to defendant's agents or

employés at Russellville, Ala., gave to the said employés or agents an insufficient address for T. C. Douglass, and that in doing so the said Hopkins was guilty of negligence as hereinbefore defined, and if you further believe from the evidence that such negligence on his part, if any, was the proximate cause of such message not being promptly delivered by defendant's employés or agents, then you are instructed to find for the defendant." The evidence shows that when the messenger boy was seeking to deliver the message in the town of Grandview, he was told by one Roots that he (Roots) was mailing a letter to R. C. Douglass at Covington, and that he could communicate with Douglass over telephone at Mr. Singly's, his father-in-law. This shows that the company obtained the information embraced in the special charge while seeking to deliver the telegram. Therefore, if it was error to refuse said charge, the appellant is in no attitude to complain. Besides, the company failed to mail a postal card to Douglass or send a return message to the sending office that Douglass could not be found, and for a more definite address, all of which was required by the rules of the company. Under these circumstances there was no error in refusing the special charge.

The court refused special charges, which is assigned as error. The effect of said charges is that the company's free-delivery limits at Grandview were within a radius of one-half mile from its office in said town, and that it was not the duty of the appellant to deliver messages outside of its free-delivery limits, but only to use diligence to deliver within the town of Grandview, and to find for defendant. To have given these charges would, in effect, have been equivalent to a peremptory instruction to find for defendant. Plaintiff pleaded negligence on the part of appellant in failing to comply with its rules in failing to mail a postal card to Douglass, or seek information for a better address from the sending office. The evidence shows negligence in failing to do this. It further shows that had a postal card been mailed addressed to Douglass, it would have reached him in time, and he would have gone to his mother's sick bed before her death. It also shows that the same would have happened had the sending office been asked for a better address. We hold that the issue of negligence thus raised was a question for the jury, and the court did not err in refusing the charges asked.

Complaint is made of the court's refusal to give a special charge as follows: "You are instructed that the evidence shows that the message dated December 5, 1905, being the second message in controversy, sent by R. Hopkins to the plaintiff, was transmitted and delivered by the defendant company with all due and reasonable diligence, and that the plaintiff has failed to show that said defendant was negligent in the transmission and delivery of said second message, dated December 5, 1905, and all issues involving said

second message are hereby expressly withdrawn from your consideration, and you are instructed that plaintiff cannot recover from defendant by reason of any alleged negligence or breach of duty in connection with said second message dated December 5, 1905." We think no injury resulted to appellant by the failure to give this charge. It seems that plaintiff did not controvert the right of appellant to make reasonable office hours, or that the rules of the company were unreasonable, but relied on the failure of appellant to observe its rules to mail a postal card to Douglass and seek further information by communicating with the sending office. Further, the evidence conclusively shows that the last message was sent too late for plaintiff to have gone to his mother's sick bed before her death, or in time for her funeral, and it was not the proximate cause of his suffering. So under the evidence and the court's charge the jury could not have awarded damages on that ground.

We have carefully considered all the assignments of error presented, and find none showing reversible error. The evidence shows conclusively that the message of November 30th, the first message, was phoned into the sending office of appellant; no understanding was had with the operator that the conditions printed on the company's blank forms should apply thereto, that the company was guilty of negligence in failing to deliver same, and that the proper verdict and judgment were rendered.

The judgment is affirmed.

# WESTERN TEXAS COMPRESS CO. v. WILLIAMS.

(Court of Civil Appeals of Texas. May 16, 1908.)

## 1. TRIAL (§ 256\*)—INSTRUCTIONS—REQUESTS—NECESSITY.

The trial court will not be put in error for not making a fuller presentation of the defense in the preliminary statement to the jury, where defendant did not request a fuller statement.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 628; Dec. Dig. § 256.\*]

## 2. NUISANCE (§ 43\*)—ACTIONS—DEFENSES—FAILURE TO COMPLAIN.

That defendant erected its plant and operated it for some time without objection by plaintiff would not be a defense to an action for damages caused by gases, odors, etc., and the overflow of oil from defendant's tanks, as plaintiff could not complain until he was injured by the nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 105; Dec. Dig. § 43.\*]

## 3. NUISANCE (§ 7\*)—ACTIONS—CARE EXERCISED IN MAINTAINING.

If the operation of defendant's compress plant amounted to a nuisance to plaintiff, no amount of care by defendant in conducting the business would exempt it from liability for damages caused by its maintenance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 8, 7; Dec. Dig. § 7.\*]

Appeal from Taylor County Court.

Action by Alex Williams against the Western Texas Compress Company. From a judgment for plaintiff, defendant appeals. Affirmed.

D. G. Hill, for appellant. Harry Tom King and B. K. Isaacs, for appellee.

## Conclusions.

SPEER, J. Appellant did not request the court to make a fuller presentation of its defense in the preliminary statement of the case to the jury, and there was therefore no error in the court's failing to do so. Besides, the fact that appellant erected its plant without objection on the part of the appellee, and operated the same for a considerable time without complaint, would not of itself constitute any defense to appellee's cause of action. Appellee had no cause of complaint until his rights had been invaded by the diffusion of gases, odors, dust, etc., and the overflow of petroleum from appellant's tanks, and of this he could not know beforehand.

The third and sixth assignments raise the point that to entitle appellee to a recovery he must have alleged and proved negligence on the part of appellant in maintaining or operating its plant. But the reverse of the proposition appears to be the law. In other words, if the operation of appellant's plant amounted to a nuisance as to appellee, then no amount of care on the part of appellant in conducting its business would excuse it from liability for the damages. The principle is thoroughly settled in railroad cases in *Daniel v. Ft. W. & Rio G. Ry. Co.*, 96 Tex. 327, 72 S. W. 578; *Rainey v. Red River, T. & S. Ry. Co.*, 80 S. W. 95; *M., K. & T. Ry. Co. v. Perry*, 46 Tex. Civ. App. 374, 102 S. W. 1169. And the rule commends itself to us as being applicable to other than railroad cases, and indeed has frequently been so held. For a case very much in point see *Berger v. Minneapolis Gaslight Co.*, 60 Minn. 296, 62 N. W. 336, where a defendant who for his own use stored on his own land petroleum, which escaped on the premises of the plaintiff, was held to be liable for the damages, without proof of negligence on his part.

Although apparently treated by both parties as seeking to recover only for personal damages to himself, we construe appellee's petition to be broad enough to authorize a recovery for injury to the realty. So that, if the court's charge is capable of the interpretation contended for in appellant's eighth assignment of error, there is yet no error shown.

The judgment of the county court is in all things affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## TEXAS TRACTION CO. v. HANSON.

(Court of Civil Appeals of Texas. Jan. 8, 1910.)

## 1. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTION OF CONTROVERTED FACTS.

An instruction, which assumes, as uncontroverted, facts the evidence as to which is conflicting, is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.\*]

## 2. CARRIERS (§ 303\*)—STOPPING OF CARS TO PERMIT PASSENGERS TO ALIGHT—ORDINANCES.

Under an ordinance requiring a street railroad to stop at street crossings where passengers request it, where the conductor received the fare and was then informed that the passenger wanted to alight at a particular street, he must stop the car there to permit the passenger to alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1240, 1243; Dec. Dig. § 303.\*]

## 3. DAMAGES (§ 216\*)—PERSONAL INJURIES—DOUBLE DAMAGES—INSTRUCTIONS.

In an action for physical injuries resulting from fright caused by having to alight from a street car at night at a wrong stopping place and walk home alone, an instruction that the jury should allow plaintiff such damages as will fairly compensate her for the mental and physical pain endured, and which she will endure on account of the injuries, and allow her for any inconvenience to which she may have been subjected, authorizes double damages; inconvenience being included in mental and physical suffering.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 550-555; Dec. Dig. § 216.\*]

## 4. TRIAL (§ 203\*)—ISSUES—INSTRUCTIONS.

Where the testimony raises an issue, the court should give a special charge submitting it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 478; Dec. Dig. § 203.\*]

## 5. DAMAGES (§ 32\*)—"INCONVENIENCE."

The word "inconvenience," as applied to the measure of damages for personal injuries, implies what is incident to physical discomfort. It is something that results naturally from physical pain, and doubtless also from mental suffering, and the terms "mental and physical suffering" comprehend "inconvenience."

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 40, 41, 71; Dec. Dig. § 32.\*]

Appeal from District Court, Grayson County; J. M. Pearson, Judge.

Action by Jennie Hanson, by next friend, against the Texas Traction Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

M. B. Templeton, T. B. Williams, and Head, Dillard, Smith & Head, for appellant. John C. Wall, for appellee.

RAINEY, C. J. The appellee brought this suit against the appellant to recover damages for physical injuries resulting by fright, caused by having to alight from appellant's car at night and walk to her home alone in the city of Sherman. Appellant answered by general denial and contributory negligence. A trial resulted in a verdict and judgment for appellee, from which appellant appeals.

Appellant complains of error in the first paragraph of the court's charge, which reads:

"The undisputed evidence of this case shows that the plaintiff, on the night of the 14th of July, 1908, went upon one of defendant's passenger cars for the purpose of being transported from defendant's beginning station to the street named Austin, located in the southern part of the city of Sherman, Tex.; that after she got aboard of the car, and when the conductor came around collecting the fares of the passengers, she paid the conductor five cents, which was the full fare, and informed him that she desired to be taken on said car to her home at Austin street, or where said defendant company's road intersected Austin street; that afterwards the conductor informed her that there was no station on Austin street, or that the car did not stop at Austin street, and she insisted on being allowed to get off at that place, and the evidence further shows that Middleton street is the nearest street to Austin street, where the car stopped. The undisputed evidence shows further that the car passed Austin street at a rapid rate, and the plaintiff insisted upon the car being stopped in order to allow her to disembark from the same. The undisputed evidence further shows that the said car went on and crossed the bridge beyond the limits of the city, and that plaintiff was allowed to disembark at a place beyond said bridge, and which was not a regular station. The undisputed evidence further shows that under the ordinances of the city of Sherman it was the duty of the defendant company to have stopped and allowed the plaintiff a reasonable time at Austin street to have disembarked from said car on the night on which she took passage on same." The contention is that said charge is upon the weight of evidence in several particulars, in that the court assumed the existence of certain facts about which the testimony was conflicting, and the existence of such facts was a question for the jury's determination: (1) "That she desired to be taken on said car to her home at Austin street, or where said defendant company's road intersected Austin street"; (2) "that afterwards the conductor informed her that there was no station on Austin street, or that the car did not stop at Austin street, and she insisted on being allowed to get off at that place"; and (3) "that the car passed Austin street at a rapid rate, and plaintiff insisted upon the car being stopped in order to allow her to disembark from the same." The assumption by the court that the facts, as stated, were uncontroverted was error.

The theories upon which the plaintiff and defendant base their case, taken from appellant's brief, are as follows: "Plaintiff's theory or contention as to the facts of this case was that she boarded defendant's car, paid her fare, and informed the conductor that she wanted to get off at Austin street; that the conductor refused to let her off at that street, telling her the car did not stop at Aus-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tin street, and after a short conversation he went forward to see the motorman about it, and did not come back to plaintiff until the car was passing, or had passed, Austin street. Defendant's theory, or contention, on the other hand, was that when plaintiff paid her fare, she told the conductor that she wanted to get off at the last stop, not mentioning the name of any street; that the last stop in Sherman was the Rusk or Middleton street stop; that the conductor did not tell plaintiff that the car did not stop at Austin street, and did not refuse to stop the car at that street; that when the car arrived at the Rusk or Middleton street stop, the car was stopped, and plaintiff informed that it was the last stop; that the plaintiff said that was not where she wanted to get off; she wanted to get off at the next stop. The conductor then rang the bell for the car to go ahead, which it did, and then he gave the stop signal for the next stop, which would have been at or near the substation; that as the car passed Austin street plaintiff called to him that the car had passed her street, and the conductor immediately ran forward and had the motorman stop the car." The parties introduced testimony supporting their different theories, and there was such a conflict in the evidence as to the existence of the facts stated by the court as "undisputed" that whether or not they did exist was a question for the jury. Further complaining of said charge, the appellant urges the following proposition, viz.: "The undisputed evidence did not show that under the ordinances of the city of Sherman it was the duty of the defendant company to stop and allow the plaintiff a reasonable time at Austin street to disembark from said car on the night on which she took passage on same, because said ordinances, if applied to this defendant, an interurban railway company, and to its cars, interurban railway cars, are inoperative, void, and of no effect because the city or council of the city of Sherman was without authority, right, or power to pass same." Under the facts of this case we regard it as immaterial whether or not the ordinances of the city of Sherman in relation to street railways apply to appellant in the operation of its cars along the streets of said city. We do not understand that the ordinance of said city requires street cars to stop at every cross street or intersection, but it does require such stop when a passenger requests that the car be stopped at such a place that said passenger may alight, or that some one may take passage on the car. So if appellee boarded appellant's car, and the conductor received the fare, but she did not specify at the time that she wanted to alight at Austin street, then appellant would not be liable for not stopping at said street. On the other hand, if the conductor received her fare, she telling him at the time that she wanted to alight at Austin street, and the car did not stop there, then appellant was liable. *Railway v. Elliott*, 26 Tex. Civ.

App. 106, 61 S. W. 726, and authorities there cited.

The court gave the following charge, which is assigned as error, viz.: "Now, if you find and believe from the evidence that the defendant company, in refusing to allow plaintiff to disembark at Austin street, and in putting her off at the place beyond the bridge where she disembarked from said car, was under all the facts and circumstances in the case guilty of negligence, as that expression is hereinbefore defined to you—that is, if you find and believe that a person exercising a high degree of care, and a competent and cautious and prudent person, would have allowed her to disembark at Austin street, and would not have had her to disembark at the place where she got off the car—and you further believe from the evidence that, as the direct and proximate result of the acts of the defendant company, plaintiff's health was injured, and that she suffered mental and bodily pain as a result thereof, and was otherwise inconvenienced as a result thereof, then you will return a verdict in favor of plaintiff, and assess her damages against the defendant company as hereinafter instructed." The objection to said charge is it assumes that the appellant refused to allow the plaintiff to disembark at Austin street, when the evidence on this point was conflicting. We think the criticism urged to the charge is correct. There was testimony to the contrary on this point sufficient to raise an issue, and it should have been submitted to the jury for their decision, and not assumed by the court.

On the measure of damages the court instructed the jury as follows: "If under the preceding section of this charge you find in favor of the plaintiff, you will allow her such damages as will, as a present cash payment, reasonably and fairly compensate her for the mental and physical pain, if any, you may believe from the evidence she has sustained on account of her injuries, if any; also you will allow her for the mental and physical pain, if any, which you may believe from the evidence she will probably sustain in the future on account of her injuries, if any; also you will allow her for the inconvenience to which she may have been subjected in having to walk from the place where she disembarked from the car to her home." The giving of said charge is assigned as error, and the objection urged thereto is: "Said charge was erroneous because it authorized and directed the jury to assess double damages, or to assess damages twice for the same thing, in that the jury were first instructed to compensate plaintiff for all mental and physical pain, and were then instructed to compensate plaintiff in addition thereto for the inconvenience suffered by her." We think the charge is susceptible to the objection urged. The charge authorizes the jury to allow double damages, in that it instructs them to allow for mental and physical suffering and

in addition thereto for the inconvenience she suffered in the walk home from where she disembarked from the car. In the case of *Railway Co. v. McCraw*, 43 Tex. Civ. App. 247, 95 S. W. 82, in treating a charge on the measure of damages for personal injuries, the court say: "Inconvenience" would imply what is incident to physical discomfort. It is something that results naturally from physical pain, and doubtless also from mental suffering." The terms "mental and physical suffering" comprehend "inconvenience." Therefore the charge was calculated to mislead the jury and cause them to assess double damages.

The following error is presented, to wit: "The court erred in refusing defendant's requested instruction No. 5, which is as follows: 'If you believe from the evidence that the plaintiff boarded one of defendant's cars in the city of Sherman on or about the 14th day of July, 1908, and paid her fare and told the conductor in charge of said car that she desired to disembark at the last stop in the city of Sherman, and that when said car arrived at the last stop in the city of Sherman, said car stopped, and said conductor informed plaintiff that she had arrived at the last stop in the city of Sherman, and plaintiff thereupon informed said conductor that she did not desire to get off at said stop, but at the next stop of said railway, then you will find for the defendant, even though you should believe from the evidence that the conductor in charge of the car did stop the car, and permitted the plaintiff to alight therefrom before he arrived at the next regular stop of said car, if he so stopped said car at the request of plaintiff.'" This charge presented appellant's theory of its defense. There was testimony introduced by it sufficient to raise the issue, and the special charge should have been given.

The judgment is reversed, and the cause remanded.

PEARCE v. WALLIS, LANDES & CO. et al.  
(Court of Civil Appeals of Texas. Dec. 22, 1909. On Motion for Rehearing, Jan. 19, 1910.)

# 1. ASSIGNMENTS (§ 54\*)—CONSIDERATION—ACTIONS.

The assignee of a cause of action acquires title by a bona fide assignment, and may maintain an action thereon though he paid no consideration therefor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 112; Dec. Dig. § 54.\*]

On Motion for Rehearing.

# 2. ASSIGNMENTS (§ 126\*) — ACTION BY ASSIGNEE—DEFENSES.

An answer, in an action by the assignee of a claim, alleging that the assignment was made for the fraudulent purpose of conferring jurisdiction on the court in a county other than

that of defendant's residence, states no defense on the merits.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 126.\*]

# 3. VENUE (§ 58\*)—ACTION ON ASSIGNMENT—PLEA OF PRIVILEGE—SUFFICIENCY.

Defendant cannot, in a plea of privilege, seeking a change of venue, present an issue of fraudulent assignment of the claim in suit, without specially charging that the claim was fraudulently assigned for the purpose of conferring jurisdiction.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 88-90; Dec. Dig. § 58.\*]

Appeal from Coleman County Court; F. M. Bowen, Judge.

Action by J. R. Pearce against Wallis, Landes & Co. and others. Defendants had judgment, and plaintiff appeals. Reversed.

Snodgrass & Dibrell, for appellant. E. A. Hawkins and Woodward & Baker, for appellees.

KEY, J. J. R. Pearce brought this suit against the firm of Wallis, Landes & Co., composed of J. E. Wallis, N. A. Landes, and C. L. Wallis, and also against G. William Baker. The plaintiff alleged in his petition that the defendant Baker resided in Coleman county, in which the suit was brought, and that the other defendants resided in Galveston county. It was alleged in the petition that the defendant Baker, having a just claim against the other defendants for \$281.98, had assigned the same to the plaintiff and guaranteed the payment thereof. Baker filed an answer admitting the facts alleged by the plaintiff. The other defendants filed pleas of privilege to be sued in another county, which pleas were in conformity with the statute enacted by the Thirtieth Legislature (Acts 30th Leg. p. 248, c. 133) in reference to such pleas, and directing that, when such a plea is sustained, the case shall not be dismissed, but shall be transferred to the proper county. After filing the pleas of privilege referred to, and without waiving the same, the defendants answered to the merits, but nowhere in any plea did they charge that the alleged assignment of the claim from the defendant Baker to the plaintiff was simulated, fictitious, or fraudulent, for the purpose of conferring jurisdiction upon the county court of Lampasas county. Notwithstanding the failure of the defendants to present any such issue by pleadings, the court heard evidence and submitted to the jury the question of fraudulent or simulated assignment of the claim by the defendant Baker to the plaintiff, and the jury found in favor of the other defendants upon that question, and thereupon the court rendered judgment sustaining the plea of privilege and changing the venue. The pleas of privilege did not present any such issue as that referred to; and, as it was not presented by any other plea, the trial court erred in submitting it to the jury.

We also sustain appellant's contention urged in criticism of the court's charge, to the effect that the question of consideration for the assignment of the claim is not, as matter of law, of controlling effect. If there was an actual bona fide assignment of the claim, then the plaintiff acquired title, even though he may have paid no consideration. The failure to pay a consideration might constitute an important circumstance bearing upon the good faith of the transaction, but it would not necessarily and as a matter of law have controlling effect.

For the errors pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

#### On Motion for Rehearing.

In our former opinion in this case it is stated that appellees did not in any plea charge that the alleged assignment from the defendant Baker to the plaintiff was simulated, fictitious, or fraudulent, for the purpose of conferring jurisdiction upon the county court of Coleman county. That statement is too broad, and is hereby corrected. No such charge was made by either defendant in his plea of privilege, but in answering to the merits they did charge that the assignment of the claim by Baker to the plaintiff was for the fraudulent purpose of attempting to confer jurisdiction upon the court below. However, the averment referred to stated no defense on the merits of the case, and therefore, as pleaded, it was immaterial. It was no part of the several pleas of privilege to be sued in another county, and therefore it did not present any issue proper to be submitted to the jury. Notwithstanding the statute enacted by the Thirtieth Legislature amending the law with reference to pleas of privilege, we are of the opinion that a defendant cannot, in a plea of privilege seeking to change the venue, present an issue of fraudulent assignment of the claim sued upon, without specifically charging in such plea that the claim was fraudulently assigned for the purpose of conferring jurisdiction.

The motion for rehearing is overruled.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. FARRIS.†

(Court of Civil Appeals of Texas. Jan. 8, 1910.)

##### 1. DAMAGES (§ 216\*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

Where, in a passenger's action for personal injuries, plaintiff testified that he was unable to work at his business of barber after his leg was injured, because of his inability to stand on the injured limb, and had fallen off considerably in weight since his injury, and suffered from pains in his head and body, and a physician testified that plaintiff's general constitution was weakened, that his heart action was affected by the injury, and that he was not now healthy, and his condition had grown worse, and

that he would not get better and would necessarily suffer some pain, an instruction permitting recovery for future pain and diminished earning capacity was proper.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 553; Dec. Dig. § 216.\*]

##### 2. EVIDENCE (§ 474\*)—OPINION EVIDENCE—HEALTH.

A witness, who had known plaintiff for several years, though not a physician or expert, could testify that he did not seem healthy after he was injured.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2196, 2197; Dec. Dig. § 474.\*]

##### 3. EVIDENCE (§ 537\*)—OPINION EVIDENCE—EXPERT TESTIMONY—QUALIFICATIONS OF EXPERT.

A witness, who had never attended a medical school, but had studied anatomy and lectured in a medical school on another subject, could testify over objection that he was not shown to be an expert, that he examined plaintiff's legs after his injuries, and one of them seemed to be swollen and larger than the other, and that the bone called the fibula in one leg was back further than the same bone in the other leg; the weight of the evidence being for the jury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2345; Dec. Dig. § 537.\*]

Appeal from District Court, Grayson County; B. L. Jones, Judge.

Action by D. W. Farris against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Coke, Miller & Coke and Head, Dillard, Smith & Head, for appellant. Wolfe, Hare & Maxey, for appellee.

RAINEY, C. J. Appellee sued the railway company to recover damages for personal injuries received by him through the negligence of the company's servants while a passenger on one of its trains. A trial resulted in a verdict and judgment for plaintiff for \$3,500, and the railway company appeals.

The company admitted liability, and the controversy is over the amount of damages sustained by the appellee. On the measure of damages the court charged the jury as follows: "You are therefore instructed, if you believe from the evidence that plaintiff was injured in said collision, you will find in his favor, and allow him such sum as you may believe from the evidence will, as a present cash payment, reasonably and fairly compensate him for the physical and mental suffering he has sustained, if any, on account of his injuries, if any, and for the physical and mental suffering, if any, you may believe from the evidence it is reasonably probable he will suffer in the future on account of his injuries, if any; also for the time he has lost, if any, on account of his injuries, and for his diminished capacity, if any, to labor and earn money in the future on account of such injuries, if any." The giving of this charge is assigned as error, and the following proposition is submitted: "The court should only

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
124 S.W.—32 † Writ of error denied by Supreme Court.

submit to the jury those issues that are supported by evidence, and it is error for the court to instruct the jury, in arriving at the damages to which an injured person is entitled, to consider physical pain and diminished capacity to labor and earn money which the jury may believe from the evidence it is reasonably probable the injured person will suffer in future as the result of his injuries, when there is no evidence or circumstances indicating that such person will suffer any physical pain in the future, or his capacity to labor and earn money will be diminished, nor the probable amount of such pain or diminished capacity, nor how long he will probably suffer such pain and such diminished capacity."

Plaintiff alleged that he was permanently injured; that his capacity to labor and to earn money in the future was greatly diminished, and that he had suffered great physical pain and mental anguish, and would continue to suffer on account of his injuries. Appellee testified as follows: "I stayed at Celeste a day or two. I went on home then to Colbert. I tried to run my business one day when I went back home. They all needed a shave, and I shaved 8 or 10 men and I quit. I was not able to continue my business [of barber]. I couldn't stand to do the work. I was hurt about all over, and I couldn't stand on my feet long enough. Standing on my injured limb just kept it hurting me all the time, kept my limb hurting me all the time. Before I got hurt my average weight was from 185 to 190 pounds. I weigh now 145 pounds. \* \* \* I haven't had much strength to get about and labor since I was injured. \* \* \* In walking from town home, or in walking from home to town, I feel an inconvenience from that. It affects me. I get awful tired, wearied, get out of breath. I suffered after the injury, after the collision occurred. My head hurt me all the time, and back of my neck and small part of my back. My eyes hurt me a good deal. \* \* \* I use a cane in walking. I have been using it ever since I got hurt. I did not have to use a cane before. \* \* \* I use it because it helps me along; it helps me to get up and down steps and anything I have to get up on, and then it helps me in walking the road. It sort of sends me along, and takes some of the pressure off of my legs and back. I have used it ever since I got hurt. \* \* \* I was a healthy man before I was in that collision. I had not had any sickness anyways recently before that collision. I expect it had been something like 15 or 20 years, maybe 20 years, since I had been sick at all. I regarded myself as a rather unusually healthy, strong man. I don't rest now since I got injured, not good, don't rest good since I have been injured. \* \* \* Where my leg was broken, that still troubles me. It hurts me a right smart. \* \* \* I can feel the place where I claim it was fractured; I feel a knot there. There is a knot

there nearly as big as the end of your finger. My leg was injured in the knee, in some way; it is stiff. It won't come up as high as the other."

Dr. W. C. Rutledge, after having testified that he was called to see plaintiff professionally on the 2d day of November, 1907, and that appellee had been under his care and treatment from that time up to the time of trial, further testified: "The last time I examined him was this morning in Judge Maxey's office. He was sitting there in the office quietly, and I took out my watch and counted his pulse, and it was 140 beats to the minute. I had him get up and walk around the hall and back, and counted his pulse again, and it was 150. That indicates that his general constitution is weakened by reason of this condition of the nervous system brought about from his injury. I have made a test of his heart action; his heart is very much exaggerated; the tension is strong and high; the pulse is quick. \* \* \* This weakened condition from the injury, in my opinion, is affecting the heart through the nerve centers. I have examined his limb lately as to the condition of it. He has either had a fracture or a crack in the head of the tibia, the upper end of the tibia. There is distinct callus thrown out there now. That is just below the kneejoint. There is a knot on the bone that we call a callus. It is either injury to the bone or fracture there that caused this to be thrown out. I have made a test of him with having him rest his foot up, one foot at a time, to place it back against his body when he was sitting. There is a difference in his limbs, in his ability to do that; he can't bring his right foot back as far as he can the left. It must be some displacement there about the head of the tibia or thickening. Of course he is not a very healthy man now. When he first came to me he weighed about 180 or 190 pounds I presume from his looks. He was fleshy then; he is very much emaciated now to what he was then. He has lost at least 30 or 40 pounds. He is not in as good condition as he was when I first saw him. \* \* \* His condition has grown worse in many respects since I first saw him. His heart action is in worse condition than it was, and he has gradually lost flesh since I first saw him. He may in the course of time get better, but my opinion is he will not. \* \* \* A man in his condition would necessarily suffer some pain."

We think the evidence was sufficient to raise the issue as to the future suffering of appellee and his diminished capacity to earn money in the future, and there was no error in the court submitting those matters to the jury. *Railway v. Harriett*, 80 Tex. 73, 15 S. W. 556; *Lumber Co. v. Bivens*, 47 Tex. Civ. App. 396, 105 S. W. 831; *Railway Co. v. Box*, 93 S. W. 134.

Error is assigned to the admission of testimony that appellee "did not seem healthy";

the witness not being a physician and expert. There was no error in admitting this testimony. The witness had known the appellee for several years. Under the circumstances the evidence was admissible. *Railway Co. v. Boyer*, 44 Tex. Civ. App. 311, 97 S. W. 1070; *Railway Co. v. Smith*, 90 S. W. 928.

Objection was made to the testimony of one Ramsey as to the appearance of appellee as to whether he was a stout and healthy man or not. This testimony is of the same nature as that just passed upon, and the same authorities are applicable. The testimony was admissible.

Error is assigned to the admission of testimony as shown by the following bill of exception, to wit: "On the trial of the above-entitled cause, while plaintiff was offering his evidence in chief, he offered as a witness in his behalf A. C. Perrin, who testified that a short time after plaintiff's alleged injuries he examined plaintiff's legs, and that one of the legs seemed to be swollen or larger than the other, and by looking and feeling he found that the point of the bone called the fibula was back three-quarters of an inch, if not an inch, farther than the bone of the other leg, to which evidence at the time it was offered defendant objected, on the ground that the witness was not shown to be an expert, and that it called for a comparison from said witness, which objection was by the court overruled, and said evidence admitted, to which action of the court in admitting said evidence defendant excepted and tenders this its bill of exceptions No. 3." The witness also testified: "His legs were stripped up above the knee. \* \* \* I examined his lower legs. I looked at them and compared the two legs. One of the legs seemed to be swollen or larger than the other. I have never attended a medical school as a student. I have studied anatomy; I have read it. I know some of the names of the bones in the body. I don't recollect all of them; I recollect those bones in the arm and leg. I have lectured in a medical college, but not on that subject." The evidence given by the witness was based upon an examination by him of the appellee's legs, and is stated by him as the conditions existing, and we think the court properly admitted it to go to the jury for them to give it such weight as they deemed it entitled to. *Rogers*, Ex. Tes. (2d Ed.) § 182.

The judgment is affirmed.

FERRIS PRESS BRICK CO. v. THOMPSON  
et al.†

(Court of Civil Appeals of Texas. Dec. 4, 1909.  
On Rehearing, Jan. 22, 1910.)

1. MASTER AND SERVANT (§ 284\*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.

In an action for death of a brick burner from the falling of a portion of a shed upon

which he had stepped to avoid the heat, fumes, and gases arising from the kiln upon which he had been working, evidence held sufficient to take the case to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1000; Dec. Dig. § 284.\*]

2. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.

In an action for death of a brick burner from the falling of a portion of a shed upon which he had stepped to avoid the heat, fumes, and gases arising from the kiln upon which he had been working, evidence held insufficient to raise the issue that defendant had provided a safe way for brick burners to go from the shed of one kiln to that of another, and that deceased, instead of adopting the safe way, took a dangerous way.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1107; Dec. Dig. § 289.\*]

3. MASTER AND SERVANT (§§ 101, 102\*)—DUTY OF EMPLOYER—SAFE PLACE TO WORK.

It is a master's duty to provide his employees a reasonably safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 179; Dec. Dig. §§ 101, 102.\*]

4. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—DEFECTIVE APPLIANCES—INSPECTION.

In an action for death of a brick burner from the falling of a portion of a shed upon which he had stepped to avoid the heat, fumes, and gases arising from the kiln upon which he had been working, evidence held sufficient to justify a finding that a proper inspection of the shed would have disclosed the defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 968; Dec. Dig. § 278.\*]

5. MASTER AND SERVANT (§ 124\*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—DUTY OF INSPECTION.

Where brick burners had been in the habit for two or three years of using a shed along the side of a kiln to go upon to avoid the gases and heat, and cleats of wood had been nailed thereon to keep them from slipping while so doing, the duty of inspection to see that the shed was in a safe condition for so doing was upon the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 235; Dec. Dig. § 124.\*]

6. MASTER AND SERVANT (§ 235\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—DUTY OF INSPECTION.

Brick burners who had been in the habit for two or three years of using a shed along the side of a kiln to go upon to avoid the gases and heat, cleats of wood having been nailed thereon to keep them from slipping, were not required to inspect the shed to see that it was in a safe condition, but could rely upon the presumption that the employer had done his duty in inspecting the shed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 714; Dec. Dig. § 235.\*]

7. MASTER AND SERVANT (§ 280\*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—ASSUMPTION OF RISK.

In an action for death of a brick burner from the falling of a portion of a shed upon which he had stepped to avoid the heat, fumes, and gases arising from the kiln upon which he had been working, evidence held not to show that the defect in the shed was obvious, or that deceased had notice thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 983, 984; Dec. Dig. § 280.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
†Writ of error denied by Supreme Court.

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

Action by L. C. Thompson and others against the Ferris Press Brick Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

G. C. Groce, for appellant. W. M. Tidwell and Farrar, McRae & Kemble, for appellees.

BOOKHOUT, J. This was an action in the district court of Ellis county, Tex., by L. C. Thompson et al., widow and children of J. W. Thompson, deceased, against Ferris Press Brick Company, for damages resulting from the death of said J. W. Thompson, who on, to wit, September 15, 1907, received injuries at the plant of appellant resulting in his death. It was claimed on behalf of appellees, plaintiffs below, that the death of said J. W. Thompson was caused by actionable negligence on the part of appellant, of which he was an employé, in failing in various particulars alleged to furnish him a reasonably safe place to work, and in failing to properly construct, inspect, and keep in reasonably safe condition a shed of one of its brick kilns, a portion of which fell, resulting in injuries to said J. W. Thompson, which caused his death. The defendant below answered by exceptions, general and special, a general denial, and pleas of assumed risk and contributory negligence on the part of said J. W. Thompson. A trial at the September term, 1908, of the district court of Ellis county, resulted in a verdict and judgment for plaintiffs below for \$5,000 apportioned between them, and, a new trial being refused, this appeal was perfected.

#### Conclusions of Fact.

J. W. Thompson on the 15th day of September, 1907, was in the employ of appellant as a brick burner at its plant in Ellis county, Tex., on which day, while at work and within the scope of the duties of his employment, he sustained injuries resulting in his death. At the time of the injuries to Thompson appellant had seven kilns in operation at its plant in Ferris, Tex. Nos. 1, 2, 3, 4, 5, and 6 paralleled each other with about 18 or 20 feet between each, and these kilns faced to the north. Kiln No. 7 was off by itself. A kiln has permanent walls of dry brick on the sides and ends, except that one end is open. It is about 65 feet long, 25 feet wide, and 18 feet high, and looks like a solid structure without windows. At the bottom of each side are eyes, which are 15 in number to the side, and are 2 brick wide and arched over, and extend out from the walls of the kiln about 18 inches. Fuel is placed in these eyes for the purpose of burning the brick. The green brick are placed in the kiln in such manner that the heat can go through them. On top of the green brick at the top of the kiln is a layer of dry brick called "a platten." A roof is construct-

ed over each kiln as follows: Alongside the kiln, every 12 feet, posts of 6 by 8 stuff extend from the ground to above the top of the kiln. On top of these posts are plates of four by six timbers, and from these plates two by six rafters are attached, and upon which the roof is placed. The roofing is 1 by 12 boxing so arranged that half of it can be opened while a kiln is burning to enable the heat and fumes to escape. The side sheds are constructed as follows: Near the top of the kiln a two by six stringer is fastened to the six by eight posts which support the roof of the kiln. This stringer runs all along the side of the kiln. Rafters run down from this two by six stringer, and a brace of two by six stuff comes up from the posts below and meets this rafter near the center of the space between the kilns, and the ends of the rafter and brace are sawed square. To this square end is nailed a two by six stringer from one to the other of said rafters, and braces all the way down the center of the space between the kilns. On the top of this framework is nailed 1 by 12 boxing, and the outer or lower edge of the shed thus constructed is about 11 feet from the ground. There are no posts supporting the outer edge of the shed. The side sheds thus constructed from each kiln come about together in the center; in fact, the outer edge of the west shed of kiln No. 5 projects slightly over the outer edge of the east shed of kiln No. 6. There is also a shed similarly constructed running the entire north front of kilns 1 to 6, except that posts from the ground up support the outer edge of this shed. There are no posts supporting the outer edge of the side sheds, nor is there any sleeper between the outer sleeper of the side sheds and the sleeper near the top of the kiln above mentioned. In burning a brick kiln the brick burner frequently has to go on top of the kiln and work the kiln; that is, to control the heat, causing it to go to different parts of the kiln. He does this by working the platten—the dry brick on top. He has a shovel, and, when the heat has sufficiently burned a brick, he tightens up the platten there and opens it at other places, and thus regulates the heat.

One witness testified: "This is hot work, and, besides the heat, gases escape from the burning kiln. The burner puts something under his shoes for their protection. We wear a piece of belt on our shoe soles to protect them from the heat. Sometimes a man can stay longer on top of a kiln than at others. I have gone on kilns and done all the necessary work to be done at that particular time before getting off, and again I have had to get off before finishing the work. Some kilns seem to have more fumes and gases or sulphur than others, and you can stay on a kiln longer some times than you can at other times. Usually one has to get off before finishing his necessary work, then go back and finish it. This is because

of the heat and gas escaping through the top of the kiln. Generally a brick burner, when he leaves the top of the kiln, gets off on a shed—that is, if he does not aim to go down to the ground. If he has not finished his work and just steps off to cool a little, he steps off on the shed. \* \* \* When we got too warm on the top of the kiln and wanted to finish before we went down, we would just step off on a shed to cool. The foreman knew that the burners used the sheds for that purpose. On the sheds, about one-third of the way or a little more from the upper edges, cleats of wood, just any kind of material that could be picked up, had been nailed along the sheds. I know that the burners used the sheds, as I have stated, for two or three years before Mr. Thompson was hurt. There was nothing else for a man to get out on when he got too warm and had to retire, except to go out on the front shed and down to the ground."

The injuries to Thompson from which his death resulted were caused by the falling of a portion of the shed attached to kiln No. 6, which gave way at or near its outer or lower edge, causing Thompson to fall to the ground. Thompson was at work on top of kiln No. 5, and the heat and fumes and gases becoming so great he stepped therefrom to avoid the same to the shed on kiln No. 6, which gave way, and he was precipitated to the ground. That part of shed No. 6 which fell was in an unsafe condition, in that the braces, sleeper, and framework of the shed had become decayed and rotten, and the nails with which the sleepers were fastened to the braces were rusted and rotten. This condition of the shed could have been discovered by inspection, and it was appellant's duty to inspect said shed, and its failure to do so and its failure to have the shed in a reasonably safe condition for a brick burner to retire upon was negligence, which proximately caused the injuries to said Thompson. The deceased, Thompson, was not guilty of negligence, and did not assume the risk. By his death appellees have sustained damage in the amount of the verdict and judgment.

#### Conclusions of Law.

It is contended that the trial court erred in refusing to instruct the jury peremptorily to return a verdict for defendant. As shown by our conclusions of fact, there was no error in this action. The evidence made a case of actionable negligence on the part of appellant, and not purely an accident, as is contended.

Nor does the evidence raise the issue that appellant had provided a safe way for brick burners to go from the shed of one kiln to that of another, and that Thompson, instead of adapting such safe way, took a dangerous way. The evidence showed that the employees had habitually used the sheds to re-

tire upon from the gases and heat for two or three years, and that cleats of wood had been nailed thereon to keep them from slipping while so doing.

It is contended that the fact that the nails intended to hold the roofing plank to the sleeper that broke were rusted to the extent shown, and that one end of this sleeper was decayed, about two of the nails in it, and that the sleeper was defective under the roofing planks, are all immaterial, since it was shown by production of the broken sleeper itself that neither of these conditions caused the break, which began below the lowest nail on the defective end, and split up obliquely to the top of the sleeper, and that there is nothing in the evidence to show that the master would have anticipated a break of this sleeper in this way. We do not agree to this contention. It was the duty of appellant to provide its employees a reasonably safe place to work. About two or three months prior to the injury to Thompson there had been some repairs put upon the shed of kiln No. 6, the shed which gave way. The workman who made the repairs asked Nolen, the foreman, if he wanted him to go ahead with the repairing and get everything in good shape. Nolen replied: "No; just go ahead, and do what has to be done at present." The witness Reeves testified: That he "saw the broken-down section of the shed where Thompson was injured the next day after the injury, and said that the outer sleeper was broken, was busted and split up, and looked to be a little doty, and the nails were kind of rusted out. It had become decayed some and split out and part of the crack looked like it was old and had become dry from the heat. The decayed and split part of the stringer was somewhere near the center of the piece at one end. That this shed was exposed to the weather, dust, smoke, and gases which made the lumber look dark, dusty, and smoky. That all the sheds had this appearance. That, on account of the darkened condition of the lumber, he did not think its soundness or unsoundness could be told by merely looking at it, nor could the rusted and decayed condition of the nails inside of the wood. A man on top of the shed could not see the stringer below except through the cracks of the roofing plank, and he supposed that a man walking on the ground below would be six or seven feet below this stringer, and he did not suppose that a man below by merely looking up could see the crack of which he spoke, without close inspection. He had never noticed it before." McCarrson, a witness for plaintiff, testified: "That he was a carpenter and went to the place about 20 or 25 minutes after the injury to Thompson. That he noticed the conditions as they then were at the place of the accident. He found that the sleeper that had been broken had decayed some, and the nails were very rotten. Nearly every one he

looked at was about rotten in two. He could not say for sure whether one could have told this condition by merely looking at the sleeper, which was pretty badly smoked up. It was smoked pretty tolerably black. He could not tell the extent to which the sleeper was rotted, as he did not pay very close attention to it—just noticed it was rotten, but did not know to what extent. When two pieces of timber come together, and the joints are subject to the influence of the weather, rain, etc., they begin to rot at the joints most every time, and, when one is laid on the other, they are apt to begin to rot at the junction. One standing under the shed could not tell the condition of the lumber under the planks between it and the rafter without a close examination, but a critical examination would disclose the condition, and, if such an examination had been made of the sleeper in question and its junction points with other timbers, it would have shown that a new piece of lumber should have been put in its place or that another piece of lumber should have been spliced on it; for instance, pieces of lumber four, five, or six feet long could have been spliced over the joint to the sleepers, and have made the place safe. The condition that he saw showed that some repairs were required, whether to be made in the way indicated or not."

It may be true, and doubtless was, that one casually walking under the shed, it being eleven feet from the ground, or casually walking over the shed, would not discover the defect therein. But the evidence was sufficient to justify the finding that a proper inspection of the shed would have disclosed the defect and the dangerous condition of the shed. The duty of inspection was on appellant. *Railway Co. v. O'Fiel*, 78 Tex. 486, 15 S. W. 33; *Williams v. Hennefeld*, 120 S. W. 567. There was no duty of inspection upon Thompson. He could rely upon the presumption that the master had done his duty in this respect. The evidence did not show that the defect in the shed was obvious or that Thompson had notice of the same.

It is assigned as error that the court erred in paragraphs 8 and 9 of the charge in instructing the jury, in substance, "that if the side sheds of kilns five and six were furnished as places of retirement by brick burners in the course of their employment, or were permitted to be used by such burners as places of retirement in the course of their employment, that it was the duty of defendant to use ordinary care to make reasonable inspection of said sheds, and to maintain them in a reasonably safe condition for such purpose, and in submitting whether defendant failed to make a reasonable inspection of the shed that broke, and whether such failure, if such there was, was a proximate cause of the injuries to J. W. Thompson, because (1) there was no evidence that

the shed of kiln No. 6, when that kiln was not in use, was furnished as, or was knowingly permitted to be used as, a place of retirement for brick burners when working on kiln No. 5, as J. W. Thompson evidently used such shed when he was injured, neither was there any evidence showing that the defendant should reasonably have anticipated that said Thompson would use said shed as he evidently did when he was injured; and (2) there was no evidence that the defendant had knowledge, or notice, of any fact that made it its duty, in the exercise of ordinary care, to inspect the shed which broke, and the sleeper which broke, with reference to the occurrence which caused the injuries to said Thompson, and the causes thereof." This contention is not sustained. The evidence justified a charge on the duty of inspection of the shed, and the jury were justified in their finding that a proper inspection would have furnished knowledge of the defects therein.

No reversible error having been pointed out, the judgment is affirmed.

#### On Rehearing.

The appellant in its motion for rehearing contends that we were in error in holding in our opinion that the evidence did not raise the issue that appellant had provided a safe way for its employes to go from the shed of one brick kiln to the shed of another, and that Thompson, the deceased, instead of using the safe way, took another, which was dangerous, to his injury. There was evidence that planks had been placed on one side of roof No. 5 to the top of roof No. 6. It is not clear from the evidence that these planks were provided for the burners or used by them to retire upon. However, we find the trial court fairly and fully submitted to the jury the issue as to whether the appellant had provided a safe way for the burners to retire, and were told if it had and that Thompson, instead of taking the safe way, chose the dangerous way and as a result was injured, then the jury were told he assumed the risk, and they should find for defendant.

The motion for rehearing is overruled.

**GURLEY v. SAN ANTONIO & A. P. RY. CO.**  
(Court of Civil Appeals of Texas. Dec. 22, 1909. Rehearing Denied Jan. 28, 1910.)

#### 1. EVIDENCE (§ 529\*)—EXPERT TESTIMONY.

In an action for damages to plaintiff's land from an overflow of waters of a creek, resulting from the erection of an embankment by defendant, testimony of an expert engineer, to the effect that plaintiff's land would have been affected by the waters in the manner complained of, regardless of the construction of the railroad, was admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2338; Dec. Dig. § 529.\*]

**2. TRIAL (§ 252\*)—INSTRUCTIONS.**

In an action against a railroad for damages through the overflow of plaintiff's land, where the record did not show the land suffered from overflow from B. river during each of certain years, a charge that if plaintiff's land was subject to overflow from such river, and if all damages resulted from such overflows, and not from the waters of a certain creek, as alleged in the petition, to find for defendant was misleading, in that the jury might infer that it was predicated on the theory that the damage, if any, was caused by overflows of the B. river, during the years named.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

**3. EVIDENCE (§ 96\*)—BURDEN OF PROOF.**

A charge permitting a recovery only if plaintiff had proved, not only allegations of his own pleadings, but also disproved, by evidence of a negative character, defensive matters pleaded by defendant, was erroneous.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 119-121; Dec. Dig. § 96.\*]

**4. WATERS AND WATER COURSES (§ 179\*)—OBSTRUCTIONS—DAMAGES—INSTRUCTIONS.**

In an action for damages to plaintiff's land through an overflow, caused by the construction of defendant's road, where the evidence was insufficient to support a finding that the diversion of the waters of a creek resulting from certain levees was responsible for all excessive overflows and consequent damages, a charge that, if either of such levees so contributed to the diversion of the waters of the creek as to cause the damage complained of, and that the acts of defendant did not contribute to the same, and that plaintiff would have suffered the damage had such acts not been committed by defendant, the latter was not liable was objectionable, as authorizing the jury to conclude from the disjunctive form in which the various matters of defense were stated that a verdict for defendant would be authorized if any one or more of such defenses were established.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 179.\*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by John Gurley against the San Antonio & Aransas Pass Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded for new trial.

Sleeper, Boynton & Kendall and Taylor & Gallagher, for appellant. R. J. Boyle and Baker & Baker, for appellee.

**SHELLEY, Special Justice.** Appellant instituted this suit against appellee for the recovery of damages alleged to have been sustained by him as a result of overflows of appellant's lands by the waters of Bullhide creek, and consequential injury to the rental values of said lands, caused by the improper construction of appellee's railway across his lands and those contiguous thereto. Appellant's petition alleged, among other things, that appellee constructed its railway in 1889, in a southerly direction across a strip of low land lying north of his land, and on and across his land; that a high embankment was erected for the roadbed of said railway across said flat strip of land, and was so construct-

ed as to stop some of the channels of Bullhide creek, which flowed through said strip of low land, and to stop the flowing of the water over said low land through its accustomed channels, and compelled it to flow through certain openings in said embankment provided therefor by appellee; that appellee negligently failed to construct openings in said embankment sufficient to provide for the ready and natural flow of the water as it had flowed previous to the construction of the railway, and failed to locate openings at such places as the natural lay of the land required for the unobstructed flow of the water; that in the construction of said embankment appellee caused to be cut along each side of said embankment ditches or barrow pits, and that as a result of this a large part of the water of Bullhide creek, instead of flowing across said flat, as formerly, was caused to flow down said ditches or barrow pits, and through openings in said embankment, and discharged on appellant's land. Appellant further alleged that appellee constructed, or permitted the construction of, a dam or levee at the north end of said embankment, extending from said embankment in a southeasterly direction to the edge of appellee's right of way, and that such obstruction assisted in turning the water southward down the right of way, through the alleged barrow pits, and ultimately onto the lands of appellant. Appellant further alleged that because of the acts of appellee aforesaid the waters of the creek were so concentrated and delivered upon his land, and same was thereby so frequently inundated, that he was unable to rent a large portion of it for the years 1900 to 1903. Appellee's answer contained general demurrer, special exceptions, general denial, and special pleas, setting up (1) that it had nothing to do with diverting the waters of the creek from their accustomed channels; that before the construction of the railroad one Norwood had constructed a levee 1,800 feet long, on the west line of his land, which adjoins appellee's right of way, thereby changing the course of said creek, and causing a part of the waters of the creek to flow along its right of way and in the direction of appellant's land; (2) that for several years after said railroad was constructed the waters of Bullhide creek flowed as they formerly did, and until the main prong of the creek, immediately east of appellee's trestle, at the north end of the embankment, was bridged by laying logs in the bed of the stream for the purposes of a bridge, thus causing the waters in said prong of the creek to be diverted along a wagon road, which extended along the east side of the right of way until it reached the barrow pits, and that each freshet gradually wore said wagon road until a channel was cut along said right of way, and in the direction of appellant's land; (3) that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

after the railroad was constructed, one Ed. Norwood constructed a levee just outside of the right of way adjoining said alleged log bridge, to prevent water from flowing on his farm, which contributed also to the diversion of the water down the right of way; (4) that the channel of "Dry branch," which is termed "Bullhide creek" by appellant, was inadequate to carry the water of Bullhide creek, and in all cases of overflow same ran down through the railroad trestles, and onto appellant's lands; (5) that appellee had a trestle 650 feet in length at the north end of its embankment, under which there were no barrow pits, and that the waters of Dry branch passed through this trestle and onto the east side thereof, and divided into two prongs, one of which flowed eastward into the Brazos river, and the other southeast into Bullhide slough; that the prong flowing eastward became filled up, and the natural trend and flow of the water being southeast, all of the water of said prongs then flowed southeast into Bullhide slough, and ultimately onto appellant's land, and that the water would have so flowed had the acts complained of not been committed. The case was tried before a jury, and verdict was returned in favor of appellee railway company, upon which judgment was rendered by the court.

Appellant's first assignment of error complains of the action of the court in permitting appellee to offer the testimony of the witness Stephen Turner, to the effect that in his opinion appellant's land would have been overflowed by the same waters from Bullhide creek, and appellant would have suffered the same damage as was complained of, had the railroad not been built, because this matter was the very one in issue, and opinion evidence regarding same was not admissible for any purpose. The witness Stephen Turner was admitted by appellant to be a skilled civil engineer, and it was undisputed that he was very familiar with the lands of appellant and those contiguous thereto; that he had been chief engineer in the construction of the railway, had run numerous levels in and about the neighborhood of Bullhide creek and appellant's lands, and had determined various elevations therefrom, which would tend to show the course of the waters in question, and, in short, had made a careful and thorough investigation of the matters involved in the controversy, from a scientific point of view. From his qualifications as an expert engineer, and upon his investigations made of the matters in issue, his opinion was elicited, as complained of by appellant, to the effect that the lands of appellant would have been affected by the waters in the manner complained of regardless of the construction of the railroad. We think the testimony was competent and admissible as that of an expert. The question involved was one as to which there was a sharp conflict in the evidence. Its solution properly involved the

making of scientific investigations and deductions therefrom, and we cannot say that the testimony complained of should not have been submitted to the jury for such weight as might be given it. *Railway v. Cochran*, 29 Tex. Civ. App. 383, 69 S. W. 984; *Bonner v. Mayfield*, 82 Tex. 234, 18 S. W. 305; *Railway v. Johnston*, 78 Tex. 536, 15 S. W. 104; *Ilfrey v. Ry. Co.*, 76 Tex. 63, 13 S. W. 165. The first assignment is therefore overruled.

Appellant's second assignment of error complains of the action of the court below in excluding the testimony of McKeown Johnson, a witness for appellant, as to his opinion concerning the cause of the change of the course of the waters of Bullhide creek, from where the witness testified the indications were that such waters had previously flowed, so as to flow down the railway right of way. The bill of exceptions upon which this assignment is predicated shows that had the witness been permitted to testify, he would have said that, in his opinion, the change in the flow of such waters, down the right of way of appellee, was caused by the opening of barrow pits of the railway company along the right of way, and toward appellant's lands. The evidence showed, without conflict, that the witness McKeown Johnson was a civil engineer of many years' experience; that he had done a great deal of railway construction in its various branches, and other work pertaining to his profession. Without reviewing the evidence on the subject as to the investigations made by this witness, as to which he testified in the trial below, and upon which his opinion was based, we will say that the record discloses facts showing such extensive investigations on the ground, running of levels, and determining of elevations, as, in our opinion, to sufficiently qualify the witness to give in evidence his opinion as an expert on the matter concerning which the testimony was offered. Appellee contends that the fact inquired about was not a fact to be proved by expert evidence, and that the jury were as capable of passing upon same as was the witness. To this proposition we cannot accede. The evidence excluded was of the same character as that of the witness Stephen Turner, which is discussed above. The qualifications of the witness Johnson as an expert on the subject were equally as strong as those of the witness Turner; and, having held that the testimony of the latter was properly admitted, it could not be consistently said that the testimony of the former was properly excluded. We, therefore, conclude that appellant should have been permitted to introduce the testimony disclosed by the bill of exception, and that the action of the court in sustaining the objection thereto was error, for which the case will have to be reversed.

In view of another trial it is thought proper to notice the remaining assignments contained in appellant's brief.

The third assignment of error complains of the following charge, given at the request of appellee railway company: "If you find from the evidence that plaintiff's land was subject to overflow from the Brazos river, and that all damages, if any, to the rental value of plaintiff's land during the years 1900, 1901, 1902, and 1903 resulted from overflows in the Brazos river, and not from the waters of Bullhide creek, as complained of in plaintiff's petition, you will find for defendant." It is contended by appellant that there was no evidence in the record to the effect that all of the damage to the rental value of his lands during the years in question resulted from overflows of the Brazos river, and that the charge complained of authorized a finding for defendant on such a theory. We think the assignment is not without merit, and that the charge, if not positively erroneous, is at least misleading and confusing, and upon another trial should be modified. While it might have been the theory of the court, in giving the charge in question, that overflows occurring in the Brazos river, whether during each of the years involved or not, may have been the cause of all the damage occasioned the rental value of appellant's lands during these years, yet, if the facts in evidence authorized a charge upon such theory, the one given does not clearly present the same. The charge here complained of is subject to the criticism that the jury might possibly infer therefrom that it was predicated upon the theory that the damage, if any, was caused by overflows of the Brazos river during particular years in controversy, 1900 to 1903. The record does not show that appellant's lands suffered from overflows of said river during each of said years, and we think that upon another trial this charge should be so corrected as to eliminate any doubt as to the theory in the mind of the court upon which the instruction is based.

The fourth and fifth assignments of error urge that certain portions of the main charge are subject to the objection that same required of the plaintiff too great a burden in proving his case. The court in the fourth paragraph of its charge, in submitting to the jury the acts complained of in plaintiff's petition as causing the damages for which recovery was asked, properly enumerated same, in the order in which they were pleaded, but, instead of concluding the premise at that point, proceeded as follows: "And you further believe from the evidence that the said water would not have flowed on plaintiff's land, or would not have flowed on same in such quantity or so frequently, but for its manner of construction and maintenance, or either, of defendant's roadbed or barrow pits, \* \* \* then if you so find, you will find for plaintiff, and the burden of proof rests upon plaintiff to establish such facts and the amount of the damages by a preponderance of the evidence." We think these assignments well taken. The plaintiff stated

a good cause of action in the petition, and was entitled to recover of defendant, if he sustained the allegations made therein by a preponderance of the evidence. It follows that he was entitled to a charge to that effect. This the court did not give, but by the language of his charge permitted the plaintiff a recovery only after he had proved, not only the allegations of his own pleading as to the cause of the damage in question, but also disproved by evidence of a negative character, defensive matters pleaded by the defendant. The error in the charge here indicated is aggravated by the requirement that the burden of proof be upon the plaintiff to disprove such matters of defense by a preponderance of the evidence. *Stookesbury v. Swan*, 85 Tex. 565, 22 S. W. 963. Every material issue in the case was sharply contested, and the evidence pro and con concerning same was in hopeless conflict, and very voluminous, and, in view of this fact it may be doubted if a charge upon the burden of proof at all, in view of such conditions, was proper. *Blum v. Strong*, 71 Tex. 324, 6 S. W. 167; *Railway v. Geiger*, 79 Tex. 21, 15 S. W. 214. Appellant presents other objections to this paragraph of the charge which we do not deem it necessary to discuss.

Appellant's sixth assignment of error attacks the sixth paragraph of the charge for the alleged reason that it singled out and submitted to the jury in the disjunctive various matters pleaded by the defendant, as to which there was evidence in the case, as being sufficient, if true, to warrant a verdict for defendant, whereas, certain of the matters pleaded were only alleged by defendant to have partially contributed to the diversion of the waters of Bullhide creek. The only portions of the charge in question which are attacked by appellant in the proposition under this assignment are those pertaining to two certain levees built, respectively, along the west side of the Norwood farm before the railway was constructed, and east of trestle 409 across appellee's right of way, after the road was constructed. The question of the effect of these levees on the natural flow of the waters of Bullhide creek was the subject of a great amount of conflicting testimony; but, taking it in the most favorable light to the appellee, we are unable to say that there was evidence sufficient to support a finding that the diversion of the waters in question which resulted from either of these obstructions was responsible for all the excessive overflows of plaintiff's lands, and all of the consequent damage to the rental value thereof. The charge, in effect, instructed the jury that, if they believed from the evidence that either of these levees so changed or contributed to the diversion of the waters of Bullhide creek during the years 1900 to 1903 as to cause the damage complained of by appellant, and that the acts of

defendant complained of did not contribute to same, and that plaintiff would have suffered the damage sustained by him had such acts not been committed by appellee, in such event to find for defendant. We think the charge is subject to the objection urged to it, and that the jury might reasonably have concluded, from the disjunctive form in which the various matters of defense were stated, that a verdict in favor of the defendant would be authorized if any one or more of such defenses were established to their satisfaction in connection with other elements as to which they were charged.

The seventh and last assignment of error complains of a portion of the fifth paragraph of the charge, wherein the jury are in effect instructed to find for defendant if they believe from the evidence that, after the waters of Bullhide creek passed trestle 409, the creek divided into two prongs, one of which flowed easterly in the direction of Bullhide Falls, and the other southeasterly in the direction of Bullhide slough, and that the easterly prong became filled up and only conveyed a part of the waters of the creek in times of overflow, and that the natural trend of the water was southeasterly towards plaintiff's land, and caused the injury to the rental value thereof. It is contended that this instruction was erroneous because not supported by the evidence. We think it sufficient to say that the testimony on this question was conflicting, and we cannot say that the charge was without evidence to authorize it, and therefore conclude that, under the circumstances, it was not subject to the objection urged.

For the reasons stated, we conclude that the judgment of the court below should be reversed, and the case remanded for another trial.

RICE, J., being disqualified, SHELLEY, Special Associate Justice, was appointed in his stead.

McKEWEIN et al. v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas. Dec. 20, 1909.)

1. WITNESSES (§ 29\*)—MILEAGE—RIGHT—RESIDENCE—DISTANCE FROM PLACE OF TRIAL—ATTENDANCE UPON SUBPENA.

Kirby's Dig. § 3157, permits depositions to be used where a witness resides 30 or more miles from the place of trial unless in attendance at court. Section 3158 prohibits a witness from being compelled to attend court where his deposition may be used unless he fails, when summoned, to give his deposition. Section 3159 provides that, where it is shown by affidavits, etc., that a witness' testimony is important, the court may order his personal attendance, though he may be otherwise exempt. *Held*, that the statutes only provided that a witness residing more than 30 miles from the place of trial should not be compelled to attend on subpoena without an order of court, and that a witness

residing in an adjoining county more than 30 miles from the place of trial who voluntarily attended upon subpoena without an order of court was entitled to mileage.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 67-69; Dec. Dig. § 29.\*]

2. APPEAL AND ERROR (§ 984\*)—DISCRETION OF TRIAL COURT—COSTS—DISALLOWANCE OF MILEAGE FEES.

Where witnesses' mileage was disallowed on the ground that they were not entitled thereto under the statute because they did not attend on an order of court, and not because the mileage was unnecessary or because an oral examination was unnecessary, etc., the disallowance of such mileage was based on an error of law, and hence was reviewable.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 984.\*]

Battle and Hart, JJ., dissenting.

Appeal from Circuit Court, Desha County; Antonio B. Grace, Judge.

Action by C. P. McKewen and others against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment allowing a motion to retax costs, plaintiffs appeal. Reversed and remanded, with directions to overrule motion.

Rascoe & Batts and Joe T. Robinson, for appellants. E. B. Kinsworthy, for appellee.

FRAÜENTHAL, J. This is an appeal from the judgment of the Desha circuit court upon an application made by the defendant to have the costs retaxed in a cause tried in that court wherein the appellants were the plaintiffs and the appellee was defendant. On March 31, 1908, the plaintiffs instituted suit in the above court against the defendant for the recovery of the value of certain personal property which had been lost or destroyed while in the possession of the defendant as a common carrier. Upon a trial of that cause a verdict and judgment was rendered in favor of the plaintiff and against the defendant for the value of the property and for all costs of the case. Some time prior to the day set for the trial of said case in the Desha circuit court, the clerk of that court, at the instance of the plaintiffs, issued a subpoena for Fred McCarty, Pet Douglass, Pet Wolf, and Jack Douglass to appear as witnesses in that case. The above witnesses resided in Arkansas county, which adjoins said Desha county, and more than 30 miles from the place where the circuit court sits in said latter county. The subpoena was duly served upon said witnesses in Arkansas county, and in obedience thereto those witnesses appeared in said Desha circuit court on the day of the trial of said cause. At the same term of said court the said witnesses proved up their attendance and the number of miles they had traveled in consequence of the summons. The clerk of the court taxed the amount of the attendance and mileage of each witness as costs arising

in said cause, and gave to each witness a certificate thereof.

At the following term of said circuit court, the defendant by written motion made application to retax the costs in said case, and asked that the mileage claimed by said witnesses be disallowed. The grounds for the application to retax said costs are set out in the motion as follows: "Defendant states that the case was disposed of on the day it was set for trial, and that no one of said witnesses was subpoenaed, and no order of the court was obtained requiring his attendance, and that all said witnesses came from a distance of more than 30 miles; that said witnesses are entitled to \$1.50 each as witness' fees, which amount the defendant is ready and willing to pay." It appears that the witnesses were actually subpoenaed in Arkansas county where they resided as above set forth; and the only ground set out in said motion for the disallowance of said mileage which is sustained by the evidence is that the witnesses resided more than 30 miles from the place where the court in which the action was pending did sit; and no order of court was obtained requiring their attendance. Upon the hearing the court sustained the motion to retax the costs and disallowed the mileage of said witnesses, and adjudged that the same be stricken from the fee bill. From that judgment this appeal is prosecuted.

The question involved in this case is whether or not the mileage of a witness should be taxed as a part of the cost of the case where such witness resided 30 or more miles from the place where the court sits in which the action is pending, and in an adjoining county, if he actually attends in obedience to a subpoena, but under no order of court for his personal attendance. It is provided by section 3157, Kirby's Dig., that the deposition of the witness may be used in the trial of all issues where "the witness resides thirty or more miles from the place where the court sits in which the action is pending, unless the witness is in attendance on the court." By section 3158, Kirby's Dig., it is provided that: "A witness shall not be compelled to attend in court for oral examination where his deposition may be used, unless he has failed when duly summoned to appear and give his deposition." And by section 3159, Kirby's Dig., it is provided: "Where it is made to appear by the affidavit of the party and the written statement of his attorney, that the testimony of a witness is important, and that the just and proper effect of his testimony cannot in a reasonable degree be obtained without oral examination before the jury, the court may, at its discretion, order the personal attendance of the witness to be compelled, although such witness may otherwise be exempt from personal attendance by law."

It is claimed that, by reason of the above provisions of the statutes, the witnesses in

this case were not entitled to mileage because they attended the trial without an order of court for their personal attendance. But we are of the opinion that the above provisions are for the benefit and protection of the witness, and deny only to the party a right to compel the personal attendance of the witness without an order of the court when he resided 30 or more miles from the place where the court sits. The witness may waive that privilege. The statute only provides that the witness shall not be compelled to attend at the place of trial if he resides 30 or more miles therefrom. It does not provide that in such event the witness should or shall not attend the court, but forbids only the compulsion of his attendance. From this it would appear that the witness may attend in obedience to the subpoena if he desires to do so. If, then, he does waive this privilege and does obey the subpoena, and does attend the court, he should receive the mileage and fee which the statute prescribes, unless his personal attendance was unnecessary, or for other reasons it would be unreasonable to allow same. The party desiring the attendance of the witness may under certain circumstances obtain an order of court compelling the attendance of the witness. In such event it is conceded that his mileage is a just part of the costs; but the only reason why the attendance of the witness is compelled by order of the court is because the witness himself refuses to attend. If he waives his privilege and is willing to attend, there would be no necessity of obtaining the order compelling his attendance. The statute does not require that the depositions must be taken and that the testimony of the witness cannot be taken by oral examination at the trial of the case. On the contrary, the statute provides that, if the witness is in attendance on the court, his deposition should not be used, although he reside 30 or more miles from the place where the court sits.

By the Code of Iowa it is provided that witnesses in civil cases cannot be compelled to attend district court at a place more than 70 miles from the place of their residence. It was held by the Supreme Court of that state that said statute was for the benefit of the witness, and that the witness could waive the exception, obey the process, and that his traveling fee should be taxed for the actual travel. *Briggs v. Rumley Co.*, 96 Iowa, 202, 64 N. W. 784. In the case of *Alabama Midland Ry. Co. v. Rushing*, 103 Ala. 542, 15 South. 853, it is said (quoting from syllabus): "While under the provisions of the statute when a witness resides more than 100 miles from the place of trial his evidence may be taken by deposition, the statute does not require that the evidence must be so taken; and, if a witness residing in the state more than 100 miles from the place of the trial attends the trial in obedience to a subpoena, he is entitled to his mile-

age and per diem." See, also, *Parsons v. Band Cutter & Co.*, 129 Iowa, 631, 106 N. W. 164; *McGlauffin v. Wormser*, 28 Mont. 177, 72 Pac. 428; *Spencer v. Peterson*, 41 Or. 257, 68 Pac. 519, 1108; *Alexander v. Harrison*, 2 Ind. App. 47, 28 N. E. 119; *Anderson v. Ferguson-Bach Sheep Co.*, 12 Idaho, 418, 86 Pac. 41.

And so we are of the opinion that solely because the deposition of the witness who resides 30 or more miles from the place of trial may be used upon such trial it does not deprive him of his mileage and per diem if he attends the court in obedience to the process of subpoena for oral examination. Section 3523, Kirby's Dig., seems to have provided mileage for the witness under such circumstances. That section is as follows: "A witness subpoenaed to attend without the limits of the county within which he resides shall receive five cents per mile going and coming from and returning to his residence by the most direct route." It does not provide as a requisite to obtaining mileage that the witness must first be compelled to attend by order of the court. In this case it is further shown that the witnesses reside in a county adjoining Desha county in which the trial was had, and they were subpoenaed more than three days before the time of the trial. Section 3119, Kirby's Dig., provides: "A witness shall not be obliged to attend for examination in the trial of a civil action, except in the county of his residence or an adjoining county; nor to attend to give his deposition out of the county where he resides or where he may be when the subpoena is served on him, requiring his attendance within three days."

We are therefore of the opinion that the court was in error in its view of the law that the witnesses were not entitled to mileage solely because they resided more than 30 miles from the place where the trial was held, and attended without an order of court requiring their attendance.

It is contended that in the disallowance of the mileage the court has only acted in the exercise of its discretion, and, unless that discretion has been abused, its judgment should not be disturbed. It is true that it is within the power of the circuit court within its sound discretion to disallow such costs which the court finds has been caused unreasonably and unnecessarily to be accumulated. Upon appeal, this court will not, in reviewing taxation of costs, overrule the circuit court, unless its judgment has been made under an erroneous view of the law or a manifest abuse of power. *Meadows v. Rodgers*, 17 Ark. 361; *Davies v. Robinson*, 65 Ark. 219, 45 S. W. 471.

With the exercise of the discretion of the court in the matter of retaxation of costs this court will not interfere; but, where the judgment of the court is based upon an erroneous view of the law, it is the duty of

this court to correct that error. *Morris v. Wheeler*, 45 N. Y. 708. In the case at bar the court did not disallow the items of mileage of these witnesses upon the ground that the attendance of these witnesses was unnecessary, or because they attended the trial for the purpose of increasing the costs, or because under the circumstances the oral examination of the witnesses was not necessary to obtain the proper effect of their testimony, or because it was unreasonable to allow the mileage; and its judgment is not based upon any allegation to the above effect in the application to retax the costs, and the judgment is not attempted to be sustained by any evidence of that character. But the court disallowed the mileage solely upon the ground set out in the application to retax the cost, and that ground was that under the provisions of the statute the witnesses were not entitled to mileage, because they resided more than 30 miles from the place of trial and attended the trial without an order of court being obtained requiring such attendance. Its judgment was therefore based upon an erroneous view of the law.

For the error indicated, the judgment is reversed, and this cause is remanded, with directions to overrule the motion to retax the cost.

HART, J. I dissent in this case. In the case of *Russell v. Ashley*, Hempst. 549, Fed. Cas. No. 12,150, the court, in passing upon a similar statute, said: "Indeed a witness residing more than 100 miles from the place of trial is beyond the coercive power of a subpoena. The party may take his deposition, but cannot compel him to attend at court and give oral testimony. This has been expressly held by the Supreme Court of the United States in the case of the *Patapsco Insurance Company v. Southgate*, 5 Pet. 615, 8 L. Ed. 243. The party desiring his testimony has no right to issue a subpoena to coerce his attendance, and, if he does, he must pay the costs incident thereto, and not throw them upon the other party." In the present case the witnesses were not compelled to obey the subpoena, and their attendance upon the court was voluntary. The rule is so firmly established in this state that statutes regulating costs are strictly construed against the party claiming them as to render a citation of authorities unnecessary. The decisions of the courts of other states which have passed upon similar statutes are in hopeless conflict. Most of the decisions on the question are collected in a note in 10 Am. & Eng. Ann. Cas. p. 397. They appear to be about equally divided in numbers, but we think the rule that fees should not be allowed witnesses in cases where the subpoena does not amount to compulsory process and where the witness may disregard it is more in accordance with our previous decisions upon the allowance of costs and fees, and

is a protection to the parties to the suit against unnecessary and vexatious costs.

This construction works no hardship upon the witnesses because their attendance has been voluntary, and not in obedience to the order of the court. It works no injustice upon the parties to the suit, for we have a statute which provides that where it is made to appear that the testimony of a witness is important, and that the just and proper effect of his testimony cannot, in a reasonable decree, be obtained without an oral examination before the jury, the court may at its discretion order the personal attendance of the witness to be compelled, although such witness may otherwise be exempt from personal attendance by law. Kirby's Dig. § 3159.

BATTLE, J., concurs in this dissent.

# EWING-MERKEL ELECTRIC CO. v. LEWISVILLE LIGHT & WATER CO.

(Supreme Court of Arkansas. Dec. 13, 1909.)

## SET-OFF AND COUNTERCLAIM (§ 8\*)—EQUITABLE SET-OFF.

Though a party sued at law for goods sold by a nonresident having no property in the state, and no agent there upon whom service could be made, cannot set up as a set-off the breach of another contract with plaintiff for the purchase of other goods, he may do so by way of an equitable set-off.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 11; Dec. Dig. § 8\*]

Appeal from Lafayette Chancery Court; J. M. Barker, Chancellor.

Action by the Ewing-Merkel Electric Company against the Lewisville Light & Water Company. From a decree for defendant, plaintiff appeals. Affirmed.

T. M. Pierce, Paul U. Farley, and Bradshaw, Rhoton & Helm, for appellant. Warren & Smith, for appellee.

BATTLE, J. The Ewing-Merkel Electric Company, a corporation organized under the laws of the state of Missouri, sold to the Lewisville Light & Water Company, a corporation organized under the laws of the state of Arkansas, an alternating current generator complete and switch board transformers for an electric light plant for \$1,150, all secondhand machinery, but guaranteed to be in strictly first-class order and in good operative condition. The sale was made under a written contract dated May 10, 1904. The Lewisville Light & Water Company purchased of the Ewing-Merkel Electric Company sundry items of merchandise between July 1 and October 1, 1904, amounting to \$488.04, and on the 5th of October, 1904, paid thereon \$300, leaving a balance of \$188.04.

On the 13th day of July, 1905, the Ewing-

Merkel Electric Company brought an action against the Lewisville Light & Water Company in the Lafayette circuit court for \$188.04.

The defendant answered and admitted that it purchased the merchandise mentioned in the complaint, and that the sum of \$188.04 remains unpaid, "but by way of set-off and cross-bill defendant states: That on the 10th day of May, 1904, it entered into a contract with plaintiff for the purchase of certain goods, machinery, and material for an electric light plant.

"That the said machinery and appliances were guaranteed to be in strictly first-class order as set out in the complaint, and defendant agreed to pay the sum of \$1,150, and plaintiff guaranteed the machinery to be in good operative condition. That plaintiff knew at the time of the contract of purchase that defendant desired to use them solely for the purpose of operating an electric plant, and guaranteed it to be in first-class order for that purpose. That defendant bought and paid for said machinery relying solely upon plaintiff's representations and guaranty as to its quality and condition. Defendant was inexperienced in the matter of such machinery which plaintiff knew, and defendant relied on plaintiff's representations.

"That after defendant had installed said machinery it was found to be defective and unsound and not in strictly first-class order, nor in good condition. The armature in the generator was worthless and burned out, and the insulation rotten and the machinery utterly worthless for the purpose of the defendant.

"That because of the defective condition of the machinery it was not worth more than \$100, and the defendant had been damaged in the sum of \$1,050.

"The plaintiff is a nonresident of the state and has no agent upon whom service can be had, nor any property in the state, and that it has no adequate remedy by law, and prays for the recovery of the damages, and asks that the cause be transferred to the chancery court of Lafayette county for hearing, and prayed for judgment."

On October 9th, in the chancery court, the defendant filed an amendment to its answer and cross-bill, as follows:

"That the exciter purchased from plaintiff failed to excite the fields and armature thus rendered it impossible to operate the said machine.

"The bearings on the dynamo were worn and rubbed, and caused the boxes to heat so that it was impossible to operate the machinery. The transformers were not in first-class order nor in good operative condition, but were worn and worthless."

On motion of the defendant the cause was transferred to the Lafayette chancery court.

The plaintiff answered the cross-complaint of the defendant and denied the allegations.

Much evidence was adduced by both parties, and the court found upon hearing that plaintiff is a nonresident and has no property in this state, that the defendant is indebted to plaintiff on the account sued on in the sum of \$188.04, and that the plaintiff is indebted to the defendant "on account of damages for breach of warranty in the contract for the sale of machinery and appliances, as alleged in the defendant's answer and cross-bill, in the sum of \$1,050, that defendant is entitled to judgment for said sum, and that the amount found for plaintiff should be set off against the amount found for defendant pro tanto, leaving due defendant the sum of \$861.96," and rendered judgment for that amount in favor of the defendant, and plaintiff appealed.

The evidence was sufficient to sustain the findings of fact by the court. At law appellee was not entitled to set up in this action, by way of set-off or counterclaim, the \$1,050 damages suffered by it by a breach of contract made by appellant. Was it entitled to set it up as an equitable set-off?

In 2 Story's Equity Jurisprudence, § 1437, it is said: "It has already been suggested that courts of equity will extend the doctrine of set-off and claims in the nature of set-off beyond the law in all cases when peculiar equities intervene between the parties. These are so very various as to admit of no comprehensive enumeration."

In *Rolling Mill Co. v. Ore & Steel Company*, 152 U. S. 596, 616, 14 Sup. Ct. 710, 716, 38 L. Ed. 565, it is said: "By the decided weight of authority it is settled that the insolvency of the party against whom the set-off is claimed is a sufficient ground for equitable interference. \* \* \* In addition to insolvency, it is held by many well-considered decisions, including those of Illinois, that the nonresidence of the party against whom the set-off is asserted is good ground for equitable relief. *Quick v. Lemon*, 105 Ill. 578; *Taylor v. Stowell*, 4 Metc. (Ky.) 175; *Forbes v. Cooper*, 88 Ky. 285, 11 S. W. 24; *Robbins v. Holley*, 1 T. B. Mon. (Ky.) 191; *Edminson v. Baxter*, 4 Hayw. (Tenn.) 112, 9 Am. Dec. 751; *Davis v. Milburn*, 3 Iowa, 163."

In *Forbes v. Cooper*, 88 Ky. 285, 11 S. W. 24, it is said: "It is certainly unconscionable for an insolvent party to coerce the payment of his claim when he is owing the other party an equal or larger sum, and thus leave the latter remediless, nor should a nonresident be allowed, under like circumstances, to enforce through the agency of the courts the collection of his debt, and compel the other party to seek a foreign jurisdiction for relief, and then perhaps find the debtor insolvent. If the object of litigation be the attainment of justice, assuredly such

results should be prevented. Indeed, the doctrine of equitable set-off to the extent it was formerly applied was based upon moral justice, and to meet such cases as the above, thus preventing wrong. It was then not uncommon to stay an insolvent or nonresident debtor in the collection of his claim until damages to which the complainant might be entitled to against him were liquidated under the order of the chancellor, and then apply them in satisfaction of his independent debt."

In *Quick v. Lemon*, 105 Ill. 578, it is said: "It would seem to be inequitable to require the corporation to go to another state to collect its demand in an action at law, and we are inclined to hold that the nonresidence of the complainant in connection with the fact that he calls upon a court of equity to enforce his judgment is sufficient to allow the defendant corporation to prove and set off its demand set up in the cross-bill against the judgment of the complainant."

To the same effect, see *Porter v. Roseman*, 165 Ind. 255, 74 N. E. 1105, 112 Am. St. Rep. 222; 6 Am. & Eng. Ann. Cas. 718, and note to that case and cases cited.

The rule announced in these cases is a just rule, and should be enforced. We see no good reason for sending a citizen of this state to a foreign jurisdiction to obtain justice when the courts of this state can afford relief. They are as fully competent to afford relief to the citizen as to the nonresident. Why should one in cases like this be accorded greater rights than the other?

Decree affirmed.

#### BLUTHENTHAL v. ATKINSON et al.

(Supreme Court of Arkansas. Jan. 10, 1910.)

##### 1. LANDLORD AND TENANT (§ 86\*)—CONSTRUCTION OF LEASE—RENEWAL—NOTICE.

Under a lease giving a lessee the option of renewal on a 60 days' notice before the expiration of the lease, such notice is a condition precedent to the right to renew, of which time is the essence.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 272; Dec. Dig. § 86.\*]

##### 2. ACTION (§ 24\*)—LEGAL OR EQUITABLE—"MISTAKE."

Where a 60 days' notice is made a condition precedent to the right of the lessee to renew his lease without providing how the notice should be given, an answer setting up the failure of such a notice, sent by mail, to be received by the lessor, does not plead such a "mistake" as gives equity jurisdiction in an action by the lessor for possession of the premises, defended on the ground that the notice so sent should be held sufficient though without proof of its actual delivery.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. § 153; Dec. Dig. § 24.\*]

##### 3. EVIDENCE (§ 71\*)—PRESUMPTIONS—DELIVERY OF MAIL.

Where a lessee properly mailed a notice to the lessor of his election to renew the lease under the option therein given, it is presumed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that such notice was received by the lessor, but this presumption may be rebutted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 92; Dec. Dig. § 71.\*]

**4. LANDLORD AND TENANT (§ 86\*)—OPTION TO RENEW—NOTICE OF ELECTION—ESTOPPEL TO PLEAD FAILURE OF NOTICE.**

Failure of the lessor, after the time for a notice of renewal by the lessee, on being approached with reference to repairs on the premises which the lessee wished to make, to mention her failure to receive a notice of renewal does not estop her to claim a forfeiture of the right to renew by failure to give the required notice.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 273; Dec. Dig. § 86.\*]

**5. LANDLORD AND TENANT (§ 86\*)—OPTION TO RENEW—NOTICE OF ELECTION—WAIVER.**

The mere failure of the lessor, after expiration of the time for notice of renewal by the lessee, to mention the failure to receive such notice, when approached by the lessee with reference to repairs on the premises, does not constitute a waiver of such notice.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 273; Dec. Dig. § 86.\*]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by Mary E. Atkinson and another against H. O. Bluthenthal. Plaintiffs had judgment, and defendant appeals. Affirmed.

Appellant entered into a lease contract with appellees' intestate on August 1, 1908, for a certain brick store building on Main street in Pine Bluff, Ark., to continue for five years, ending September 1, 1908. This contract provided that the lessee might renew the lease for five years upon the same terms and conditions, "but the said lessee shall give the said lessor sixty days' notice if he so desires to occupy said building." The provision of 60 days' notice required the lessee to give notice not later than July 1, 1908, in order to be in time. The term of the lease expired. The lessee failed to give the notice, and the appellees demanded possession of the premises, which being refused, appellees brought this suit to recover same, and damages in the sum of \$1,050. Appellant answered, admitting possession, but denying that he held without right. He set up the lease contract between himself and appellees' intestate, and alleged that he had faithfully paid the rent and complied with every requirement of the contract save as to the payment of rent not then due, which he tendered in court. Appellant also for equitable defense set up: "That on June 26, 1908, he wrote a letter to appellee, Mrs. J. C. Atkinson, stamped same with 2 cent postage, and deposited it in the United States mails at Pine Bluff; that in due course of mail the same would have reached and been delivered to appellee on the same afternoon or the morning following, and appellant, in writing and mailing said letter, honestly believed that same would be duly delivered; that thereafter appellant met the same appellee on the street, and under the firm impression that said notice had been

received, he advised with appellee concerning certain improvements to be made by him on said building, which were not to be begun until after October, 1908, and the appellee at that time did not advise appellant that he had never notified her of his intention to retain possession after September 1st, and consequently would have no right to make improvements after that date. Appellant paid rent promptly, and continued in possession of the property after September 1, 1908, under the belief and intention to retain said property during the additional term, nor was he advised that appellees claimed the contract at an end until after she had refused to accept the rent for the month of September, at which time she first stated that appellant had failed to avail himself of the extension option. Appellant immediately advised appellee that he had given notice of his intention to remain in possession of said property at the time above referred to, and at the same time gave additional notice to her that he would remain in possession under the lease contract, tendering her the moneys due for rentals of the property under said contract, which she declined. Appellant states that he honestly intended to remain in possession of said building during said additional term, and intended to give notice of such intention, and that if said letter so mailed by him to appellant was not received by her in the usual course of mail, it was an unavoidable accident and a surprise to him. Appellant further states that he was unable to discover the fact that said letter had not been received by appellee by the use of reasonable diligence, because he says that the envelope in which said notice was mailed bore on its left-hand corner a request that the same be returned to appellant if not delivered within five days, and appellant charges that, notwithstanding said request, the envelope and notice were never returned to him, and but for unavoidable accident, if the letter had not been delivered, the same should have been returned to appellant; that the appellees, believing that appellant intended to remain in said building for said additional term, did not attempt to nor have they leased the same to any other person, and they have in no wise been damaged on account of a failure to receive such notice, but that if it be determined that appellees were damaged by failure to receive such notice, he offers and tenders into court all moneys that may be due her for damages as a result of the unavoidable accidents as aforesaid. He prays that the lease be by the court declared to be in force for five years from September 1, 1908, and that upon the payment of the rental specified therein he be permitted to occupy said building under the term of said lease, and that inasmuch as this answer raises issues strictly cognizable in a court of equity, he prays that the cause

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be transferred to the Jefferson chancery court for final determination."

The court refused, over appellant's objection, to transfer the cause to the chancery court. The court instructed the jury that the notice required by the contract must have been actually received by the lessor; that the burden was on appellant to show that he had given the notice; that no particular form of notice was required, nor was it necessary to have same served by an officer; that any communication, verbal or written, actually delivered to plaintiff in due time would be sufficient. The court submitted to the jury on the evidence adduced the question as to whether appellees received the notice in due time, and on this subject instructed the jury as follows: "If you find from a preponderance of the evidence that on the 25th day of June, 1908, the plaintiff was residing in Pine Bluff, Ark., and that on that day the defendant wrote a letter to plaintiff notifying her of his intention and desire to claim the benefit of his option and renew the lease for another term of five years, inclosed the same in an envelope, addressed it to plaintiff at the city of Pine Bluff, Ark., placed thereon the necessary postage stamps, and mailed it to her in said city, then the law presumes that it was delivered to her in due course of time and the burden is on the plaintiff to show by a preponderance of evidence that she did not receive it." The court further instructed the jury that: "By the terms of the contract the option was with the defendant to renew the lease or not as he might elect. If he elected to renew it, he was bound to give notice of such intention within the time specified. The plaintiff was not required to do anything in the matter, and had a right to remain silent regarding it, if she chose." The court refused prayers by appellant telling the jury, in effect, that if appellant mailed a letter notifying appellees that he would avail himself of his option to extend the lease under the contract, and that such letter in due course of mail would have reached the lessee before July 1, 1908, this would be sufficient to constitute the giving of the notice required, notwithstanding any testimony on the part of appellees to the effect that such letter and notice were not received. The court also rejected prayers of appellant seeking to have questions of estoppel and waiver, under the evidence, submitted to the jury. Objections were made and exceptions reserved to the rulings of the court on the declarations of law. There was a verdict in favor of appellees for \$1,040.50. Judgment was entered for that sum, and this appeal seeks to reverse the judgment. Other facts stated in opinion.

White & Alexander and Ben J. Althelmer, for appellant. Crawford & Hooker, for appellees.

WOOD, J. (after stating the facts as above).  
1. Appellant, lessee, under the contract had

a lease of the building as follows: "For the term of five years from and after the first day of September, 1903, with the privilege on the part of the said lessee to occupy the said building for five years longer upon the same terms and conditions as herein described, but the said lessee shall give the said lessor sixty days' notice if he so desires to occupy said building." When the five years expired the lease for that term was at an end. But appellant had the privilege of occupying the building on the same terms and conditions, provided he complied with the condition to give notice. As we construe the contract, this condition as to notice was a condition precedent to another lease upon the same terms and conditions for a period of five years. The language of the stipulation as to the 60 days' notice was such as to make time of the essence of the contract so far as obtaining a further term of lease for five years is concerned. Until this condition precedent as to notice was complied with no rights vested in appellant to occupy the premises for another five years under the same terms and conditions that he was then occupying them. A court of equity cannot make contracts for parties, and cannot be invoked to compel parties to make contracts. Here there was no contract for an additional term of five years until the notice was given. The forfeiture here, if it be proper to call it such, was not of rights under a contract entered into for another term of five years, and because of a breach of some condition subsequent, but the forfeiture was of the right to continue to occupy the premises for another term of five years because of a failure to comply with a condition precedent. The appellant had no leasehold estate in the premises for a new term of five years, nor the right to have such created, until he had given the notice required by the lease contract. Where the condition must be performed before the estate can commence it is called a condition precedent; but, where the effect of it is either to enlarge or defeat an estate already commenced, it is called a condition subsequent. The former avoids the estate by not permitting it to vest until literally performed. Taylor on Landlord & Tenant, § 27. The appellant had the option or privilege, upon complying with the terms of the lease contract as to notice, of a further term of five years. The covenant bound the lessor to grant the lessee the further term upon notice given, but it did not bind the lessee to give the notice. In such case "if notice is stipulated for, it must be given." "From the notice of a condition," says Mr. Taylor, "it is obvious that equity cannot relieve from the forfeiture of an estate which arises upon a condition precedent unperformed." Taylor, L. & T. § 277; 1 Pom. Eq. Jur. § 455. There is no analogy in the case at bar to cases where equity for sufficient cause intervenes to prevent a forfeiture of existing contract for breach of its terms.

The answer contained no allegation that called for the interposition of a court of equity. The chancellor, therefore, did not err in overruling the motion to transfer. Furthermore, the contract did not require the notice to be given through the mails. Any other method of giving the notice to the lessor would have been sufficient. The accident, so called, of a failure to get the notice to the lessee by letter was not unavoidable. Appellant voluntarily selected this method; he could have avoided the miscarriage of the letter through the mails by not using the mails, and by giving the notice some other way. The attempt to give the notice by letter was not a mistake on the part of appellant. He intended to give it this way, but he knew he could give it orally, or by sending notice through a messenger or officer; he chose the mails. This was not a mistake at all, or if so, certainly not one that a court of chancery will correct. It was the duty of appellant, under the contract, to give the lessor notice. Nothing short of the information which the contract specified, communicated, in some manner, to the lessor, would fulfill the requirements of the law. Appellant, having choice of a number of agencies to make the communication, is responsible if through such agency he fails to make it. The failure in such case is but the failure at last of the one making the selection of methods, and equity cannot relieve from the consequence of such failure on the ground of accident or mistake. The answer from any view point did not call for the interposition of a court of chancery.

2. The circuit court having refused to transfer the cause to the chancery court, it stood for trial on the issues presented by the complaint and the answer first filed. These were submitted to the jury upon correct instructions. The evidence on behalf of appellant tended to prove that he attempted to give the notice in the manner set up in the answer that was made the basis of the motion to transfer. After the letter containing the notice was written, it was sealed, stamped with a two cent postage stamp, directed to Mrs. J. C. Atkinson, and given to appellant's agent to mail. Appellant paid no further attention to it until he received notice to quit. The evidence on behalf of the appellees was to the effect that no letter containing notice of appellant's intention to take the premises for the further period of five years was received. Where a letter has been properly mailed, the law raises a presumption that it was duly received by the person to whom it was addressed; but, as was said by the Supreme Court of the United States in *Rosenthal v. Walker*, 111 U. S. 193, 4 Sup. Ct. 386 (28 L. Ed. 395): "The presumption so arising is not a con-

clusive presumption of law, but a mere inference of fact, founded on the probability that the officers of the government will do their duty." As was declared by our own court in *Planters' Ins. Co. v. Green*, 72 Ark. 305, 80 S. W. 151: "The presumption, in the absence of evidence to the contrary, is that it was received, but this presumption may be rebutted." The evidence showed conclusively that the letter was not received, but nevertheless, the court submitted the question to the jury to determine from all the evidence, instructing them properly as to the presumption of delivery that arises in the usual course of business connected with the proper mailing of a letter, and the handling of the same by the officers of the government, and instructing the jury that the burden was on the appellees to overcome this presumption by a preponderance of the evidence. The court thus gave appellant the benefit of this presumption of delivery as evidence in the case, and conformed its charge in this respect to the rule announced in the above cases. There was evidence on behalf of appellant tending to show that some time in July, after he thought the notice had been received by appellees of his intention to occupy for another term of five years, he met Mrs. Atkinson on the street, and "mentioned to her about putting in the front the same as the Grand Leader front" to the store. It would have taken some time to put in this front, and appellant intended to put the improvements in some time in September or October, 1908. He did not say anything about the lease, because he thought his letter had reached Mrs. Atkinson. She "did not that time mention that she had not received the letter." Upon this evidence appellant predicates error in the refusal of the court to grant his prayers seeking to have the questions of waiver and estoppel submitted to the jury. There was nothing in the above testimony to constitute an estoppel against appellees, nor to show that the notice required by the contract was waived. On the contrary the court correctly instructed the jury that Mrs. Atkinson, under the evidence, was not required to do anything in the matter, and had a right to remain silent regarding it if she chose. If she had done or said anything prior to the time for giving the notice, or after it should have been given, showing that she waived it, the case would have been different. She did not receive any rents, after the lease expired, nor did she do or say anything whatever at any time that would show an intention to waive her rights under the lease, nor to estop her from maintaining this suit for the possession of the premises and damages for the unlawful detention thereof.

The judgment is affirmed.

**FRANKS v. TOWN OF HOLLY GROVE.**

(Supreme Court of Arkansas. Jan. 10, 1910.)

**MUNICIPAL CORPORATIONS (§ 747\*)—TORTS—ACTS OF OFFICERS—LIABILITY.**

An incorporated town is not liable for the acts of its mayor and marshal in enforcing, without malice, an illegal ordinance by imprisoning one violating it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1573; Dec. Dig. § 747.\*]

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Action by Lowell Franks against the Town of Holly Grove. From a judgment for defendant, plaintiff appeals. Affirmed.

Manning & Emerson, for appellant. Thomas & Lee, for appellee.

WOOD, J. This appeal is to determine whether an incorporated town is liable in damages for the acts of its mayor and marshal in enforcing, by unlawful imprisonment, a void ordinance of the town, making it a misdemeanor for persons 15 years of age and under to get on or off of any moving trains within the corporate limits; such persons not being passengers. What these officers did in connection with the arrest, conviction, and imprisonment of appellant was in their capacity as public officers. They acted without malice toward appellant. Although the ordinance was illegal and void as to minors under the age of 12 years, still the appellee is not liable for the acts of its officers in seeking to enforce it, for the reason that the officers were acting in a public and governmental capacity. The functions they performed were of a public, not private, nature. 28 Cyc. 1257. As early as the case of *Trammell v. Town of Russellville et al.*, 84 Ark. 105, 36 Am Rep. 1, we held: "For acts done by them in their public capacity, and in discharge of their duties to the public, cities and towns incur no liability to persons who may be injured by them. Neither for the act of the council in passing an illegal ordinance, nor for that of the mayor in issuing a warrant of arrest for its violation, nor for that of the marshal in arresting the offender under it, is a town liable to him." And as late as *Collier v. Ft. Smith*, 73 Ark. 447, 84 S. W. 480, 68 L. R. A. 237, we said: "Towns and cities are not answerable for the acts or omissions of their officers or agents while acting for the state or sovereign in public or governmental capacity." See, also, *Gray v. Batesville*, 74 Ark. 519, 86 S. W. 295. Whatever may be the rule in other jurisdictions the above is the established doctrine of this court. It has good reason and authority to sustain it, and we, therefore, adhere to it. See other authorities cited in appellee's brief.

The judgment, therefore, is affirmed.

**HANNA v. ST. LOUIS & S. F. R. R. CO.**

(Supreme Court of Arkansas. Jan. 10, 1910.)

**1. APPEAL AND ERROR (§ 1064\*)—PERSONAL INJURIES—ACTION FOR—HARMLESS ERROR.**

In an action against a railroad company for personal injuries from stepping on a spike in a plank left exposed by defendant's servants in repairing a station platform, while an instruction that, if plaintiff came out of the house and stepped upon the nail without looking to see where he was stepping, this "would not constitute negligence that would render the defendant liable," would have better expressed the issue had it stated that the facts recited would constitute contributory negligence on the part of plaintiff, yet the inaccuracy was harmless, plaintiff having admitted that he did not look to see where he was stepping.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

**2. RAILROADS (§ 278\*)—ACTION FOR PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.**

In an action against a railroad company for personal injuries from stepping upon a spike in a plank left exposed by defendant's servants in repairing a station platform, where plaintiff knew when he entered the station that the work of tearing away the platform was going on, that the debris was still scattered about, and he failed to look where he stepped when he came out, he was as a matter of law guilty of contributory negligence, barring a recovery.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 891-900; Dec. Dig. § 278.\*]

**3. RAILROADS (§ 278\*)—DUTY TO KEEP PLATFORM IN SAFE CONDITION—PERSONAL INJURIES—ACTION FOR—NEGLIGENCE.**

The general rule that, where a person goes upon the platform of a railroad company to transact business without reason to suspect danger, it is a question for the jury to determine whether he is blameless in his own conduct, and it cannot be said as a matter of law that he must be upon the lookout for danger, does not apply where the danger is known to the injured person, and he takes no precaution whatever for his own safety.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 891-900; Dec. Dig. § 278.\*]

Appeal from Circuit Court, Benton County; J. S. Maples, Judge.

Action by Henry Hanna against the St. Louis & San Francisco Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Rice & Dickson, for appellant. W. F. Evans and B. R. Davidson, for appellee.

McOULLOCH, C. J. Plaintiff, Henry Hanna, instituted this action against the St. Louis & San Francisco Railroad Company to recover damages for personal injuries alleged to have been caused by negligence of defendant's servants. The trial jury returned a verdict in favor of defendant, and plaintiff appealed. The alleged negligence upon which the action was based consisted of leaving exposed on the ground in front of the station at Beaty, Ark., a plank or slab with a spike in it, and the injury was caused by plaintiff stepping on the spike as he walked out of and away from the station.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Plaintiff lived and was engaged in the mercantile business at Beaty and was agent of the express company, a position which he accepted and held to accommodate the people there. It seems that the railroad company did not keep an agent there, and plaintiff was intrusted with the keys to the depot, so that he could have access to it at all times.

The wooden platform in front of the station was about worn out, and defendant sent a crew of men to remove it and to replace it with a platform of dirt and cinders. The men proceeded with the work, and, while it was going on, plaintiff went over to the station to get a buggy top which had come by express that day and was stored in the depot. This was near the middle of the day, and plaintiff knew what the men were doing; in fact, he had called the attention of the roadmaster to the necessity for a new platform. He went into the depot, and, as he came out of the door carrying the buggy top in his hands, he stepped on the slab containing the spike, which was lying on the ground in front of the depot. The spike pierced his foot, and inflicted a very painful injury. He was carrying the buggy top in front of him, so that he could not see where he was stepping, and he says that he did not look to see where he stepped. Plaintiff testified that, when he went into the depot, the platform had been completely torn away and the old material carried off, that the slab with the spike in it was not lying on the ground in front of the door, and the workmen were at that time digging a ditch in front of the door preparatory to building the new platform of dirt and cinders. Witnesses introduced by the defendant testified that, when plaintiff went into the depot, the men were still at work tearing the platform away, and that the loose plank and debris had not been moved, but was scattered about on the ground. One testified that no change was made in the situation while plaintiff was in the depot.

The court fairly submitted the case to the jury on instructions requested by plaintiff and by defendant and of the court's own motion. Error is assigned in giving the following two instructions:

"(1) I charge you that if you find from the evidence that the defendant company was causing this platform to be torn up for the purpose of substituting another; that the workmen were engaged in removing the planks; that while so doing one of the planks was left for a short time where it had fallen with a spike turned up before the plank was removed; that the plaintiff entered the building while these servants were engaged in tearing up and removing said lumber; that the plaintiff came out of the house and stepped upon the nail without looking to see where he was stepping, and the injury was

thereby inflicted—this would not constitute negligence that would render the defendant liable."

"(3) I charge you that it is the duty of one who goes upon the premises knowing that the platform is being torn up for the purpose of substituting another platform, and who enters a building knowing that the platform is torn away, or being torn away, to look where he steps as he leaves the building. If he fails to do this and is injured thereby, he is guilty of contributory negligence."

The first instruction would perhaps have better expressed the issue by saying that the state of facts recited would constitute contributory negligence on the part of plaintiff which would preclude a recovery of damages, instead of saying that such a state of facts "would not constitute negligence that would render the defendant liable." This inaccuracy was, however, harmless, for plaintiff admitted that he did not look to see where he was stepping when he came out of the station door; and, if he knew when he went into the station that the work of tearing away the platform was going on, that the debris was still scattered around on the ground, and he failed to look where he stepped when he came out, he was guilty of contributory negligence which barred a recovery. The instructions fairly submitted the question whether or not the work of tearing away the platform was completed and the debris removed when plaintiff went into the station. This particular instruction, as well as others, submitted that question, and the jury found that issue against plaintiff; so, with that issue settled against him, it followed as a matter of law that, if he knew of that situation and failed to look where he stepped when he came out, he cannot recover. The situation was one of danger, of which he was fully apprised, and it was an act of negligence for him to ignore the danger entirely and blindly walk out without looking where he stepped.

The case is unlike one where a person goes upon the platform of a railroad company to transact business without reason to suspect danger. There it is generally a question for the jury to determine whether he is blameless in his own conduct, and it cannot be said as a matter of law that he must be on the lookout for danger. *St. L., I. M. & S. Ry. Co. v. Fairbairn*, 48 Ark. 491, 4 S. W. 50. But such is not the rule where the danger is known to the injured person, and he takes no precaution whatever for his own safety. Under these circumstances, there is nothing to submit to the jury, for it is not a matter about which men will differ that one who is fully aware of a dangerous situation and takes no precaution at all against the danger is guilty of negligence.

We find no error in the instructions, and the judgment is affirmed.

**BRADFORD v. ST. LOUIS, I. M. & S. RY. CO.**

(Supreme Court of Arkansas. Jan. 10, 1910.)

**1. CARRIERS (§ 359\*)—PASSENGERS—COMPARTMENTS — EJECTION OF WHITE PASSENGER FROM COACH SET APART FOR COLORED PERSONS.**

Under Kirby's Dig. §§ 6622, 6632, requiring railroad companies to provide equal but separate and sufficient accommodations for the white and colored races, a company may make reasonable regulations as to the time and manner of designating the respective compartments of the races; and, where there were more colored passengers than the end of the smoker set apart for them would accommodate, the conductor could order the white passengers to take seats in a Pullman coach, in the rear, and, if a white passenger in the smoker refused to change his seat, could use such force as was necessary to eject him from the smoker and compel him to go to the coach designated for white passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1439; Dec. Dig. § 359.\*]

**2. CARRIERS (§ 267\*) — PASSENGERS—EQUIPMENT — SEPARATE COACHES FOR RACES — RIGHT TO REQUIRE.**

Railroad companies may, independent of statute, make reasonable rules for the separation of passengers belonging to different races, if equal accommodations are provided, though reasonable rules prescribed by statute must be followed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 994; Dec. Dig. § 267.\*]

**3. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In a passenger's action for damages for his ejection from the smoker after the conductor had directed him to leave it so as to make room for colored passengers, it was not reversible error to admit evidence of the conductor that it was his duty to eject white passengers who had paid their fare from the smoking compartment while the train was in motion, if they did not leave that car and go to another coach when ordered to do so in order to make room for colored passengers, and that he had authority to use the white end of the smoker for colored passengers when the colored end was not sufficient to hold all the colored passengers.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.\*]

Appeal from Circuit Court Lonoke County; Eugene Lankford, Judge.

Action by John Bradford against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

October 30, 1908, appellant filed complaint in the Lonoke circuit court against the St. Louis Iron Mountain & Southern Railway Company, charging that while he was a passenger on the defendant's train the conductor "recklessly, maliciously, and unlawfully struck and choked said plaintiff," and that the conductor and the porter and the brakeman again assaulted him, beat him upon the head, cursed, choked, and threatened to kill him. Damages were asked in the sum of \$1,900 actual damages and \$500 punitive damage. The answer of the defendant denied that the conductor or other employé reckless-

ly, willfully, and maliciously assaulted appellant, and denied that any of them cursed him, alleged that defendant seated himself in a coach designated for colored passengers, and that the conductor requested him to enter a coach for white passengers; that appellant refused to do so, and asserted the intention of remaining in the coach assigned to colored passengers; that the conductor removed him, using only such force as was necessary. It also claimed that appellant was drunk and disorderly, and denied that plaintiff was entitled to any damages.

John Bradford took passage on appellee's train at Argenta for Jacksonville, another station not far distant. He took his seat in the "smoker," a car with two compartments. One of these where appellant seated himself was designated for white people. Bradford appeared to be under the influence of liquor. Twenty-five or 30 colored passengers boarded the train at Argenta. There was not room in the colored compartment for them, and in a few minutes after the train pulled out from Argenta they went into the compartment of the smoker where appellant and other white passengers were. Immediately thereafter the conductor also went into the compartment where appellant and others were, and told the white passengers that he needed the "smoker" for the accommodation of the negroes, and requested the white passengers to go back into the rear car. There was a "dead head" Pullman car in the rear where all the white passengers could be seated. All "seemed to go" except appellant. He said he would not give up his seat to a negro, called upon his friends to stand by him, and refused to comply with the request of the conductor. The conductor tried to persuade him to go, but he refused with an oath, telling the conductor that, if he wanted him out of there, he would have to put him out.

The conductor, whose version of the matter the jury accepted, testified as to the manner of appellant's expulsion as follows: "I took my coat off and took him back to the sleeper. Mr. Bradford ran his hand in his hip pocket, and I grabbed his throat with my left hand and choked him, and he commenced to nod like that, and I took him and led him back like a little man. I laid my hands on his shoulders, and walked behind him. I went back to see that he had a seat; and I seated him in the Pullman, on the right-hand side of the car, facing north. I did not strike him with my fist, or kick him. I took him by the throat to protect myself when he put his hand in his pocket. I thought he was going for a knife or a gun. When I saw him do that, I did take him by the throat; and I did it to resist whatever assault he might make on me. The porter did not kick Bradford. He didn't have his hands on him. The brakeman did not strike

him, or beat him or kick him. He wasn't even in the car." The conductor further testified as follows: "It is the rule of the company to seat the colored passengers in the front and to use the rear end for the white passengers. If it becomes necessary in order to accommodate passengers, we go and request the white people to vacate that partition car, and take seats in other parts of the train. The rule of the company gives the conductor the right to force white people to go out and let negroes in there while the train is going, if it becomes necessary, even though when they had taken their seats in there it was assigned and designated for white people. We have no rule which requires us to see that no one goes from one car to another while the same is in motion. We are supposed to keep them from riding on the platform; but it is not particularly dangerous to pass from one car to the other because you are in motion. Under our rule we have a right to move passengers from one car to another in order to give all passengers a seat, and we can do that while the train is going along. In order to comply with the laws of the state as to separate cars for white and black passengers, we have a right to move the white passengers from a car where they have taken their seats, if it becomes necessary to use that car to seat black passengers. And, if they refuse to leave it, we have a right to eject them from the coach. There was no sign in this car, but it was usually used as a smoking car for white passengers. At the time I asked the gentlemen to vacate, the auditor had not been around and taken up fare. I don't think he had. I acted under rule 338, and seated the passengers in the sleeper. We can take any one back out of the train and seat them in the Pullman car during the day without extra charge. The train conductor is superior to the Pullman conductor and has that right. I had control over that car that day. I wasn't authorized to use that car, except when cases arise to use it. It was a dead head car and belonged to the Pullman Company."

The rule 338 was read, and is as follows: "Should there not be sufficient sitting room in the coaches during the day to accommodate all of the passengers, and should there be a sleeping car attached to the train in which there are vacant seats, the conductor may seat some of the passengers in the sleeping car, noting on his report the number of passengers placed in such car and the stations to and from which they travel. This should not be done when passengers in the sleeping car have retired or to such an extent as to discommode regular sleeping car passengers." The conductor continued his testimony as follows: "My understanding of the rule is that whenever it becomes necessary I can change the assignment of passengers from one coach to the other in order to comply with the law. As I understand it, we

must provide seats for all passengers, and if I haven't enough room in the colored car for all colored passengers, I can request the other people to vacate that car." There was other testimony tending to corroborate the testimony of the conductor. The above testimony was introduced over appellant's objection. The grounds of his objection are: (1) That there was error in permitting witness Hunter to testify that it was his duty to eject the white passengers from the smoking compartment of the car assigned and set apart to white passengers while the train was in motion; (2) that he had the power and right to use the white smoker for colored passengers when the compartment set apart to them was not sufficient to seat them; and (3) that he had the right to eject a white passenger from the smoking compartment for white passengers while the train was in motion and after the passenger had paid his fare.

The testimony of appellant tended to show that on his refusing to leave the car where he was seated he was violently assaulted and choked by the conductor into insensibility, and was severely injured; that the conductor used abusive and profane language towards appellant; that the porter and brakeman also assaulted him. Appellant's testimony was corroborated by other witnesses.

The appellant presented the following prayer: "(8) If you find from the evidence that the plaintiff, John Bradford, took passage on defendant's train and had a ticket to the place of destination, it was the duty of the conductor to furnish him with a seat, and, when assigned a seat, the conductor would not have a right to eject him from said seat to give it to another passenger; and, if you believe from the evidence he was forcibly removed from said seat for the purpose of giving it to another, you are instructed that said ejection was unlawful, and you should find for the plaintiff." The court refused to grant the prayer, and appellant duly excepted. The court gave among others the following instruction: "(20) You are instructed that it is the duty of the conductor in charge of a passenger train to assign the passengers to a coach or compartment of the coach to which they belong by virtue of the race to which they belong, and, if the passenger refuses to occupy the coach or compartment to which he belongs because of his race, and occupies and insists and persists in occupying a coach or compartment to which he does not belong because of his race, the conductor has the right to use such force as it is necessary to eject such a passenger from such a coach to which such a passenger does not belong."

The appellant objected to the instructions and excepted to the ruling of the court in giving them. The verdict and judgment were for appellee. This appeal is duly prosecuted.

Trimble, Robinson & Trimble, for appellant. Kinsworthy & Phaton and Jas. H. Stevenson, for appellee.

WOOD, J. (after stating the facts as above).

1. The court in correct instructions presented to the jury the issues of fact as to whether it became necessary for the conductor in the discharge of his duty to eject appellant from the smoker, and if so, whether he performed his duty in a lawful manner, i. e., without any unnecessary force, and without any insult or uncalled for humiliation to appellant. The verdict of the jury settles the disputed questions of fact in favor of appellee.

2. The controverted questions of law are presented in the refusal of the court to give appellant's prayer No. 7, and in giving appellee's prayer No. 20. Prayer No. 7 is predicated upon the theory that when once separate coaches or separate compartments are assigned respectively to the white and African races, and the passenger has been furnished a seat in the car or compartment set apart for the use of the race to which he belongs, thereafter the officers of the trains could not make a new and different assignment of cars for the use of the separate races, and cause the passengers belonging to those races to adjust themselves accordingly. No warrant for such construction can be found in the provisions of the "separate coach law." Sections 6622-6632, inclusive, Kirby's Dig. The purpose of the law was to require railway companies to provide "equal but separate and sufficient accommodations for the white and African races" for their mutual comfort and convenience. The law should be so construed to conserve the welfare of the public white and colored who use this mode of travel. If the rigid and narrow construction obtained as set forth in prayer 7, the inevitable consequence would be at times to greatly inconvenience and annoy both races. The case at bar aptly illustrates what might result constantly if the conductor having supervision of the train and intrusted with the duty of securing as far as practicable the comfort of all the passengers were not allowed, if the emergency demanded it, to reassign coaches for the different races, and to compel the passengers to take the coaches or compartments thus set apart for their use. Here for instance there was ample room for the comfortable seating of both races by the arrangement which the conductor ordered. But if appellant under the law could have retained his seat in the compartment first assigned to white people, and could have compelled the conductor to allow such assignment to stand, it would have resulted in great discomfort to a considerable number of the passengers of both races. The lawmakers, having required equal but separate and sufficient accommodations for the white and African races, wisely left the matter of when

and how the coaches and compartments should be designated and set apart to the good judgment of the companies, the only exaction being that provision should be made for the equal, separate and sufficient accommodation of the races named, and that the companies should compel the passengers to obey the requirements of the law by accepting and using the separate accommodations furnished them. The company has the right to make reasonable rules and regulations as to the times and manner of the designation and assignment of the separate compartments furnished under the law. To these the passengers must conform. It will be observed that the railway companies and the passengers have reciprocal duties and obligations looking to the due enforcement of the provisions of the "separate coach law." Railway companies have the power independent of any statute to make reasonable rules for the separation of passengers belonging to different races, observing the conditions of equality of accommodations. Where the statute prescribes all the rules and regulations to be observed, of course, if these are reasonable, they must be observed. But, where the statute is silent as to particular rules and regulations, the common-law right of the carrier to make them and have them obeyed remains unimpaired. 9 Curr. Law, p. 512, § 27; Ohio Valley Ry. v. Lander, 104 Ky. 431, 47 S. W. 344, 882, and authorities cited in brief of counsel in that case for appellant; 2 Hutchinson on Car. § 972, note 23. The court therefore did not err in refusing prayer No. 7 and in giving prayer No. 20. There were no reversible errors in the rulings of the court upon the admission of evidence.

The judgment is therefore affirmed.

#### HAGLIN v. ATKINSON-WILLIAMSON HARDWARE CO.

(Supreme Court of Arkansas. Jan. 3, 1910.)

#### 1. APPEAL AND ERROR (§ 635\*)—ABSTRACT— CONTENTS—MOTION FOR NEW TRIAL.

Under Supreme Court rule 9, requiring the abstract on appeal to contain the material parts of the proceedings, etc., below upon which he relies, together with such other statements from the record necessary to a full understanding of the questions presented, an abstract which did not show that appellant filed a motion for a new trial, and that it was denied, was fatally defective, so that the judgment will be affirmed; no errors appearing in the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 635.\*]

#### 2. APPEAL AND ERROR (§ 281\*)—MOTION FOR NEW TRIAL—EFFECT OF ABSENCE.

In absence of a motion for new trial, only errors apparent on the record proper will be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1654; Dec. Dig. § 281.\*]

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

**3. APPEAL AND ERROR (§ 665\*)—ABSTRACT—CONCLUSIVENESS.**

The Supreme Court will take appellant's abstract as the record of the proceedings below, unless its correctness is questioned by appellee; and a statement therein that a motion for new trial was filed and overruled sufficiently shows the lower court's refusal to correct the alleged errors.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 663.\*]

**4. APPEAL AND ERROR (§ 768\*)—BRIEFS.**

The Supreme Court accepts appellant's assignments of error urged in the brief as being properly raised in the motion for new trial, unless appellee claims the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3103; Dec. Dig. § 768.\*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by the Atkinson-Williams Hardware Company against Edwin Haglin. From a judgment for plaintiff, defendant appeals. Affirmed.

W. A. Gillenwaters, for appellant. Winchester & Martin, for appellee.

**HART, J.** This is an action by the Atkinson-Williamson Hardware Company against Edward Haglin to enforce a lien for material furnished for a building to be erected on defendant's lots in the city of Ft. Smith, Sebastian county, Ark. There was a trial before a jury, and a verdict for the plaintiff. The defendant has appealed from the judgment rendered upon the verdict.

Counsel for appellant says that the only question raised by the appeal is: "Can appellee enforce its lien against the property for material that did not go into the building and become a part thereof?" He insists that the court erred in modifying an instruction, asked by him on this point. He sets forth in his abstract the instruction asked by him on this point, and the modification thereof by the court, but does not set out the other instructions given by the court. He also sets out a portion of the testimony adduced at the trial, which tends to show that a part of the materials furnished were not used in the construction of the building, but does not set out all the testimony as the substance thereof. Nowhere in his brief or abstract is there any reference to a motion for a new trial. The cause was brought and tried in the Sebastian circuit court for the Ft. Smith district.

Counsel for appellee has not attempted to supply the omissions in the abstract of appellant, but relies solely upon the right to have the judgment of the lower court affirmed for a noncompliance with rule 9 of this court. His brief was filed on the 3d day of December, 1909, in ample time before the submission of the case for counsel for appellant to have presented to the court his ex-

cuse for the alleged omissions in his abstract had he desired to do so. Rules of procedure are eminently proper, and absolutely necessary to the orderly dispatch of the business before the court. Rule 9 has been adopted for many years, and has been uniformly enforced where no sufficient excuse for not complying with it has been made to the court. The question then is squarely raised: Has rule 9 been complied with? If it has not according to numerous decisions of the court, extending over a period of time, of many years, the judgment of the lower court must be affirmed. It is not necessary to discuss the question of whether the modification of the instruction complained of, and the testimony abstracted, was sufficient to raise the issue intended to be presented; for the abstract is fatally defective in that it does not show that appellant filed a motion for a new trial in the lower court, and that the same was denied.

It is the settled law of this state that where there is no motion for a new trial, only errors in the rendition of the judgment which are apparent on the record proper will be considered. We take the abstract of the appellant as the record showing the proceedings of the court below, except where its correctness is questioned by appellee. We do not interpret our rules otherwise than reasonably. For instance, we do not require that the motion for a new trial be set out in full in the abstract of appellant. We recognize the abstract to be what its name implies, and where it states that a motion for a new trial was filed and overruled, that is sufficient to show that the lower court refused to correct the alleged errors. And we take the assignment of errors presented and urged in the brief as causes for reversal as being properly set out and raised in the motion for a new trial, unless that the fact is challenged by appellee, in which case, we examined the transcript to settle the disputed issue. Otherwise each judge, in turn, would be compelled in all cases to explore the transcript to ascertain if the assignments of error were properly saved, or rely upon the statement of the judge in whose care the transcript is lodged. The latter course would make the opinion that of one judge, and not that of the court. We have heretofore uniformly recognized and enforced this interpretation of the rules. Hence the citation of only a few cases is necessary for illustration of its application. *Wallace v. Ry. Co.*, 83 Ark. 359, 103 S. W. 747; *McDonough v. Williams*, 86 Ark. 600, 112 S. W. 164; *St. L., I. M. & S. Ry. Co. v. Boyles*, 78 Ark. 374, 95 S. W. 783.

For the reason that appellant has not in his abstract and brief shown that a motion for a new trial was filed and overruled in the lower court, the judgment will be affirmed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**CAPITAL FIRE INS. CO. v. J. H. DAVIS & SON.**

(Supreme Court of Arkansas. Jan. 10, 1910.)

**1. INSURANCE (§ 646\*)—ACTIONS ON POLICIES—BURDEN OF PROOF.**

In an action on an insurance policy not issued by defendant, where plaintiffs claimed that defendant became liable thereon by a consolidation with the company issuing it, which defendant denied, the burden was on plaintiffs to prove defendant bound on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1647; Dec. Dig. § 646.\*]

**2. INSURANCE (§ 665\*)—ACTIONS ON POLICIES—EVIDENCE—SUFFICIENCY.**

In an action on an insurance policy, not issued by defendant, evidence held insufficient to show that defendant was bound by the policy, either by consolidation or other contract with the company issuing it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1709; Dec. Dig. § 665.\*]

Appeal from Circuit Court, Cleburne County; Brice B. Hudgins, Judge.

Action by J. H. Davis and another, copartners under the firm name of J. H. Davis & Son, against the Capital Fire Insurance Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

C. S. Collins and Ratcliffe, Fletcher & Ratcliffe, for appellant.

**BATTLE, J.** Plaintiffs, J. H. Davis and Thomas W. Davis, partners doing business under the firm name and style of J. H. Davis & Son, brought this action against the Capital Fire Insurance Company and others. They alleged: That they, on and prior to the 29th day of April, 1905, were engaged in the business of general merchants at Wolf Bayou, Ark. That they owned the building in which they conducted their business, as well as a stock of general merchandise. That the building was of the value of \$400, and the merchandise was of the value of \$2,500. That on the 29th day of April, 1905, for and in consideration of \$45 to be paid by the plaintiffs, the Arkansas Mutual Fire Insurance Company, a corporation organized under the laws of the state of Arkansas, insured the building at \$225 and the stock of goods at \$1,275, for a period of one year, commencing on the 10th day of June, 1905, and continuing until the 10th day of June, 1906. That they paid \$15 of the \$45 to the Arkansas Mutual Fire Insurance Company on the 20th day of June, 1905, and the remainder on the 20th day of July, 1905, to the Arkansas Insurance Company.

"That on or about the 1st day of July, 1905, the Arkansas Mutual Fire Insurance Company changed its corporate name to that of the Arkansas Insurance Company, under which name it conducted an insurance business until on or about the 20th day of May, 1906, when the Arkansas Insurance Company was merged in the Capital Fire Insurance Company, one of the defendants herein.

"That by the terms of the merger the Capital Fire Insurance Company assumed and agreed to pay all liabilities of the Arkansas Mutual Fire Insurance Company and the Arkansas Insurance Company.

"Plaintiffs further said that on the 27th day of December, 1905, and while the insurance policy was in full force and effect, the building and stock of merchandise so insured was consumed by fire, and that their loss was total, with the exception of goods of the cost value of \$28.92."

Plaintiffs made other allegations in their complaint, and asked for judgment against the Capital Fire Insurance Company and others for the sum of \$1,500 debt, \$180 statutory penalty, and \$500 for attorney's fee.

The defendant, Capital Fire Insurance Company, answered, and, among other things, denied that there was any so-called "merger" of the Arkansas Insurance Company "in this company, or that any privity of relations were established by any contract of reinsurance between this company and plaintiffs. The facts being that the contract was special and as to a certain list of contested claims, including the one of plaintiffs, the Capital only guaranteed 50 per centum of the entire list. That this defendant has long since complied with this part of its contract, and neither it or its bondsmen are liable thereon to plaintiffs or any one, but it denies that the contract was of such a nature as to establish privity between it and plaintiff or any policy holder of the Arkansas Insurance Company, or a right of action against it at all." And it pleaded many defenses.

The jury in the case, after hearing the evidence and instructions in the case, returned a verdict in favor of the plaintiffs for \$1,500 and 6 per cent. per annum interest; and the court rendered a judgment against the Capital Fire Insurance Company for that amount and interest, and for \$180 penalty and \$200 for attorney's fee; and the said defendant appealed.

The plaintiffs alleged, and the defendant denied, that the Arkansas Insurance Company "merged" in the Capital Fire Insurance Company, and that by the terms of the merger the latter assumed and agreed to pay all liabilities of the Arkansas Mutual Fire Insurance Company or the Arkansas Insurance Company. The latter alleged that it agreed to pay only 50 per centum of the former's loss, which was \$750, and that it has long since complied with this part of its agreement; but the former recovered \$1,500 and interest and penalty and attorney's fee.

The burden was upon appellees, plaintiffs, to prove that appellant became bound to them by consolidation with the Arkansas Insurance Company, or other contract, to pay the amount due them, if any, on the policy of insurance sued upon in this action. They have failed to do so. The only evidence they

adduced was the following letter, which was read as evidence over the objection of the defendant:

"Little Rock, Ark., May 19, 1906.

"H. F. Fix, Heber, Ark.—Dear Sir: You have, of course, been advised by separate letter of the consummation of arrangements between the Arkansas Insurance Company and the Capital. The writer of this letter, who will be secretary of the consolidated company, has been advised that you are one of the most valued agents of the Arkansas.

"The letter, which you received, advises you that in future I will be in charge of the management of the office of the consolidated company, and I only write in this personal manner to you to express my continued confidence in you as an agent, and with the hope that the future business relations between you and the Capital Fire Insurance Company will be as pleasant as those which existed between you and the Arkansas.

"With kindest personal regards, I am,

"Yours very truly,

"G. B. Sawyer, Secretary."

The separate letter referred to was not offered as evidence, and its contents were not shown. The evidence adduced was insufficient and incompetent to show a consolidation. There was no statute authorizing such a consolidation, and there was no evidence that the stockholders of the two companies undertook to consolidate, or authorize a consolidation, or, if undertaken, the terms of it. The evidence was insufficient to sustain the verdict and judgment recovered.

Reversed and remanded for a new trial.

WOOD, J., not participating.

## MAJESTIC MILLING CO. v. COPELAND.

(Supreme Court of Arkansas. Jan. 10, 1910.)

### 1. SALES (§ 152\*)—DELIVERY—CONDITIONS PRECEDENT—NOTICE BY BUYER.

A buyer of flour for delivery in car load lots on his giving shipping directions from time to time, who breaches the contract by failing to give shipping directions, cannot complain of the failure of the seller to perform, unless the seller first repudiated the contract and refused to deliver the flour in accordance with its terms, in which case the buyer need not give further shipping directions, but he may treat the contract as at an end and sue for damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 357; Dec. Dig. § 152.\*]

### 2. CONTRACTS (§ 312\*)—BREACH—INTENT.

A party to a contract is not justified in treating it as broken by the adverse party, unless there has been a distinct and unequivocal intention, manifested either by words or conduct of the adverse party, not to perform the contract.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 312.\*]

### 3. SALES (§ 176\*)—CONTRACTS—DELAY IN DELIVERY—WAIVER.

A buyer of goods for delivery in car load lots on his giving shipping directions from time

to time waives any delay in delivery by consenting thereto.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.\*]

### 4. SALES (§ 176\*) — CONTRACTS — ABANDONMENT.

A seller of various brands of flour for delivery in car load lots on the buyer giving shipping directions failed to deliver flour of a specified brand after receiving shipping directions, because he did not have that brand of flour on hand, but performance of the contract by the seller was within the capacity of his mill, and there was nothing to show that, if the buyer had insisted on the fulfillment of his orders for that grade, it could not have been done, and he consented to delay in deliveries of that brand. *Held*, that the buyer could not treat the contract as abandoned by the seller because of his inability to perform.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 176.\*]

Appeal from Circuit Court, Craighead County; Frank Smith, Judge.

Action by Rudy Copeland, doing business under the name of the Copeland Commission Company, against the Majestic Milling Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Hawthorne & Hawthorne, for appellant. Lamb & Caraway, for appellee.

McCULLOCH, C. J. Plaintiff, Rudy Copeland, was engaged in business at Jonesboro, Ark., under the trade-name and style of Copeland Commission Company, and defendant, Majestic Milling Company, was operating a flouring mill at Aurora, Mo. On February 16, 1907, plaintiff gave a written order, which was accepted by defendant, for 1,000 barrels of flour, said order being in the following form:

"2-16-07.

"Majestic Milling Company: Ship to Copeland Commission Co. at Jonesboro, Ark.:

How ship:	60 day shipment.	
Terms:	Net A-L Att.	Amt. \$. . . . .
1000 Bbl. Flour		Base
Majesty	48	3.70
Show Me	48	3.30
Uncle Joe	48	2.70
Prince	48	Base 3.60

"Draw through Bank of Jonesboro.

"D. R. Bradford.

"Copeland Com. Co.,

"By Rudy Copeland."

D. R. Bradford was defendant's agent, and solicited the order. There is no controversy as to the construction of the contract; it being conceded that, according to its terms, the flour was to be shipped within 60 days from date thereof. And it was understood that, in accordance with plaintiff's method of doing business, the flour was to be shipped to his order in car load lots whenever he gave shipping directions from time to time. About the time this contract was entered into plaintiff was given the exclusive right to sell defendant's flour in certain territory in north-

eastern Arkansas and southeast Missouri. Another contract for 1,000 barrels of Majesty, the higher grade of flour, was entered into February 22, 1907, but no directions were ever given for shipments under that contract, and that feature of the case passed out in the trial below, and there is no controversy here concerning it. Defendant delivered a part of the flour—360 barrels—under the contract of February 16th, and this action was instituted by plaintiff to recover damages for an alleged breach of the contract on the part of defendant in failing and refusing to deliver the remainder. Plaintiff recovered judgment below, and defendant appealed.

The point at issue in the trial below was whether or not defendant failed or refused to deliver the flour in accordance with the contract. Plaintiff contended that defendant was unable to perform the contract, and refused to do so. On the other hand, defendant contended that the failure to deliver the flour was due entirely to plaintiff's failure or refusal to give shipping directions.

The evidence shows that the grade of wheat used by defendant produced three grades of flour, which were branded "Majesty," "Show Me," and "Uncle Joe"; the proportion being 80 per cent. Majesty, 17 per cent. Show Me, and 3 per cent. Uncle Joe. It became necessary, therefore, for defendant to adjust its sales so as to conform to the proportion in which the several grades of flour were produced, otherwise the capacity of the mill would be overtaxed and storage space become congested with unsold grades. The capacity of the mill was 1,000 barrels per day. All of the transactions between the parties were conducted by written correspondence, and there is no dispute as to what passed between them. That part of the correspondence which reflects the conduct of the parties with reference to the alleged breach of the contract by defendant in failing or refusing to ship the flour occurred on and after March 14, 1907, and will be copied in full, except that the letters concerning an order for shipment of a car load to Jericho, Ark., on March 13th, which order was afterwards by agreement cancelled, are omitted. The correspondence related to a car load of flour ordered by plaintiff on March 14th to be shipped to Paragould, Ark., which he had sold to Bertig Bros.

"March 14th, 1907. Majestic Milling Co., Aurora, Mo.—Dear Sirs: Please ship us at once on our contract to Paragould, Ark., via Frisco and Cotton Belt:

50	Bbbls.	Show Me	Flour	in	wood.
75	"	"	"	"	48's.
30	"	"	"	"	24's.

"Please get the car in transit as soon as possible, and send all papers through the Bank of Jonesboro as usual. The customer to whom we have sold this flour has four other cars booked with us, and is one of our very best customers. We usually sell him ten

cars at a time. He has been using Comet manufactured by the Eisenmeyer Milling Co., and is their second patent. He has also used a few cars of Bulte's Pelican which is his third grade. We have assured him that Show Me will come up to either of these flours, and if it does he will make us a splendid customer, and we hope we will not be disappointed in the quality of the goods. Yours truly, Copeland Commission Co."

"March 15th, 1907. Messrs. Copeland Commission Co., Jonesboro, Ark.—Gentlemen: Beg to acknowledge receipt of your specifications for two cars, one dated March 13th, and the other March 14th. These shipments will move on dates specified unless we have instructions to ship sooner from you. We do not see much change in the equipment situation. However, we are living in hopes though we may die in despair. We appreciate your kindness in furnishing the specifications early in order that we may be able to give you better service. Yours very truly, Majestic Milling Company."

"Aurora, Mo., March 21st, 1907. Messrs. Copeland Commission Co., Jonesboro, Ark.—Gentlemen: We are just in receipt of your wire of even date with reference to Paragould car. We immediately wired you 'Badly oversold on Show Me. Do all can. Can't you change specifications any?' By way of explanation will state that our former manager, Mr. Wilson, used such extremely poor judgment and sold long on this special brand, which is causing us no end of trouble. We are gradually getting out of our cramped condition, and if you can in any way change the specifications of this car with some other brand we would certainly appreciate this. This will assist us greatly in giving prompt shipment. If you cannot do this, we will move car at the earliest possible moment. Yours very truly, Majestic Milling Co., W. H. Roark, Mgr."

"Aurora, Mo., March 26th, 1907. Messrs. Copeland Commission Co. Jonesboro, Ark.—Gentlemen: With reference to the car for Paragould to be shipped at once, we note that this is a straight car of Show Me, our extra fancy brand. Would like to ask if you can in some way use a portion of this car in some other brand, as we are in a very bad condition, and it will be impossible for us to fill this order promptly, as our mill is now full of flour of the high grade, and, in order to manufacture this special grade we are compelled to make more Majesty and we absolutely have not the room in which to put it. We would consider it a special favor if you could make some change in specifications and help us out on our badly congested condition. We would also be more than pleased to have some specifications on your 1,000 barrel order given us on February 22nd. For your information will state that our former sales manager, Mr. Wilson, sold us so long on this special brand as we have been doing everything in our power to work ourselves

out of this cramped condition, and have succeeded thus far fairly well. However, it seems that we have just about reached the climax, and if we cannot get some of our high patent moved, the Show Me orders are bound to receive some serious delay. [No signature.]”

“March 27th, 1907. Majestic Milling Co., Aurora, Mo.—Dear Sirs: Our customer at Paragould is unable to change specifications on car of flour. Therefore, we will thank you to make every possible effort to get car out as soon as possible, and oblige, Yours truly, Copeland Com. Co.”

“Aurora, Mo. March 28th, 1907. Messrs. Copeland Com. Co. Jonesboro, Ark.—Gentlemen: With reference to your letter of the 27th inst., we will await further shipping instructions on the Jericho car as requested. We would, however, be pleased to move this car as soon as possible, as we are very much congested for space. With reference to the car for Paragould we are very sorry that specifications could not be changed but will do our utmost to move this car at an early date, but as previously stated our mill is full of high grade flour, and it is utterly impossible for us to fill this order until we can get some storage room in order that we may make the extra fancy which goes in this car. We would be pleased to have another of your valuable orders at any time. Yours very truly, Majestic Milling Company, W. H. Roark, Manager.”

“March 29th, 1907. Majestic Milling Co. Aurora, Mo.—Dear Sirs: We are in receipt of your favor of the 26th, and sorry to note your cramped condition on ‘Show Me’. We have already written you the condition our customer is in on this, and beg to say that we would be only too glad to have him take his contract in Majesty but the class of trade he handles would not warrant him in doing so. We have another car of Show Me sold for prompt shipment to Jonesboro, but can arrange to delay that some time yet, but the Paragould customer is entirely out, and we will have to arrange to get him a car some place else of a similar grade if you are unable to make a shipment. Kindly advise us by wire upon receipt of this if you can possibly arrange to get this car out tomorrow or Monday. Yours truly, Copeland Com. Co.”

“Aurora, Mo. March 30th, 1907. Messrs. Copeland Com. Co. Jonesboro, Ark. Gentlemen: Replying to your kind favor of the 29th, will state that we have just advised you with reference to Paragould car, stating that it would be satisfactory to us for you to cancel this order and we now confirm the same. As previously stated, we dislike to cancel orders, but wish to thank you for being so kind to us, under the circumstances, and assure you that we certainly appreciate your kind consideration. As previously stated, Mr. Wilson got us in very bad shape on this Show Me brand of flour, and we have been doing all in our power to

get out of this cramp, but in order to fill any orders of Show Me we must have time. We assure you that when we are able to get out of this position, we will not be so blind as to get into it again. Again thanking you for your kindness, and hoping to hear from you again, we remain, Yours very truly, Majestic Milling Co., W. H. Roark, Mgr.”

“April 4th, 1907. Majestic Milling Company, Aurora, Mo.—Dear Sir: We had to buy a car of flour for our Paragould customer and have gotten it for him, but you may keep the order you now have for Paragould entered to ship out about the 20th of this month. Suppose you will be sufficiently caught up with your orders by that time to make shipment. This customer uses about one car every two weeks, and he will have the car we have just shipped to him used up by that time. Yours truly, Copeland Commission Co.”

“April 5th, 1907. Messrs. Copeland Comm. Co. Jonesboro, Ark.—Gentlemen: Referring to your order given our Mr. Bradford Feb. 16th, for 1,000 barrels to be shipped out 60 days from date. We would appreciate it very much if you could give specifications so that we could get this flour moving as we are very much congested for room and the time is getting short. Yours very truly, Majestic Milling Company.”

“April 8th, 1907. Majestic Milling Co. Aurora, Mo.—Dear Sirs: We wrote you a few days ago to let the Paragould order remain as booked to ship out in ten days. We have a letter from our customer there changing specifications slightly and request car to come out at once. Please change specifications to read:

60 Bbls.	Show Me in wood.
70 Bbls.	“ “ “ 48’s.
30 Bbls.	“ “ “ 24’s.

“Ship to us at Paragould as quickly as possible. Upon the quality of this flour depends much future business, and we hope you will see to it that it is fully up to the standard. Yours truly, Copeland Commission Co.”

“April 11th, 1907. Messrs. Copeland Com. Co., Jonesboro, Ark.—Dear Sirs: Inclosed please find invoice covering C. O. & G. 10336 flour shipped you today. We would like to have the balance of your valuable specification covering our contract now pending as soon as possible, as the sixty days is about up. Anxiously awaiting your prompt reply, beg to remain, Yours very truly, Majestic Milling Company.”

This concluded the correspondence up to the date of the expiration of the 60-day period specified in the contract. A car load of flour, the order for which is contained in the letter of April 8th, copied above, was shipped out on April 10, 1907. It is not contended that plaintiff ever gave directions for shipment of flour during the lifetime of the contract after the last shipment on April 10, 1907; nor is it contended that defendant ever

expressed any unwillingness or inability to fully perform the contract further than may be implied from the correspondence hereinbefore copied. The question then arises: Does the evidence establish a breach of the contract on the part of defendant? For if the plaintiff was the first to break the contract, or if he failed to perform his part of the contract by giving directions for shipment of the flour, then he cannot complain at defendant's failure to perform. *Townes v. Oklahoma Mill Co.*, 85 Ark. 596, 109 S. W. 548. Defendant could not ship the flour until proper directions were given, and plaintiff was at fault in not giving directions, unless defendant first repudiated the contract and refused to deliver the flour in accordance with its terms. If, however, defendant first repudiated the contract and broke it by failure or refusal to deliver the flour after being requested so to do, then plaintiff was not bound to give further shipping directions, for he had the right to treat the contract as at an end, and sue for the damages sustained by reason of the breach. *Spencer Medicine Co. v. Hall*, 78 Ark. 336, 93 S. W. 985; *Gauger v. Sawyer & Austin Lbr. Co.*, 88 Ark. 422, 115 S. W. 157; *Benjamin on Sales* (7th Ed.) § 568; *Dingley v. Oler*, 117 U. S. 490; 6 Sup. Ct. 850, 29 L. Ed. 984; *Withers v. Reynolds*, 2 Barn. & Adol. 822.

But the rule is well established that in order for one party to a contract to be justified in treating it as broken by the other, and claiming damages for the breach, there must have been a distinct and unequivocal intention manifested either by the words or conduct of the other not to perform the contract. *Spencer Med. Co. v. Hall*, supra; *Armstrong v. St. P. & P. C. & I. Co.*, 48 Minn. 113, 49 N. W. 233, 50 N. W. 1029. The evidence in this case does not warrant the conclusion that defendant ever refused to perform the contract. On the contrary, the correspondence shows a willingness on its part to perform, and up to the last it called on plaintiff to furnish specifications for shipping the flour. This was the last word between the parties during the lifetime of the contract. There was some delay in making shipments, but plaintiff consented to it, and the last request for shipment was promptly complied with. He waived the delay by consenting to it. *Tidwell v. Southern Engine & B. Wks.*, 87 Ark. 52, 112 S. W. 152.

Nor does the evidence warrant the finding that defendant was unable to deliver the flour. The most shown is that defendant could not promptly deliver the brand of flour called for; but the delay was consented to. There is nothing to indicate that, if delivery of the flour had been insisted on, it could not have been furnished within the lifetime of the contract. The capacity of defendant's mill was 1,000 barrels per day, 17 per cent. of the output being of the grade and brand

called for, and it is easy to see that performance of the contract with plaintiff was within the capacity of the mill. It is true that defendant had other orders for the same grade of flour; but there is nothing to show that, if plaintiff had insisted on the fulfillment of his orders for that grade, it could not have been done. He had no right to treat defendant's request for delay as an abandonment of the contract, especially when he consented to the delay.

It is unnecessary to decide whether according to the terms of the contract defendant had the right to delay shipment until the last day of the specified time; for no further requests for shipment were made, and plaintiff is in no attitude to complain. Upon the whole, we are of the opinion that the verdict of the jury is not sustained by the evidence. The judgment is therefore reversed, and the cause remanded for new trial.

ST. LOUIS, I. M. & S. RY. CO. v. WELLS.  
(Supreme Court of Arkansas. Jan. 10, 1910.)

1. MASTER AND SERVANT (§ 217\*)—INJURIES TO SERVANT—ASSUMED RISK.

Where a fireman of six months' experience and average intelligence knew that about one-third of the engines were equipped with screens on the lubricator feed glasses, which were immediately in front of him on the boiler, and there was no defect or anything inherently dangerous in the glass, except that it might occasionally break, as any other implement or tool might, he assumed the risk of injury from the breaking of the glass.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 588; Dec. Dig. § 217.\*]

2. MASTER AND SERVANT (§ 153\*)—MASTER'S DUTY—WARNING SERVANT—NECESSITY OF INSTRUCTION.

A master need not warn an inexperienced servant of possible dangers in the performance of his duties, where experience and instruction are not necessary to enable him to do his work with safety.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 316½; Dec. Dig. § 153.\*]

3. MASTER AND SERVANT (§ 158\*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Where a lubricator feed glass on a locomotive boiler was not inherently dangerous, so that a warning to a fireman that it might possibly break would not have obviated the danger of its breaking, failure to warn him that the glass might sometimes break was not the proximate cause of his injury from its breaking.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 304; Dec. Dig. § 158.\*]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Action by W. H. Wells against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and case dismissed.

E. B. Kinsworthy and Lewis Rhoton, for appellant. J. H. Harrod, for appellee.

HART, J. This is an appeal by the St. Louis, Iron Mountain & Southern Railroad Company from a judgment rendered against it in the Lonoke circuit court in favor of W. H. Wells for physical injuries received by him on account of the alleged negligence of the railroad company in not screening or shielding the feed glass of the lubricator on one of its engines, whereby his right eye was destroyed by the bursting of said feed glass. The statement of facts is substantially as follows:

W. H. Wells, the plaintiff, was 22 years of age. Until about 20 years old, he worked on a farm. He then worked for a railroad company in the capacity of car repairer and engine watchman. About six months before the injury occurred, he was employed by the defendant company as fireman, in which capacity he worked until the time of the injury, of which he complains. His usual run as fireman was on the Central Division between Little Rock and Van Buren in the state of Arkansas. He was directed at the beginning of each run to fill the lubricator on the engine, and did so unless the engineer arrived first and filled it. He had no other duties to perform in connection with the lubricator. The oil feeds through a glass tube, and the lubricator is right above the boiler in plain view of the engineer and fireman when on their seats. The engines are equipped with screens and wire shields to the feed glass when they leave the shops, but these are soon taken off by the engineer so that he can better watch the oil feed through the glass to the cylinder. On the road in question the shields and screens had been removed from as many as two-thirds of the engines. The plaintiff first saw the engine in question on February 18, 1908, when he left Little Rock on it as fireman. His run was to McGehee in this state. The next morning at McGehee, when the plaintiff climbed upon the engine, the engineer told him that he had already filled the lubricator. The engineer went back to the tank to see about the water. While he was gone, the plaintiff noticed some steam escaping from the bottom of the feed glass. He says that he thought this might be dangerous and decided to shut off the steam. He went forward toward the lubricator and started to take hold of the condenser, and about that time the glass burst. A piece of the glass flew in his eye and injured it so severely that it had to be removed.

The above statement of facts is uncontradicted, and thus raises the issue of whether the court erred in not giving a peremptory instruction in favor of the defendant.

The plaintiff was a man of average intelligence. He had been employed by the defendant as fireman for six months. He knew that only one-third of its engines were equipped with shields or screens on the feed glass

of their lubricators. The lubricators were on the boiler immediately in front of him, where but to look would be to know whether or not the feed glass was guarded by shield or screen. Plaintiff said that he had never known one of the feed glasses to break before, but any one with his experience must have known that glass will sometimes break.

There was nothing inherently dangerous about the use of the feed glass. The only danger was that which might arise from the occasional breaking of it just as any other tool or implement might break. It is not contended that there was any defect in it. We think, under the undisputed facts, it was one of the risks incident to the service which the plaintiff assumed when he entered the employment of defendant as fireman on one of its locomotives. *St. L., I. M. & S. Ry. Co. v. Corman*, 122 S. W. 116; *Louisiana & Arkansas Railway Company v. Miles*, 82 Ark. 534, 103 S. W. 158, 11 L. R. A. (N. S.) 720.

Besides, "It is not the duty of a master to warn an inexperienced servant of the dangers liable to be encountered by him in the performance of his duties where experience and instruction are not necessary to enable him to do with safety the work he is employed or required to perform." *Ford v. Bodcaw Lumber Company*, 73 Ark., at page 55, 83 S. W. 346.

The only duty plaintiff had to perform in connection with the lubricator was to fill it when directed by the engineer. There was nothing inherently dangerous in working near it. If the plaintiff had been warned that the feed glass might occasionally burst, it could not have lessened the likelihood of explosion in this case. Hence the mere fact that he was not told that the feed glass might sometimes break in no wise contributed to cause his injury. *Brands v. St. Louis Car Co.*, 213 Mo. 698, 112 S. W. 511, 18 L. R. A. (N. S.) 701.

Therefore we conclude that the court erred in not directing the jury to return a verdict for the defendant.

For that error, the judgment must be reversed, and the cause dismissed.

#### DAVIS v. DAVIS et al.

(Supreme Court of Arkansas. Jan. 3, 1910.)

##### 1. INJUNCTION (§ 46\*)—TRESPASS.

A plaintiff was not entitled to an injunction restraining his children from entering on and occupying his property, where it appeared that they were not trespassers, but had improved the land.

[Ed. Note.—For other cases, see Injunctions, Cent. Dig. §§ 98, 99; Dec. Dig. § 46.\*]

##### 2. WILLS (§ 302\*)—EXECUTION—WITNESSES.

Under the express provisions of Kirby's Dig. § 8012, subd. 5, an unattested will in the handwriting of a testator must be established

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by the unimpeachable evidence of at least three disinterested witnesses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 706; Dec. Dig. § 302.\*]

### 3. HUSBAND AND WIFE (§ 49½\*)—GIFTS BETWEEN.

A wife may give her husband money or contribute it to the improvement of their home, and he cannot be forced to return it.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 256; Dec. Dig. § 49½.\*]

### 4. IMPROVEMENTS (§ 4\*)—COMPENSATION.

Under Kirby's Dig. § 2754, providing that one who, believing himself to be the owner under color of title, makes improvements on land, shall be entitled to compensation therefor, children not making improvement under color of title, on their father's land, were not entitled to compensation.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. § 13; Dec. Dig. § 4.\*]

### 5. SET-OFF AND COUNTERCLAIM (§ 31\*)—VALIDITY.

In an action by a father to restrain his children from entering on and interfering with his possession of land, a claim of one of the defendants for compensation for services rendered plaintiff as a nurse or domestic, being entirely distinct from the subject-matter of the suit, could not be litigated therein.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 52; Dec. Dig. § 31.\*]

Appeal from Benton Chancery Court; T. H. Humphreys, Chancellor.

Action by William Davis against Oscar F. Davis and others. From the judgment, both parties appeal. Reversed and remanded.

J. A. Rice, for plaintiff. R. F. Forrest, for defendants. O. F. Davis, pro se.

**BATTLE, J.** William Davis, Eliza J. Davis, Oscar F. Davis, Ella A. Beauchamp, and Ella B. Davis, William being the father, and Eliza J. Davis being the mother, of the other three, constituted one family. Discord reigned among them. Father and children lost respect for and confidence in each other, and indulged in disparagement, and paternal feeling and filial love and affection seemed for a while to have departed from their midst. Finally the mother died, and was buried, and the children made ready to depart, and the old man softened and invited them to remain with him in the old homestead, and they accepted his invitation. They remained a short time, when the same old bickerings, ill will, discord, and vituperation returned. The old man grew tired of the children and brought this suit against them, on the 21st day of August, 1908, in the Benton chancery court, to drive them from his home. He alleged in his complaint that he is the owner of a certain tract of land containing 40 acres, and that he resides thereon and cultivates the same as his only means of support, and that for a long time the defendants have habitually and unlawfully, against his will and consent, interrupted plaintiff in the possession and quiet enjoyment of his property, by per-

sisting in residing thereon and assuming the authority to manage and control same, and by preventing plaintiff's tenants and other employes from occupying and cultivating the same, and by otherwise unlawfully interfering with plaintiff's peaceable enjoyment of said premises and to his great personal discomfort and financial injury and damage, and threaten to and will continue to do so unless restrained from so doing. He asks that they be perpetually enjoined from such interference and interruption in plaintiff's quiet and undisturbed enjoyment of his property and his home.

Mrs. Beauchamp, a defendant, answered and admitted that the legal title in the land is vested in the plaintiff, but denied the other allegations in his complaint. And she alleged:

"And this defendant says that in the month of August, 1907, she was requested by the plaintiff to take up her residence upon said premises.

"That in compliance with the said request she did so. That plaintiff agreed that if she would do so that he would make title to this defendant, to her brother Oscar F. Davis, and to her sister Ella B. Davis to an undivided one-fourth interest each in the lands and premises set forth in the complaint, and, as a further consideration for her so doing, that he would deed to her sons John L. Beauchamp and Earl R. Beauchamp an undivided one-eighth interest each in the lands and premises.

"That by reason of her contract with plaintiff she declined an offer of \$65 a month and her expenses, as a traveling sales lady. That she could have made during said time as sales lady the sum of \$780, but that instead of accepting the sum she, in compliance with her contract with plaintiff, has devoted all of her time and attention to him and his business, to her great loss, to wit, in the sum of \$780.

"And the defendant, further answering, says that, as a part of her contract with William Davis, she was to occupy the land and premises during the lifetime of William Davis, free from any charge, for rent or otherwise, from her, together with her brother Oscar F. Davis and her sister Ella B. Davis.

"And this defendant prays that this plaintiff be enjoined and restrained from in any manner selling or disposing of the real estate, or from mortgaging or incumbering the same in any manner whatever.

"And defendant, having fully answered, prays that, upon a final hearing of this cause, she be decreed an undivided one-fourth interest in the lands; that the court find that she is entitled to occupy the same in connection with her brother Oscar F. Davis during the lifetime of the plaintiff; that she have and recover all her costs in this behalf laid out and expended; and that she have and recover all other proper legal and equitable relief to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which in good conscience she is entitled, and will ever pray."

Oscar F. Davis answered and made the denials contained in the answer of Mrs. Beauchamp, and by way of cross-complaint pleaded the same contract with the plaintiff and asked for specific performance of the same.

Ella B. Davis answered and denied the allegations contained in the complaint of plaintiff, and, further answering, said:

"The defendant, answering further and by way of cross-complaint, states that on or about the 14th day of December, 1895, Eliza J. Davis, the mother, and wife of plaintiff, inherited as her share from her father's estate the sum of \$357.76 and gave of this inheritance \$300 to the plaintiff, with which plaintiff built the house upon the premises and otherwise improved the same. That Eliza J. Davis prior to her death bequeathed to the codefendant, Ella B. Davis, this money, together with her interest in the land, and requested the plaintiff to pay the money to this defendant, which the plaintiff has failed to do.

"That this defendant has an interest in the S. W.  $\frac{1}{4}$ , S. W.  $\frac{1}{4}$  of section 5, township 17, range 33 west, in the sum of \$300 and interest at the rate of 6 per cent. from the 14th day of December, 1895.

"And the defendant, further answering, states that in the year 1885 the plaintiff employed her to labor as a domestic in his family and agreed to pay her reasonable compensation per week for her services. That she labored for the plaintiff as domestic for 23 years. That her services were reasonably worth the sum of \$5 per week, and that there is due her for services aforesaid the sum of \$5,980.

"That 18 years ago plaintiff employed this defendant as a nurse to nurse and care for his sick wife and agreed to pay her therefor what her services were reasonably worth, and that her services as a nurse were reasonably worth the sum of \$1 per day, and that the plaintiff is justly indebted to her in the sum of \$6,205 for services as nurse.

"That from the time that the defendant entered the services of the plaintiff, there has been running between them a mutual running account, and that no settlement has ever been had with the plaintiff for the services so rendered by this defendant, and that there is now due and unpaid to this defendant the sum of \$12,185.

"And the defendant, further answering, says that in the month of August, 1907, the plaintiff approached Mrs. L. A. Beauchamp and stated to her that he desired this defendant, her brother, Oscar F. Davis, and Mrs. L. A. Beauchamp to remain with him and care for him during his declining years, and stated that as a compensation for their care and attention he would leave to each of them a one-fourth interest in the lands and premises hereinbefore described in plaintiff's complaint,

and would leave to John L. Beauchamp and Earl R. Beauchamp an undivided one-eighth interest in said estate.

"And this defendant thereupon accepted the proposition so made by William Davis and has since continued to remain at his home and to do and perform all duties incumbent upon her and to care for and nurse and minister to the said William Davis and look after his wants and household affairs as best her abilities would permit."

And she prayed as follows:

"The premises being proved, this defendant prays that the court determine what interest she has in said premises, and that she have partition thereof. That she have specific performance of the contract so entered into by and between William Davis and this defendant. That the court declare her entitled to an undivided one-fourth interest in the lands and premises subject to the life estate of William Davis. And that William Davis be enjoined and restrained by the court from in any way selling or disposing of the lands or from in any wise mortgaging or incumbering the same, and that upon a final hearing of this cause she have such other general, proper, and equitable relief as equity and good conscience may require."

The plaintiff answered the cross-complaints of Mrs. Beauchamp and Oscar F. Davis, and denied that he entered into an agreement, orally or otherwise, with either of them, that he would convey to them, or either of them, a one-fourth interest in the lands, or that either of them, in pursuance of any such agreement, rendered any services whatever; that Mrs. Beauchamp, at the time of his alleged contract with her, had any definite contract or understanding with any other person whereby she was entitled to a monthly salary of \$65 per month, or any other sum.

And for further defense he stated: That the contract set out in the cross-complaints and relied upon by Beauchamp and Oscar F. Davis, if made, was oral, and under the statute of fraud is void, which he expressly pleaded.

And he answered the cross-complaint of Ella B. Davis as follows:

"Plaintiff, in his answer to the cross-complaint of Ella Davis, denied his liability in any sum whatever to her, or that he ever employed her as a domestic or nurse, or that she rendered any services in pursuance of such employment, or understanding, or that he ever at any time agreed to pay her for any such services. During the time of alleged services she was a member of his household, residing with him as a child and member of his family, and whatever services she rendered, either as a domestic or as a nurse in caring for her sick mother, were rendered as a child and member of the household and without any expectation or understanding that she was to be compensated therefor, other than to share in the home in

common with the other members of the family, which she did; and that at no time prior to the bringing of this suit did she disclose to the appellant that she expected him to pay for said services. And he further shows that her claim for compensation for such services is stale, outlawed, and barred by the statute of limitation, which is pleaded as a defense herein, and that the alleged contract to convey an interest in the lands to her was never made, and, if made, was oral, not in writing, and is void under the statute of frauds, and was without consideration, and that the defendant has no vested rights or claims against the lands, either presently or prospectively.

"He denies that she ever rendered any service in pursuance of any such contract.

"And for further defense to her cross-complaint he denies that Eliza J. Davis, mother of defendant, Ella Davis, had any interest, in the lands other than a widow's inchoate right of dower, but admits that in the year 1896, his wife, Eliza J. Davis, inherited some \$350 from her father's estate, and that a portion thereof was used by appellant and his wife, Eliza J. Davis, in the construction of a residence or dwelling house upon the property in controversy, some 10 or 12 years ago, and that the remainder of said inheritance was used by the family for the common uses and benefits of all the members of the family, including Eliza J. Davis, and without any understanding that the same was a loan by her to her husband, to be repaid, or that the same was ever to become a charge against him, personally, in his lifetime, or against his estate at his death."

The plaintiff demurred to the separate cross-complaint of the defendant, and for cause stated:

"(1) That the facts set forth in said cross-bills, if true, do not constitute a cause of action against the plaintiff.

"(2) Because the alleged contract set forth in said cross-bills, under and by which the defendants claim an interest in the lands described in the complaint, is oral, not in writing, and void under the statute of frauds and of no force and effect.

"(3) Because the claim for services set forth in the cross-bill of defendant Ella Davis shows upon its face to be stale and barred by limitation, and because the claim for service set forth in said cross-bill cannot be litigated or adjudicated as a defense to plaintiff's action."

A motion was filed to dismiss the complaint as to Ella B. Davis.

The court, after hearing the evidence adduced by all the parties, dismissed the complaint as to Ella B. Davis, and found as follows:

"(1) That plaintiff, William Davis, is the sole owner of the lands and improvements thereon and described as follows: S. W.  $\frac{1}{4}$ , section 5, township 17, north, range 33 west,

Benton county, Ark.—and is entitled to the peaceable and quiet and uninterrupted possession thereof, as against the defendants, L. A. Beauchamp and Oscar F. Davis.

"(2) That the defendant, Oscar F. Davis, is entitled to recover of appellant William Davis \$21 for improvements on the premises by him.

"(3) That L. A. Beauchamp is entitled to recover of appellant \$275 for improvements made on the place by her.

"(4) That the defendant Ella Davis is entitled to recover of appellant \$250 for improvements made on the lands with money bequeathed to her by her mother, Eliza J. Davis."

"(5) That the contract set forth in the cross-complaints, whereby cross-complainants claim an interest in the lands, has become burdensome, and impracticable, and that it would be unreasonable to specifically perform and enforce the same as against the plaintiff, William Davis.

"(6) And the court enjoined the defendants, Oscar F. Davis and L. A. Beauchamp, from going on and residing upon the lands described, against the consent of the plaintiff, except for the purpose of visiting Ella Davis, while residing thereon.

"(7) And the court declared a lien upon the land hereinbefore described, to secure the payment to the several defendants the several sums of money hereinbefore mentioned and adjudged to be due them, with interest, provided neither of said sums shall become due and payable until the death of appellant, William Davis, or until he should sell the lands, and that the lien shall be nonenforceable so long as plaintiff, William Davis, remains the owner of the same.

"(8) And the court adjudged and decreed in accordance with the foregoing findings and judgments, and that one-half of the cost be paid by each party, except Ella Davis, who recovers all her costs against the plaintiff."

Both parties have appealed.

Plaintiff is not entitled to the relief prayed for in his complaint. Courts of equity do not grant injunctions to restrain trespasses, when the injury is not irreparable and destructive of plaintiff's estate, or where he has a full and adequate remedy at law. *Myers v. Hawkins*, 67 Ark. 413, 56 S. W. 640; *Haggart v. Chapman & Dewey Land Company*, 77 Ark. 527, 92 S. W. 792; *Western Tie & Timber Company v. Newport Land Company*, 75 Ark. 286, 87 S. W. 432; *McCarty v. Wilson*, 81 Ark. 115, 98 S. W. 682; *Hall v. Wellman Lumber Company*, 78 Ark. 408, 94 S. W. 43; *Terry v. Rosell*, 32 Ark. 478, 489; *Foster*, Ex parte, 11 Ark. 304. It is true that plaintiff alleged in his complaint that defendants have and are now trespassing upon his land to his irreparable injury, but the evidence failed to sustain the allegation. On the contrary, the court found that

they had improved his land, and awarded sums of money to each of them for improvements.

The defendants base a claim to an interest to the land upon a request of them to remain at his home, made by plaintiff about the 2d day of September, 1907, the day after their mother was buried. This claim is based upon the testimony of the defendant Mrs. Beauchamp. She testified that her father said:

"Ella, I know that you intend to leave. If you will stay here and you go and beg Oscar and Ella to stay, I will give you one-fourth of the place, Ella and Oscar each one-fourth, and your two boys the other one-fourth." He said: "There is no other little clod of dirt that will be home to you." And he said: "I will do different to what I have ever done. I will do what you say. I won't be here long." Plaintiff testified: "A day or two after my wife died, notwithstanding the family had been living very disagreeably and unpleasantly for a number of years, I suggested to Mrs. Beauchamp one morning that I would like for us all to live together in case that we could live and get along in peace; live as a family should live. I emphasized that. I repeated that because we had not got along together for a number of years. But I suggested to her that we would try to live together if we could live together as a family ought to, and live in peace, and spoke about it being pleasant for us all to live together if we could get along, and further that if we all could live together peaceably, not saying we had to remain on that place, or that they should remain, I remarked that at my death, in case of our living together as a family should, if I had anything left to whom it would belong. I told them that the land should be divided between Mrs. Beauchamp, Oscar, and Ella Davis in equal parts, and John and Earl R. Beauchamp, Mrs. Beauchamp's sons, one-fourth each. That what I had left should be divided among them equally." This conversation had reference to the division of his land at his death. All of them seem to have understood that the father would hold the land during his life, and that at his death it would be divided among them in the proportion stated. The promises made were gratuitous. There was no contract. The whole burden was upon the father. The children were to stay on his place. They were to pay no consideration, and have no control of the farm or

the lands and to receive no part of its profits. There was no stipulation that they would do anything for him, but only stay, make their home with him, he furnishing the home. They acquired no interest in his lands.

Ella B. Davis acquired no right to or against the land by the paper writing handed to her by her mother. It is as follows:

"After my death, when this place is sold, I want Ella to have the \$250.00 that is in it, and that I give her the wardrobe and sewing machine and the bedstead, and I want my children to have my part of the land.

"[Signed] E. J. Davis."

The body of it and the signature to the same are in the handwriting of Mrs. Davis. It is unattested, and, under the statutes of this state, must be established, if at all, by the unimpeachable evidence of at least three disinterested witnesses. Kirby's Dig. § 8012, subd. 5. The writing in this case was not so established, and was not competent evidence. If it was, there was no evidence that the \$250 mentioned therein was used in the improvement of the lands in question under the contract or promise of plaintiff, Mrs. Davis' husband, to return the same. Plaintiff testified that there was not. She had the right to give it to him, or contribute it to the improvement of their home, and he cannot be forced to return it. *Pillow v. Sentelle*, 49 Ark. 430, 433, 5 S. W. 783.

The improvements for which the court allowed the defendants compensation were not made under color of title, and under the statute they were not entitled to compensation for the same. Kirby's Dig. § 2754. And there were no rents against which they could set off improvements in equity. *Teaver v. Akin*, 47 Ark. 529, 532, 1 S. W. 772.

Plaintiff was not liable to Mrs. Beauchamp for the \$65 a month she failed to earn as a traveling agent to sell. He had not undertaken to pay her that amount, nor was such a failure the result of the breach of contract that she alleges that she made with the plaintiff. The claim of Ella B. Davis for compensation for services she rendered plaintiff as a nurse or domestic is entirely distinct and independent from the subject-matter of this suit and cannot be legally or equitably litigated in the same.

The decree of the chancery court is reversed, and the cause is remanded, with directions to the court to dismiss the complaint and cross-complaints for want of equity.

**LONDROY v. SOVEREIGN CAMP WOODMEN OF THE WORLD et al.**

(Kansas City Court of Appeals. Missouri. Jan. 10, 1910.)

**1. INSURANCE (§ 783\*)—MUTUAL BENEFIT INSURANCE—RIGHT TO CHANGE BENEFICIARY.**

A beneficiary has no vested interest in a benefit certificate, but insured may change his beneficiary at will, if he does so according to the rules of the association.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1949; Dec. Dig. § 783.\*]

**2. INSURANCE (§ 782\*)—MUTUAL BENEFIT INSURANCE—PAYMENT OF DUES BY BENEFICIARY.**

Under Rev. St. 1899, § 1417 (Ann. St. 1906, p. 1116), that the beneficiary of a benefit certificate contracts to pay the member's assessments and dues, and does so, does not thereby deprive insured of the right to change the beneficiary or revoke the certificate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1948; Dec. Dig. § 782.\*]

**3. INSURANCE (§ 784\*)—MUTUAL BENEFIT INSURANCE—CHANGE OF BENEFICIARY—COMPLIANCE WITH BY-LAWS.**

To change the beneficiary of a benefit certificate, insured must substantially comply with the laws of the association, and the adoption of a particular method of changing the benefit certificate is the exclusion of all other methods.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1950-1954; Dec. Dig. § 784.\*]

**4. INSURANCE (§ 784\*)—MUTUAL BENEFIT INSURANCE—CHANGE OF BENEFICIARY—WAIVER OF PROVISION.**

After death of a member of a benefit association, the association could not waive as to his certificate a law of the association providing the method of changing the beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1954; Dec. Dig. § 784.\*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by L. F. Londroy against the Sovereign Camp Woodmen of the World, in which Thomas Wilson intervened. There was a directed verdict against plaintiff and defendant in favor of intervener, and plaintiff appeals. Affirmed.

S. M. Hutchinson, for appellant. George H. English, for respondent Wilson. A. H. Burnett and McCune, Harding, Brown & Murphy, for other respondents.

**BROADDUS, P. J.** This suit is to recover on a benefit certificate issued by the Woodmen of the World to William H. Nall, for the beneficiary therein named Malvina E. Nall, his mother, on the 16th day of July, 1894. The insured died in March, 1906, in good standing, having paid all his dues to the society up to that time. Mrs. Nall, the beneficiary, died within a few days thereafter. The plaintiff claims the benefit of the insurance on the following grounds, viz.: That during the fall of 1895 she received and accepted an offer of marriage from the insured; that at all times since said date said insured acknowledged her as his affianced wife, and

that at the time of her acceptance of said offer of marriage, and in consideration of her promise and for other good and valuable considerations, he agreed to and did name plaintiff as the beneficiary in said certificate, and informed her that under the laws and by-laws of the society said certificate was payable to her at his death. She further claims that since the date of her engagement to the insured she loaned him divers sums of money, aggregating more than \$1,000, which were evidenced by his promissory notes, and that in consideration for such loans he made a written assignment of the benefits of the certificate to plaintiff. The evidence shows that plaintiff loaned the insured divers sums of money. On December 14, 1895, he borrowed from her \$310, due in one year, for which he executed his promissory note. At one other time he borrowed \$50, and at another time \$360, for which he merely acknowledged receipt by memorandum in writing. On December 14, 1898, he borrowed \$100, as evidenced by a writing as follows: "I borrowed from Miss L. F. Londroy, 1233 Grand Avenue, Room 16, my intended wife, the sum of one hundred dollars, for which all money I have borrowed from her is covered by an insurance policy which I want her to have in case of my death. W. H. Nall." There was abundant evidence going to show that an engagement to marry existed between the two, and the reason he gave for not consummating it was that he could not afford to do so while his mother lived, as he would have to support her. There was no proof of assignment by the deceased to the plaintiff of the benefit certificate, nor was there any tending to show that he at any time made any promise to that effect, or that the society knew of the relation existing between him and plaintiff. The defendant acknowledged its liability, but denied that plaintiff was entitled to the benefits of the certificate, and set up that it was payable to Thomas Wilson, the administrator of the estate of Malvina E. Nall, the beneficiary named. Wilson voluntarily appeared and entered his appearance and claimed the benefits as such administrator. The defendants offered no evidence. The court instructed the jury to return a verdict in favor of the administrator and against plaintiff, and against the defendant society for the face of the policy and interest. The jury returned a verdict as directed, upon which judgment was entered, and plaintiff appealed.

If the plaintiff was affianced to be married to the deceased she was a proper subject as a beneficiary, and that she was so we think is established by the evidence. The certificate was issued and accepted subject to the constitution, laws, and by-laws of the association. In the by-laws of the association it is provided that: "Should a member desire to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

change his beneficiary or beneficiaries, he can do so upon the payment of a fee of one dollar and the surrender of his certificate to the clerk of his camp with the desired change noted thereon. The certificate and fee shall be forwarded to the sovereign clerk or head clerk, who shall issue and return a new certificate as requested." The deceased did not, as we have seen, at any time attempt to comply with the law in order to change the beneficiary in his certificate from that of his mother to the plaintiff. It is well settled law that a beneficiary has no vested interest in the certificate, but insured may change his beneficiary at will, if he does so according to the rules and regulations of the association providing for such change. *Grand Lodge A. O. U. W. v. O'Malley*, 114 Mo. App. 191, 89 S. W. 68. The statute provides, in cases where the beneficiary contracts to pay the member's assessments and dues, and does either, it does not deprive the member of the right to change the name of the beneficiary or revoke the certificate, provided that such change or revocation be done in the manner provided by the laws of the association. *Rev. St. 1899, § 1417 (Ann. St. 1906, p. 1116)*. We have understood always that in order to change the beneficiary, the insured must substantially comply with the provisions of the laws of the order of which he is a member, providing for such change, and that the adoption of a particular method of changing a benefit certificate is the exclusion of all other methods. *Coleman v. Knights of Honor*, 18 Mo. App. 189; *Head v. Council Cath. Knights*, 64 Mo. App. 212.

The plaintiff seeks to avoid the effect of the said law of the association on the ground that the association waived compliance therewith in a subsequent by-law. It reads: "After a beneficiary certificate shall have been in force for five consecutive years immediately preceding the death of a member, the sovereign camp shall not contest its payment on any grounds whatever, except the sovereign died by the hands of the beneficiary, or beneficiaries named therein and it be clearly shown that the same was not an accident." We cannot see that this by-law has any application to the case, as the defendant is in no way contesting its liability, but on the contrary admits that it is liable. The defendant only asks that the court adjudge to whom the benefit shall be paid. The plaintiff contends that the defendant association by its original answer waived a compliance with said law. We have examined the answer, and we find nothing therein that in the least degree tends to show any such waiver, and besides it did not have the power to do so after the death of the member.

Much of plaintiff's argument is taken up with her contention that the member had a vested interest in the benefit certificate in question and could therefore deal with it

as with other property belonging to him, and has cited authorities tending to support her views, but as such is not the law in this state, as we have shown, we refrain from comment on this position. We do not believe there is a single debatable question raised on the appeal.

Affirmed. All concur.

#### PLATTE CITY v. PAXTON.

(Kansas City Court of Appeals. Missouri. Jan. 10, 1910. Rehearing Denied Jan. 24, 1910.)

##### 1. MUNICIPAL CORPORATIONS (§ 359\*)—PUBLIC IMPROVEMENTS—CONTRACTS—SUFFICIENCY OF PERFORMANCE.

Where a party contracts to construct a sidewalk on the established grade, a substantial compliance with this specification is sufficient.\*

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 891; Dec. Dig. § 359.\*]

##### 2. MUNICIPAL CORPORATIONS (§ 280\*)—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—PETITION.

*Rev. St. 1899, § 5989 (Ann. St. 1906, p. 3024)*, provides that upon the petition of ten citizens of the city, the board of aldermen shall have power to make contracts for the construction of sidewalks, and section 5991 that in addition to the powers hereinbefore granted, the board of aldermen may, by ordinance or resolution, condemn wooden and defective sidewalks, remove them, and provide for the construction of new walks. *Held*, under these provisions that the petition is required only where a sidewalk is to be constructed for the first time, and not where an old or defective walk is to be removed and replaced by a new one.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 740; Dec. Dig. § 280.\*]

##### 3. MUNICIPAL CORPORATIONS (§ 314\*)—PUBLIC IMPROVEMENTS—ORDINANCES—PLANS AND SPECIFICATIONS.

Plans and specifications for the construction of a sidewalk need not be filed with the city clerk at the time the ordinance authorizing the improvement is passed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 827, 828; Dec. Dig. § 314.\*]

##### 4. MUNICIPAL CORPORATIONS (§ 314\*)—PUBLIC IMPROVEMENTS—ORDINANCES—PLANS AND SPECIFICATIONS—STATUTES.

Reference in an ordinance authorizing a street improvement to plans and specifications on file as allowed by *Rev. St. 1899, § 5989 (Ann. St. 1906, p. 3024)*, is only a statutory substitute for their incorporation within the ordinance; and, where this is done, no plans or specifications need be filed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 827, 828; Dec. Dig. § 314.\*]

##### 5. MUNICIPAL CORPORATIONS (§ 338\*)—PUBLIC IMPROVEMENTS—CONTRACTS—ACCEPTANCE OF BIDS.

Where a city ordinance was passed authorizing a street improvement, and plaintiff submitted a bid for the work duly signed, which was accepted by a resolution of the city council properly passed and made of record, this was a sufficient compliance with *Rev. St. 1899, § 6759 (Ann. St. 1906, p. 3327)*, prescribing that contracts made by a city be in writing, and sub-

scribed by the parties thereto, so as to render the assessment for the improvement valid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 867; Dec. Dig. § 338.\*]

**6. MUNICIPAL CORPORATIONS (§ 338\*)—PUBLIC IMPROVEMENTS—FORMAL CONTRACT—NECESSITY.**

A written contract can create no rights or obligations in excess of, or defeat those created by, an ordinance; and, where a city ordinance was passed authorizing a street improvement, and plaintiff submitted a bid for the work, duly signed, which was accepted by a resolution of the city council, properly passed and made of record, there was no necessity for a separate written contract.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 867; Dec. Dig. § 338.\*]

**7. MUNICIPAL CORPORATIONS (§ 335\*)—PUBLIC IMPROVEMENTS—CONTRACTS—ACCEPTANCE OF BIDS.**

Where a city ordinance was passed authorizing a street improvement, and plaintiff submitted a bid for the work, which was accepted by resolution providing that the work be completed within 30 days, this provision did not inject a new condition into the contract so as to render the acceptance incomplete, since the ordinance, not specifying a time for the completion of the work, by implication required it to be done within a reasonable time, and the designation in the resolution of 30 days, which was a reasonable time under the circumstances, constituted no new element, and the ordinance would control over a resolution accepting a bid for performance of the work, and providing that it be completed either in an unreasonably long or short time, so that that part of the resolution should be considered as surplusage.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 861; Dec. Dig. § 335.\*]

Appeal from Circuit Court, Platte County; A. D. Burnes, Judge.

Action by the City of Platte City, to the use of W. A. Prior, against William M. Paxton. From a judgment for plaintiff, defendant appeals. Affirmed.

William M. Paxton, J. W. Coots, and C. H. Winston, for appellant. James H. Hull, for respondent.

**JOHNSON, J.** This suit is to enforce the lien of a special tax bill issued by Platte City, a city of the fourth class, in payment of the cost of laying a granitoid sidewalk in front of premises of defendant. The answer interposes a number of defenses. The cause was tried to the court without the aid of a jury, and judgment was entered for plaintiff. Defendant appealed.

On May 1, 1907, an ordinance was passed, entitled "An ordinance to condemn wooden and brick and defective sidewalks in the city of Platte City and for the removal of all walks so condemned and to provide for the construction of new sidewalks so condemned and removed." A wooden sidewalk in front of defendant's property was condemned in this ordinance, and was ordered to be removed and replaced by a granitoid sidewalk. Defendant failed to comply with the

ordinance, and on August 7th of the same year another ordinance was passed, in which, after reciting the enactment of the first ordinance, and defendant's refusal to comply with its requirements, it was provided that the wooden walk be removed and replaced by a granitoid walk. Full specifications for the improvement were embodied in the ordinance. The specifications included the work of excavating, and provided that the cost of such work should be treated as a part of the cost of the improvement. The street commissioner was ordered to prepare specifications and an estimate of the cost of the improvement, to file them with the city clerk, and then to advertise for bids. In obedience to this ordinance, the street commissioner prepared and filed plans and specifications, which were the same as those embraced in the ordinance, with the exception that they failed to mention the work of making the necessary excavation for the sidewalk. An estimate was filed at the same time, and, in further compliance with the ordinance, an advertisement was made for bids, and in response thereto plaintiff filed the following bid on October 2d: "I, W. A. Prior, agree to furnish all materials, forms, labor, etc., necessary to build and complete the said sidewalks as specified in notice and to do all work according to specifications and in a workmanlike manner for the sum of twenty cents per square foot." At a regular meeting of the board of aldermen held October 2d, a motion was carried that the bid of plaintiff, being the only bid, and consequently the lowest and best bid, be accepted, and "it is also further ordered that W. A. Prior construct the walks within 30 days from the time of the letting of the contract."

No written contract was executed by the parties; the ordinance, bid, and acceptance by motion being treated as the contract. It is conceded the work was done in accordance with the specifications, except in one particular. The ordinance required the walk to be laid on the established grade. Defendant contends this was not done, while plaintiff contends that this requirement was substantially met. After the completion of the work (accomplished within 30 days of the passage of the motion accepting the bid), an ordinance was passed ratifying all that had been done, and an assessment was levied, and the tax bill in suit issued in conformity thereto. The court made the following special findings of fact:

"The court, having been requested by plaintiff to make a special finding of facts, makes the following finding: The court finds that at the time of the passing of all the ordinances in question, and at all times mentioned in the pleading and evidence, that the city of Platte City was a city of the fourth class, duly and legally incorporated under the laws of the state of Missouri,

and existing and acting as such at all times mentioned in the pleadings and the evidence. The court further finds that in this particular matter of constructing sidewalks in front of the property described in the petition the city proceeded under the general statute giving the city power to tear up wooden sidewalks and replace them. The court finds that at the time this sidewalk was condemned by the city authorities the wooden sidewalk existing in front of the property mentioned in the petition was in a dilapidated, dangerous, and unsafe condition. The court finds that the ordinance, orders, and official acts of the officers of the city of Platte City, concerning the condemning and removal and tearing up of the old walks, and replacing them by putting down the granitoid walks in question, was legal and conformed to the ordinances of the city of Platte City, and also to the laws of this state. The court further finds that all of the proceedings and ordinances condemning and tearing up of the old wooden sidewalks and constructing and building the granitoid sidewalks were legal and valid, and that the proceedings were according to law. The court further finds that from the weight of the evidence in the case the granitoid sidewalk constructed on the premises described in the petition is substantial, and is practically on grade according to the lay of the land and the surface of the land and street, and the finding will be for the plaintiff."

These findings, so far as they relate to controverted issues of fact, will be treated as the verdict of a jury. On the issue of whether the sidewalk was laid on the established grade we find credible evidence in the record supporting the finding of the court that the sidewalk substantially conforms to that established grade. A substantial compliance with specifications in such cases is a sufficient compliance. It would be a harsh and unjust rule that would require the contractor to construct the sidewalk to conform exactly in its whole course to the established grade.

Many points are made by defendant in support of his contention that the proceedings leading to the assessment were invalid for the reason that they did not meet the requirements of the statute. We shall discuss all of these points we deem of sufficient merit to call for special notice.

First, it is said the city had no authority to condemn the old sidewalk and to order the construction of a new one to replace it, since it appears that no petition of 10 citizens was filed. The statute provides (section 5989, Rev. St. 1899 [Ann. St. 1906, p. 3024]): "Upon the petition of any ten citizens of the city the board of aldermen shall have power to make contracts for the construction of sidewalks," etc. Section 5991 provides: "In addition to the powers hereinbefore granted, the board of aldermen may, by ordinance or resolution, condemn wood-

en and defective sidewalks, and may remove walks so condemned and may provide for the construction of new sidewalks in the place of walks so condemned and removed." Construing these two sections together, we think they express the legislative intent of requiring a petition of 10 citizens only in instances where it is proposed to construct a sidewalk for the first time, and not to cases where it is proposed to remove an old and defective sidewalk and replace it with a new one. The latter cases fall within the purview of section 5991, which appears to dispense with the filing of an initiatory petition.

Further, it is argued that the proceedings were void because the plans and specifications referred to in the ordinance authorizing the improvement were not on file with the city clerk at the time of the passage of that ordinance. The statutes make a marked distinction between sidewalks and other classes of street improvements, such as paving and grading. In the latter cases the initiatory proceedings must either contain the plans and specifications, or else refer to plans and specifications then on file. This is for the protection of the property owners to be affected. They must be given an opportunity to arrest the proceedings by a majority protest against the improvement. *City of Kirksville v. Coleman*, 103 Mo. App. 215, 77 S. W. 120; *Paving Co. v. O'Brien*, 128 Mo. App. loc. cit. 281, 107 S. W. 25. But the law makes no provision of this character where a sidewalk is to be constructed, and consequently there is no necessity for the plans and specifications to be on file at the time of the enactment of the ordinance authorizing the improvement. Moreover, in cases such as the present, where the ordinance itself embodies full plans and specifications, it is immaterial whether or not they be filed at all. Reference in the ordinance to plans and specifications is only a statutory substitute (section 5989) for their incorporation with the ordinance.

Next, defendant insists that the assessment was invalid because no written contract was executed by the city and plaintiff (citing section 6759, Rev. St. 1899 [Ann. St. 1906, p. 3327]). The ordinance, plaintiff's written bid duly signed, and the resolution accepting the bid, which was duly passed and made of record, constituted a written contract, and were a sufficient compliance with the statute. It is the law that the written contract can create no rights or obligations in excess or defect of those created by the ordinance; and, this being true, what necessity can there be for the execution of a separate written contract?

Defendant urges that the acceptance by the city did not close the contract, because it injected a new condition; i. e., that the work should be completed in 30 days. The ordinance did not specify a time for the completion of the work, and therefore, by

implication, required the improvement to be completed within a reasonable time. It appears that the motion accepting the bid merely specified a reasonable time, and therefore did not attempt to add a new condition to the contract expressed in the ordinance; but, if the time stated had been either unreasonably long or short, the ordinance would control, and that part of the motion should be regarded as mere surplusage because of its utter impotence.

We conclude that the proceedings leading to the issuance of the tax bill were valid, and accordingly the judgment is affirmed. All concur.

### SIMMONS et al. v. ONETH.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

#### 1. BROKERS (§§ 54, 56\*)—RIGHT TO COMMISSIONS.

A broker earns his commission when he produces and introduces to his principal a buyer able, ready, and willing to buy on the terms at which the broker is authorized to sell, and, where he is the procuring cause of the negotiations which result in a sale, he is entitled to his commission, even though the negotiations were conducted and concluded by the principal in person.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 65, 85–89; Dec. Dig. §§ 54, 56.\*]

#### 2. BROKERS (§ 63\*)—RIGHT TO COMMISSIONS.

Where the owner on the production of a purchaser by the broker fixes or varies the terms, he is liable for commission if he fails to carry out his contract, and convey according to the modified terms agreed upon by the buyer.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94–96; Dec. Dig. § 63.\*]

#### 3. BROKERS (§ 54\*)—RIGHT TO COMMISSIONS.

The owner of property placed it with brokers for sale at \$3,200. The brokers found a purchaser able, ready, and willing to purchase for \$2,900 provided he could have possession on or before November 20th. The owner agreed to take that sum and to give possession on that date if nothing prevented but, having met with misfortune making his moving from the place difficult, he in good faith offered to give possession on November 22d, which the prospective purchaser refused. It did not appear that the prospective purchaser was ever ready and willing to buy unless he could have possession on November 20th, the day fixed in his proposition. *Held* that, as the prospective purchaser only agreed to buy if he could have possession on that date, the brokers did not find a purchaser ready, able, and willing to take the property upon the owner's terms, and did not earn their commissions.

[Ed. Note.—For other cases see Brokers, Cent. Dig. §§ 75–81; Dec. Dig. § 54.\*]

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by F. G. Simmons and another against J. F. Oneth. Judgment for defendant, and plaintiffs appeal. Affirmed.

Watson & Salyer, for appellants. A. H. Wear, for respondent.

GRAY, J. This cause was commenced in the Greene county circuit court in January, 1908, to recover a commission for finding a purchaser for the farm of the respondent. The answer was a general denial. A jury was waived and a trial had December 23, 1908, resulting in a judgment for the defendant, and plaintiffs appealed.

There is not much controversy over the facts in the case, and a correct statement of the same is about as follows: The defendant owned a farm in Webster county, and listed the same with the appellants, or one of them, as real estate agents, to sell. The appellants advertised the farm for sale, and finally interested one C. W. Bryan, of Rhome, Tex., to come to Springfield in October, 1907, with the view of purchasing the farm. The appellant Watts took Bryan out in the country to see some farms, and including the farm of the respondent. At the time the farm was placed with the agents to sell the price was fixed at \$3,200, with nothing said about time for possession. After some talk, the defendant reduced the price to \$2,900, but the deal was not consummated, and Bryan went to his Texas home. On October 15, 1907, Bryan wrote Watts at Rogersville, stating that he would take Oneth's farm at \$2,900, and that he wanted possession the 15th of November, or as soon as possible. On October 19th Bryan wrote the bank at Rogersville, inclosing a check for \$500, to be held as a forfeit on the deal for the respondent's land. In this letter the bank was directed to sign a contract, binding Bryan to buy the land for \$2,900, possession to be given on or before November 20th. On the same date he wrote the respondent a letter informing him that he had sent the check for \$500 to the bank as a forfeit, and that he had agreed to take the place for \$2,900, provided Oneth would furnish a perfect abstract of title and warranty deed, and possession of place by November 20, 1907. On October 24th the respondent answered the letter, accepting the terms, except as to possession, and said in regard to that matter: "Will try and give possession of the place by the 20th of November, if nothing prevents." About the 15th of November Bryan came to Missouri and wanted possession of the farm by the 20th, according to his proposition of purchase. Oneth informed him he could not give possession on the 20th, that he would have to have eight days longer, but finally offered to give possession by the 22d of November. Bryan objected to this, said he had his family paying board at a hotel, and wanted to get on the farm where the members of his family could have some rest. The respondent informed him that he could not give possession on the 20th on account of misfortunes; that on the 17th of November, his boy, who was teaching school, had been stab-

bed by a pupil; that one of his horses had died and one had got sick, and he had to depend on his neighbors to get rid of things on the farm, but he would give him possession by the 22d, as above stated.

Bryan at all times refused to carry out the contract unless he could have possession on the 20th. It seems while the parties were thus quibbling and unable to agree on the date of possession the deal was called off. A real estate broker earns his commission when he produces and introduces to his principal a buyer who is able, ready, and willing to buy on the terms at which the broker is authorized to sell; and, where the agent is the procuring cause of negotiations which result in the sale, he is entitled to his commission, even though the negotiations were conducted and concluded by the principal in person. *Morgan v. Keller*, 194 Mo. 663, 92 S. W. 75. And the authorities agree that where the principal, on the production of a purchaser by the broker, fixes or varies the terms, he is liable for the commission if he fails to carry out his contract, and convey according to the modified terms agreed upon by the buyer. *Sallee v. McMurray*, 113 Mo. App. 253, 88 S. W. 157.

In this case when the property was placed in the hands of the agents to sell for \$3,200, and no time fixed for possession to be given, the agents were entitled to their commission when they produced a person ready, able, and willing to take the property for \$3,200, and the respondent could not have avoided the payment of the commission by refusing possession at once. But in this case the appellants did not find a purchaser ready and willing to buy the property at the price first fixed by the respondent. On the contrary, they found a man ready and willing to buy the property for \$2,900, provided he could have possession on or before November 20th. The respondent never agreed to give possession on November 20th. He agreed to give possession on that date if nothing prevented. It stands admitted in the case that his boy had been stabbed on the 17th of the month; that one of his horses had died and another was sick, so that he had to rely somewhat on his neighbors for assistance in gathering his crops. With all of this showing that he was acting in the utmost good faith, he offered to give possession on the 22d of the month, and to pay the board of Mr. Bryan's family at a hotel for the extra time. This proposition Bryan refused to accept, and there is no testimony in this case that he ever was ready and willing to buy the property unless he could have possession on the 20th of November, the day fixed in his proposition to purchase.

When Oneth altered the terms upon which he had authorized the appellants to sell his farm, he had the right to fix the time for possession. When Bryan offered to purchase,

he had the right to fix in his offer the date when he was to have possession. Oneth at no time had a binding contract which he could have enforced against Bryan, as Bryan only agreed to buy if he could have possession on November 20th. The appellants failed to find a purchaser ready, able, and willing to take the farm upon the terms fixed by the owner, and therefore did not earn their commissions.

The judgment is for the right party, and will be affirmed. All concur.

#### TYLER ESTATE v. HOFFMAN.

(St. Louis Court of Appeals. Missouri. Jan. 4, 1910. Rehearing Denied Jan. 18, 1910.)

##### 1. CORPORATIONS (§ 415\*)—CORPORATE OFFICERS—AUTHORITY—BY LAWS.

A corporate by-law giving the president authority to check on the funds of the company in the bank, and saying "notes, drafts, acceptances and other pecuniary obligations in connection with the business of the company may be executed by the president," did not of itself give express authority to create liens on its property by mortgage or pledge.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1667; Dec. Dig. § 415.\*]

##### 2. CORPORATIONS (§ 399\*)—PRESIDENT—ACTUAL AUTHORITY—HOW CREATED.

Actual authority of a corporate president or general manager to do acts of a particular kind or make a certain class of contracts in its behalf, and among others to create a lien on its property, by pledging or mortgaging it, may be established, not only by a resolution of the board of directors but by fair inference that it had been conferred on him, drawn from the continued exercise of the authority, with the knowledge of the directors, and without objection from them, and especially is this true if the officer has been allowed unhampered management of the affairs for a considerable period with knowledge of the directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1602-1610; Dec. Dig. § 399.\*]

##### 3. CORPORATIONS (§ 400\*)—APPARENT AUTHORITY OF CORPORATE OFFICERS—RESTRICTIONS.

A particular course of business by a corporation through its president may create apparent authority to do acts which in point of fact the officer has been inhibited from doing by the directors; and persons in reliance on the appearance might make contracts with the official which would be binding if they had no notice of the limitation of his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1590; Dec. Dig. § 400.\*]

##### 4. CORPORATIONS (§ 425\*)—AUTHORITY OF CORPORATE OFFICERS—ESTOPPEL.

The estoppel mode of validating the acts of a corporate officer, as distinguished from the inference of actual authority, from a certain course of dealing, more often comes into operation when the officer is invested with certain duties, which, according to common usage carry with them the right to do some particular act or make contracts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1700; Dec. Dig. § 425.\*]

##### 5. PRINCIPAL AND AGENT (§ 90\*)—IMPLIED AUTHORITY OF AGENTS.

If a principal permit the agent to exercise certain powers continually, it is reasonable to imply authority to exercise them, as

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

principals usually protest against such conduct if opposed to their wish.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 254-261; Dec. Dig. § 99.\*]

**6. CORPORATIONS (§ 399\*)—AUTHORITY OF CORPORATE OFFICER—CHATTEL MORTGAGE.**

Under the principle that if a corporation permits a corporate officer to do certain acts without objection, he will be invested with actual authority so to do, where by long course of dealing a corporation permits its president to handle all the funds, make contracts, borrow money, give pledges, etc., actual authority to make a chattel mortgage will also be inferred though the president had not theretofore made such a contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1610; Dec. Dig. § 399.\*]

**7. CORPORATIONS (§ 432\*)—AUTHORITY OF OFFICER—CHATTEL MORTGAGES—ADMISSIBILITY OF EVIDENCE.**

On an issue as to the authority of a corporate president to make a pledge of its property and give a chattel mortgage, evidence that he had exercised complete control of the business of the company, handled its funds, borrowed in its name, when he wished, and had assigned contracts, under which money would come due to persons from which he had borrowed, with the tacit, if not express, approval of the board of directors, was admissible to show that he had actual power to give a chattel mortgage and pledge its property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1735; Dec. Dig. § 432.\*]

Appeal from St. Louis Circuit Court, Virgil Rule, Judge.

Action by the Tyler Estate (a corporation) against the Brooks Publishing Company; T. G. Hoffman, interpleader. From a judgment for plaintiff, Hoffman appeals. Reversed and remanded.

Defendant, the Brooks Publishing Company, was heretofore a corporation doing business in the city of St. Louis, to wit, publishing "syndicate matter for magazines," and its customers were the publishers of magazines. J. W. Brooks was the promoter of the company and its president. The evidence tends to show he really had full control of the business of the company, and managed it without interference by other officers or the directors. One director said: "He practically was the whole company himself; that really is the whole thing in a nutshell." In fact, prior to the transactions in controversy, there had been no meeting of the board of directors for about seven months—or later than March 12, 1907. The company's offices were in the building in St. Louis known as the "Granite Building" and belonging to the Tyler Estate, the plaintiff corporation. On the 4th or 5th of October, 1907, the interpleader T. G. Hoffman, whose office was in the same building, lent the Brooks Publishing Company \$170 or \$175, the amount being in dispute. The money was borrowed by Mr. Brooks as president of the company, but the testimony goes to show in the name of the company and for its benefit, and the money was used to discharge the company's obligations. The note

given for the loan was dated October 5, 1907, fell due 15 days after date, and contained a promise to pay the interpleader \$175, for value received, at 8 per cent. per annum from date; compounded if not paid annually. The note was signed by the Brooks Publishing Company, by J. W. Brooks, President. On the same day, October 5, 1907, the Brooks Publishing Company, by J. W. Brooks, president, executed and delivered to Hoffman, a chattel mortgage on certain personal property, to wit, a filing case, three desks, two graphophones, one shaving machine, one library table, two flat top desks, six office chairs, and two typewriters. This mortgage recited the execution of the note and purported to be given to secure it. The mortgage was duly filed in the record's office, so as to impart notice of a lien on the property described in it. Circumstances are in evidence from which respondent claims the conclusion may be drawn that the amount advanced by Hoffman on the loan was only \$170, the note being made for \$175 to cover interest or a bonus, and, therefore, the note was usurious, and the mortgage given to secure it invalid against an attaching creditor. Rev. St. 1899, § 3710; Marx v. Hart, 186 Mo. 503, 523, 66 S. W. 260, 89 Am. St. Rep. 715. On the contrary, the testimony of Brooks and Hoffman went to prove \$175 was advanced by Hoffman, \$5 being handed to Brooks to pay an urgent creditor on October 4th, and a check for the balance the next day. About a week after this loan, Brooks borrowed \$50 more of Hoffman, for which he gave no note, but handed Hoffman a check of the Brooks Publishing Company for \$52.50. The evidence would support different inferences as to whether this money was borrowed personally by Brooks, or in behalf of the publishing company; and also would support different inferences as to whether usurious interest was charged. No mortgage was given to secure it, but in a few days after it was made, Brooks fell into difficulty about the rent of the offices occupied by the publishing company, and Hoffman's second loan having matured, Brooks carried to Hoffman's office two graphophones, the shaving machine and an Oliver typewriter, leaving them there in pledge for said loan. A little later the Tyler Estate brought suit for rent, and attached the Brooks Publishing Company's office furniture, including the property covered by the mortgage and the pledge to Hoffman, and said property having been seized under the writ of attachment, Hoffman filed an interplea claiming title to it under the mortgage and pledge. His claim was resisted by the Tyler Estate on two grounds: as regards his mortgage, to wit, that the loan secured was tainted with usury and the mortgage invalid as said; and that the instrument had been executed by Brooks as president of the corporation without au-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thority from the directors. As to the title the interpleader held to part of the property by virtue of the contract of pledge, the attaching creditor asserted that loan was likewise tainted with usury, and the lien was invalid under the statute, and also that the money was lent to Brooks personally and not to the corporation. The case between the interpleader and respondent was tried before the court without a jury, and the court, after giving six declarations of law at the request of the interpleader, found the issues on the interplea in favor of respondent. We transcribe two of the declarations to indicate the theory of law declared: "The court declares the law to be that if the court, sitting as a jury, believes and finds from the evidence that the officers, directors and stockholders of the Brooks Publishing Company enacted the by-law offered in evidence, and intended and interpreted the same to give to the president the right to execute notes, pledges, mortgages and otherwise deal with the credit and assets of the corporation, and permitted and assented to his continued exercise of such right, then \* \* \* the creation of the debt and the execution of the mortgage and the creation of the pledge, if you find there was a pledge, involved in this suit, was legal and binding on the Brooks Publishing Company and on the plaintiff in this case." "The court declares the law to be that if the court, sitting as a jury, believes and finds from the evidence that the defendant, the Brooks Publishing Company, constituted Jas. W. Brooks its chief business representative or agent, and permitted him, without objection to exercise the full powers of the corporation in making contracts and business deals, contracting debts and obligations, borrowing money, and discounting or pledging its contracts, and that it was the usage of the company to permit said Brooks to do these things without the previous consent or authorization of the board of directors, or any formal ratification thereafter, then it impliedly authorized him, said Brooks, to make the debt and mortgage and to create the pledge, if you find there was a pledge, in controversy in this suit between plaintiff and T. G. Hoffman, the interpleader." An appeal was taken by the interpleader.

Hugh D. McCorkle, for appellant. Chas. S. Reber, for respondent.

GOODE, J. (after stating the facts as above). As to the contention against the validity of the chattel mortgage and the pledge because of usury in the loans, suffice to say the evidence was not, in our opinion, conclusive one way or the other, but raised issues of fact for the court to determine as trier of the facts.

The main controversy on the appeal relates to the exclusion of evidence proffered by the interpleader upon the question of the authority of Brooks as president of the Brooks Publishing Company, to execute the mortgage on its

property, or to pledge its property to secure loans made in its behalf. And right here we may say there was evidence conducing to show both liens were made in the company's behalf, and it seems not to be questioned the mortgage loan was. The rejected offers of proof were evidence regarding the financial condition of the Brooks Publishing Company and the supply of money it had to carry on its business; what authority and power Brooks, as president, had been exercising in respect of financial transactions such as the negotiation of loans and the assignment of property by way of pledge to secure loans, without express authority, for or ratification of his acts by the board of directors. More specifically the interpleader offered to prove Brooks constantly attended to all the financial affairs of the company, had borrowed money for it, and assigned advertising contracts held by the company as well as other contracts, as collateral security for loans he had made on its behalf. The general tenor of the offer of proof went to show he had exercised complete control of the business of the company, handled its funds, borrowed in its name when he wished, and on two or more occasions had assigned contracts under which money would become due to it to persons from whom, in its behalf, he had borrowed. Interpleader's attorney conceded he had no proof to offer tending to show Brooks ever had executed a chattel mortgage in behalf of the company other than the one in question; but said he could show contracts representing valuable considerations had been put up as collateral security for loans and notes of the company; that those things had been done by the president "without formal authority or formal ratification, but they were all known to the board of directors and had been discussed at meetings of the board without action of any character being taken on them." Evidence to prove those alleged facts was, as said, excluded. Certain by-laws of the company were received in evidence, which authorized the president to receive and disburse money of the company, and to keep or cause to be kept, accurate accounts of such disbursements, giving him authority to check on the funds of the company in the bank, and saying "notes, drafts, acceptances and other pecuniary obligations in connection with the business of the company (may) be executed by the president." The last clause of the by-laws went far toward expressly empowering Brooks to borrow money for business purposes of his company, but hardly can be held to be express authority to him to confer liens on its property by way of mortgage or pledge. The offer of proof went to show he had pledged company property to secure loans and with the knowledge of the directors and their tacit, if not express, approval, after report and discussion of the acts. Hence the pledge to the interpleader was a contract of the same kind he had theretofore made with the board's approval.

Actual authority in a president or general manager of a company to do acts of a particular kind, or make a certain class of contracts in its behalf, and among others to give a lien on its property by pledging or mortgaging it, may be established, not only by a resolution of the board of directors, but by fair inference it had been conferred on him, drawn from the continued exercise of the authority with the knowledge of the directors and without objection from them. And especially is this true if the officer who purported to act for the company had been allowed unhampered management of its affairs for a considerable period, and the money borrowed was used for the benefit of the company, to the knowledge of the directors. *First Nat. Bank v. Mining Co.* (C. C.) 89 Fed. 439; *Mining Co. v. First Nat. Bank*, 95 Fed. 23, 36 C. C. A. 633; *Sherman, etc., Co. v. Swigart*, 43 Kan. 292, 23 Pac. 569, 19 Am. St. Rep. 137; *Nat. State Bank v. Fork, etc., Co.*, 157 Ind. 10, 60 N. E. 699; *Moore v. Gaus & Sons Mfg. Co.*, 113 Mo. 98, 106, 20 S. W. 975. Some vagueness is detectible in the books regarding whether this implied, or, as it may be called more properly, inferred authority, can be availed of by a person with whom a corporation official makes a contract, unless the person dealt with knew of the previous similar acts by the official and relied on them, as showing authority in the official; that is, had relied on the appearance of authority with which the latter had been invested and which he had been held out to the world as possessing, by a course of conduct he had pursued and the company had tolerated.

It is contended for respondent in the present case there was no proof, or offer to prove, Hoffman knew of a course of business pursued by Brooks in respect of borrowing money for the company and transferring its property as security for the loans. Therefore it is argued Hoffman is not entitled to the benefit of any appearance of authority created by prior transactions. No doubt such a course of business might create apparent authority to do acts which, in point of fact, the official had been inhibited from doing by resolution of the directors; and persons in reliance on this appearance might make contracts with the official which would be binding, if they had no notice of the limitation of his powers. *Empire, etc., Cattle Co. v. Railroad* (C. C.) 135 Fed. 135. But the law goes further. Actual authority to a corporation officer to do acts he is accustomed to do with the knowledge of the company, may be implied from that method of management. Hence a customary act by an official may be treated as valid and within the exercise of an actual authority, not necessarily because the company is estopped to deny its validity from having invested the officer with apparent authority to perform it, but because the inference can be drawn that he was, in truth, authorized. The estoppel mode of validating the acts of an officer of a corporation, or the

acts of an agent of any other principal, more often comes into operation when the officer or agent is invested with certain duties, which, according to common usage carry with them the right to do some particular act or make contracts. For instance, if a banking company appoints a person cashier, he has apparent authority to do whatever bank cashiers are accustomed to do; and those dealing with him may take for granted he has such authority, even though, in fact, it has been expressly withheld from him, unless they have reasonable grounds to believe it has been withheld. *Lawson, Usages & Customs*, § 65 et seq.; 4 *Thompson, Corporations*, §§ 4744, 4877. But numerous authorities favor the proposition that where a corporate officer has been allowed by the directors of a company to pursue a particular line of acts, beyond those belonging to him by virtue of his office, or wield certain powers not commonly exercised by officials of the same class, this is evidence that such unusual powers had been allowed by the directors. 4 *Thompson*, §§ 4746, 4881, et seq.; *Clark, Corporations*, 481; *Bank v. Coal Co.*, 86 Mo. 125, 139; *Sparks v. Transfer Co.*, 104 Mo. 531, 539, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. Rep. 351; *Chenoweth v. Express Co.*, 93 Mo. App. 185, 199; *Chambers v. Lancaster*, 160 N. Y. 342, 349, 54 N. E. 707; *Moshannon, etc., Co. v. Sloan*, 109 Pa. 532. That doctrine is palpably sound; for long acquiescence by the directors of a company in a line of conduct pursued by an official, and particularly a chief official, certainly has a tendency to prove they regard him as acting within his authority; otherwise it is fair to presume they would check him. The probabilities and the law at this point are the same as between a company and its officials as they are between a principal and his agent. If the principal permits the agent to exercise certain powers continually, it is reasonable to imply authority to exercise them, as principals usually protest against such conduct if opposed to their wish.

It is said as regards the validity of the mortgage in present dispute, it was conceded Brooks had never before executed a mortgage in behalf of the company, and therefore it follows he had been invested with no authority by usage to execute one. This is too narrow a view. If he had been accustomed to manage all the financial affairs of the company, borrow money and execute notes in its behalf, and secure the loans by assignments of property as collateral security, and the board knew of and discussed these doings, and did not object to them, but accepted their fruits, we think this impliedly conferred power on him to secure a loan, not only by assignments of property in the form of pledges, as he had theretofore done, but also in the form of a chattel mortgage. The effect of security in the two forms would be the same practically so far as the company's rights and

obligations were concerned. The case of *State ex rel. v. Perkins*, 90 Mo. App. 603, which is relied on by respondent's counsel as an authority against the right of Brooks to execute the mortgage, is, in its facts, too unlike the case at bar to be in point. There, no habit of the president to borrow money in the name of the company or control its business with the knowledge of the directors and without express authority from them was shown. It is true the opinion said that, as far as appeared, the mortgage or deed of trust in question was the first act of the kind the president of the company had ever attempted, and the security therefore stood unsupported by any implied authority to execute it. But that remark must be understood with reference to the facts of the case; which were, as said, that no general management of the business and financial affairs of the company by its president and the borrowing of money and securing it on company property was shown. The opinion did not mean to say, if such a course of business had been pursued, the chattel mortgage security would fail simply because no instrument of the identical kind had been executed by the president before, even if analogous ones had.

The declarations of law given by the court rather look in conflict with the rulings on the evidence, particularly the second one.

For the exclusion of the offered evidence, the judgment will be reversed and the cause remanded. All concur.

# BURNS et al. v. METROPOLITAN LIFE INS. CO.

(Kansas City Court of Appeals. Missouri. Jan. 10, 1910. Rehearing Denied Jan. 24, 1910.)

## INSURANCE (§ 290\*)—LIFE INSURANCE—MISREPRESENTATIONS AS TO AGE OF INSURED—EFFECT ON POLICY.

Under Rev. St. 1899, § 7890 (Ann. St. 1906, p. 3746), providing that no misrepresentation in obtaining a life insurance policy shall affect its validity unless the misrepresentation actually contributed to the death of insured, the provisions of the policy that proof of the actual age of insured may be required with proofs of death, and the amount payable shall be the insurance which the premiums would have purchased at the true age, is void, though insured misstated his age in applying for the insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 671; Dec. Dig. § 290.\*]

Appeal from Circuit Court, Linn County; Jno. P. Butler, Judge.

Action by Kate Burns and another against the Metropolitan Life Insurance Company. Plaintiffs had judgment, and defendant appeals. Affirmed.

Nathan Frank, W. M. Oliver, and Tunnell & Hart, for appellant. Burns & Burns, for respondents.

ELLISON, J. Defendant issued to one John O'Neil a policy of life insurance, agreeing, upon certain conditions, to pay upon his death, to his two daughters, the sum of \$500. He paid the premiums until his death. Defendant tendered \$291.33 in full discharge of the amount due on the policy. The tender was refused, and this action was brought. The tender was kept good. The trial court rendered judgment for the plaintiffs for the full face of the policy, and defendant appealed.

The written application of O'Neil for the policy stated that he was 65 years of age, and the premiums required by defendant and paid were based on that age. But the policy contained the following provision: "Absolute proof of age may be required with proofs of claim hereunder, and the amount payable shall be the insurance that the actual premium paid would have purchased at the true age of the insured." The defendant claimed O'Neil's true age to have been 79, when he took out the policy, and it is not disputed that the amount tendered was sufficient if defendant can be allowed the defense.

Plaintiffs insist that the defense is not good for the reason that it is based on an immaterial misrepresentation not allowed to the defendant. They call to their aid the following statute: Section 7890, Rev. St. 1899 (Ann. St. 1906, p. 3746): "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury." That statute has been many times before the appellate courts of the state and has been upheld by them. The object and intention of the lawmakers in enacting it is thus stated by the Supreme Court in *Scheurmann v. Insurance Co.*, 165 Mo., loc. cit. 650, 65 S. W. 725: " \* \* \* Its manifest aim and object was to prevent the wrongs and injustice that too frequently befell the relatives and friends of the insured after their death, resulting from the growing evil practiced by life insurance companies, of calling for answers to all manner of immaterial questions from an applicant for insurance, bearing in the remotest degree, if at all, upon the risk to be assumed, and then by a general provision incorporated in the policy to be issued, declaring that if any one of the answers be untrue, or not as stated, it should avoid the policy, which condition without legislative aid the courts were compelled to enforce without regard to whether the particular answer which was shown to be untrue was material to the risk or not, or whether the untrue

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

answer was the result of an innocent mistake or an intentional wrong."

Defendant insists that the statute has no application to the character of case in hand. The policy contained provisions as to misrepresentation, declaring forfeiture in certain contingencies; but defendant insists that it is not basing its defense upon misrepresentations, fraudulent or otherwise, but upon affirmative provisions of the contract—that it is not asking a forfeiture, nor is it seeking to escape liability, but only defending on the amount due under the contract. It must be admitted that to say the defense is not good is to deny the right of the parties to make their own contract, and that we should not do unless the statute requires it of us. We know of no law, if the statute does not apply, which specifies what terms shall be inserted in contracts of life insurance. If defendant is not seeking to do that which the statute was intended to prevent, the statute should not aid the plaintiffs. The statute says that no misrepresentation shall be deemed material or render the policy void unless the matter misrepresented contributed to the death, etc. But defendant says it is not claiming the policy to be void. It recognizes its validity. Defendant says it is not claiming there was any misrepresentation in the case, material or otherwise, which should avoid the policy. Its claim is that both it and the assured, realizing a mistake might be made in stating or setting down the age in the first instance, agreed that the real age could be shown and that the amount of insurance due would be what the premiums paid would buy for one of that age. It does not follow that a misstatement of age is a fraudulent misrepresentation. There has been more than one instance in this court where an applicant for insurance found he was mistaken as to his own age. It may well be asserted that it was not an unreasonable nor an unjust thing to do for the parties to make it a contractual provision that the amount due on the policy should be what the premiums would buy for the true age.

But we have the statute defining in positive terms a public policy to govern and control contracts of insurance, and we ought not to so interpret such contracts as to allow the insurance company to nullify the policy adopted and thwart the object intended to be secured. The statute does not require that the misrepresentation should be actually fraudulent. A misrepresentation may be fraudulent in law though innocently made. The statute says that misrepresentations shall not be material, and the effect of this contract is to make them material by allowing them to affect the amount of insurance. Here was a misrepresentation as to age, and we are asked to permit it to reduce the amount of the policy under the guise of a contract to that effect. The statute does not permit the mak-

ing of a binding contract which would indirectly annul the object of its enactment. If it could be allowed in this instance, there would be nothing to prevent a contract completely abrogating the statute. It would be equivalent to adding to it a proviso: "Unless the parties contract that the misrepresentation may be material and that it may avoid the policy." That would be legislation which, if desired, should be obtained elsewhere.

In our opinion the trial court put the proper construction on the statute.

The judgment will be affirmed. All concur.

### CULVER v. WILLIAMSBURG CITY FIRE INS. CO.

(Kansas City Court of Appeals. Missouri. Jan. 10, 1910. Rehearing Denied Jan. 24, 1910.)

#### 1. INSURANCE (§ 388\*) — FIRE INSURANCE—FORFEITURE—WAIVER.

Under Rev. St. 1899, § 7976 (Ann. St. 1906, p. 3792), providing that all adjustments and examination of books and accounts shall be held in the neighborhood where the fire occurs, unless another place is agreed on after the loss, insurer making no demand for the production of insured's inventory and books in the neighborhood where the fire occurred, nor agreeing with insured for another place for such production and examination, waived the forfeiture provision in the iron-safe clause of the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 388.\*]

#### 2. EVIDENCE (§ 474\*)—OPINION EVIDENCE—COMPETENCY OF WITNESS—VALUE.

One who had traded for a stock of merchandise, and who had been selling the same for two months, and in the meantime buying other goods to replenish the stock, is qualified to testify to the value of the goods.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2218; Dec. Dig. § 474.\*]

#### 3. APPEAL AND ERROR (§ 1066\*)—REVIEW—HARMLESS ERROR — ERRONEOUS INSTRUCTIONS.

Where compliance with the iron-safe clause in a fire policy was waived, and the only question was the extent of the loss under the policy, an instruction that, if insured's failure to comply with the iron-safe clause was not material to the risk, the failure was no defense, though unnecessary, was not prejudicial to insurer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

Appeal from Circuit Court, Linn County; John P. Butler, Judge.

Action by George Culver against the Williamsburg City Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Fyke & Snider, for appellant. R. S. Kathan and A. W. Mullins, for respondent.

BROADDUS, P. J. The plaintiff's action is to recover on two fire insurance policies, and is contained in two counts. The first count declares on a policy issued by defendant on July 1, 1908, insuring a certain building in the sum of \$1,000, store, furniture and

fixtures therein in the sum of \$200, and general stock of merchandise in the sum of \$800 for the period of one year. The second count is to recover on a policy issued November 11, 1907, to Jones & Fletcher which was transferred to plaintiff, insuring stock of general merchandise in the sum of \$800, for one year. On June 1, 1908, plaintiff exchanged a farm for the store building, furniture fixtures, and merchandise, and he took possession and commenced business a few days thereafter. Each of the policies contained what is known as the "iron-safe clause," which is pleaded as a defense on the ground of plaintiff's failure to comply therewith. It reads as follows: "The assured shall take an itemized inventory of the stock hereby covered at least once a year during the life of this policy and shall keep books of account correctly detailing all purchases and sales of stock and shall keep said inventory and books of account securely locked in a fire-proof safe at night, or in some place secure against fire in another building during all the times said store is not open for business, and in case of loss the assured agrees and covenants to produce all such books and inventories, and in event of failure to produce the same this policy shall be null and void and no suit at law shall be maintained thereunder for any loss or claim for damage under said policy." Fletcher, one of the former owners of the building and stock, in connection with the plaintiff, took an inventory of the stock beginning June 1, 1908, and finishing on the 4th day of that month. Plaintiff carried on the business of buying and selling until August 4, 1908, when during the night the building and contents were destroyed by fire.

It is conceded that defendant was notified of the loss, but it does not appear that its adjuster was at the place of the fire or the neighborhood where it occurred. And the record fails to show that defendant at any time demanded the production and an inspection of plaintiff's inventory and books. The bare statement of plaintiff, in speaking of the matter that, "I saw them once at New Cambria," is all that the record contains in reference to the matter. There is nothing to show why plaintiff met defendant's adjuster at New Cambria, but we presume it must have been in reference to his loss. Plaintiff in connection with Fletcher, about the 4th of June, 1908, took an inventory of the stock on hand, and while he continued in business he kept a cashbook. At the close of each day he entered in his book the amount of money found in the cash drawer. He made no memorandum of the amount of goods sold or purchased, but kept on hand the bills made out for those purchased. The expenses of the store were paid out of the cash received for goods. He sold for cash or exchanged for produce. The invoice showed at the date of purchase \$4,713.87. During the time he was in business he realized from sale of goods according to his statement about \$900,

and his profits he estimated at about 25 per cent. His purchases amounted to \$414. After making a reasonable allowance for the expenses of the store which is not shown by the cashbook, the plaintiff must have had on hand at the time of the fire over \$3,000 worth of goods, the total insurance on which would have been below the three-fourths value thereof. At the time plaintiff saw defendant's adjuster at New Cambria about two months after the fire, he did not tell him that he had said cashbook, for at that time, according to his statement, it was mislaid. Whether the adjuster ever saw the inventory is a matter of conjecture, as the record does not show. But we presume he did. At the trial defendant admitted that it was liable for the loss of the building for the full amount of insurance on that item, and on the fixtures, but denied that it was liable for the loss on the merchandise. Judgment was rendered for plaintiff for the total insurance, from which defendant appealed, but only asks that that part of the judgment which embraces the loss on the merchandise be reversed.

Appellant insists that respondent forfeited his policy on the merchandise by his failure to take and safely keep the inventory and books required by said iron-safe clause. The inventory and book in question has received the most critical attention of the appellant. We find that the inventory, while perhaps not the most complete in all its details as it should be, is sufficiently explicit and will compare favorably with most of those that have come to our attention. The cashbook is certainly unsatisfactory in some important respects, and in our opinion was not what the terms of the said clause required. But whether the inventory and the book were such as respondent was required to keep is of no great importance in the view we must take of the case. Under section 7976, Rev. St. 1899 (Ann. St. 1906, p. 3792), "all adjustments, arbitrations, settlement and examination of books, invoices and accounts, shall be had at the town, city or neighborhood where the fire occurs, unless some other place be agreed upon between the insurer and insured after the loss without any regard to any provision in the policy to the contrary." There being no evidence of a demand for production and examination of respondent's inventory and books at the place or the neighborhood where the fire occurred, and no place agreed upon for that purpose, the appellant waived the forfeiture provision of the policy. *Carp v. Insurance Co.*, 116 Mo. App., loc. cit. 543, 92 S. W. 1137.

Error is assigned because respondent was permitted to testify to the value of the goods. The reason assigned is that it was not shown that he was competent to testify as to such value. In view of the fact that he had traded for them and been selling them for two months, in the meantime buying other goods to replenish his stock, we

believe he was qualified to speak as to the value.

Instruction numbered 5 given for the plaintiff is objected to on the ground that "it is erroneous because it tells the jury that if plaintiff's failure to comply with the iron-safe clause was not material to the risk, then such failure was no defense." The reason assigned for the objection is that a failure to comply with the iron-safe clause precludes a recovery and the materiality of the risk is not involved. But as compliance with the clause was waived as we have seen, we cannot see what it has to do with the plaintiff's right to recover, as it was no longer a condition precedent to that right. The instruction was unnecessary, but it could work no prejudice to defendant. The destruction of the goods having been shown, the only question left for the jury was as to the extent of plaintiff's loss, and the verdict of the jury on that question is fully warranted by the evidence.

Objections to instructions 1 and 2 are considered of no importance for a similar reason.

The judgment is affirmed. All concur.

**LEHNICK v. METROPOLITAN ST. RY. CO.**  
(Kansas City Court of Appeals. Missouri. Jan. 10, 1910. Rehearing Denied Jan. 24, 1910.)

**1. APPEAL AND ERROR (§ 882\*)—INVITED ERROR—INSTRUCTIONS.**

In an action for injuries to a passenger on a street car, although the petition charged that he was riding on the platform, defendant cannot complain of plaintiff's instruction, submitting the hypothesis of his being either there or on the step leading to the platform, where it used the same language in some of its instructions which were given by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. § 882.\*]

**2. APPEAL AND ERROR (§ 1001\*)—VERDICT—CONCLUSIVENESS.**

A verdict supported by substantial evidence will not be disturbed on appeal, though the reviewing court would have found a different verdict on the same evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

**3. APPEAL AND ERROR (§ 1006\*)—REVIEW—VERDICT—AMOUNT OF RECOVERY.**

In an action for injuries to a passenger, the fact that the jury on the first trial awarded plaintiff only \$1,000 does not show that a verdict of \$2,500 on a second trial, with a different jury and somewhat different evidence, was the result of passion or prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3954; Dec. Dig. § 1006.\*]

Broadus, P. J., dissenting.

Appeal from Circuit Court, Jackson County; Thomas J. Seehorn, Judge.

Action by Emil Lehnick against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John H. Lucas, for appellant. James A. Reed, T. J. Madden, and Bird & Pope, for respondent.

**JOHNSON, J.** This is an action for personal injury, alleged to have been sustained by plaintiff while riding as a passenger on one of defendant's cable cars then operated by defendant. The case has been under consideration by us on two other occasions. Our first opinion and judgment were set aside and a rehearing granted. After a rehearing we remanded the case for another trial, which resulted in plaintiff's favor, and again defendant has appealed.

The case will be found reported in 118 Mo. App. 611, 94 S. W. 996, where a history and statement of its character may be found, making a repetition unnecessary. We have concluded that in view of the second verdict in plaintiff's favor, the trial court did not abuse its powers and discretion in refusing to sustain defendant's demurrer to the evidence, and in refusing to grant a new trial based on the ground of there not being any testimony to make plaintiff's case of sufficient substance to go to the jury. In our judgment, the opinion in *Bartley v. Railway Co.*, 148 Mo. 124, 49 S. W. 840, relied upon by defendant, does not require that we find error in the regard mentioned.

The petition charges specifically where plaintiff was riding on board the car, viz., the platform. Yet plaintiff's instruction No. 3 submits the hypothesis of his being either there or on the steps leading to the platform. We cannot give ear to defendant's complaint of this, from the fact that it, in terms, uses the same language in its instructions No. 6 and 18, which were given by the court.

Other instructions, including those for either party, fully covered every phase of the case, and we would not be justified in saying that the jury was misled, or that the legal points involved were not fully complied with in respect to the direction which a jury should receive from a court. Instruction No. 11 was refused as offered, and given as amended by the court. The amendment was proper. A confusing number of instructions were offered by defendant, 29 in all. Fifteen of these were given, and that number was too many.

Complaint is made of prejudice, bias, and passion of the jury, and of consequent excessiveness of the verdict. Such complaint was also made in the motion for new trial. The verdict was for \$2,500. On the former trial it was for \$1,000, on practically the same evidence. By reference to the two former opinions in the case it will be seen that, for reasons there stated, we have not been very favorably impressed with plaintiff's case. But after all is said that can be said against the righteousness of the verdict, we are com-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

pelled to admit that in all respects it is supported by substantial evidence. The evidence in the present record differs somewhat from that considered in our opinion in the 118 Mo. App. report, and does not appear to us to preponderate so much on the side of defendant. Were we sitting as triers of fact we would still decide the case in favor of the defendant, but our functions cease when we find the verdict supported by substantial evidence, and that the trial was conducted without prejudicial error. The juries that have faced the parties and witnesses, and have heard the evidence, have not entertained our view of the facts, but we have no cause to say the last jury were influenced by passion or prejudice, nor would we be justified in arrogating their functions to ourselves. The injuries of plaintiff were severe, and we cannot hold, as a matter of law, that a verdict of \$2,500 is excessive. This being true, the fact that a former jury assessed the damages at only \$1,000 does not stamp the present verdict as the product of passion or prejudice. Within the limits fixed by the evidence, each jury, in the assessment of damages, had considerable latitude, and, since we find the last verdict to be within reasonable evidentiary limits, we cannot do otherwise than to give it our approval.

Accordingly the judgment is affirmed.

ELLISON, J., concurs. BROADDUS, P. J., dissents.

WILKERSON v. ST. LOUIS & S. F. R. CO.  
(Springfield Court of Appeals. Missouri. Jan. 10, 1910.)

**1. MASTER AND SERVANT (§ 279\*)—INJURY TO SERVANT—LIABILITY.**

The liability of a railroad under Rev. St. 1899, § 2864, as amended by Laws 1905, p. 136, § 1 (Ann. St. 1906, p. 1637), for the death of a servant through the negligence of a servant while running any train, is founded on negligence in operating a train, and the negligence is to be established by proof, and where, on a consideration of the facts giving plaintiff the most favorable interpretation that they will allow of, negligence is not affirmatively shown, there can be no recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. § 279.\*]

**2. NEGLIGENCE (§ 1\*)—ACTIONABLE NEGLIGENCE.**

The test of negligence is: Did the human agent in charge of the instrumentality causing the injury complained of act with the care that an ordinarily prudent person under the same circumstances would have exercised, and, if he did, there is no actionable negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

**3. NEGLIGENCE (§ 83\*)—HUMANITARIAN DOCTRINE.**

Where a defendant or its servants before an accident discovered, or by the exercise of

ordinary care might have discovered, plaintiff's perilous position, and then neglected to use the means at their command to prevent the injury when the use of such means would have prevented the accident, the defendant is liable.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.\*]

**4. MASTER AND SERVANT (§ 137\*)—INJURY TO SERVANT—NEGLIGENCE.**

Trainmen may presume that flagmen and other employes, on or near the track, will keep out of danger, and the railroad is not liable for an injury to them unless the trainmen have good reason to believe that the employes will not keep out of danger, and then fail to use proper means at their command to prevent injuring them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 274; Dec. Dig. § 137.\*]

**5. MASTER AND SERVANT (§ 137\*)—INJURY TO SERVANT—NEGLIGENCE.**

Unless the evidence, in an action for the death of a flagman struck by a train because of the failure of the engineer to stop the train after the discovery of decedent's peril, showed that the engineer saw decedent, or by the exercise of ordinary care could have seen him, in time to have avoided the accident, there could be no recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 274; Dec. Dig. § 137.\*]

**6. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—NEGLIGENCE.**

Where, in an action for the death of a flagman struck by a train because of the failure of the engineer to stop the train after the discovery of decedent's peril, there was no evidence as to when decedent went on the track, or how long he had been on it before he was struck, there was no evidence which justified the conclusion that the engineer saw him, or could have seen him, in time to have prevented the accident, and there could be no recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972; Dec. Dig. § 278.\*]

**7. MASTER AND SERVANT (§ 265\*)—INJURY TO SERVANT—NEGLIGENCE.**

Where, in an action for the death of a flagman struck by a train, the facts failed to point to the negligence of the railroad as the proximate cause of the injury, but revealed a state of facts from which an inference could as reasonably be drawn that the accident was due to a cause other than the negligence of the railroad, the railroad need not explain the cause of the accident to defeat a recovery; the doctrine of *res ipsa loquitur* not applying.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 881; Dec. Dig. § 265.\*]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

Action by W. W. Wilkerson, administrator of Ezra Moore, deceased, against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

This was an action commenced in the Christian county circuit court and tried before a jury. The material part of the petition, after alleging the death of Ezra Moore and the appointment of respondent as administrator, is as follows: "That the deceased was a brakeman on one of the freight trains

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of appellant running from Springfield to Thayer, Mo.; that deceased was killed by the operation of another train of the appellant at or near Norwood, Mo., on the 18th of August, 1907; that the deceased was ordered by the conductor of the train upon which he was working to walk east from Norwood on the tracks of appellant's road for the purpose of signaling and flagging trains approaching Norwood; that the deceased walked upon and along the appellant's tracks for a reasonable distance with signal lights and placed torpedoes on the track in different places, and afterwards walked back west on the tracks of appellant's road to a point where the track was level and straight from the east for over a quarter of a mile; that while displaying his signal light the deceased was run over and killed by a train of appellant, No. 706, which was approaching Norwood station from the east."

Specifying appellant's negligence, the petition continues: "That the killing of plaintiff's intestate was the direct result of the negligent, careless, and reckless manner in which the train was run, managed, and controlled by defendant's agents, servants, and employes, in this: That after defendant's employes in charge of and operating said train saw, or by the exercise of reasonable care and diligence, had they not been reckless in operating said train, could have, seen the dangerous position in which the plaintiff's intestate, Ezra Moore, was situated, and seeing or by the exercise of reasonable care and diligence, if said train had not been recklessly operated by defendant's agents, servants and employes in charge of said train, could have seen, the imminent peril in which plaintiff's intestate was placed, and that the deceased was unaware of the near and dangerous approach of said train, and that the agents, servants, and employes in charge of said train negligently and carelessly failed to sound an ordinary whistle in time to avoid the injury herein complained of, and, in fact, did not at any time before the injury to and death of plaintiff's intestate, either ring the bell, sound the whistle, or give any other signal by which plaintiff's intestate might be warned of the near and dangerous approach of said train; and negligently failed and neglected to use the brakes or other appliances for stopping said train, and negligently failed to use the appliances provided for and at hand of putting said train under control and stopping the same before it struck and killed plaintiff's intestate, but, on the contrary therefore, recklessly and negligently run its said train against the plaintiff's intestate without recognizing the torpedo signals which were run over and discharged before striking plaintiff's intestate, and without recognizing or applying the signal lights displayed by him, and without keeping any lookout whatever, the same train being so made up that the tender was in front of said engine and ca-

boose behind the same, and there being no light whatever on said tender, and said train being run at a high, dangerous, and reckless rate of speed, by reason of all of which plaintiff's intestate was run over," etc.

The answer was a general denial.

The alleged cause of action is of that class denominated "death from wrongful act," and is brought under the provisions of section 2864, Rev. St. 1899, amended by Laws 1905, p. 136, § 1 (Ann. St. 1906, p. 1637), which provides that whenever any person, including an employe of a corporation, is killed by the negligence of a co-employe, or shall die from any injury occasioned from the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe while running, managing, or conducting any locomotive or train of cars, etc., the corporation employing such person shall pay a penalty in the sum of not less than \$2,000 and not to exceed \$10,000, in the discretion of the jury.

The record discloses that the deceased was in the employ of the defendant company as a brakeman, running from Springfield to Thayer, and that he had been in the service only five weeks. On the afternoon of the 17th day of August, 1907, he, together with the other members of the train crew, ran their train to Norwood, in Wright county, Mo., where a collision occurred blocking the three tracks of the defendant's railroad at that place. The accident was reported to a dispatcher of the defendant company, who ordered a train back from Cabool—about 19 miles east of Norwood—to assist in clearing the tracks. This train was in charge of Conductor A. M. Bibee, Engineer J. A. M. Cadle, and a fireman, and consisted of an engine, tender, and caboose. The engine was reversed, running backward, with the tender in front, and was going at the rate of about 22 miles an hour. It was 4 or 5 o'clock in the morning, and the weather was damp and foggy, and it was dark. The deceased, as stated, was a brakeman on the wrecked train at Norwood of which J. W. Edwards was the conductor. The only evidence as to negligence introduced in the case was that offered by the plaintiff, consisting of the testimony of J. W. Edwards, conductor of the wrecked train at Norwood, J. A. M. Cadle, engineer of the relief train from Cabool, and A. M. Bibee, conductor of the relief train. At the conclusion of plaintiff's testimony, the defendant offered a demurrer to the evidence, which was by the court overruled, and defendant introduced no evidence whatever. Plaintiff obtained judgment for \$2,500, from which defendant has perfected its appeal.

The evidence discloses this state of facts: The train on which deceased was a brakeman was wrecked at Norwood, thereby blocking the three tracks at that place. For the purpose of clearing these tracks, a dispatcher of the defendant company ordered the return of a freight locomotive from the town of

Cabool, a station 19 miles southeast of Norwood on the same line of defendant's railroad. The conductor of the wrecked train at Norwood ordered the deceased, Ezra Moore, to go out and flag this extra train that was coming on from Cabool to remove the wreck. This order was given between 4 and 5 o'clock in the morning before daylight. The deceased took with him a red and a white lantern, and went east to flag the train, and was not again seen by his crew until his dead body was returned to Norwood, after a lapse of 1½ hours after the time that he went east with his lanterns. The relief train arrived at Norwood at about 6 o'clock. At the time the deceased was ordered to flag the relief train, his conductor stated to him that the engine would be backing towards Norwood and would have no lights because the tender would be in front. He was not seen to take any torpedoes with him. This was the statement of his conductor, J. W. Edwards.

Engineer Cadle, who was in charge of the engine of the relief train, stated: That he received orders at Cabool to return to Norwood; that he left Cabool at about 4:47 a. m.; that there was no headlight on the tender towards the west, but that there was an electric light in the cab to enable the fireman to discharge his duties. He stated that when he was within about three-fourths of a mile from Norwood, rounding a curve, he was running about 22 miles an hour, when the engine hit the torpedoes. He testified: That he did not see the deceased at any time before he struck him or at the time he struck him; that the track was straight from where he rounded the curve for a mile towards Norwood; that he had given his signals about one-fourth of a mile east of where the deceased was killed, which consisted of two long and two short whistles, that being the usual and ordinary signal on approaching a station; and that these signals could have been heard a distance of at least a mile. The whistles were given by him on approaching the curve, and he ran the locomotive between one-fourth and one-eighth of a mile after sounding the whistles before striking the first torpedo. He stated that, when he ran over the first torpedo, he immediately tried to stop the train, and when he struck the second torpedo he at once put the brake in emergency and was trying to see a light. The two torpedoes were about 30 feet apart. He testified: That, when he was looking for a signal or a flagman, he heard a dull sound and saw an object roll down the bank that he thought might be a hog; that the morning was drizzly and foggy; that he was keeping a lookout; but that he did not see the deceased or stop his engine before striking him; that the distance from where he ran over the first torpedo to where he struck the deceased was from 60 to 80 feet; that the engine was running 22 miles an hour;

and that it would have required from 200 to 250 feet in which to have stopped. He further stated that just before he reached Norwood he expected a flagman to be there, and he was looking out for him and trying his best to find him—"straining every nerve for that purpose"—and saw nobody on the track. He stated: That, if deceased had been standing up on the track or by the side of the track, he could have seen deceased about 40 feet from the front end of the locomotive and beyond that point, he could have seen a person on or near the track 200 feet from the front end of the tender. That the explosion of the torpedoes indicated to him that a flagman was in the neighborhood. After the object was struck, the engineer went on to Norwood at a speed of six or eight miles an hour. That upon his arrival at Norwood he made an examination of the engine and tender and found pieces of a man's clothing and blood on the tank trucks on the left side going towards Norwood. He then went to the place where he thought the deceased was struck and found lantern frames in the middle of the track near the left rail.

Witness Bibee, the conductor of the relief train, testified for the plaintiff as to the distance in which a train ought to be stopped under the circumstances detailed in evidence if the train was running 22 miles an hour, and he fixed the distance at 210 feet. He stated that he heard the explosions of the torpedoes, that there were two of them, and that they were on the curve.

W. F. Evans and John H. Lucas, for appellant. G. A. Watson and Hamlin & Seawell, for respondent.

NIXON, P. J. (after stating the facts as above). As we have seen in the statement of this case, this action is for a liability created by section 2864 of the Revised Statutes of 1899, amended by Laws 1905, p. 136, § 1 (Ann. St. 1906, p. 1637), and the liability of the defendant is based upon the negligence of its servants in operating a locomotive, and there can be no liability under well-established principles unless the plaintiff has shown the negligence of the defendant's servants. That is the very ground of recovery fixed by the statute under which this suit is prosecuted. Negligence is an affirmative fact to be established by proof before there can be any recovery on account of it, and it is a question of law whether the evidence in a given case tends to prove such negligence. Upon a consideration of the facts in this case—giving the plaintiff the most favorable interpretation that they will allow of or that can be reasonably put upon them as well as every fair inference from the facts—if negligence is not shown affirmatively from such facts, there can be no recovery by the plaintiff. *Ryan v. McCully*, 123 Mo. 636, 27 S. W. 533; *Keown v. St. Louis R. Co.*, 141 Mo. 86, 41 S. W. 926; *Tarwater v. Han-*

nibal & St. J. R. Co., 42 Mo. 198; Lovell v. Kansas City S. R. Co., 121 Mo. App. 466, 97 S. W. 198.

It has been said that the definitions of "negligence" by courts and text-writers are more numerous than any other title within the scope of the law; but, after we have gone over and examined all of such definitions, at last we must come to the supreme test—the test of common sense: Did the human agent in charge of the instrumentality that caused the injury act with the care that an ordinarily prudent man under the same circumstances would have exercised? If he did, there is no actionable negligence.

Stripped of all superfluous verblage and simply stated, the charge of negligence in the petition means, and can only mean, that the engineer in charge of the relief train did see, or by the exercise of ordinary care could have seen, the deceased on or near the railroad track in a place of peril in time to have given him signals or stopped the train and prevented the accident. The law of negligence in this state, as charged in the petition, has been often stated. Where a defendant or its servants before an accident discovered, or by the exercise of ordinary care might have discovered, plaintiff's perilous position, and neglected to use the means at their command to prevent the injury when the use of such means would have prevented the injury, the defendant is liable. *Kelny v. Missouri Pacific Ry. Co.*, 101 Mo. 87, 13 S. W. 806, 8 L. R. A. 783; *Morgan v. Wabash Ry. Co.*, 159 Mo. 262, 60 S. W. 195. As was said in the case of *Scullin v. Wabash Ry. Co.*, 184 Mo., loc. cit. 707, 83 S. W., loc. cit. 764: "This is too well-settled law in this state to require any further discussion of it." And yet in this case we have tabulated by the industry of respondent's counsel some 40 or 50 cases to establish this well-known doctrine.

In support of their contention that the demurrer of the appellant to the respondent's evidence was properly overruled by the trial court, we have been directed by learned counsel for respondent to numerous cases decided by the appellate courts of this state. An analysis of the cases cited makes it apparent that they do not belong to a class like the present by reason of an entirely different state of facts developed. In this case there is no testimony which furnishes any reasonable ground for expectation or anticipation by those in charge of the relief train of the presence of any person on or so near the track as to be in a place of peril at the time of the accident, or so long before the accident as to have enabled the engineer, by the use of the appliances at his command, to have stopped the train before it struck deceased. Hence the one question in this case did not arise in those cases cited, and they have no application to the facts of this case. *Holwerson v. St. Louis & S. Ry. Co.*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850.

As there are no tangible facts or circum-

stances to show where the deceased went on the track or so near it as to imperil his safety, there is no proof that the engineer could have stopped his train in time to have averted the accident, and, there being a failure to prove negligence, no liability would attach to the defendant company. So that the one question which the plaintiff had to maintain to support his case was: When did the deceased go upon the track in front of the approaching train? Without this question being answered by tangible evidence, the judgment falls to the ground like a house of cards. The one necessary vital fact to be proven by the plaintiff was: When did the deceased go upon the track in front of the approaching train and place himself in a position of peril? This is not a question of presumption; it is a question of fact. To this question the most scrutinizing examination of the evidence fails to give any answer. It is as silent as the grave and as voiceless as the Egyptian sphinx. And no argument, speculation, citation of authorities, imagination, or presumption, however ingeniously devised or protracted, will supply this missing keystone. Without it, the whole case of the plaintiff falls into shapeless ruins.

The court in this case gave but one instruction as to negligence for the plaintiff, to the effect that, if the jury should find from the evidence that the deceased was on or near the track in such a position as to be in imminent peril of being struck by the approaching train and that the defendant's employees in charge of the engine were aware of his peril in time to have enabled them by the exercise of ordinary care to have stopped the train and averted the injury, and they failed to exercise such care, by reason of which the deceased was killed, the jury should find the issues for the plaintiff. This was an entirely correct declaration of the law provided there was any evidence to sustain it.

Yet the court for the defendant gave this further instruction: "The court instructs the jury that there is no evidence in this case that the deceased was on or near the track in a place of peril far enough away from the engine that the engineer could thereafter have stopped the train by the exercise of ordinary care on the part of the engineer in time to have averted the injury, and you cannot find for the plaintiff on that ground." In other words, the court instructed the jury, on the one hand, that, if the deceased was on or near the track in such a position of peril that he was seen or could have been seen in time to have averted the accident, the jury should find for the plaintiff; but, for the defendant, the court instructed the jury that there was no evidence in the case that the deceased was on the track of the defendant or near it in such a place of danger that he could have been seen by the engineer in charge of the train in time to have enabled him to prevent the accident. In short, the court instructed the jury that they should

sustain a demurrer to plaintiff's evidence instead of taking that responsibility upon himself and acting on the strength of his convictions.

The deceased knew that the train was approaching from the east because he went out for the very purpose of meeting it. He was sufficiently informed as to the condition of the approaching train—how it was made up, that the tender would be in front, and as to the lights on it. He needed no special training or long experience in order to be apprised of the danger of being on the track in front of the approaching train. As far as is shown by the testimony in this case the duty that he was called upon to discharge in flagging the relief train did not require his presence upon the track in front of the approaching train or so near the track as to imperil his safety; that he was not required in any way, by instructions of the company or by any of its rules and regulations, or for very necessity or customary usage, to be upon the track, or so near it as to imperil his safety in order to discharge the duty that he had undertaken.

Again, the engineer in charge of the relief train had no reasonable grounds to apprehend that the flagman in discharge of his duties would be in front of the engine or so near the track as to imperil his safety in flagging the train. Consequently, this engineer was not required to discharge the same duty towards the deceased that he would ordinarily have been required to discharge if he had been approaching a public crossing or passing through any place where he should have expected to meet pedestrians crossing the track or in cases where he would expect workmen on the track. Nor had he any right to expect or apprehend, so far as the evidence goes in this case, that the deceased in flagging the train would expose his person in any way to be injured by this train. It is true the evidence shows that, after the explosion of the torpedoes under his train, he expected a flagman to be there, and that he was looking for him and trying to see him; but there is no evidence from which we can deduce any fact or inference favorable to the plaintiff that the engineer was looking for the flagman with the expectation or apprehension that it would be necessary to give him signals, or to slow down or stop the train, or that the flagman would be in a place of peril on or near the track.

The same rule would apply to flagmen as to other employes working on or near the railroad track. In the case of *Evans v. Wabash Ry. Co.*, 178 Mo., loc. cit. 517, 77 S. W., loc. cit. 518, Burgess, J., speaking for the court, said: "It will not do to apply this rule (the humanitarian doctrine) in all its strictness to sectionmen whose business it is to work upon and keep in repair railroad tracks, for they are supposed to look after their own personal safety, and to know of the time at which trains pass, to look for

them and see them, and to move out of the way. It is common knowledge that these men often voluntarily wait until trains get dangerously close to them, and then step out of danger and let them pass by, and to require trains to stop on all such occasions, when sectionmen are discovered on the track, would not only be imposing upon railroads unjust burdens, but would greatly interfere with traffic and travel. Those in charge of trains have the right to presume, in the first place, that such persons will keep out of danger, and not until they have good reason to believe that they will not do so, and then fail to use all proper means at their command to prevent injuring them, in consequence of which they are injured or are injured by reason of the willful negligence of those in charge of the train, should the defendant be held liable, and there was nothing of that kind in this case." See *Davies v. People's Ry. Co.*, 159 Mo. 1, 59 S. W. 982; *Clancy v. St. Louis T. Co.*, 192 Mo. 615, 91 S. W. 509.

The engineer, while less than half a mile from where deceased was struck, had sounded the usual signals given on approaching a station, which the evidence shows could have been heard a mile. When he rounded the curve and heard the first torpedo explode and first had reason to apprehend the presence of the flagman in the vicinity, he immediately tried to stop the train, and, when he struck the second torpedo, he put the brake in emergency. He stated: That it was a drizzly and foggy night; that he was trying to see a light or a flagman, and "straining every nerve to do so," and could see nothing; that soon after the train passed over the second torpedo he heard a dull sound, and saw an object roll down the bank which he thought might be a hog, but which afterwards proved to be deceased; that the distance from where he struck the first torpedo to the place where he struck the second was a distance of 60 or 80 feet; and that at the time he struck the first torpedo he was running 22 miles an hour. The three witnesses for the plaintiff testified that, with all the appliances at the command of the engineer, he could not have stopped the train in a less distance than 210 feet. If then, upon plaintiff's own showing, the engineer had no grounds to apprehend the presence of the flagman in the vicinity until he struck the first torpedo, and if at that time the deceased was at the place standing on the track where he was struck—only 80 feet from the engine—and the engine could not have been stopped in less than 200 feet, there is absolutely no showing of negligence. So that if the engineer had been charged with the apprehension of the presence of the flagman in the neighborhood by the explosion of the first torpedo, and if at that time he had known that the deceased was on the track, he could not have averted the accident.

We must therefore recur to the proposi-

tion already stated—that unless the evidence shows that the engineer in charge of the relief train did see the deceased, or could have seen him by the exercise of ordinary care, in time to have prevented the accident, there is no liability. Again, without any evidence as to when deceased went upon the track or how long he had been upon it before he was struck, how can the conclusion be drawn from the evidence that the engineer saw him, or could have seen him, in time to have prevented the accident? This case is one where the most careful examination shows that all the facts connected with the accident fall to point to the negligence of the defendant as the proximate cause of the injury, but reveals a state of facts from which an inference could as reasonably be drawn that the accident was due to a cause or causes other than the negligence of the defendant. In such a case plaintiff cannot rely upon mere proof of surrounding facts and circumstances; nor is the defendant called upon to explain the cause of the accident or purge itself of inferential negligence. The doctrine of *res ipsa loquitur* does not apply in this case; and, unless we are to assume negligence from the fact of death by reason of injuries received from a locomotive in defendant's service, there can be no recovery in cases like this.

On the showing made by the plaintiff—and no evidence was introduced by the defendant—there was no such evidence of negligence as authorized a recovery in this case. Our conclusion is that the trial court should have given defendant's instruction in the nature of a demurrer to the evidence at the close of plaintiff's case.

The judgment is therefore reversed. All concur.

### JOBES v. WILSON et al.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910.)

#### 1. TRIAL (§ 252\*)—INSTRUCTIONS—ASSUMPTION OF FACTS NOT SHOWN.

An instruction, submitting to the jury the falsity of certain representations, is error, where there is no evidence that they were false.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 596; Dec. Dig. § 252.\*]

#### 2. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING ISSUES.

An instruction, submitting to the jury the falsity of certain representations, which ignores the question whether the representations were believed and relied on, is error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613, 617; Dec. Dig. § 253.\*]

#### 3. BILLS AND NOTES (§ 90\*)—WANT OF CONSIDERATION.

Where a note was given for the full price of a horse purchased after paying the larger part thereof, on the representation of the seller's agent, who made the sale, that he had no authority to indorse the payment, the note was

obtained without consideration, whether such representations were false or not.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 163, 164; Dec. Dig. § 90.\*]

#### 4. BILLS AND NOTES (§ 497\*)—BONA FIDE PURCHASERS—BURDEN OF PROOF.

Negotiable Instruments Law 1905 (Laws 1905, p. 250; Ann. St. 1906, § 463—55), § 55, provides that the "title of a person who negotiates an instrument is defective \* \* \* when he obtains the instrument or \* \* \* negotiates it in breach of faith or under such circumstances as amounts to fraud." Section 59 provides that where "it is shown that the title of any person who has negotiated an instrument is defective the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course." Held that, where a note for the price of a horse was delivered to the agent of the payee after the greater part thereof was paid, on the agent's representations that he had no authority to indorse such payment, but would have the payee do so, which was not done, the assignee of the note has the burden of showing that he is a bona fide holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675—1687; Dec. Dig. § 497.\*]

#### 5. PLEADING (§ 84\*)—ACTION ON NOTE—SEPARATE ANSWER OF MAKERS.

Where each of several makers of a note delivered to the agent of the payee rely in defense on different statements made to them by the agent when the note was executed, separate answers should be filed by each maker.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 168—171; Dec. Dig. § 84.\*]

#### 6. BILLS AND NOTES (§ 537\*)—ACTION BY ASSIGNEE—BONA FIDES OF PLAINTIFF—QUESTION FOR JURY.

In an action on a note by the assignee thereof, where it is shown that there was fraud by the payee in obtaining the note, whether plaintiff is a bona fide holder is a question for the jury.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 537.\*]

#### 7. BILLS AND NOTES (§ 509\*)—ACTION BY ASSIGNEE—BONA FIDES OF PLAINTIFF—EVIDENCE.

In an action on a note by the assignee thereof, on the question of plaintiff's bona fides the jury may consider the facts that plaintiff purchased the note without recourse, without knowing the makers, and without inquiring as to their financial condition except statements by the payee, and that he paid but a little more than one-half of its face value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1740—1745; Dec. Dig. § 509.\*]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

Action by C. S. Jobs against H. M. Wilson and others. Defendants had judgment, and plaintiff appeals. Reversed.

Milton Schwind and J. W. Hartley, for appellant. G. A. Watson and G. A. McCafferty, for respondents.

GRAY, J. This is a suit on a promissory note, dated April 2, 1906, for \$1,067, due July 1, 1907, payable to A. J. Ream & Co. at the Bank of Nixa, Mo., and with interest at 6 per cent. per annum before maturity, and 8

per cent. after maturity, payable annually, and signed by the respondents. On the note are the following indorsements: "April 2, 1906, paid \$230.00. Without recourse, A. J. Ream & Co." The appellant sued on the note in the Christian county circuit court, and claimed that he bought the same in June, 1906, with two other notes of the same amounts, with the same credits indorsed thereon, and signed by the same parties. The answer of the defendants alleges that the payees, through their agent, a Mr. Guggie, agreed to sell a standard bred stallion for \$3,200, to be represented by 16 shares of stock of \$200 per share, and if any of the said shares of stock remained unsold, the payees would take the same; that it was further agreed in case said stallion died within one year from the date of delivery, the purchasers should have the option of choosing another horse, or receiving \$1,000 of insurance, which the sellers carried on each of their horses in a "blanket" policy; that it was further agreed that the contract should be reduced to writing and delivered to said purchaser; that 10½ shares of said stock were sold by the payees, through said agent, to parties other than these defendants, for which the said agent received for the payees the sum of \$2,100; that 1½ shares of said stock were not sold, and were retained by the sellers; that the remaining 4 shares of stock, aggregating \$800, were subscribed for by the defendants; that on the 2d day of April, 1906, and after the said Guggie had received the sum of \$2,100 for the said payees, and after the said agent had taken over the 1½ shares of stock, amounting to the sum of \$300, he falsely and fraudulently represented to the said defendants that it was necessary for them to sign promissory notes for the full amount of the purchase price of said stallion; that the said notes would be sent to A. J. Ream & Co., and that the note sued on in plaintiff's petition would be canceled and returned to defendants; that the second note for a like amount would be canceled and returned to the defendants, and that a credit of \$400 would be placed upon the third note; that relying upon the false and fraudulent representations of said agent, they were induced to sign the notes herein referred to. They further alleged that the credits of \$2,600 were never placed on said note; that the said two notes were not canceled; that the written contract was never delivered; that the stallion so purchased died within 12 months; and that the payees refused to furnish another or pay the \$1,000; and alleging that the said notes were wholly without consideration and void, and specially denying that plaintiff, before maturity of said note, purchased the same in good faith for a valuable consideration. The reply was a general denial.

At the trial the plaintiff, Jobes, testified in his own behalf, to the effect that he bought the notes for about \$1,750 to \$1,850; that he knew in a general way how the business of

the payees was conducted—that is, that a horse would be sold in the neighborhood, and notes given for the purchase price—that he made no effort to ascertain the solvency of the signers, but relied upon his experience as a bank examiner in buying that class of paper, but further stated he had some information from the result of an inquiry one of the payees had made. When he was asked if it did not strike him as a little peculiar, if the payees thought the note was good, to sign it without recourse, he answered: "No; it did not, especially in view of the facts in connection with the business." That he purchased the paper after the partnership between Ream & Co. had dissolved, and each had taken his part of the paper, and that the note was indorsed without recourse, for the reason that the partner who had surrendered his interest to the other would not be liable. The plaintiff resided in Kansas City, Mo., where the payees resided and had been in business. The makers of the paper were farmers in Christian county.

The defendant Wilson testified that Guggie told him that, in the event the horse died, another horse would be furnished, or \$1,000 would be paid; that he only agreed to take one-fourth of a share, which would be \$50, and that one of the other payees, Mr. Beverage, took one-fourth of a share with him, and Guggie agreed to take their note for \$100. But when the sale was put through, Guggie came around with notes for \$3,200, and he told him he would not sign them, and he would have to make \$100 note, but Guggie said, "You sign these notes, and I will send them on to the office and have a \$3,100 credit placed on them," but after he got their signatures, he took the three notes and had them signed by the other parties, and when the horse died, the makers were notified that no horse would be furnished. On cross-examination he testified that Guggie said he could not credit the notes, and that he did not have the power to do that, but he would explain it to Ream, and they would credit the notes. The defendant Brown testified that he took a one-half share, and when he did, he was told by Guggie that the horse was insured for \$1,000, and if he died within three breeding seasons, another horse, or \$1,000, just as he wished, would be furnished; that when he signed the notes, Guggie told him that when the notes were sent to Kansas City, the company would credit the notes for all that was paid, and that he (Brown) was not standing good for anybody else, because he had certificates showing how much each had. W. A. Boyts, a defendant, testified that, when he made inquiry as to why the parties were asked to sign a \$3,200 note, Guggie said he could not credit them, and that the company would credit them when they were sent in.

All the testimony showed that the parties were to have shares of stock at the rate of \$200 per share for the interest they had in

the animal, and there was abundant testimony to prove that Guggie represented to them that he did not have the power to credit the notes with the payments made, but the same would have to be done at Kansas City, and that he also agreed that, in case the animal died within three breeding seasons, a new horse would be delivered, or \$1,000 paid, at the option of the makers. There were 11 names signed to the note. The testimony is uncontradicted that \$2,100 had been paid by the makers on the notes previous to the time Guggie took them to Kansas City, and that in addition thereto, certain shares of stock were unsold, and that the payees were to take the same, and to that amount the purchase price of the stallion, which the makers of the note were to pay, was thereby reduced. The horse died, and the payees refused to furnish another animal or pay the \$1,000. The agent took the notes to Kansas City, and had a credit of \$233 placed upon each one, but what was done with the balance of the cash paid on the notes at the time of their execution the evidence does not disclose.

It is claimed that the makers had no right to rely upon the statement of the agent that it was necessary for him to send the notes to Kansas City to have the full amounts credited thereon by the payees, and that the notes would be canceled to the amounts of the payments. In passing upon the question whether or not persons were justified in relying upon the statement of agents, all surrounding facts and circumstances should be taken into consideration. According to the evidence, Mr. Guggie went into this community where these defendants were residing, and stayed for about three weeks. He interested them in the proposition of getting a standard bred stallion in their neighborhood, and informed them that the sellers of the animal would take an interest with them in the enterprise. The proposition was a fair one, and the payees were to become part owners with the purchasers, and therefore it is not to be wondered that these honest and unsuspecting citizens accepted his statements as the truth, and relied upon them. It may be admitted that his statement that he did not have authority to credit the \$2,100 on the back of the notes would not have deceived men accustomed to handling commercial paper, or men accustomed to dealing with and knowing the authority of agents, but the court decisions are full of cases where statements no more unreasonable than this have been relied upon by people in the rural districts. When a man has gone into a farming community and obtained the confidence of citizens thereof, and obtained their hard-earned money for nothing, the courts should not listen with too willing care to the cry, "They ought to have known better."

While there was abundant proof that certain statements were made by the agent of the payees and relied on by the defendants, there was no evidence that the statements

were false. The respondents could not rest by proving that statements were made, and that they relied on them, but it was necessary for them to prove that the statements were false. The court, at the request of defendants, gave an instruction submitting to the jury the question of the falsity of the said representations; and, as there was no evidence that the representations were false, the action of the court in giving this instruction was error, for which a new trial must be ordered. This instruction is wrong in another important particular. It entirely ignored the question whether the defendants believed the representations to be true and relied on them.

The answer, after alleging that the representations were made, and that they were false, and that defendants relied on them and were deceived thereby, and that on account thereof the note was fraudulently obtained, closes by stating, "the note was obtained without consideration." If the defendants should not be able to prove that the representations were false, yet, according to the answer, the note was obtained without consideration, as the agent of the payees had the money to pay the same at the time it was executed. What we have just said does not, under the evidence, apply to all the defendants. The defendant Wilson testified that the agent of the payees told him that when the notes reached the office of the payees, \$3,100 would be credited on them, and there only would be left unpaid \$100, and that this unpaid amount would be applied, so that \$33 $\frac{1}{3}$  would be left unpaid on each note. The defendant Wade testified that the said agent told him that the money paid would be credited on the three notes, but he did not claim any one of the notes was to be paid in full and returned to the maker, but the notes would have credits on them showing who had paid for the stock subscribed. No one of the defendants testified that out of the money paid to the agent of the payees was the note sued on to be paid in full and returned to them, and therefore, under this evidence, the court could not submit the question of total failure of consideration at the time the notes were given.

When the suit is instituted by the payee against the maker, the right to plead a partial failure of consideration is not to be questioned. But when the suit is brought by a third person, who has acquired the note before maturity, the question whether the defense of a partial failure of consideration can be made, although the purchaser of the note, at the time he purchased the same, knew that the maker did not receive full consideration for its execution, is not so easily answered. The note sued on herein was executed after the negotiable instrument law of 1905 (Laws 1905, p. 243; Ann. St. 1906, §§ 463—1 to 463—197) had taken effect, and we believe the provisions of that act settle the question in this state. Section 28 of that act reads:

"Absence or failure of consideration is a matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise." This section permits the defense of a total or partial failure of consideration against all persons but a holder in due course. Section 52 defines a holder in due course to be a person who has taken an instrument upon the following conditions: "(1) That it is complete and regular upon its face. (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. (5) That he took it in the usual course of business." Under the laws of this state as they existed prior to the act of 1905, there was a difference as to the burden of evidence in cases where it was claimed the note was obtained by fraud, and where it was claimed it was given without consideration. In the first case, when the defendant showed that the note was obtained by fraud, the burden of evidence was then on the holder to show that he acquired it in due course, but when the failure of consideration merely was proven, the burden of evidence did not shift, but remained with the defendant to show that the plaintiff was not a holder in due course. *Hahn v. Bradley*, 92 Mo. App. 399; *Bank v. Rominee*, 136 Mo. App. 57, 117 S. W. 105; *Hamilton v. Marks*, 63 Mo., loc. cit. 178. But by the act of 1905 we believe that the burden is the same in each case. Section 59 (page 250) of that act reads: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument is defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course."

It will be noticed that in all cases where the title of the person negotiating an instrument is defective, the burden is on the holder then to prove he acquired it in due course. Section 55 defines a defective title as follows: "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." If the allegations of the answer are true, or if the statements of the defendants as to what was to be done with the notes are to be believed, then it was an act of bad faith, amounting to a fraud, on these defendants, as the term is defined in section 55, to negotiate these notes without placing the credits upon them, and

therefore the burden in this case will remain with the plaintiff, if on another trial the defendants prove to the satisfaction of the jury their statements as to the circumstances under which they executed the notes. In our construction of the act of 1905 we are supported by the courts of other states. *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 193; *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 125 Am. St. Rep. 265; *Bourland v. McKnight & Bro.*, 79 Ark. 427, 96 S. W. 179, 4 L. R. A. (N. S.) 718.

In this case, the defendants all joined in one answer. The evidence shows that the statements made to them and relied upon by them were not the same in all cases, and it seems to us, if the cause is retried, that separate answers should be filed according to the true facts relied upon. The appellant insists, however, that notwithstanding the ability of the defendants to prove the allegations of their answer, under all the evidence the plaintiff is a holder in due course as the term is now defined under the laws of this state. If we are right in our interpretation of the act of 1905, the burden will be upon him, if the defendants show the note was obtained by fraud, or that the consideration partly failed before he purchased it, to prove that he is an innocent purchaser without notice, or, as the term is now used, "a holder in due course." And this will be a question for the jury. *Investment Co. v. Bruce*, 132 Mo. App. 257, 111 S. W. 888; *Bank v. Rominee*, 136 Mo. App. 57, 117 S. W. 105.

As this case must be retried, we do not want to comment on the facts further than to say that the fact that the plaintiff purchased the note without recourse, and at the time did not know any of the defendants, and made no inquiry as to their financial condition except statements made to him by the seller of the note, and with the further undisputed fact that he purchased \$2,500 worth of notes bearing 6 per cent. interest, for \$1,800, are questions which the jury have a right to consider. The payment of value for negotiable paper is a circumstance which should be taken into account with other facts in determining the question of the bona fide of the transaction, and, when full value is paid, is entitled to great weight. *Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676. But the amount of discount on the purchase of a note, and the inadequacy or unreasonableness of the price paid therefor, is evidence of bad faith to be submitted to the jury. *Hugumin & Co. v. Hinds & Weissgerber*, 97 Mo. App., loc. cit. 353, 71 S. W. 479; *Leavitt v. Taylor*, 163 Mo., loc. cit. 171, 63 S. W. 385; *Lay v. Wissman*, 36 Iowa, 305; *Dewit v. Perkins*, 25 Wis. 451; *Fuller v. Goodnow*, 62 Minn. 163, 64 N. W. 161; *Mee v. Carlson* (S. D.) 117 N. W. 1033; *Jordan v. Grover*, 99 Cal. 194, 33 Pac. 889.

For the errors above specified, the judgment is reversed, and the cause remanded for a new trial. All concur.

## DAVIDSON v. SCHMIDT et al.

(St. Louis Court of Appeals. Missouri. Jan. 4, 1910.)

## 1. EVIDENCE (§ 12\*)—JUDICIAL NOTICE—POPULATION OF COUNTY.

Courts may take judicial notice that a county has less than a certain population.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 17; Dec. Dig. § 12.\*]

## 2. CONSTITUTIONAL LAW (§ ½\*) — ABROGATION.

The sovereign authority which makes a Constitution may abrogate and repeal its provisions.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § ½.\*]

## 3. STATUTES (§ 167\*)—REPEALS BY IMPLICATION.

In jurisdictions where the principles of the common law obtain, prior statutes may be repealed by implication, perforce of a subsequent law revising the whole subject-matter of the first, and intending to substitute the latter for the former.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 242, 243; Dec. Dig. § 167.\*]

## 4. COURTS (§ 1\*)—JURISDICTION.

The repeal of a statute conferring jurisdiction will oust the jurisdiction thereby conferred.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 1.\*]

## 5. STATUTES (§ 158\*)—REPEAL BY IMPLICATION—PRESUMPTION.

Repeals by implication are not favored, and the legislative intent to that effect is not prima facie presumed, and such repeals are not adjudged to occur except where they are inevitable, or it is obvious the Legislature intended that result.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.\*]

## 6. COURTS (§ 472\*)—AMOUNT IN CONTROVERSY—JURISDICTION—REPEAL OF STATUTE BY NEW CONSTITUTION.

Const. 1820, art. 5, § 6, conferred exclusive original jurisdiction in all civil cases, not cognizable before a justice of the peace, on circuit courts until otherwise directed by the General Assembly, which included a suit to enforce a mechanic's lien for less than \$50, and the same provision was carried into Const. 1863, art. 6, § 13. Act March 30, 1872, p. 44, § 1, conferred on justices of the peace jurisdiction of mechanics' liens, not exceeding \$90 in amount, in counties having less than 100,000 population, and was carried forward in Rev. St. 1899, § 3891 (Ann. St. 1906, p. 2151), so as to confer jurisdiction on justices of the peace of suits to enforce mechanics' liens for not over \$150 in counties of less than 50,000. Const. 1875, art. 6, § 22 (Ann. St. 1906, p. 234), provides that the circuit court shall have exclusive original jurisdiction in all civil cases "not otherwise provided for," and "such concurrent jurisdiction with justices of the peace as is or may be provided by law." *Held*, that the circuit court would not have exclusive original jurisdiction of foreclosure of mechanics' liens for less than \$50 in a county having less than 50,000 population, since under the phrase "not otherwise provided for" in the Constitution, which was a revision of the whole subject-matter, Acts 1872 did provide for jurisdiction of the justices of the peace in such cases.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1208; Dec. Dig. § 472.\*]

## 7. COURTS (§ 472\*)—CONCURRENT JURISDICTION—CIRCUIT COURT AND JUSTICE'S COURT—MECHANICS' LIENS—EFFECT OF CONSTITUTION.

*Held*, also, that though circuit courts might have had concurrent jurisdiction of such mechanics' liens at the time the act of 1872 (Laws 1872, p. 44), was passed since there were no words taking away such original jurisdiction as conferred by Const. 1820, or Const. 1863, still by Constitution 1875 the circuit court was divested of such jurisdiction, since under the phrase "shall have concurrent jurisdiction with justices of the peace as 'is' or may be provided by law," Acts 1872 did not confer that express concurrent jurisdiction which the quoted phrase implied, and this is so especially in view of the other statutes in force in 1875 (Wag. St. 1872, c. 82, art. 1, § 3, chapter 41, art. 3, § 2), which expressly define the concurrent jurisdiction as above \$50 and less than \$90, and by Rev. St. 1899, § 1674 (Ann. St. 1906, p. 1217), which was passed pursuant to Const. 1875, which gave concurrent jurisdiction for actions for recovery of money, which would include mechanics' liens, to more than \$50 and less than \$90.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1208; Dec. Dig. § 472.\*]

Reynolds, P. J., dissenting.

Appeal from Circuit Court, Cape Girardeau County; Henry C. Riley, Judge.

Action by H. J. Davidson against A. J. Schmidt and others. From a judgment for plaintiff, defendants appeal. Reversed, and transferred to the Supreme Court.

C. H. Daues and Robert L. Wilson, for appellants. Benson C. Hardesty, for respondent.

NORTONI, J. This action originated in the circuit court. Its purpose is to enforce a mechanic's lien for an amount less than \$50; that is to say, for the sum of \$13.50. The court proceeded with the case as though it were possessed of jurisdiction over the subject-matter, notwithstanding all of the parties are residents of Cape Girardeau county. The finding and judgment were for the plaintiff, and defendant appeals.

It is argued that, the cause having originated in the circuit court, the judgment must be reversed for the reason the court is without jurisdiction in the premises. We believe the argument to be sound, and that the judgment should be reversed.

The identical question involved here was presented to, and ruled upon by, our Supreme Court in *Stamps v. Bridwell*, 57 Mo. 22, under different constitutional and statutory provisions than those which now obtain. In that case, which was an action to enforce a mechanic's lien for an amount less than \$50, the Supreme Court adjudged that the circuit court was without either original or concurrent jurisdiction over the subject-matter. That case was subsequently cited and relied upon to support the proposition that the circuit court of Jackson county was without original jurisdiction under the charter provision of Kansas City to enforce the lien of

a small tax bill. See *Williams v. Payne*, 80 Mo. 409. Later the identical question involved in the case last cited came before the Supreme Court a second time. This was an action on a small tax bill which originated in the circuit court of Jackson county, and the Supreme Court overruled its former decision in *Williams v. Payne*, supra, and it may be overruled the principle of *Stamps v. Bridwell*, supra, as well. At any rate, in this case the Supreme Court announced the doctrine that where it appeared a court had once been possessed of jurisdiction over a subject-matter, the same would continue to reside therein, unless words of limitation are used in a subsequent law which is relied upon to divest the jurisdiction or the prior law is repealed. It is said substantially, when subsequent legislation is relied upon to divest a court of a jurisdiction which it once exercised, there must be words of limitation contained in the subsequent act relied upon, either by using the word "exclusive," or by repealing the former act giving jurisdiction, by which it may appear that the Legislature intended, not only to confer jurisdiction on the new tribunal, but also to divest the jurisdiction which theretofore obtained in the old one. See *Tackett v. Vogler*, 85 Mo. 480.

Now, it is argued here, in support of the judgment of the trial court, that the case last mentioned overruled *Stamps v. Bridwell*, supra, and that under the doctrine of *Tackett v. Vogler* the circuit court of Cape Girardeau county is possessed of original jurisdiction in mechanic's lien actions even though the amount involved be less than \$50. The argument proceeds from the fact that under the Constitution of 1820, and until the act of March 30, 1872 (*Laws 1872*, p. 44) touching mechanics' liens, the circuit court was possessed of original jurisdiction in respect of such matters, notwithstanding the amount involved. It is said that, original jurisdiction over mechanic's lien actions for such an amount having once inhered in the circuit court under the Constitution of 1820, it continues to reside there, for the reason no express words of limitation employed by competent authority have ever taken it away. It is very true that "exclusive original jurisdiction in all civil cases" which were not cognizable before a justice of the peace was conferred upon the circuit court by the Constitution of 1820 until otherwise directed by the General Assembly. See section 6, art. 5, Const. Mo. 1820; *Rev. St. Mo. 1835*, p. 23. It is true, as well, that the legislative authority of that period conferred exclusive original jurisdiction, in all civil cases which were not cognizable before county courts and justices of the peace, upon the circuit court. See *Rev. St. 1835*, § 8, p. 155. And we believe, without doubt, jurisdiction over mechanics' liens for any amount obtained in the circuit court until the act of March 30, 1872. Indeed the Supreme Court in effect so ruled. See *Ashburn v. Ayres*, 28 Mo. 75. The Constitution

of 1865 vested in the circuit courts "exclusive original jurisdiction" in all civil cases which were not cognizable before justices of the peace until otherwise directed by the General Assembly. See section 13, art. 6, Const. 1865 (*Gen. St. Mo. 1865*, p. 37). In conformity with this grant of power to otherwise direct the act of March 30, 1872, concerning mechanics' liens was passed by the Legislature. By virtue of this enactment justices of the peace in counties having less than 100,000 permanent inhabitants were given jurisdiction to enforce mechanics' liens where the amount or balance claimed to be due did not exceed \$90. See section 1 of the act approved March 30, 1872, touching jurisdiction of justices of the peace. *Laws Mo. 1872*, p. 44. It may be conceded that there are no words contained in this act which pointedly exclude the jurisdiction of the circuit court which theretofore obtained over mechanics' liens. However this may be, the act referred to operated to confer upon justices of the peace in counties having less than 100,000 permanent inhabitants original jurisdiction to enforce such liens when the amount or balance claimed to be due did not exceed \$90. It may be conceded, too, that Cape Girardeau county is a county of less than 100,000 permanent inhabitants, and that this is a question of which the court may take judicial notice. *Mason v. Hannah*, 30 Mo. App. 190.

It may be, under the rule announced in *Tackett v. Vogler*, 85 Mo. 480, and invoked by the plaintiff, that under the Constitutions and statutes above referred to the circuit court of Cape Girardeau still retained original jurisdiction over mechanics' liens, notwithstanding the amounts involved: That is to say, it may be the act of March 30, 1872, did not operate to divest the circuit court of such jurisdiction as it theretofore had with respect to mechanics' liens, for two reasons: First, because no words of limitation such as "exclusive," or otherwise expressive of the legislative intent to confer exclusive original jurisdiction on justices of the peace in such cases involving less than \$90, appeared in the act; and, second, because the prior law was not repealed. However this may be, the subsequent Constitution of 1875, and pertinent legislation thereunder, points otherwise. It seems plaintiff relies exclusively on our earlier Constitutions and statutes to support the jurisdiction of the circuit court over the subject-matter of the present controversy. It is certain that the sovereign authority which made the Constitutions of 1820 and of 1865 may abrogate and repeal those constitutional provisions. A new Constitution was made and adopted in 1875. The Constitution of 1875 contains the following provision touching the jurisdiction of the circuit courts: "The circuit court shall have jurisdiction over all criminal cases not otherwise provided for by law; exclusive original jurisdiction in all civil cases not otherwise provided for; and such concurrent jurisdiction with and

appellate jurisdiction from inferior tribunals and justices of the peace as is or may be provided by law. It shall hold its terms at such times and places in each county as may be by law directed; but at least two terms shall be held every year in each county." Section 22, art. 6, Const. 1875 (page 234, Ann. St. 1906).

It will be observed that the constitutional provision above quoted confers upon the circuit courts "exclusive original jurisdiction in all civil cases not otherwise provided for." Now it is certain that this provision does not confer "exclusive original jurisdiction" upon the circuit court in all mechanics' lien actions notwithstanding the amount involved, for the very simple reason that it expressly purports to convey "exclusive original jurisdiction" on such courts in all cases not otherwise provided for, and the matter of jurisdiction touching mechanics' liens for small amounts had theretofore been provided for by competent legislative authority in the act of March 30, 1872, heretofore cited. This act of the Legislature conferring authority upon justices of the peace in certain mechanic's lien cases continued to remain a parcel of our law at the time of the adoption of the Constitution of 1875, and, so far as important here, continues to obtain to the present time. That is to say, under section 3891, Rev. St. Mo. 1899 (Ann. St. Mo. 1906, § 3891), justices of the peace, in counties having less than 50,000 inhabitants, have jurisdiction to enforce mechanics' liens where the amount or balance claimed to be due does not exceed \$150. The court will take judicial notice too, that Cape Girardeau is a county having less than 50,000 inhabitants. *Mason v. Hannah*, 30 Mo. App. 190.

Although the circuit court may have possessed exclusive original jurisdiction with respect to mechanics' liens for any and all amounts between the dates of the adoption of the Constitution of 1835 and the enactment of the statute of March 30, 1872, which, no doubt, conferred concurrent authority on justices of the peace in certain cases, it is obvious that from and after the adoption of the Constitution of 1875 an exclusive original jurisdiction touching these matters no longer obtained in the circuit court. Indeed, such exclusive original jurisdiction did not reside in the circuit court after the statute of March 30, 1872, and the only original jurisdiction in civil cases which the Constitution of 1875 purports to confer upon the circuit court is that not otherwise provided for. The matter of jurisdiction over mechanics' liens for amounts such as that involved here had been theretofore conferred upon justices of the peace, and has continued ever since.

The argument of the plaintiff concedes that justices of the peace have jurisdiction over mechanic's lien cases such as that involved here, and is to the effect that the circuit court has concurrent jurisdiction thereof as well, for the reason that such jurisdiction was vested in it under the Constitution

of 1820, and has never been taken away by competent words or enactment to that effect. We do not understand the Supreme Court ruled, in the case of *Tackett v. Vogler*, 85 Mo. 490, that a jurisdiction which once resided in a court could not be taken away by subsequent legislation in any other manner than by the employment of express words of limitation or exclusion. On the contrary, we understand the court to have declared in that case that such words will operate to take away jurisdiction which theretofore obtained, or that a repeal of the former act giving jurisdiction operates the same result. It would be a marked variation from principle, indeed, for any court to declare that a statute giving jurisdiction may not be repealed so as to oust it without using pointed and express words to that effect. Indeed, it is universally true, in those jurisdictions where the principles of the common law obtain, that prior statutes may be repealed by implication perforce of a subsequent law revising the whole subject-matter of the first, and intending to substitute the latter for the former. *State ex rel. v. Patterson*, 207 Mo. 129, 145, 105 S. W. 1048; *State, to the Use, v. Hickman*, 84 Mo. 74, 79; *Smith v. State*, 14 Mo. 147, 152; *State v. Roller*, 77 Mo. 120, 129; *State v. Summers*, 142 Mo. 586, 44 S. W. 797; *State v. Dalton & Fay*, 134 Mo. App. 517, 114 S. W. 1132. In fact, the authority relied upon by the plaintiff—that is, *Tackett v. Vogler*—asserts, as we understand it, that a jurisdiction once had may be divested, even though express words of limitation are not employed, if the former act giving the jurisdiction is repealed in such manner as to show that the Legislature intended, not only to confer jurisdiction on the new tribunal, but to take it away from the old as well. It is true the court in that instance was speaking more particularly of the lack of words of limitation in the act before it. However, it placed a repeal of the former act on a par with such words of limitation. The court said: "There must be words of limitation to take it away, either by using the word 'exclusive,' or by repealing the former act giving jurisdiction, by which it may appear that the Legislature intended not only to confer jurisdiction on justices of the peace, but also to take away the other jurisdiction." (Italics are our own.)

No one can doubt for a moment that a repeal of a statute conferring jurisdiction will oust the jurisdiction thereby conferred. Repeals may be had in three ways: First, by express words to that effect contained in the statute; second, by such repugnance in the two laws as evinces that they may not both operate as a rule of decision at the same time; and, third, by such a revision of the whole subject-matter of the former law as manifests an intention on the part of the Legislature to substitute the subsequent law for the prior. The two latter methods are regarded as repeals by implica-

tion. *State v. Dalton & Fay*, 134 Mo. App. 517, 114 S. W. 1132; *Young v. Kansas City, St. Jo., etc., R. R.*, 33 Mo. App. 509. It is true the law does not favor repeals by implication, and the legislative intent to that effect is not *prima facie* presumed. Such repeals are not adjudged to occur except where they are inevitable, or it is obvious the Legislature intended that result. *State v. Dalton & Fay*, 134 Mo. App. 517, 114 S. W. 1132; *Bishop's Statutory Crimes* (3d Ed.) § 151; *Pac. R. R. Co. v. Cass County*, 53 Mo. 17. In the more recent case of *Lackland v. Walker*, 151 Mo. 210, 263, 52 S. W. 414, the Supreme Court clearly recognizes that a prior jurisdiction may be repealed and divested as well by necessary implication negating the powers and jurisdiction of the class of courts to which our circuit court belongs as by unequivocal terms to that effect.

With these principles before us, we come now to examine as to whether the jurisdiction of the circuit court, which obtained between 1835 and 1872 in respect of mechanics' liens for an amount such as involved here, has been divested by subsequent law. It is entirely clear from the Constitution of 1875 and legislation thereunder that the matter of jurisdiction of the circuit court has been entirely revised, with an obvious intention to substitute the later law on the subject for the former. We have pointed out that under the Constitution of 1875 the present case does not fall within the "exclusive original jurisdiction" of the circuit court. Now, to consult the provisions of the Constitution contained in the same section heretofore quoted, as to the concurrent jurisdiction of such courts. It is provided in that section of the Constitution that the circuit courts shall have "such concurrent jurisdiction with \* \* \* justices of the peace as is or may be provided by law." Here is a positive mandate of the Constitution to the effect that the circuit courts shall have such concurrent jurisdiction with the justices of the peace only as is or may be provided by law. Now, while it is true that when the Constitution was adopted in 1875 justices of the peace had concurrent jurisdiction with the circuit court in mechanic's lien cases for an amount not exceeding \$90 under the act of March 30, 1872, it is also true that no express provision of the Constitution or the statutes conferred concurrent jurisdiction on the circuit court in such cases. The jurisdiction in the circuit court in respect of those matters obtained by virtue of its grant of exclusive original jurisdiction in all civil cases until otherwise directed by the General Assembly. See section 13, art. 6, Const. 1865. It is therefore obvious that there was no law in force at that time defining the concurrent jurisdiction of the circuit court with justices of the peace in such express terms as to include mechanic's lien cases for the amount here involved. Indeed, contra to this, express statutory provisions in force at

the time the Constitution of 1875 was adopted declared and defined the concurrent jurisdiction of the circuit court in terms express and explicit to the exclusion of the case now under consideration. Those statutes will be presently pointed out. Although by an invasion of the exclusive jurisdiction of the circuit court the act of March 30, 1872, operated to confer a concurrent authority on justices of the peace in respect of mechanic's lien suits such as this one, the concurrent original jurisdiction of the circuit court as distinguished from its exclusive original jurisdiction was clearly marked out and defined in express terms by other statutes in force in 1875. Those statutes were section 3, art. 1, c. 82, p. 808, 2 Wag. St. 1872, and section 2, art. 3, c. 41, p. 430, 1 Wag. St. 1872. These statutes were in force at the date of the adoption of the Constitution of 1875. The first section above referred to relates to justices' courts, and provides in express terms that justices of the peace and circuit courts should have concurrent original jurisdiction when the debt or balance due, exclusive of interest, shall exceed \$50 and not exceed \$90. See 2 Wag. St. 1872, § 3, p. 808. The second section referred to relates to the jurisdiction of the circuit courts, and expressly provided that such courts shall have concurrent original jurisdiction with justices of the peace when the debt or balance due, exclusive of interest, shall exceed \$50 and not exceed \$90. See 1 Wag. St. 1872, § 2, p. 430.

It thus appears that at the time the Constitution of 1875 was adopted, the statutes mentioned expressly defined the concurrent original jurisdiction of the circuit court with justices of the peace. From this fact, we ascertain the framers of the Constitution of 1875 contemplated a continuation of such concurrent jurisdiction in the circuit court as had theretofore been expressly declared until it should be otherwise provided by law. It seems clear that when the Constitution declares the circuit court shall have "such concurrent jurisdiction with \* \* \* justices of the peace as is \* \* \* provided by law," such instances of concurrent jurisdiction in the circuit court only as had theretofore been expressly established and then existed were contemplated and referred to, for it related to "concurrent jurisdiction" then "provided by law." The concurrent jurisdiction authorized is such as "is or may be provided by law." The word "is" thus employed signifies an intention on the part of the framers of the Constitution to continue such concurrent jurisdiction in the circuit court as had theretofore been expressly authorized as "concurrent jurisdiction," and the provision as to such "as may be provided by law" contained a grant of power to the Legislature authorizing such future enactments touching the matter of concurrent jurisdiction as should be proper. This thought is re-enforced when we notice that the next preceding clause of the same section of the

Constitution provides that the circuit court shall have "exclusive original jurisdiction in all civil cases not otherwise provided for." Now, it is apparent by this provision the framers of the Constitution intended that all civil cases otherwise provided for at that time should fall without the exclusive jurisdiction of the circuit court, and that only such matters as were then or might in future be brought within the concurrent jurisdiction of that court by express provision touching concurrent jurisdiction should be thereafter regarded as within the concurrent jurisdiction of that tribunal. When we give effect to every word of the Constitution, as we must, it is obvious that its framers intended the Legislature should mark out in plain terms the instances of concurrent jurisdiction, and that only such cases should be considered as within the concurrent jurisdiction of the circuit court as were theretofore or thereafter expressly so declared. We are persuaded that the mere fact the exclusive jurisdiction of the circuit court had been invaded by the act of March 30, 1872, and concurrent authority given to justices of the peace in lien cases for an amount not exceeding \$90, cannot avail to continue a concurrent authority in the circuit court in such cases after the adoption of the Constitution of 1875, in the absence of some express provision giving concurrent authority to the circuit court. The act of March 30, 1872, conferred no authority on the circuit court. That court had authority before, and the act of 1872 operated only to confer a portion on the justice of the peace. In brief, when considered from the standpoint of a revision of the whole subject, the Constitution of 1875 contemplates concurrent jurisdiction of the circuit court with justices of the peace in those instances which were then or thereafter expressly declared to be within such concurrent jurisdiction; and the mere fact that a justice of the peace had jurisdiction over a given case that was also within the jurisdiction of the circuit court is not, of itself, sufficient to continue a concurrent jurisdiction in the circuit court after the Constitution of 1875. The circuit court, not having concurrent original jurisdiction over the subject-matter by express enactment to that effect at the time the Constitution of 1875 was adopted, it is entirely clear that it could obtain none unless the same was thereafter provided by legislative enactment, for this much the Constitution directs.

Under the authority thus vested in the Legislature to define the concurrent jurisdiction of the circuit court, that body contributed the following enactment to our law, as may be ascertained by reference to section 1674, Rev. St. Mo. 1899 (Ann. St. 1906, § 1674). So much of that statute as is relevant here is as follows: "The circuit courts in the respective counties in which they may be held shall have power and jurisdiction as

follows: \* \* \* Concurrent original jurisdiction with justices of the peace in all counties and cities, in all civil actions for the recovery of money, whether such actions be founded upon contract or tort, or upon bond or undertaking given in pursuance of law, in any civil action or proceeding, or for any penalty or forfeiture given by any statute of this state, when the sum demanded, exclusive of interests and costs, shall exceed fifty dollars, and does not exceed the maximum jurisdiction of justices of the peace in like cases in any such county or city; and also in all such cases where the sum demanded, exclusive of interests and costs, is less than fifty dollars, and wherein there are two or more defendants, not all of whom reside in the same county." It will be observed that the provisions of the statute quoted purport to treat of the question of concurrent original jurisdiction in the circuit court with justices of the peace in all civil actions for the recovery of money. Now a mechanic's lien suit is a civil action, the chief object and purpose of which is to recover money. The enforcement of the lien provided for by the statute is for the purpose only to secure the payment of money. The statute confers concurrent jurisdiction in such cases only when the sum demanded, exclusive of interest and costs, shall exceed \$50, and does not exceed the maximum jurisdiction of the justices of the peace in like cases in any such county or city. This statute was enacted by the Legislature under the constitutional direction to it to mark out the instances of concurrent jurisdiction in the circuit and justice courts. The portion quoted, with subsequent provisions not relevant here, purports to cover the whole subject-matter, and is obviously intended as a substitute for all prior law on the same subject. That the Legislature did not intend the circuit court should have concurrent jurisdiction with justices of the peace in amounts less than \$50 in cases of this character is obvious, as will appear from the fact that this entire section points out only one instance where concurrent jurisdiction shall exist in the circuit court for a sum less than \$50. It is provided therein that circuit courts shall have concurrent jurisdiction with justices of the peace in cases where the sum demanded, exclusive of interest and costs, is less than \$50, and "wherein there are two or more defendants not all of whom reside in the same county." This provision in and of itself indicates with great force that the Legislature intended a concurrent jurisdiction for amounts less than \$50 in no other instances than that mentioned. The sum and substance of the whole matter is the circuit court certainly did not have exclusive original jurisdiction, and that it has only such concurrent jurisdiction as the Legislature was directed by the Constitution of 1875 to confer. As by the Constitution of 1875 the circuit court is possessed of only such concurrent jurisdiction with

justices of the peace "as is or may be provided by law," no such jurisdiction exists in the circuit court over the present subject-matter, for the reason the Legislature has not so provided by law. *Mason v. Hannah*, 30 Mo. App. 190, 195. The revision of the whole subject-matter above referred to divested any concurrent jurisdiction in the circuit court, if such theretofore existed, and none other has been conferred.

The judgment should be reversed. It is so ordered.

GOODE, J., concurs. REYNOLDS, P. J., dissents, as he deems the opinion in conflict with the judgment of the Supreme Court in *Tackett v. Vogler*, 85 Mo. 480, *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414, *St. Louis v. Hollrah*, 175 Mo. 79, 74 S. W. 996, and requests the case be certified to that court for final determination.

It is so ordered.

#### HALL v. MISSOURI & KANSAS TELEPHONE CO.

(Kansas City Court of Appeals. Missouri. Jan. 10, 1910. Rehearing Denied Jan. 24, 1910.)

##### 1. NEGLIGENCE (§ 23\*)—USE OF LAND—TRESPASSERS—PLACE ATTRACTIVE TO CHILDREN.

A telephone company in possession of a vacant lot as a licensee, while constructing a telephone line across it by means of an appliance consisting of pulleys and a rope strung along the top of the poles and down along the side of the poles to the ground, owes no duty to children trespassing thereon, except not to injure them wantonly; the contrivance not being a dangerous one calculated to attract children.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 33, 34; Dec. Dig. § 23.\*]

##### 2. TELEGRAPHS AND TELEPHONES (§ 20\*)—NEGLECT—ACTION—QUESTION FOR JURY.

A telephone company constructed a telephone line by means of pulleys and a rope strung along the top of the poles and running down, by means of the pulleys, along the side of the poles to the ground, where it ran through a pulley. While the work was going on, a child trespassing was injured by having his hand caught in the pulley. The work was not dangerous to bystanders, and the company did not warn the child. *Held*, that it was not negligent as a matter of law, as it could not reasonably have anticipated the accident.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 20.\*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by Thomas M. Hall, by William A. Hall, next friend, against the Missouri & Kansas Telephone Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Harvey E. Hartz, William A. Medill, and M. Defoe Pypes, for appellant. Battle McCordle, Gleed, Hunt, Palmer & Gleed, for respondent.

BROADDUS, P. J. This is a suit for damages for injuries received by plaintiff as the alleged result of defendant's negligence. The plaintiff, at the time he received his injuries, was an infant five years of age. The petition sets out that the defendant was operating and maintaining a telephone line in Kansas City, and was running north and south between Twenty-Third and Twenty-Fourth streets and parallel with Mersington avenue and about midway between the latter avenue and Cleveland avenue; that on the 29th day of June, 1907, the defendant was engaged in stretching a cable wire and lead conduit containing wires across poles along its telephone line, for which purpose they used pulleys and a rope strung along the top of its poles, which rope ran down by means of said pulleys along the side of one of said poles to the ground; that one of the said pulleys was fastened to the pole close to the ground; that the end of the rope passed through this pulley to which a horse was hitched; that this pole was standing on vacant uninclosed ground; that the public have been accustomed to pass over this ground; that children of the neighborhood were accustomed to play there, especially near and around said pole, all of which was well known to defendant company, or by the exercise of reasonable diligence could have been so known to defendant; that on the day aforesaid plaintiff, together with his two brothers and another companion, all minors and of tender years, who were playing in the vicinity of said poles, were attracted to them by reason of the horse, rope, and pulleys; that the defendant, through its agents, while engaged in stretching said cable and conduit, well knew that plaintiff and his companions were standing around and in close proximity to said pole, pulleys, and rope; that defendant's agents negligently and carelessly, and without any signal or warning to plaintiff or to his companions as to the danger and consequences of coming in contact with said rope and pulley, started the horse, which was standing a few feet from the pole, pulling the rope; that plaintiff stood watching the rope coming down the pole and passing through the pulley near the ground, when, after the horse had gone about 125 yards, plaintiff without any negligence on his part took hold of the moving rope with his left hand above the pulley, first permitting it to pass through his hand, when suddenly his hand closed on the rope and was drawn into the pulley and permanently injured. When the cause came on for trial defendant objected to the introduction of any evidence on the part of plaintiff, for the reason that the petition did not state a cause of action. The court sustained the objection and instructed the jury to return a verdict for the defendant, whereupon plaintiff took a nonsuit with leave to move to set it aside, and the jury

was discharged. Judgment was entered in favor of defendant, which the court refused to set aside, and plaintiff appealed.

The argument of plaintiff is that: "It is a well-recognized and well-settled principle of law that persons who leave unguarded dangerous machines or appliances, which are attractive to children where children are wont to play, are held guilty of such negligence as will create a liability for any injury inflicted on such children as are attracted into playing with such machinery, or appliances." And it is claimed that the case falls within the rule applied to turntables and other similar cases. In *Kelley v. Parker Washington Co.*, 107 Mo. App. 490, 81 S. W. 631, this court enunciated the rule that: "It is negligence for the owner to leave dangerous machinery on his premises in a condition likely to cause injury; and a contractor for grading a street who leaves a scraper in the street liable to inflict injury on children attracted thereby is guilty of negligence." "The act of a gas company in causing gas pipes to be piled on sloping ground in a street without blocking them so as to prevent them rolling was negligence so as to render it liable for injuries to a child caused by the rolling of the pipes, although the pipes were put in motion by other children playing upon them, where the evidence showed children were in a habit of playing on that street, and the pipe was so piled as to be easily put in motion." *O'Hara v. Gaslight Co.*, 131 Mo. App. 428, 110 S. W. 642. Where, although the contrivance was not dangerous to persons of full understanding, yet, where its construction and movement was likely to excite a small child's curiosity and allure him to thrust his hand into a dangerous place, it was a question whether defendant should have anticipated such an incident, was one for the jury. *Hillerbrand v. May Mercantile Co.* (Mo. App.) 121 S. W. 326. It is negligence on the part of a railroad company to omit to secure its turntables so that children cannot revolve them. *Nagel v. Railway Co.*, 75 Mo. loc. cit. 659, 42 Am. Rep. 418. In *Kelley v. Parker Washington Co.* and *O'Hara v. Gaslight Co.*, supra, the dangerous instrumentalities were left unguarded and improperly secured in public streets where children had the right and were likely to go, and in that respect different from this case. In *Hillerbrand v. May Mercantile Co.*, the child was injured in a store where he had accompanied his mother, who was there on business. The court therefore considered that he was there by invitation. These two cases are clearly distinguished from the turntable and kindred cases. It may be inferred from the allegation of the petition that defendant was licensee on the vacant lot at the time it was engaged in constructing its telephone line, and that plaintiff and his companions were mere trespassers. In such cases the owner owes no duty to the trespasser except not

to injure him wantonly. *Witte v. Stifel*, 123 Mo. 295, 28 S. W. 891, 47 Am. St. Rep. 668. "Parties entering such private premises without invitation are trespassers, whether young or old, and the proprietor owes them no duty save not to injure negligently after discovering them." *Smith v. Dold Packing Co.*, 82 Mo. App. 9. In these two cases it is also held that the doctrine in the turntable cases is not to be extended, and its correctness is, moreover, questioned.

This case is distinguished from the turntable and kindred cases in the most important particulars. In the first place, as has been said, it was not a dangerous contrivance left unguarded, calculated to attract the curiosity of children. The cause of action is not predicated upon the theory that it was such, but that the injury was the result of defendant's negligence in not warning plaintiff that it was going to be put in operation. Such is the sum and substance of the alleged negligence. Such being the case, did defendant owe plaintiff any further duty, he being uninvited and a trespasser, than not to injure him wantonly as said in *Witte v. Stifel*, supra; or not to injure him negligently, in the words used in *Smith v. Dold Packing Co.*, supra? It is not contended that defendant acted wantonly but negligently.

Answering, for the sake of the argument, only, that defendant is to be held to the exercise of ordinary care, we do not see that plaintiff has made out a case. The work being carried on in the usual and ordinary manner and with care, the plaintiff is forced to rely solely upon the ground that, notwithstanding such was the case, it became the duty of defendant to anticipate that some child might possibly catch hold of the rope so as to draw his hand against the pulley through which it was passing and thereby get injured. Had we not had this example before us, we could scarcely imagine how any one could have been injured in that manner. And, at most, it may be characterized as a "mishap." It could not have been reasonably anticipated, or anticipated, as to that matter, at all. In order to constitute negligence of any kind, there must have been something in the action of the plaintiff indicating that he was going to put himself in peril in some way or another, and the defendant failed to save him from danger, which it could have done by the exercise of ordinary diligence. Plaintiff's argument, in effect, is that plaintiff was in a position of peril while the work was going on, and that defendant ought to have notified him of danger. But he was not so in peril, because the operation was not dangerous to bystanders and to have anticipated that one would or could, even though a child, get injured, would require not only the exercise of the highest degree of care, but a challenge to prescience itself.

The court was clearly right, and the cause is affirmed. All concur.

## NORRIS v. LETCHWORTH.

(Kansas City Court of Appeals. Missouri. Jan 10, 1910.)

1. VENDOR AND PURCHASER (§ 58\*)—PERFORMANCE OF CONTRACT—PAYMENT OF PURCHASE MONEY.

Where defendant contracted with plaintiff to sell him his farm, agreeing to deliver the deed on payment of the purchase price, these covenants were interdependent, and the obligation was on plaintiff to pay, or tender, the purchase money on the date fixed by the contract for the consummation of the sale, before defendant would be in default for failure to convey.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 88; Dec. Dig. § 58.\*]

2. VENDOR AND PURCHASER (§ 82\*)—MODIFICATION OF CONTRACT—PAROL AGREEMENT—CONSIDERATION.

A written contract for the sale of land cannot be modified by a subsequent parol agreement, for which there was no consideration.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 138, 139; Dec. Dig. § 82.\*]

3. ESTOPPEL (§ 78\*)—EQUITABLE ESTOPPEL—RELIANCE ON ADVERSE PARTY—CONTRACT.

Defendant contracted in writing to sell plaintiff his farm for a certain price. Subsequently he told plaintiff not to borrow the money in Wisconsin, where he lived, but to come to Missouri, where the farm was, and he would secure a loan for him. Plaintiff went to Missouri, but defendant did not secure the loan. *Held*, that defendant was not thereby estopped to repudiate the promise, since the plaintiff is presumed to have known that it was unenforceable.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204-210; Dec. Dig. § 78.\*]

4. VENDOR AND PURCHASER (§ 334\*)—REMEDY OF PURCHASER—RECOVERY OF PURCHASE MONEY.

Where a vendee failed to pay all of the purchase price for land, and the vendor refused to perform, the vendee may recover the amount paid, less the damages, if any, suffered by the vendor from the breach of the contract; there being provision in the contract authorizing retention of the amount paid as liquidated damages or a forfeiture.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 973; Dec. Dig. § 334.\*]

5. VENDOR AND PURCHASER (§ 330\*)—MEASURE OF DAMAGES—BREACH OF CONTRACT FOR SALE OF LAND.

The measure of damages for the breach by the vendee of the contract for the purchase of land is the difference between the contract price and the market value of the land on the day the sale was to have been completed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 955; Dec. Dig. § 330.\*]

Appeal from Circuit Court, Morgan County; Wm. H. Martin, Judge.

Action by Edward Norris against Charles P. Letchworth. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Sangree & Bohling, for appellant. A. A. Knoop and Wray & McVey, for respondent.

JOHNSON, J. Plaintiff sued to recover \$500 paid defendant on the purchase price of a farm in Morgan county. Defendant, by his agents, entered into a written contract, by the terms of which he agreed to sell and con-

vey the farm to plaintiff for the price of \$8,700, but the sale was not consummated, and each party claims the other was at fault. Plaintiff prevailed in the trial court, and the cause is here on the appeal of defendant. The contract, which was signed by plaintiff and the agents of defendant on August 23, 1907, provided that defendant and his wife should execute a warranty deed and deposit it in a bank in Versailles. Defendant was to forward an abstract of title to the bank in the town in Wisconsin where plaintiff lived, and on examination of the abstract and approval of the title by plaintiff, the abstract was to be returned to the Versailles bank, and plaintiff was to deposit \$500 in the latter bank to be delivered to defendant's agents. The warranty deed was to be held by the bank until January 1, 1908, on which date the remainder of the purchase price was to be paid by plaintiff to the bank, and the deed was to be delivered to plaintiff. Possession of the land was to be given on the date just mentioned. There was a mortgage of \$2,000 on the farm, and the option was given plaintiff of paying the whole of the purchase price, or of assuming the mortgage and paying the remainder. Such were the main provisions of the written contract. Plaintiff claims, however, that some time after this contract was signed, he had a conversation with defendant, in which he stated that he did not have enough money to pay the whole of the purchase price, and would be compelled to borrow money on the farm. He had made the first payment of \$500, and had about \$2,100 more to pay on the purchase price. Defendant told him not to attempt to borrow the money in Wisconsin, and that defendant would procure the necessary loan for him from a loan company in Versailles. Plaintiff accepted this proposition, and, relying on it, shipped his goods and live stock from Wisconsin to Versailles, where he arrived late in the afternoon of January 1, 1908, the date named in the contract for closing the sale. Defendant met him at the train, and helped him unload his live stock and goods. During that evening defendant told plaintiff that his agents had misrepresented to him the price at which they had sold the farm, and informed plaintiff that he would not close the transaction unless he could get more money than his agents proposed to give him. Negotiations ensued covering a period of several days, the purpose of which on the part of defendant was to obtain a substantial concession from his agents on their commission. The negotiations failed, and on January 3d defendant went to the bank and obtained possession of the deed. Becoming convinced that defendant would not close the sale on the terms of the contract, plaintiff bought another farm on the 9th or 10th of January, and brought this suit to recover the \$500 he had paid on the purchase price.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The evidence adduced by defendant discloses an entirely different state of facts from that above stated, which is gathered from the evidence of plaintiff. The defendant admits that he complained to plaintiff that his agents had deceived him, but denies that he refused to consummate the sale unless they would surrender part of their commission. He denies that he had agreed with plaintiff to procure him a loan on the land, and states he was ready and willing to perform his part of the contract, but plaintiff was unable to perform his part on account of his lack of sufficient money and of his inability to obtain a loan on the farm. If the rights of the parties are to be measured only by the terms of the written contract, it is clear that plaintiff—not defendant—broke the contract. The covenants for the delivery of the deed and for the payment of the purchase money were dependent covenants, and the obligation was on plaintiff to pay or tender to defendant the purchase money on January 1st—the date fixed by the contract for the consummation of the sale. *Low v. Marshall*, 17 Me. 232; *Guthrie v. Thompson*, 1 Or. 353; *Leaird v. Smith*, 44 N. Y. 618; *Irvin v. Bleakley*, 67 Pa. 24.

Plaintiff invokes the rule that, "where the promisor before the time of performance expressly renounces his contract, the promisee is thereby entitled, either to treat the contract as broken and sue at once for its breach without averring an offer or readiness to perform, or he may wait until the time of performance has expired, and then sue for the consequences of nonperformance." *Manufacturing Co. v. McCord*, 65 Mo. App. 507, and cases cited. We do not think this rule has any application, for the reason that there is no evidence that defendant renounced the contract before the time for the performance. He did declare—so plaintiff says—that he would not perform the contract unless he received a part of the agent's commission, but this declaration was made on the last minute of the last day for the performance of the contract, and under conditions that made it impotent. All plaintiff had to do was to go to the bank where the deed was held, pay the purchase money, and get the deed. He did not do this, for the simple reason that he did not have the money. The alleged renunciation did not occur until plaintiff himself was confronted with his obligation to perform, and had shown his inability to discharge that obligation.

But plaintiff argues that he was ready and willing to perform the contract as modified by the subsequent oral agreement, and that defendant must be held to have defaulted because of his failure or refusal to provide a

loan for the completion of the payment of the purchase price. "Parties may by a subsequent oral agreement, upon a sufficient consideration, change the method or terms of their written contract." *Henning v. Insurance Co.*, 47 Mo. 425, 4 Am. Rep. 332. The weakness of plaintiff's position is that the oral agreement was entirely without a consideration to support it. The written contract imposed no duty on defendant to procure a loan for plaintiff, but did impose on plaintiff the obligation to pay the purchase price on January 1st. The offer of defendant was purely voluntary, since he had the right to demand compliance by plaintiff with the contract. Plaintiff did not promise anything in return for the proffered service, and we perceive no ground for the contention that there was a consideration. The promise must be regarded as a mere nudum pactum.

The learned trial judge appeared to think defendant might be held on the ground of estoppel; that since his promise induced plaintiff to change his course, defendant should not be heard to repudiate the promise when it became too late for plaintiff to help himself. The defect of this view is that it justifies plaintiff in having relied upon a mere naked promise. Plaintiff is presumed to have known that the promise was not enforceable, since every man is presumed to know the law, and he had no right to trust the word of a man with whom he was dealing at arm's length, especially when that man was an utter stranger to him. The law requires a person to act with reasonable prudence and diligence in his business affairs, and will not protect one who negligently fails to protect himself. It is unfortunate for plaintiff that he trusted the word of a stranger, but he has no one to blame but himself if his confidence was misplaced. There is no question of estoppel in this case.

It does not follow from the views expressed that plaintiff necessarily must lose the \$500 that he paid on the purchase price. The contract does not attempt to provide for the retention by defendant of the down payment as a forfeiture or as liquidated damages for the breach of the contract by plaintiff; and, if defendant suffered no damages on account of the breach, plaintiff, under proper pleadings, would be entitled to recover the full amount of the payment. If defendant suffered damages, he would be entitled to offset them against plaintiff's demand, and the measure of his damages would be the difference between the contract price and the market value of the land on January 1, 1908.

The judgment is reversed, and the cause remanded.

## PAINTER v. PAINTER.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910. Rehearing Denied Feb. 1, 1910.)

1. TENANCY IN COMMON (§ 27\*)—CONVERSION OF PERSONAL PROPERTY.

Where a father devised all of his property to his wife and children to be divided by the children on the wife's death, they, without administration, became the owners of it as cotenants, and a sale by the mother of part of the personal property to one of the children would presumably pass only her interest, and, in the absence of proof that it was meant to exclude the other legatees from their estate in the property, such as a demand by them to share in the enjoyment thereof and refusal to accede to this demand, the sale could not be treated as a conversion against them.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 70-75; Dec. Dig. § 27.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 153\*)—ACTION FOR CONVERSION—EVIDENCE—SUFFICIENCY.

In an action by an administrator for conversion of personality of the estate, judgment was properly rendered for defendant, where the only act of conversion alleged occurred before plaintiff's appointment as administrator, and the evidence failed to establish such allegation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 629, 630; Dec. Dig. § 153.\*]

Appeal from Circuit Court, Warren County; Jas. D. Barnett, Judge.

Action by Herman Painter, administrator, against Lizzie C. M. Painter. From a judgment for defendant, plaintiff appeals. Affirmed.

J. W. Delventhal and E. Rosenberger & Son, for appellant. Emil Roehrig, for respondent.

GOODE, J. Solomon Painter died in May, 1883, leaving four sons and four daughters. The devising clause of his last will was as follows: "After the payment of my debts and funeral expense, I want all of my personal property and farming utensils and real estate left to my wife and children during her single life, at her death it is to be sold and equally divided among my children, except my three boys Herman and Otto and John I want to give one hundred and fifty dollars advantage of the girls. All the surplus money made over and expenses to be put at interest. I further claim the right of everything so long as I live; at my death I want three disinterested men to appraise the property and put it in book form, and at her death the same process."

Sophia Painter, widow of the testator, survived him until November, 1906, or 23 years, when she died. The defendant, Lizzie Painter, who is one of the children of Solomon and Sophia Painter, lived on the home place with her mother until the latter died, and according to the testimony of plaintiff, Herman Painter, the mother remained until her death in possession of all the personal prop-

erty left by Solomon Painter. He testified further certain articles of personal property which had formerly belonged to Solomon Painter were on the home place when his mother died. No administration was granted on the estate of Solomon Painter until December 10, 1906, or about a month after the death of the widow, when Herman Painter was appointed administrator and as such inventoried what personal property still remained at the home place. He testified there were some tables, a heating stove, chairs, vise and anvil, wagon, bed, desk, benches, two mules, and other property; that after his appointment he went to the home place and demanded to be allowed to have those articles appraised as belonging to the estate of Solomon Painter, but defendant, Lizzie Painter, met plaintiff and his appraisers at the door of the house and refused to let them enter to appraise the property, saying she had bought everything and it all belonged to her, turning over to plaintiff some old papers which she said was all that belonged to her father's estate. Plaintiff testified the property which remained on hand and belonged to his decedent's estate was worth about \$100; that Lizzie Painter said she had bought from her mother for \$700 all the personal property her father left. Other testimony which need not be stated was given, and when plaintiff rested the court directed the jury to return a verdict for defendant, and plaintiff appealed. The action is in the nature of trover to recover \$1,000 as the value of various articles of personal property, including those already mentioned and many others alleged to have belonged to the estate of Solomon Painter, and to have been converted by defendant to her own use in December, 1903. It is alleged defendant sold and disposed of some of the personal property described in the petition and otherwise converted the remainder to her own use. Plaintiff sues as administrator, avers his appointment in December, 1906, and that defendant, after demand duly made by him, had neglected to surrender the property described in the petition or pay the reasonable value thereof. As filed, the case was against the husband of defendant, as well as herself, and the petition contained two counts; but the plaintiff dismissed as to defendant's husband, and also dismissed the second count of the petition, or took a nonsuit upon it.

At the date of the alleged conversion, to wit, in December, 1903, it is certain the plaintiff was neither in possession of the property alleged to have been converted, nor did he have title to it, for he had not been appointed administrator, and was not appointed for three years later. We do not say plaintiff, as an administrator subsequently appointed, cannot maintain an action for a conversion at that date, if one occurred, having no occasion to decide the point, as we hold no tes-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

timony was adduced tending to prove a conversion by defendant at said date, or any time near it. By the will of the testator, the property in controversy belonged to his wife and children during her life, and they owned it as co-tenants. In strictness of law the title should have passed to them through personal representatives of the deceased, and an administration of his estate. But, so far as appears, there were no creditors, the legatees were of age, and in such circumstances a distribution of personal assets by the heirs or legatees without administration has been tolerated and the title treated as in them, though the regular method of devolving the title of a decedent by administration had been omitted. *Richardson v. Cole*, 160 Mo. 372, 61 S. W. 182, 83 Am. St. Rep. 479; *Bank v. Hoppe*, 132 Mo. App. 449, 111 S. W. 1190; *Pullis v. Pullis*, 127 Mo. App. 294, 106 S. W. 275; *McCracken v. McCaslin*, 50 Mo. App. 85. The fair way to treat this case is to regard the title to the property in controversy as having vested in the legatees, the mother and children, as tenants in common during the mother's life. Nothing was proved tending to show a conversion in 1903, during the life of her mother, by defendant, except her declaration to plaintiff, after the mother's death, that she (defendant) had bought the property from her mother. It was not proved the other children had been excluded in any way from controlling and enjoying their interest in the property so as to work a conversion as to them, except said statement of a sale by the mother to defendant; and, in the absence of some proof that the sale was meant to exclude the other legatees from their estate in the property, such as a demand by them to share in the enjoyment of the property and refusal to accede to the demand, we do not think the sale should be treated either as a conversion against them, there being at the time no administration on the father's estate, or as conversion for which the administrator could sue after his appointment. *Prima facie* the sale by the mother as one of the co-tenants to defendant, would only pass the mother's interest, as it does not appear the mother claimed exclusive ownership. *Brown v. Wellington*, 106 Mass. 318, 8 Am. Rep. 330; 17 Am. & Eng. Ency. Law (2d Ed.) 680. Anyhow, defendant's husband, who was a legatee, was as much entitled as any other legatee to possession of the property pending administration, and defendant's mother was likewise entitled to possession, which right, as to her own interest, she might pass to defendant. Under the circumstances, the mere detention of the property by defendant would not afford her co-owners a case for conversion; especially as it does not appear her possession was intended to exclude their rights, or that they ever had made a demand to share in the use and enjoyment of the property. *Williams v.*

*Nolen*, 34 Ala. 167; *Bell v. Layman*, 1 T. B. Mon. (Ky.) 40, 15 Am. Dec. 83; *Winner v. Penniman*, 35 Md. 165, 6 Am. Rep. 385; *Stafford v. Azbell*, 8 Misc. Rep. 316, 28 N. Y. Supp. 733; *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 262; *Strong v. Colter*, 13 Minn. 82 (Gil. 77); *Newby v. Harrell*, 90 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503; *Heller v. Hufsmith*, 102 Pa. 533; *Cowan v. Buyers*, *Cooke* (Tenn.) 53, 5 Am. Dec. 668. It results no conversion of the property in controversy in 1903 as alleged was proved, and hence the court did right in directing a verdict in defendant's favor.

It by no means follows defendant was entitled to retain the property against the demand of the administrator of her father's estate after one had been appointed, even if she had purchased from her mother; for the mother had only a life estate as cotenant with her children. Hence we merely affirm the judgment without prejudice to the right of plaintiff to bring an action for conversion after demand made by him for possession of the property; but in so ruling we must not be understood to intimate any opinion as to what would be the result of such an action.

It is ordered the judgment be affirmed. All concur.

#### CASEY v. ST. LOUIS & S. F. R. CO.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

##### 1. PLEADING (§ 250\*)—AMENDMENT OF STATEMENT OF FACTS—DAMAGES.

The amendment of the statement of facts in an action for double damages for trespass on land, merely increasing the damages demanded, does not change the cause of action, and is properly allowed.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 732; Dec. Dig. § 250.\*]

##### 2. APPEAL AND ERROR (§ 439\*)—POWER OF TRIAL COURT—AFTER ALLOWANCE OF APPEAL.

The allowance of an appeal does not prevent the trial court from thereafter, during the same term, setting aside its judgment and entering a proper one.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2197; Dec. Dig. § 439.\*]

Appeal from Circuit Court, Wayne County; Jos. J. Williams, Judge.

Action of trespass by James W. Casey against the St. Louis & San Francisco Railroad Company. Plaintiff had judgment, and defendant appeals. Affirmed.

W. F. Evans, W. J. & J. H. Orr, and Jas. Orchard, for appellant. V. V. Ing, for respondent.

GOODE, J. The opinion given on the former appeal of this case will show its merits. *Casey v. Railroad*, 116 Mo. App. 235, 91 S. W. 419. The evidence is not contained in the

present record; it being irrelevant to the points made on the appeal which are technical. The action as originally instituted was for double damages for the destruction of plaintiff's meadow and cornstalk pasturage by cattle which had strayed into his fields in consequence of defendant's omission to fence its right of way. In the original statement plaintiff laid his damages at \$50 and asked judgment for twice that amount. After the remand of the case by this court to the circuit court, plaintiff was permitted to amend his statement by laying his damages at \$100, instead of \$50, and praying for twice the former amount. He obtained a verdict for \$65, August 6, 1908, and on said verdict, on the same day, judgment was entered for \$65; that is, the sum found by the jury, instead of twice said sum. Timely motions for new trial and in arrest were filed by defendant and overruled, and then on August 21, 1908, during the same term of court, an affidavit for appeal was filed and the appeal allowed and granted to this court. Afterwards, during some day in August not stated, the court adjourned until December 7, 1908, which would be an adjourned term of the August term, and continued over all undisposed of motions and proceedings. On December 8, 1908, that being the second day of the adjourned August term, the court set aside its orders overruling defendant's motions for new trial and in arrest; also set aside the judgment previously entered in the cause and the order allowing an appeal. Thereupon, the court, on plaintiff's motion, entered judgment on the verdict for twice the amount of damages returned by the jury, or \$130. An exception was saved by defendant to this ruling on the ground the court had lost jurisdiction of the cause by the appeal previously allowed on August 21, 1908. Afterwards the court again overruled defendant's motions for new trial and in arrest, and on said December 8th allowed an appeal in the cause to this court.

Errors are assigned for permitting plaintiff to amend his statement by increasing the damages demanded, and for the setting aside of the judgment first entered on the verdict for \$65 and entering judgment for twice the amount after the appeal had been allowed. The action as originally filed was one for double damages for failure to comply with the statute, and the amendment swelling the amount of damages claimed did not change the cause of action and was properly allowed. *Elliott v. Abell*, 39 Mo. App. 346.

It has been said in many cases that, when an appeal is allowed from the circuit court to an upper tribunal, the former court loses jurisdiction over the cause; but the extent of this rule was expounded by the Supreme Court in *Crawford v. Railroad*, 171 Mo. 68, 66 S. W. 350, and shown not to prevent the trial court from setting aside its judgment and en-

tering a proper judgment after granting an appeal, provided the orders are made during the term the first judgment was rendered. This is what the court did in the present case and was within its power.

The judgment is affirmed. All concur.

# VANDERBURGH v. ST. LOUIS & S. F. R. CO.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

## 1. RAILROADS (§ 484\*)—FIRES—QUESTION FOR JURY.

Evidence held to raise a question for the jury whether the fire which destroyed plaintiff's property was caused by sparks from defendant's locomotive which passed with a heavily loaded train only a few minutes before the fire was discovered.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 484.\*]

## 2. APPEAL AND ERROR (§ 932\*)—REVIEW—PRESUMPTIONS.

It will not be presumed that the jury in assessing the damages considered an item of which there was no evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 932.\*]

Appeal from Circuit Court, Dunklin County; Jas. L. Fort, Judge.

Action by W. F. Vanderburgh against the St. Louis & San Francisco Railroad Company. Plaintiff had judgment, and defendant appeals. Affirmed.

W. F. Evans, Moses Whybark, and A. P. Stewart, for appellant. E. F. Sharp and Russell & Deal, for respondent.

GOODE, J. Plaintiff sued for the value of property said to have been consumed in a fire set by one of defendant's locomotives. The property was an iron hoop mill building, machinery, hoops, and supplies in it, in the town of Marston, New Madrid county. The mill building was adjacent to a building used as a cotton gin and also one used as a planing mill; all the buildings being under one roof. There is no doubt the property was destroyed by a fire which burst out about 1 o'clock November 12, 1906; but defendant contends the evidence was not sufficient to carry the issue to the jury of whether the fire was set by a passing locomotive. The conflagration started in the cotton gin and was discovered in a few minutes, say eight, after a heavily loaded freight train of 54 cars had passed. The day was Monday, the plant had not been in operation since the preceding Friday, and there was no fire in or about it unless some of the employes had been smoking cigarettes. There was a rather unsuccessful attempt to prove they had been. Running alongside the cotton gin were what are known as ventilators which opened into the gin house proper and communicated with ventilators extending above the roof,

through which cotton lint was discharged into the air. The coverings of the ventilators which projected above the roof were eight or ten inches above the tops of the pipes; the latter being two feet across and communicating with the interior of the building. The edges and sides of them and the entire roof were covered with cotton lint, a combustible material and easily ignited. The buildings were about 60 feet from the main line of defendant's track and the ventilators in the roof perhaps 10 feet further. As the freight train passed, it was going around a curve, laboring heavily, the fireman was feeding fuel into the fire box as the locomotive passed the gin house, and a shower of sparks was being discharged from the engine flue and falling about the depot platform, which was some 200 or 300 feet away from the gin house, about the hoop shed, an appurtenance to the hoop mill, but a little further south along the track, and generally about the west side of the track. A witness who was standing by the hoop shed stepped under it to escape the fall of sparks and cinders. Water was poured on the tops of the sheds to keep them from igniting from the cinders. The smoke was blowing directly over the gin house. A witness said the wind blew hard enough to blow sparks and cinders over the sheds. Considering the highly inflammable nature of the flaky lint covering the inside and outside of the gin ventilators, the sparks and cinders being thrown off by the engine, and the distance the evidence shows they were blown by the wind, the direction of the wind, the almost instantaneous discovery of the fire after the train had passed, the lack of proof of any other source from which it could have caught, the proximity of the buildings to the track, and the fact that cinders fell on nearby roofs, we hold it was for the jury to determine whether the gin took fire from a cinder or spark emitted by the locomotive, and the hoop mill which was connected with the gin, shared in the conflagration.

The only other complaint made is that the jury assessed damages for freight charges paid by plaintiff on certain consumed articles of personal property. The jury found the verdict for the full amount demanded, \$1,586.23. Nothing was said in the petition about freight charges, but during the trial plaintiff offered to prove the amount paid for freight on the property when it was shipped to the factory, to wit, \$79.84. This evidence was excluded. The jury were not authorized by the instructions to give any damages for freight charges on the burned property, but were directed to allow plaintiff its reasonable value, if they found the fire had been set by one of defendant's engines; and in ascertaining the value to take into consideration the condition of the building, machinery, other property burnt, length of time

it had been in use, its repair, together with all other facts and circumstances in evidence tending to show its value. No evidence regarding the freight paid was before the jury, and hence it is not to be presumed the jury took that item into consideration in assessing the damages.

The judgment is affirmed. All concur.

#### ABLER v. SCHOOL DIST. OF ST. JOSEPH.

(Kansas City Court of Appeals. Missouri.

Jan. 10, 1910. Rehearing Denied

Jan. 24, 1910.)

#### 1. SCHOOLS AND SCHOOL DISTRICTS (§ 41\*)—MERGER—RIGHTS AND LIABILITIES OF SUBSISTING DISTRICT.

Where one school district goes entirely out of existence by being annexed to or merged in another, if no arrangements are made respecting the property and liabilities of the district that ceases to exist, the subsisting district will be entitled to all the property and answerable for all the liabilities.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 71-80; Dec. Dig. § 41.\*]

#### 2. SCHOOLS AND SCHOOL DISTRICTS (§ 131\*)—TEACHERS—NECESSITY OF CERTIFICATE.

Where a school-teacher has a certificate as a licensed teacher, at the time of employment, it is not required that it extend to the end of the term of the employment; all that is required is that it be renewed at its expiration.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 287; Dec. Dig. § 131.\*]

#### 3. SCHOOLS AND SCHOOL DISTRICTS (§ 131\*)—TEACHERS' CERTIFICATE—VALIDITY.

Where a school-teacher was competent to teach, and held a certificate to that effect from the proper authority, and his contract to teach was lawful, that his certificate did not state that it was either first or second class would not affect its validity, since he belonged to one or the other of the classes, and either was sufficient authority to teach in the public schools of the county.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 287; Dec. Dig. § 131.\*]

#### 4. SCHOOLS AND SCHOOL DISTRICTS (§ 130\*)—TEACHERS' CERTIFICATES—VALIDITY.

Where a teacher's certificate, dated September 6, 1904, recited that it was for the term of one year from this date, unless revoked, a writing which followed the signature, "Good till the next regular examination, March, 1906," did not limit the duration of the certificate, since the law required that it should be issued for one year, and it so recited.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 285; Dec. Dig. § 130.\*]

Appeal from Circuit Court, Buchanan County; Henry M. Ramey, Judge.

Actions by Charles B. Abler against the School District of St. Joseph, Mo. Judgments for plaintiff, and defendant appeals to the Supreme Court. Appeal transferred from the Supreme Court to the Kansas City Court of Appeals (221 Mo. 663, 120 S. W. 1159). Affirmed.

H. K. White, for appellant. William S. Sherman and James W. Boyd, for respondent.

BROADDUS, P. J. The plaintiff in the trial court sought to recover from appellant damages for failing to perform a certain contract, alleged to have been made with School District No. 7. The petition, after an allegation of the corporate capacity of the two districts, sets out that on the 9th day of September, 1904, the voters of district No. 7 voted in favor of becoming incorporated with defendant School District of St. Joseph, and that on September 15, 1904, the directors of the latter voted to accept District No. 7, and received all its property, real and personal, and assumed its debts. It is alleged that prior thereto District No. 7 entered into a contract with the plaintiff for performance by him of janitor work for the ensuing year. He claims that he entered upon the performance of his work, and worked a few days prior to September, 1904, at which time defendant would not longer permit him to do his work, although he was willing to do so. He asks for damages against defendant on his contract. The answer of defendant admitted the corporate capacity of the two school districts, but denied all the other allegations, and set up the following as a defense: That the pretended contract was void because District No. 7 had not provided any income and revenue for the fiscal year commencing July 1, 1904, had failed to make any levy of any taxes upon the property within its limits for that fiscal year, had failed to make any estimate of the amount needed for sustaining the schools, and the rate required to raise such amount needed, and had failed to make any enumeration of children of school age living within the limits of the district, so that it was not entitled to any of the public school fund required to be apportioned by the county clerk of the said county, including the moneys received by the county in the treasury of the state, and including moneys arising from interest on funds derived from sale of school lands, and moneys arising from the county school fund, and moneys arising from the payment of railroad and bridge corporations of taxes levied on their property, and that the district had no other funds or sources of income whatever at the time of making the alleged contract. The records of District No. 7 showed that at a meeting of its directors held on the 2d day of September, 1904, plaintiff was employed as janitor at a stipulated salary, and it was shown that defendant refused to permit plaintiff to continue his service in the performance of his contract.

For further statement we quote from that of the appellant to wit: "The defendant introduced \* \* \* the record of the case of School District No. 7 v. Defendant School District. The opinion is reported in 184 Mis-

souri Reports, at page 140 [82 S. W. 1082], and following. In brief the case showed that in 1901, owing to a mutual mistake as to the effect of the extension of the city of St. Joseph over a portion of the territory of District No. 7, the directors of No. 7 had surrendered to the defendant school district jurisdiction over that portion of the district which was taken into the city limits. At the same time it turned over a small amount of money in the general fund, which, with some additional money collected from the delinquent tax list, the defendant district had used in paying debts of District No. 7 and repairing the McKinley School, which was in the surrendered part of the district. The defendant district had also used some of its own moneys for these purposes, in addition to the above funds legally belonging to No. 7. In addition \* \* \* No. 7 had turned over to the defendant ' \* \* at this time its balance in the interest and sinking fund. Between the time of the receiving those moneys and the institution of the suit by No. 7 to recover the surrendered territory and property, the defendant district had paid interest on the bonds issued by No. 7. In this suit it tendered the balance of this fund on hand and deposited the same in court. The Supreme Court allowed the defendant its disbursement, so that when the case was decided in this court, the defendant district was found not to owe No. 7 anything on general account, and to owe No. 7 exactly the amount tendered. The record of this case also showed that after the merger of the two districts the money deposited by the defendant district was returned to it. The defendant \* \* \* showed that the only money received by the defendant \* \* \* at the time of the merger was the above amount turned back into the interest and sinking fund."

It was admitted that in 1904 and 1905 there was no money whatever to the credit of District No. 7 upon the books of the county treasurer, and "that the directors and officers of School District No. 7 did not make any enumeration of the children within the school district, or estimate of funds needed for school purposes," and took no steps whatever to provide funds for any school purpose, general or special. It was admitted that the schoolhouses in District No. 7 were worth \$30,000. The finding and judgment of the court was for the plaintiff, from which the defendant appealed to the Supreme Court on a constitutional ground. But the court held that, as the question had not been raised in the trial court, it could not be raised in that court, and transferred the case to this court.

The Supreme Court held that the annexation, in 1901, of School District No. 7 to the appellant's district was without authority of law and invalid. The opinion of the court was handed down in October, 1904, and after the actual merger of the two districts in Sep-

tember previously. The contract of employment was made in July of the year, and, while the School District was in law, under the said decision, a separate district. But it was contended that the district could not enter into a valid contract, and thereby create indebtedness, without first having made provisions for such indebtedness, and that, as no such steps had been taken in the way of enumerating the number of children in the district of school age, and otherwise providing for revenue to meet its obligations, the contract was void under article 10, § 12 of the Constitution (Ann. St. 1906, p. 287). But as we have seen that question cannot be raised in this court. Therefore the act of the District No. 7 in employing plaintiff is not subject to the charge of invalidity.

The only remaining question is whether the merger of the two districts annulled the execution of the contract sued on, leaving the district liable only for the value of services already performed under the contract at the time of the merger. It is said: "Where performance of a contract is dependent upon the continued existence of a person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation." 7 A. & E. Ency. of Law, 116. And so we find the law in *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. Ed. 945; *Read v. Frankfort Bank*, 23 Me. 318; *People v. Globe Mutual Ins. Co.*, 91 N. Y. 174, and other cases. We have no doubt about the correctness of the principle, and cannot see how it could be otherwise, but there is much room for difference of opinion in its application. We do not think the rule has any application to this case. The question has been decided by the Supreme Court in *Thompson v. Abbott*, 61 Mo. 176. It is there held that where one corporation goes entirely out of existence by being annexed to or merged in another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property, and answerable for all the liabilities. This case was where under the statute a township school district became merged in an adjoining town for school purposes, and the board of education of the municipality took possession and control of the school property of the annexed district.

The cases of respondent and Mary McCarthy, Charles Street, and William Drowns were all submitted together in this court by the parties, and the opinion in one is to govern in the others so far as they apply. That of Street stands upon the same footing as this case, as both were employed as janitors.

William Drowns was employed as teacher. It appeared that his certificate as a licensed teacher would have expired before the expiration of the contract. The statute provides that a teacher's certificate "must be in force for the full time for which the contract is made." The statute is construed as follows: "A proper and reasonable construction of the statute does not require that the teacher shall, at the time of his employment, have a certificate which reaches to the end of such term of his employment, provided that during the time of such employment he has the proper certificate. Certainly no more should be required of the teacher than that he renew his certificate at its expiration." *School District v. Edmonston*, 50 Mo. App. 65; *Hibbard v. Smith*, 135 Mo. App. 721, 116 S. W. 487.

The form of the certificate is objected to. It is dated September 6, 1904, and is denominated "Special." It recites that the applicant has furnished satisfactory evidence of good, moral character, and upon examination has attained certain grades specifying the following, which it recites: "Therefore authority is hereby given him to teach in the public schools of Buchanan county for the term of one year from this date unless this certificate be revoked." After the signature of the commissioner is written: "Good till the next regular examination March, 1905." The objection is twofold: First, that it is neither a first class nor second class certificate; and, second, that it is issued for a period less than one year. The statute requires that two classes of certificates be issued, viz., first and second class, and that they be issued for one year. We do not think it makes any difference whether the certificate was classified or not if Mr. Drowns was competent to teach, and had a certificate to that effect from the proper authority, and his contract with the district was lawful. He belonged to one or the other of the classes, and it made no difference which, for either was sufficient authority for him to teach in the public schools of the county. The writing on the certificate did not limit the duration of the certificate itself, as it ran for one year. It was unauthorized, and could not have the effect of contradicting the recitations in the certificate. The law required that it should be issued for one year, and it so recited.

There was no objection made to the certificate of Mary McCarthy, who was also employed at the same time as a teacher.

It follows therefore that the cases of Charles Street, Mary McCarthy, William Drowns, and the respondent herein against appellant be affirmed. All concur.

## WALKER et al. v. LEWIS.

(Kansas City Court of Appeals. Missouri. Jan. 10, 1910.)

## 1. APPEAL AND ERROR (§ 927\*)—REVIEW—SUFFICIENCY OF EVIDENCE.

Where the evidence is substantial, the court on appeal, in considering a demurrer to the evidence, will accept it as true.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 927.\*]

## 2. PRINCIPAL AND AGENT (§ 23\*)—EVIDENCE OF AGENCY—SUFFICIENCY.

In an action against a livery stable keeper for conversion of property, loaned to assist in showing a horse defendant agreed to sell for plaintiff, evidence held to sustain a finding that the person who actually received the property from plaintiff was defendant's agent in so doing.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 23.\*]

## 3. TROVER AND CONVERSION (§ 29\*)—ACTIONS—PARTIES—JOINDER.

Where there are several joint owners of a chattel, they should join in an action for its conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 189; Dec. Dig. § 29.\*]

## 4. JUDGMENT (§ 235\*)—PARTIES—ONE OR MORE COPLAINTIFFS.

Where two or more sue jointly for conversion, that the evidence shows title to be solely in one of the plaintiffs does not preclude judgment in favor of that one.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 414; Dec. Dig. § 235.\*]

## 5. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING ISSUES.

In an action for conversion of chattels, an instruction to find for plaintiff on finding certain facts, which include all the elements of the cause of action, except demand for the property and refusal to deliver it, was not erroneous where the existence of these elements was admitted by both parties.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 253.\*]

## 6. TRIAL (§ 256\*)—INSTRUCTIONS—REQUESTS—NECESSITY—DEFINING WORDS.

In an action for conversion of chattels, it is not error to use the word "converted" in a charge stating the elements of the cause of action, without defining it; no request having been made to have it defined.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 639; Dec. Dig. § 256.\*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by Mary V. Walker and another against Hugh M. Lewis. From a judgment for the plaintiff named, defendant appeals. Affirmed.

Mytton & Parkinson, for appellant. Chas. M. Street, for respondent.

JOHNSON, J. The petition alleges: That plaintiffs "are, and at all times hereinafter stated were, the owners of one runabout wagon, one set of single harness, one bridle, one saddle, and one saddle blanket. That on or about the 10th day of March, 1905, they loaned and delivered to the defendant said property for the purpose of assisting him in the sale of a horse belonging to the plaintiffs;

the said defendant desiring to use said property in driving and showing said horse to prospective purchasers." Then follows the allegation that defendant converted the property to his own use, and judgment is prayed for the value of the property. The answer is a general denial. A trial to a jury resulted in a verdict for the plaintiff Mary V. Walker for \$100. The jury found that her coplaintiff had no interest in the cause of action. Accordingly, judgment was entered for Mrs. Walker, and Henry was dismissed. Defendant appealed.

Counsel for defendant earnestly contend that the court should have given the jury a peremptory instruction to find for the defendant for the reason that "there was no evidence to sustain the allegations of the petition that the defendant Lewis sold or disposed of or converted to his own use the property sued for." We shall not recite the details of the evidence. Counsel attack the credibility of the testimony of plaintiffs, and it appears that their account of the transaction is contradicted by very strong testimony, some of which is from disinterested witnesses, but there is nothing in it to overtax credulity. It is consistent, and we must say it is substantial. As we have often declared, we do not weigh evidence, and, where we find that of the plaintiff to be substantial, we accept it as true in our consideration of the demurrer to the evidence.

Material facts disclosed by the evidence of plaintiffs are as follows: Mrs. Walker owned a driving horse and the property in controversy. She had bought the property chiefly for the use of her son, the plaintiff Henry. Defendant was a liveryman in St. Joseph, and plaintiffs had kept the horse at his barn. A short time before the beginning of the transaction in controversy, she began keeping the horse and rig in her own barn. She concluded to dispose of the property and conversed with defendant by telephone about selling the horse for her. Defendant agreed to sell the horse and said he would send a man after it. Shortly after this conversation, a nephew of defendant called at Mrs. Walker's house to get the horse, stating he had been sent by defendant. He asked and was given permission to take the wagon, harness, saddle, etc., for use in showing the horse. The nephew afterward sold the horse and turned the proceeds over to plaintiffs; but he failed to return the other property. Later plaintiffs asked defendant to return the property, and he promised to do so, giving as an excuse for his failure to return it that he had been very busy. A lawyer was then employed by plaintiffs, and oral demand was made on defendant for the property; but he denied that he had ever received it or had it in charge. This suit followed.

Defendant relies on the case of Walsh v.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Sichler, 20 Mo. App. 374, to support his contention that no case was made against him by the evidence. In that case it is said: "I understand the law to be that, to maintain the action of trover, there must be either a taking from the owner or an unwarranted assumption of control and ownership over the thing, or an alleged use or abuse of it, or proof of demand, and refusal to surrender." It may be true, as defendant says, that he did not touch the property, that his nephew, who was not employed by him, but by another liveryman, took the property and retained possession of it; but, nevertheless, the evidence of plaintiffs shows that defendant himself became the bailee of Mrs. Walker and as such should be held liable for the tortious act of his nephew. He agreed with Mrs. Walker to take the property for the purpose of selling the horse, and the inference is permissible, to say the least, that he sent his nephew as his agent to receive the property which was delivered by plaintiffs on the assurance that the delivery was to defendant. If defendant suffered his agent to retain the property and afterwards to convert part of it, that was a breach of defendant's duty as bailee, and he cannot exonerate himself from liability by showing that he, personally, had nothing to do with the conversion.

One of the points made against the instructions may be disposed of at this time, since the question arises under the demurrer to the evidence. Defendant argues that Mrs. Walker should not be permitted to recover for the reason that she sues as a joint owner, while the evidence discloses, and the jury found, she was the sole owner. We are cited to the following authorities: *Butler v. Boynton*, 117 Mo. App. 467, 94 S. W. 723; *Megher v. Stewart*, 6 Mo. App. 498; *Little v. Harrington*, 71 Mo. 390; *Upham v. Allen*, 76 Mo. App. 206; *Seay v. Sanders*, 88 Mo. App. 478. It should be borne in mind that this is not an action on contract, but is founded on a tort; consequently, cases which deal with the question of whether a plaintiff may declare in his petition as a joint obligee in a contract are not in point. The rule in this state is that, where there are several joint owners of a chattel, they ought to join or be joined in an action for the wrongful conversion of the chattel. The rule is based on the idea that the defendant should not be harassed by a multiplicity of suits. *Butler v. Boynton*, *supra*. Doubtless this rule moved counsel to include Henry as a party plaintiff, fearing the permission given him by his mother to use the property might be held to constitute him a joint owner, and, in such event, if he were not joined, there would be a defect of proper parties. We are cited to no authority which holds that the improper joinder as party plaintiff of a person who has no interest in the converted property is fatal to a recovery by the plaintiff the proof shows to be the sole

owner. The opposite doctrine was applied by the St. Louis Court of Appeals in *Pettingill v. Jones*, 30 Mo. App. 280, and it meets with our approval. On the verdict that the plaintiff Henry had no interest in the property, it was proper for the court to enter judgment against him and in favor of his coplaintiff, who was adjudged to be the sole owner.

The following instruction, given at the request of plaintiff, is objected to by defendant: "The court instructs the jury that if you find from the evidence that the plaintiffs were the owners of one runabout wagon, one set of single harness, one bridle, one saddle, and one saddle blanket, described in the petition, and that on or about the 10th day of March, 1905, they loaned and delivered to the defendant said property for the purpose of assisting him in the sale of a horse belonging to the plaintiffs, and that said defendant has sold or disposed of said property without authority of the plaintiffs or converted said property to his own use, then you will find for the plaintiffs." It is argued, in effect, that an instruction directing a verdict must include in its hypothesis all of the facts elemental to the cause of action. That is true. In this case the proof of plaintiff shows that defendant rightfully took possession of the property by the hand of his agent and held it for the purpose of the bailment, and that after the accomplishment of that purpose he wrongfully refused to restore the property on the demand of plaintiff, and still retains it in the possession of his agent. In such case the cause of action becomes complete on the demand of plaintiff for a return of the property and the refusal of defendant to comply with the demand. The instruction includes all the elements of the cause of action except that of the demand and refusal. The defendant, however, testified to a conversation with plaintiff's attorney, the substance of which was a demand for the return of the property, a threat that suit would be brought if compliance with the demand were refused, and the refusal of defendant to return the property on the ground that he was not plaintiff's bailee and had had nothing to do with her property. Thus it appears that the existence of the fact omitted from the instruction was admitted by both parties. It was not necessary to submit to the jury a fact withdrawn by the parties from the field of debatable issues, and the instruction was not erroneous on that ground. Nor do we think the use of the word "converted" without giving its legal definition reversible error. The meaning of that word is well understood by the laity, and, considering the context, we fail to perceive how the jury could have been misled to defendant's prejudice. Had defendant feared a misunderstanding of the word, he should have asked an instruction defining it.

The judgment is affirmed. All concur.

## SCHEFFLER v. CITY OF HARDIN.

(Kansas City Court of Appeals. Missouri. Jan. 10, 1910.)

**1. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.**

Where, in an action against a city for injuries on a defective street, the city in its answer admitted its existence as a domestic municipal corporation, the admission in evidence of a plat of dedication of the municipality which failed to locate it in any particular place, but did locate it in a township, was not prejudicial to the city.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4167; Dec. Dig. § 1051.\*]

**2. EVIDENCE (§ 25\*)—JUDICIAL NOTICE—GEOGRAPHICAL FACTS.**

The court takes judicial notice of an incorporated municipality and its location.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 31-33; Dec. Dig. § 25.\*]

**3. MUNICIPAL CORPORATIONS (§ 819\*) — DEFECTIVE STREETS—ACTIONS—EVIDENCE.**

One suing an incorporated city for injuries on a defective street need not show the location of the city by metes, distances, and boundaries, but need only show in a general way that the street was within the limits of the city, and evidence that the street was one of its principal streets sufficiently located the place of the injury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1739, 1740; Dec. Dig. § 819.\*]

**4. DEDICATION (§ 35\*)—STREETS—ACCEPTANCE.**

The act of a city in grading a dedicated street is an acceptance of the dedication and the exercise of jurisdiction over the street.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 75; Dec. Dig. § 35.\*]

**5. MUNICIPAL CORPORATIONS (§ 759\*)—STREETS—DEFECTS—LIABILITY.**

A city accepting the dedication of a street by grading it and exercising jurisdiction over it must keep it in a reasonably safe condition for use by the traveling public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1598; Dec. Dig. § 759.\*]

**6. TRIAL (§ 203\*)—INSTRUCTIONS—ISSUES.**

Where, in an action for injuries on a defective street, there was no controversy but that the street was a public street over which the city had assumed jurisdiction and control, it was not necessary to charge what was necessary to constitute a public street.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477-479; Dec. Dig. § 203.\*]

Appeal from Circuit Court, Ray County; Francis H. Trimble, Judge.

Action by Alice M. Scheffler against the City of Hardin. From a judgment for plaintiff, defendant appeals. Affirmed.

Lavelock & Kirkpatrick, for appellant. M. M. Bogee and J. L. Farris, for respondent.

**BROADDUS, P. J.** The plaintiff's suit is to recover damages occasioned by a fall she alleges she received on one of defendant's streets. Plaintiff's evidence tends to show that on the night of February 28, 1908, while in the company of her mother and brother, when she was passing along on what was called Elm street, that in stepping from the

sidewalk onto a crossing in an alley that intersected said street her heel went into a hole in the crossing, and caught there, which caused her to fall whereby she was injured, and that at the time she was in the exercise of due care. Her evidence was that the sidewalk was constructed of concrete and the crossing where she was injured of planks; that the latter was in an unsafe condition and had been so for a long time previous. It was shown by the evidence of the mayor and other witnesses that Elm street was one of the principal streets of the town and used generally by the traveling public. The purport of the mayor's evidence was that the city had graded Elm street, and that the crossing had been in since 1890. He was asked: "Since you have been mayor has the authorities of the city of Hardin laid any walk of any kind on Elm street in the city of Hardin, street or crossing? Answer: Yes; we have graded the streets." The plaintiff, in order to locate the town, introduced over defendant's objections a dedication and plat which were filed for record January 22, 1869. The objection was that they were indefinite and failed to show the tract of land on which the town was located. The language of the dedication was as follows: "Dedication. The within described plat, streets and alley with the various courses composing the plat of the town of Hardin is of the following real estate, to wit: The southwest quarter of section thirty-three and thirty-two township (52) fifty-two, North, range twenty-six West, and duly laid out by us for said town of Hardin, Ray county, Missouri on the 16th day of February 1869." The plat shows the streets, alley, and blocks and lots of the town, but it nowhere shows in what part of the two quarter sections it is located. The evidence of the defendant tended to discredit that of the plaintiff as to the condition of the sidewalk, and to show that she had been guilty of contributory negligence. The finding and judgment were for the plaintiff, and defendant appealed.

It is urged by appellant that the court erred in the admission as evidence the said plat to prove the location of the town of Hardin. The argument is that it is void for uncertainty. In a sense that is true. It would not be sufficient as evidence where there was a contest over title to lands, or where such question is involved. *McCormick v. Parsons*, 195 Mo. 91. 92 S. W. 1162; *Campbell v. Johnson*, 44 Mo. 247. But the question of title is in no way a matter of controversy in this case. This evidence was offered to locate the town of Hardin. Whereas it failed to locate it in any particular place, in the section, it did locate it in a certain township in Ray county, Mo. We do not think it was necessary for the plaintiff to have resorted to a more definite location, especially in view of the following admission in defendant's answer,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

viz.: "Now on this day comes the defendant in the above-entitled cause, and for amended answer to the petition of the plaintiff herein admits it now is and at the date mentioned in said petition a municipal corporation organized and incorporated under and by virtue of the statutes of the state of Missouri," etc. The plat served no useful purpose, but could have worked no prejudice, for the court takes judicial cognizance of the town and its location as being a municipal corporation. The plaintiff was not required to show the location of the town by metes, distances, and boundaries, but only to show in a general way that Elm street was within the town limits whatever they might be. When she proved that Elm street was one of the principal streets of the town, she did all that the law required of her so far as locating the place of her injury.

But it is contended that the evidence fails to show that the town had ever at any time assumed jurisdiction over Elm street, and that plaintiff failed for that reason to make out a case for recovery. To sustain this theory appellant has called our attention to certain decisions of our courts. It is said: "The mere dedication of a city street to public use by means of a recorded plat does not of itself render the municipality liable for negligent failure to keep the street in repair. It is necessary further to show that the street in question has been accepted before that liability begins. Even in acceptance of a dedication transferring title to the street in trust for the public does not impose a liability to keep the dedicated land in repair as a street. The latter obligation does not attach until the corporation in some official and appropriate manner has invited or sanctioned its use as a street by the public. But such sanction may be given by acts of its proper officers as well as by acts in the form of ordinances." *Baldwin v. City of Springfield*, 141 Mo., loc. cit. 212, 42 S. W. 719. And so is the law in *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168, and other cases. The decisions noted apply to additions to a municipality. It does not appear that Elm street was located on any addition to the town, and there is nothing in the record to authorize an assumption that it was such. And, if it had been such, we believe the evidence introduced by plaintiff was sufficient to show that the street had been accepted by the town. The mayor's testimony that the street had been graded by the city was sufficient under the language of the decisions, supra, to show acceptance of the street and the exercise of jurisdiction over it, and such as to render defendant liable for failure to keep them in repair.

Instructions numbered 1 and 2, given for plaintiff, are criticised on the ground that they submit to the jury the legal proposition upon which the plaintiff's right to recover

hinged. That is to say, that the "question really submitted \* \* \* was whether this traveled way was a public street of the city for the maintenance of which it was in duty bound without telling the jury what would constitute such street and such duty." As there was no controversy but the street was a public street over which the town had assumed jurisdiction and control, it was not necessary to tell the jury what was necessary to constitute a public street. If Elm street was within the limits of the original town as we are justified in assuming it was, it was the duty of the town to keep it in a reasonably safe condition, provided it was in general use by the traveling public.

Finding no error in the record, the cause is affirmed. All concur.

### DRAKE v. CITY OF BOSWORTH.

(Kansas City Court of Appeals. Missouri. Jan. 10, 1910.)

#### 1. MUNICIPAL CORPORATIONS (§ 396\*)—DRAINS—DAMAGES—BENEFITS—DISTINCT TRACTS.

Where plaintiff's lots north of an alley were used for a gallon house and gristmill, while his lots on the south side of the alley, directly opposite those on the north side, were used for a dwelling, they were wholly separate, so that benefits to the lots north of the alley by the construction of a drain in the street could not be considered in determining the damage thereby to the lots south of the alley, though the fact that the lots lay on opposite sides of the alley would not of itself make them separate tracts for the purpose of assessing damages and benefits; their use for different purposes being controlling.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 396.\*]

#### 2. APPEAL AND ERROR (§ 179\*)—PRESENTATION BELOW—MEASURE OF DAMAGES—NECESSITY.

Defendant cannot urge on appeal that a certain measure of damages should have been adopted when it did not request any instruction submitting that measure of damages, or otherwise raise the question below.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1137; Dec. Dig. § 179.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 404\*)—DRAINS—CONSTRUCTION—DAMAGES—JURY QUESTION.

It is the special province of the jury to determine the amount of damages in an action for damage to property by the construction of a drain in the street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 997; Dec. Dig. § 404.\*]

Appeal from Circuit Court, Carroll County; John P. Butler, Judge.

Action by B. F. Drake against the City of Bosworth. From a judgment for plaintiff, defendant appeals. Affirmed.

T. L. Crane and Lozier, Morris & Atwood, for appellant. L. H. Woodyard and Jones & Conkling, for respondent.

ELLISON, J. Plaintiff was the owner of certain real property in the city of Bosworth.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

He brought this action to recover damages he alleges he has sustained by reason of the city having constructed a drain or ditch in the street along the front of a part of his property. He prevailed in the trial court.

It appears that plaintiff's property was lots 19 and 20, in block 17, and lots 16, 17, and 18, in the same block. Lots 19 and 20 were south of the other lots and separated from them by an alley which ran east and west through the block, and they faced or abutted the narrow way east on Snow street, running back to the center of the block; lot 19 lying lengthwise along the alley. The other lots faced north and abutted on Missouri avenue, though lot 18 laid lengthwise on Snow street. Thus we have lots 19 and 20 running lengthwise east and west facing east; and the other lots across the alley facing north, the rear ends coming down to the north side of the alley along the south side of which lot 19 extended lengthwise. Plaintiff's residence and barn were on lots 19 and 20, and a "gallon house" and a "gristmill" owned by him were on the other lots across the alley. He brought this action for damages to lots 19 and 20, the residence part of his property, thus situated and occupied in block 17. The defendant city, under the idea that the drain or ditch was of peculiar benefit to the property north of the alley, contends that such benefit should have been considered in arriving at the amount of the damage to be assessed to plaintiff for damages to his residence lots; and defendant objected to instructions given for plaintiff in which the jury was directed not to consider any supposed benefit to the property north of the alley. Whether such benefits should have been considered is the point for decision.

The damage done to one's property in prosecuting a public work or improvement may be reduced by the benefit received by the same property from such improvement. That very general statement will not be disputed; but, when it comes to applying it to a specific case, there is sometimes great difficulty in ascertaining what should be considered the same property. The damage to property should be reduced by the special benefit that property receives. How are we to ascertain whether the part benefited belongs to, or is a portion of, the part damaged? When are the two parts one body of land? The matter has been so recently discussed by the Supreme Court (*Railroad v. Aubuchon*, 199 Mo. 352, 363, 97 S. W. 867, 9 L. R. A. [N. S.] 426, 116 Am. St. Rep. 499) and by this court (*Burde v. St. Joseph*, 130 Mo. App. 453, 110 S. W. 27) that we can readily state the general considerations which should govern in determining the question. The land thus divided into parts, one benefited and the other damaged, must be one general tract or piece used for one general purpose. In saying that it must be one piece, it must be understood that government survey divisions, or divisions by city

plats, into different lots and blocks, will not necessarily destroy its unity. Nor will an alley or street or highway do so. Such divisions do not necessarily destroy the one general purpose or use to which the property was put or could have been put before the lines of division were made. *Union Elevator Co. v. Railway Co.*, 135 Mo. 353, 365, 38 S. W. 1071; *K. C. Ry. Co. v. Norcross*, 137 Mo. 415, 424, 38 S. W. 299. Applying this rule to the case before us, we find that the fact that the property damaged is separated by lot lines on the city plat and by an alley from that which was benefited does not of itself make it more than one piece of property, and does not prevent the benefit to one part being subtracted from the damage done another part. But the fact that the lots lying north of the alley were used for purposes separate and distinct from the use of the part south of the alley makes the tracts distinct, so that the damage to the one and the benefit to the other cannot be considered together. The lots north of the alley, as has been stated, were used for a gallon house and gristmill situated thereon. These were wholly distinct from and wholly without connection with the residence on the lots south of the alley. Though owned in unity—that is, by one person—the purpose of their use was not single; on the contrary, was independent and apart. As said by Judge Lamm in *Railroad v. Aubuchon*, *supra*, if the land is held as separate farms "or as a distinct home or tenement in a city," etc., the bare fact of contiguity will not be controlling.

Objections are made to plaintiff's instruction on the measure of damages. These are that immediately following the words, "market value," the word "value" is used without being limited by the word "market." We regard the complaint as hypercritical. We think it could not have been misunderstood, or have misled the jury, especially in view of instructions for defendant.

Then it is said that in some instances the cost of restoring property to its original condition is less than the damage if there is no restoration, and in such cases the measure of damage would be the cost of restoration instead of difference in market value before and after the wrongful act. But the difficulty with this point at this time is that at the trial it was not brought forward by defendant, and does not appear in any instruction which we find in the record. Besides, the instructions submitted by defendant adopt the identical measure submitted by plaintiff.

We note the suggestion that the damages are excessive. We think we would not be justified in interfering with the conclusion of the jury whose special province was to determine the amount. *Investment Co. v. St. Joseph*, 191 Mo., loc. cit. 459, 90 S. W. 763.

The judgment should be affirmed. All concur.

**CREASON v. MISSOURI, K. & T. RY. CO.**  
(Kansas City Court of Appeals. Missouri. Jan. 10, 1910.)

**RAILROADS (§ 439\*) — KILLING ANIMALS ON TRACK—PETITION.**

In an action against a railroad company for double damages under Rev. St. 1890, § 1105 (Ann. St. 1906, p. 945), for killing an animal on the track, a petition which alleges the place where the animal went on the track and was killed, that it was not at a highway crossing nor within the limits of any municipality, but at a point where the track passed through inclosed fields, that at that point the company had failed to erect lawful fences and cattle guards, and that the killing was occasioned thereby, was sufficient against a demurrer.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1551-1562; Dec. Dig. § 439.\*]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

Action by C. W. Creason against the Missouri, Kansas & Texas Railway Company. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Reversed.

M. J. Lilly, for appellant. E. O. Doyle, for respondent.

**ELLISON, J.** This action was instituted in the circuit court of Randolph county to recover double damages for the killing of plaintiff's cow by one of defendant's engines. The case is founded on section 1105, Rev. St. 1890 (Ann. St. 1906, p. 945), which requires railway companies to erect and maintain fences and cattle guards. The trial court sustained a demurrer to the petition, and plaintiff appealed in due course.

The material parts of the petition are as follows: "That plaintiff was on the 24th day of March, 1908, the owner of a certain animal, of the value of \$75, to wit, a four year old short horn milch cow; that on said 24th day of March, 1908, said animal went upon the said railroad of defendant at a point about five miles east of Moberly, in Randolph county, Mo., and was while upon said railroad struck by the locomotive and cars, then and there being run and operated upon defendant's said line of railroad, and killed; that said animal went upon said railroad not at the crossing of any public highway or other road and not within the limits of any incorporated town or city, but at a point where said railroad passed through, along, and adjoining inclosed and cultivated fields; that at the point where said animal went on said railroad defendant on and before said date failed and neglected to erect and maintain lawful fences on the sides of its said railroad and to construct and maintain cattle guards as required by law; and that the injury aforesaid was occasioned by defendant's said failure to construct and maintain such fences and cattle guards." We are of the opinion that the petition substantially meets the requirements of pleading under the stat-

ute aforesaid. It alleges the place where the animal went upon the defendant's railroad track and where it was killed by defendant's train. It then alleges that the place where the animal went upon the track was not at a highway crossing and not within the limits of any town or city, but at a point where the track passed through, along, and adjoining inclosed and cultivated fields; that at that point defendant had failed to erect lawful fences and cattle guards; and that the killing was occasioned by such failure. The allegations follow, with appropriate reference to the case, the language of the statute, and this is permissible. *Summers v. Railway Co.*, 29 Mo. App. 41; *Mayfield v. Railway Co.*, 91 Mo. 298, 3 S. W. 201; *Ringo v. Railway Co.*, 91 Mo. 667, 4 S. W. 396.

We have considered the argument of defendant and authorities cited in support of the demurrer, but do not consider that they sustain the judgment, and it is accordingly reversed and the cause remanded. All concur.

**MULLINAX et al. v. LOWRY et al.**

(Kansas City Court of Appeals. Missouri. Jan. 10, 1910.)

**1. FRAUD (§ 49\*)—ISSUES, PROOF, AND VARIANCE.**

A pleading by an agent who represented the buyer in a contract of sale, and who subsequently became the owner of the contract, which alleges that the seller was guilty of fraud practiced on the pleader inducing the contract of purchase, is not sustained by proof that the sale was made to the buyer represented by the pleader as agent, and that the fraud was practiced on him.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 44, 45; Dec. Dig. § 49.\*]

**2. ASSIGNMENTS (§ 80\*) — OF CONTRACT AS PASSING RIGHT OF ACTION FOR DECEIT.**

An assignee of a contract of sale may not avail himself of the fraud of the seller practiced on the assignor, unless the cause of action in favor of the assignor on the ground of fraud has been assigned.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 147; Dec. Dig. § 80.\*]

**3. ASSIGNMENTS (§ 24\*)—RIGHTS ASSIGNABLE — RIGHTS OF ACTION—FRAUD.**

An action for fraud practiced on a buyer by the seller and inducing the purchase is not assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 46; Dec. Dig. § 24.\*]

Appeal from Circuit Court, Mercer County; Geo. W. Wanamaker, Judge.

Action by George T. Mullinax and another against W. H. Lowry and another. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

Orton & Orton, for appellants. J. C. Wilson and Ben F. Kesterson, for respondents.

**ELLISON, J.** This action is based on a contract for the purchase of a lot of hay and

corn. The defendants filed an answer setting up a counterclaim. There are two defendants, though we need only refer to one of them. The judgment was for the defendants.

It appears that one Fox bought the hay and corn of plaintiffs by a written contract; that Fox was represented by and acted through defendant as his agent. The hay was sold at \$9 per ton and the corn at 50 cents per bushel. A portion of the hay was delivered and a part of purchase price was also paid. Defendant, then discovering that the hay was not of the quality bought, refused to receive or to accept any more. This action resulted for the difference in the price which was to be received and what the hay was worth on the market when refused. Since the contest relates to the hay, we will not consider the corn. Nor is it necessary, so far as our conclusion is concerned, to deal with the matter of cash payments made, or whether they were intended to be on the corn or the corn and hay. Defendant's answer set up a counterclaim, and pleaded the written contract showing that plaintiffs' agreement to sell the hay to Fox was made through this defendant as agent for Fox, and that afterwards Fox assigned the contract to defendant. Thus the agent negotiating the contract became the owner of it and Fox dropped out of the transaction.

It is set up in the answer that plaintiffs, knowing that "defendant" wanted the hay to ship and sell on the market, falsely, deceitfully, and fraudulently, with intent to cheat and defraud "defendant," represented that the hay was first-class timothy and suitable for the market, and that "defendant" not knowing the true quality, and it being impossible for him to examine it, and relying on plaintiffs' representations, purchased it, etc. It is then properly alleged that certain payments were made before learning the quality of the hay; that is, that it was of inferior and unmarketable kind, and that defendant was compelled to sell at a loss, to his damage, etc. It thus appears that the sale was made to Fox, and that the fraud and deceit was practiced upon Fox; but that the answer charges the representations to have been made to, and the deceit practiced upon, the defendant. It is manifest that the pleader has allowed himself to charge that the deceit and fraud was practiced upon the defendant from the circumstance that defendant was the agent who made the contract for Fox and afterwards became the owner of it; thus being substituted for Fox in the transaction. But as a matter of law the contract was made with Fox and the fraud and deception was practiced upon him, and the answer should have so alleged it. As the matter stands, we have one cause of action stated and a different one proven, which is not allowable. *Henry County v.*

*Bank*, 208 Mo. 209, 226, 106 S. W. 622, 14 L. R. A. (N. S.) 1052.

Again, there is no allegation that the cause of action arising in favor of Fox by reason of the fraud and deceit alleged to have been practiced upon him was assigned to defendant. Without such assignment defendant has no right to avail himself of it.

But the further question remains: Is such an action assignable? Can an action for fraud and deceit practiced upon the assignor be maintained by the assignee for the purpose of recovering damages arising from the deceit practiced upon the assignor? The law is that it cannot. *Harrison v. Craven*, 188 Mo. 500, 87 S. W. 962.

The judgment is reversed, and the cause is remanded. All concur.

#### NICHOLSON et al. v. ST. LOUIS & S. F. R. CO.

(Kansas City Court of Appeals. Missouri. Jan. 10, 1910. Rehearing Denied Jan. 24, 1910.)

##### 1. CARRIERS (§ 117\*)—FREIGHT—EQUIPMENT.

Common carriers must furnish suitable vehicles for transporting freight, and are liable for losses caused by their failure to do so, though they are entitled to determine, in the first instance, the sufficiency of the vehicles furnished.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 509; Dec. Dig. § 117.\*]

##### 2. CARRIERS (§ 156\*)—EQUIPMENT—DEFECTIVE EQUIPMENT—CARRIER'S LIABILITY.

Where a shipper had bulk corn, which was shipped in a stock car, sacked en route without removing it from the car, and redelivered it for transportation under a bill of lading providing that damage on account of being loaded in a stock car was at the owner's risk, the carrier was not liable for damage to the corn by it being loaded in the stock car.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 697, 698; Dec. Dig. § 156.\*]

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by W. S. Nicholson and others, against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

W. F. Evans, Dana, Cowherd & Ingraham, and Arthur H. Morse, for appellant. Adrian F. Sherman and Edmond C. Fletcher, for respondents.

**BROADDUS, P. J.** This is an action for damages, by the shippers against the carrier, to grain, occasioned by failure, it is alleged, of the carrier to provide a proper car for its transportation. The article was shelled corn, and was shipped from Kansas City, Mo., to Mobile, Ala., February 24, 1903. On the 19th day of said month plaintiffs purchased the corn from the Ernst-Davis Grain Company, which was then in a car numbered 49307, on the defendant's track. It had come from a point in Kansas to Olathe by another car-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rier, where it was transferred to defendant's railroad, and from thence to Kansas City. Ernst-Davis Company directed defendant to deliver the car to the plaintiffs for shipment, and at the same time, by request of plaintiffs, they directed defendant to place the car containing the corn at the warehouse of McNulty for the purpose of sacking. The defendant placed the car as directed, where it was sacked by McNulty acting for plaintiffs, and weighed by W. E. Hales, deputy weighmaster of the Board of Trade; the plaintiffs in both instances paying for the service. The sacking and weighing was done in the car where the corn was left, and the car sealed by the deputy weighmaster. According to their usual custom plaintiffs by their agent, Danciger, partly filled in a bill of lading showing the number of the car and its destination. A few days before the shipment, and before J. H. Barr, defendant's agent, signed the bill of lading, Danciger called at his office, and asked if the car would run through to Mobile. Barr told him that it would, and called his attention to the fact that the corn was loaded in a stock car. Barr testified: That Danciger came to his office and gave him the number of the car; that he called his attention to the fact that the car was a stock car; that he seemed somewhat surprised, and wanted to know how a car of bulk corn could be loaded in a stock car; and that he (Barr) told him that he presumed that the car was boxed up. The bill of lading contained the following: "Owner's risk of damage on account of being loaded in stock car." When the corn arrived at its destination it was found to be damaged to the extent of \$110. The damage was attributed to the fact that the corn was not sufficiently protected while in transit, because a stock car was not sufficient for that purpose. The consignee paid for the corn, and plaintiffs seek to recover as assignees. Plaintiffs recovered judgment, and defendant appealed.

The first question is one of liability. It is urged that the court should have directed a verdict of the jury for defendant on the case plaintiffs made out. The plaintiffs rely upon the common-law rule that it was the duty of the carrier to have furnished a safe means, such as a box car, for the shipment of the corn, and that, having failed to comply with the law, it is liable for the damages resulting from its failure of duty in that respect. While defendant admits the rule, it insists that it does not govern this case, for the reason that plaintiffs are estopped from claiming its benefits as they, after having been informed that the corn was in a stock car for several days before the bill of lading was signed, had a sufficient length of time for them to have had it placed in a box car before the shipment had started for its destination if they had so desired. That their failure to request a reloading of the corn, taken in connection with the agreement in

the bill of lading that they assumed the risk of damage on account of the corn being loaded in a stock car, amounted to a selection on their part of the character of the car in which it was to be carried is contended by defendant. The rule is stated thus: "It is the business of common carriers to have vehicles suitable for the transportation of the freight shipped, and they are responsible for losses occurring in consequence of defects in this regard. But the carrier is the judge of the sufficiency of his carriages in the first instance." *Sloan v. R. R. Co.*, 58 Mo. 220. "A contract, though signed by the shipper, agreeing to release the carrier, will not exonerate him from resulting damages, or from his implied duty to furnish suitable means to safely transact his business." *Potts v. Ry. Co.*, 17 Mo. App. 394. "A shipper who knowingly loads his hogs into a car not provided with trapdoors, as the statute requires, is not estopped from complaining of injury resulting from the lack of such doors." *Pad-dock v. Ry. Co.*, 60 Mo. App. 328. The defendant in that case sought to escape liability on the ground that plaintiff by his contract, as a consideration for reduced rate, had waived his damages. But the court held that that rate was not a reduced rate, and that therefore there was no consideration for the agreement. It was contended that plaintiff had nothing to do with selecting the car in question. The defendant selected the car, and was liable for damages resulting from its insufficiency. "A carrier cannot exonerate himself from resulting damage by reason of a breach of his implied duty to furnish suitable means to safely transact his business; and this, though the cars are seen by the shipper, who also attends his stock. The rule is applicable, in principle to stock pens provided by carriers for the receiving of live stock." *Mason v. Ry. Co.*, 25 Mo. App. 473. Where a shipper examined the car in which his hogs were loaded, and recited in the bill of lading that he found it safe and suitable, the carrier was held liable for loss of hogs escaping from the car by reason of its defects. *Jones v. Ry. Co.*, 115 Mo. App. 232, 91 S. W. 158.

A law writer says, in reference to exceptions to the rule we have been discussing, that: "The rule holding railroad carriers bound to furnish cars adapted to the goods they undertake to transport does not apply where the shipper, with means and opportunities of knowledge, voluntarily selects the car on which he desires his property transported. The carrier is not responsible in such case for damages resulting from the unsuitableness of the car." 1 *Elliott on Railroads*, § 1480. And the law is similarly stated in 1 *Hutchinson on Carriers*, § 295. This statement of the law is not in the least in conflict with the holding in *Jones v. Railway*, supra, where the shipper inspected a car that had defects which he did not discover. We

may safely conclude that, had he discovered the defects, and with that knowledge, without protest, shipped his stock therein, the court would have held that he was estopped by his acts from claiming loss by reason of such defects. In *Paddock v. Railroad*, supra, although plaintiff had knowledge of the defects in the car, it does not appear that he had any choice in the matter, and was therefore compelled to abide by that selected by the carrier. In a case where the shipper, after due time for deliberation, elected to ship his live stock in a box car instead of a stock car, the carrier was held not to be liable for injury to his stock by reason of injury they suffered in consequence of not being transported in a suitable conveyance. *Huston Bros. v. R. R. Co.*, 63 Mo. App. 671. Where the shipper knew of the defects of a box car in which his animal was shipped, and attempted to rectify them, it is held that it was a question for the jury, where the animal was injured by such defects, to determine from the facts whether the shipper assumed the risks incident to the defects in question, and whether the carrier furnished a suitable car. *Coupland v. R. R. Co.*, 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534. In a case where fruit was shipped in a refrigerator car without ventilation, which was injured in transportation by heat for want of ventilation, and where before transportation the shipper kept the car ventilated by keeping side doors open, but they were so constructed that they could not be kept open for transit, and were air-tight when closed, and where the car was not designed to be ventilated, it was held that the carrier was not liable. *Densmore Commission Co. v. Ry. Co.*, 104 Wis. 563, 77 N. W. 904. Where the consignor was authorized to select cars for transportation of its merchandise, and where it made the selection, and damage resulted to the articles shipped by reason of the unsuitableness of the car, it is held that the carrier is not liable. *Frolick Glass Co. v. Ry. Co.*, 138 Mich. 116, 101 N. W. 223, 110 Am. St. Rep. 310. It is clear from the authorities, and it could not well be otherwise, that when a shipper is afforded the opportunity to select the vehicle in which to transport his goods, and he makes such selection with knowledge of its defects, and injury results therefrom, the carrier is not liable. Therefore under the application of this rule the plaintiff was not entitled to recover. The car containing the corn was transferred to defendant railroad at Olathe and carried thence to Kansas City, and by order of the owners delivered to the plaintiffs. Plaintiffs, with knowledge that it was loaded in a stock car, caused the corn to be sacked without removing it, and redelivered it so loaded to the defendant for transportation, with the stipulation in the bill of lading mentioned,

thus in the most unmistakable manner indicating to the defendant that they desired the corn to be transported in the stock car. In view of the facts there is no reasonable grounds for any other conclusion. As the plaintiffs failed to make out their case, it is not necessary to notice other phases of the case.

Reversed. All concur.

### COMPTON v. RASMUSSEN.†

(Kansas City Court of Appeals. Missouri. Jan. 10, 1910.)

#### APPEAL AND ERROR (§ 634\*)—RECORD—SUFFICIENCY.

Where the record on appeal, in an action involving the validity of tax bills for street paving, which is very lengthy, contains photographic copies of plats of parts of the city, so reduced in size that neither the written nor printed matter on them, including figures, can be read, and defendant fails to point out in what portions of the record many of the points made can be verified or examined, the appeal will be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2775; Dec. Dig. § 634\*]

Appeal from Circuit Court, Macon County; Meyers D. Campbell, Special Judge.

Action by William R. Compton against Hans M. Rasmussen. From a judgment for plaintiff, defendant appeals. Dismissed.

R. S. Matthews & Son and R. W. Barrow, for appellant. B. R. Dysart, for respondent.

**PER CURIAM.** This action involves the validity of certain tax bills for street paving in the city of Macon. The judgment in the trial court was for the plaintiff, and defendant appealed.

Plaintiff insists that the appeal be dismissed on the ground that there has been no compliance on defendant's part with the statute and rules requiring a proper abstract to be filed. The point is well taken. The record and proceedings at the trial are quite voluminous, and we have had printed a literal copy of everything that transpired at the trial. Among the principal, if not principal, points urged by defendant against the validity of the bill, is that the property sought to be charged did not abut upon Jackson street, the street which was paved; that it lacked several feet of coming out to that street. It was a matter of dispute whether the area said to be known as Jackson street was not composed in part of Dameron street. In the contest at the trial as to these streets there was much evidence introduced, particularly of plats of parts of the city of Macon, and additions thereto, with dedications and acknowledgments. Several of these related to the laying out or dedication of the streets in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

†Motion to reinstate cause granted.

controversy, beginning back in the early days of the city. Photographic copies of these are attached to the abstract, so reduced in size as to be of no value. The written or printed matter, including figures, cannot be made out.

In addition to this, there is not pointed out in what portions of the lengthy record many of the points made by defendant may be verified or examined.

The record is in such condition as to render it altogether impracticable for us to intelligently examine into the merits of the appeal, and it is accordingly dismissed. *Coal Co. v. Railway Co.*, 134 Mo. App. 405, 114 S. W. 574.

### TILLMAN v. MAYOR, ETC., OF CITY OF GLASGOW.

(Kansas City Court of Appeals. Missouri. Jan. 10, 1910.)

#### APPEAL AND ERROR (§ 537\*)—RECORD—EXCEPTIONS—BILL OF EXCEPTIONS.

Matters of exception are not reviewable on appeal, where the bill of exceptions was not filed in time; the delay not being due to any fault of respondent's counsel.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2404, 2405; Dec. Dig. § 537.\*]

Appeal from Circuit Court, Howard County; A. H. Waller, Judge.

Action by Amelia Tillman against the Mayor, Councilmen, and Citizens of the City of Glasgow. From a judgment for plaintiff, defendant appeals. Affirmed.

Percival Birch, for appellant. A. W. Walker and O. S. Barton, for respondent.

**JOHNSON, J.** This suit is for damages resulting to plaintiff from the acts of defendant city in changing the grade of the street in front of property of plaintiff and in removing certain shade trees. It is conceded the petition states a cause of action, and that the verdict and judgment, which were for plaintiff, are responsive to the issues made by the pleadings. The errors assigned by appellant relate entirely to matters of exception.

Point is made by respondent that such matters are not before us for consideration, because the abstract of the record discloses that the bill of exceptions was filed out of time. The point is well taken. We do not agree with appellant that the failure to file the bill of exceptions in time was due in whole or in part to any fault of respondent's counsel.

We find no error in the record proper, and it follows that the judgment must be affirmed. All concur.

### HARRIS v. KANSAS CITY SOUTHERN RY. CO.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

#### 1. MASTER AND SERVANT (§§ 101, 102\*)—APPLIANCES—DUTY OF MASTER.

The duty of a master to furnish the servant with reasonably safe appliances with which to perform the services requires the master to exercise ordinary care to keep such appliances in a reasonably safe condition; the question of neglect in such respect being determined by reference to the conduct of an ordinarily prudent person under like circumstances.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171-174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

#### 2. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

Plaintiff, a railroad employé, while drawing spikes with a clawbar, the prongs of which were so worn that it was given to slipping away from the spike, threw the weight of his body across the bar, which slipped, and he fell and was injured. *Held*, that it was for the jury whether the defective condition of the prongs and the likelihood of such use of the bar were such as to bring the resulting injury within the range of reasonable probabilities an ordinarily prudent employer should have anticipated.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.\*]

#### 3. MASTER AND SERVANT (§§ 101, 102\*)—APPLIANCES—DUTY OF MASTER.

As a general proposition, the obligation of the master to exercise ordinary care to furnish reasonably safe appliances is the same in respect to simple appliances and simple work as in any other, unless in a case where the appliances and the contemplated use thereof are so very simple and commonplace that an ordinarily prudent person would not reasonably anticipate the danger entailed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171-174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

#### 4. MASTER AND SERVANT (§§ 101, 102\*)—APPLIANCES—NEGLIGENCE.

The question of a master's negligence in furnishing unsafe appliances for work must be determined with reference to the dangers to be reasonably apprehended.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171-174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

#### 5. MASTER AND SERVANT (§ 203\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

The servant assumes only such risks as are ordinarily incident to the employment, and regarded as reasonably within the contemplation of the parties at the time of entering into the contract of hire.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 538-543, 550; Dec. Dig. § 203.\*]

#### 6. MASTER AND SERVANT (§ 208\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A clawbar used by plaintiff, an employé, was to his knowledge defective, in that the prongs and the heel of the bar were so worn that when the bar was used to draw spikes from ties, it would slip from the spike, for which reason plaintiff was accustomed to drive the bar under spike heads with a maul. After driving the bar under a spike, plaintiff, instead of pushing down on the bar with his arms, threw the weight of his body across the end, when the

bar slipped from the spike, causing plaintiff to fall, and he was injured. *Held* that, the bar being a simple appliance, plaintiff assumed the risk of the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 551; Dec. Dig. § 208.\*]

Goode, J., dissenting.

Appeal from Circuit Court, Newton County; F. C. Johnston, Judge.

Action by Sam Harris against the Kansas City Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed. Cause certified to the Supreme Court for determination; one of the judges having dissented on the ground that the decision conflicts with a ruling of the Supreme Court.

O. L. Cravens, for appellant. Benton & Ruark, for respondent.

**NORTONI, J.** This is an action for damages accrued to the plaintiff on account of personal injuries received through defendant's alleged negligence in furnishing him a defective clawbar with which to perform his labors as a section hand. The plaintiff recovered, and defendant prosecutes the appeal.

The evidence tended to prove that plaintiff was a farmer of mature years, and had recently entered the defendant's employ as a laborer upon a section of its railroad. He had been engaged at work on the section about four or five days before his injury. It appears plaintiff had never used a clawbar before the occasion of his injury; and, even though such instruments were frequently used by his associates on the section, he said he was entirely unfamiliar therewith. The defendant's section foreman instructed the plaintiff and his companion to proceed to pull spikes from a pile of ties lying by the roadside, and furnished them with the defective clawbar for the purpose. A clawbar is an iron or steel instrument, about 5 or 6 feet in length, having two prongs, to be inserted beneath the spike head. The heel of the bar on which rests the lift, is immediately underneath the turn of the prongs. The clawbar is operated by inserting the prongs beneath the spike head and bearing down on the elevated end of the bar which results in lifting the spike from the ties. The clawbar with which the plaintiff was instructed to work was defective in that the heel thereof was worn and the prongs for insertion under the spike head on either side of the spike were battered and worn to such an extent that it was impossible to remove the spike therewith unless the bar was first driven under the spike head with a maul, and even then it was likely to, and did frequently, give way or slip. In other words, the prongs or claws of the bar were so battered and worn that they would not adhere to the spike during the time required in the operation of lifting it from its place in the tie. It appears the plaintiff and his companion

had been using the bar about 30 minutes when his injury occurred. The mode of operation was for the plaintiff to insert the prongs of the bar beneath the spike head and hold the same while his companion drove it tight thereunder with a maul, whereupon plaintiff would bear down upon the elevated end of the bar and lift the spike. Plaintiff and his companion alternated in this operation. They had pulled not to exceed 10 spikes when the plaintiff was injured. In the operation of removing each spike the bar had slipped or given way one or more times. Plaintiff received his injury in this manner: His companion drove the clawbar tight under the spike head, and plaintiff threw the weight of his body across the elevated end of the bar in the act of bearing down thereon when, because of the battered condition of the prongs, the bar slipped from under the spike head, causing him to fall. As a result of the fall, plaintiff's knee came in contact with a spike in one of the other ties, which inflicted a severe and painful injury.

It is argued by defendant that inasmuch as the clawbar was a simple appliance, and the mode and manner of its use a simple operation, there was no breach of duty on the part of the master in furnishing the same; that is to say, it is suggested that the obligation to exercise ordinary care to the end of furnishing reasonably safe appliances does not obtain when both the appliance and the work to be performed therewith are simple and commonplace. There may be, and no doubt are, cases properly ruled, on the doctrine asserted, but we are not persuaded that it should find application here. The rule obtains generally, we believe, throughout the law of master and servant, that it is the duty of the master to furnish the servant with a reasonably safe appliance with which to perform the services contemplated in the employment. And this duty continues to obtain to the end that the master shall exercise ordinary care toward keeping such appliances in a reasonably safe condition for the purpose intended. The question of neglect in respect of such matters is to be determined by reference to the conduct of an ordinarily prudent person under like circumstances. That is to say, omissions which entail injuries such as might have been foreseen or anticipated by a reasonably prudent person as within the range of reasonable probabilities are regarded as negligent breaches of duty in respect of the obligation referred to. The typical prudent man, whose conduct furnishes the standard to which a master is bound to conform, is supposed to exercise a proper degree of care, not merely in observing existing conditions, but also in forecasting future occurrences. *Labatt on Master and Servant*, § 140. See, also, sections 141, 142; *Gibson v. Pacific R. R. Co.*, 46

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
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Mo. 163, 2 Am. Rep. 497; *Anderson v. Forrester*, etc., Box Co., 103 Mo. App. 382, 77 S. W. 486, as to the general proposition. See, also, *Fuchs v. St. Louis*, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136; *American Brewing Association v. Talbot*, 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538; *Pollock on Torts*, 36; *Loehring v. Construction Co.*, 118 Mo. App. 163, 94 S. W. 747.

It is conceded the clawbar was defective in that the prongs for insertion under the spike head were so battered and worn as to render it an inefficient instrument; that is to say, because of the defective prongs and the worn condition of the heel of the bar on which rested the lift, it was given to slipping away from the spike when pressure was applied, as was necessary in the process of extracting the spike from the tie. The appliance being such a simple affair, and the work to be performed therewith commonplace in its character, it may be that an ordinarily prudent person would not anticipate that an injury might follow a careful use of the bar in the ordinary way by pressing down thereon with the hands. The ordinary and usual manner to use the clawbar for extracting spikes is to insert the prongs under the spike head and bear down on the bar with the hands, but men frequently perform the task identically as this plaintiff attempted to do when he fell and received the injury complained of; that is, men engaged at such work quite frequently throw the weight of the body across the elevated portion of the bar to the end of lifting a spike which is stubborn or difficult of dislodgement. This is such an ordinary method to pursue in the use of the bar that the defendant must have known the bar in question would likely be so employed. At any rate, it was for the jury to say whether or not the defective condition of the prongs and the likelihood of the use of the bar as indicated were such as to array the resulting injury to plaintiff within the range of reasonable probabilities an ordinarily prudent employer should have foreseen or anticipated. This being true, the case discloses negligence on the part of the defendant in furnishing such a defective bar, and this is true even though the appliance were a simple one, and the work for which it was furnished commonplace.

We decline to accept as true the general proposition that the law does not require the master to exercise ordinary care in furnishing a simple appliance for a simple use, although there may be exceptions to the rule. In *Warner v. C., R. I. & P. Ry. Co.*, 62 Mo. App. 184, the Kansas City Court of Appeals expressly denied the doctrine asserted, and said that it knew of no principle of law which holds the master to the obligation to provide reasonably safe machinery and appliances where they are dangerous and complex in their nature, and at the same time exempts him from such duty when the ap-

pliances are simple in construction. However, in a subsequent case, *Anderson v. Forrester*, etc., Box Co., 103 Mo. App. 382, 77 S. W. 486, the same court gave judgment to the effect that the furnishing of an ordinary, although defective, nail by the master to a carpenter, from which an injury ensued when driving it, was not sufficient on which to predicate a negligent breach of duty against the master. It is said in that case that a nail is such a common and simple appliance that an ordinarily prudent man would not anticipate danger in furnishing the same to a carpenter for use in nailing lumber. On that score it was affirmed that no negligent breach of duty in respect of the master's obligation to furnish a reasonably safe appliance for the purpose appeared. The doctrine of that case is certainly sound. Both the appliance, the nail, and the use contemplated were very simple and very commonplace. Although the nail was defective, and it was in the range of probabilities that the defect might occasion an injury, it seems that no ordinarily prudent man would anticipate danger in furnishing a carpenter with such a simple appliance for such a common purpose. The point is: Although the result was probable, it was not a reasonable probability to be forecasted. See, also, *Post v. C., B. & Q. R. Co.*, 121 Mo. App. 562, 97 S. W. 233.

The case of *Blundell v. Miller Elevator Mfg. Co.*, 189 Mo. 552, 88 S. W. 103, is relied upon by the defendant as supporting the doctrine that there can be no negligence affirmed on the part of the master for furnishing a defective, simple appliance, to be used for a simple purpose. The case referred to is not authority for the proposition stated. In that case the plaintiff received his injury from the slipping of a ladder on the granitoid floor of a basement while he was engaged on the ladder in constructing an elevator. There is much said in the opinion with respect to simple appliances employed for simple purposes, etc. The case was finally determined, however, upon the relevant proposition of fact that the defendant had not furnished the ladder for the plaintiff's use at all. It appeared that the plaintiff had picked the ladder out himself, and that it had not been furnished by the defendant. The court said the "plaintiff, therefore, has failed absolutely to show that the ladder was one of the appliances which the defendant furnished." In further discussing the case, however, the court said, assuming that the ladder was furnished by the defendant, the failure to provide spikes or hooks to keep it from slipping was not sufficient to render the defendant liable, as the ladder was a simple appliance, and one that was familiar to every grown man. The ladder appeared to be without a defect, and the only complaint was that it was without spikes on the bottom to hold it from slipping. The court declared the ladder to be like others in common use and

said: "There is a total absence of any evidence in this case showing that the ladder furnished was not a reasonably safe appliance, and could not have been safely used for the purposes to which it was applied or intended to be applied." So, instead of the case establishing the doctrine that there can be no negligence on the part of the master in furnishing a defective simple appliance for a simple use, it appears to have acquitted the defendant of liability on the ground that there was no negligence shown, for the reason, first, that the defendant did not furnish the ladder at all; and, second, that if it did furnish it, the ladder was reasonably safe for the purpose intended. That is to say, that the ladder was in no respect defective, and that therefore the obligation to furnish a reasonably safe appliance was fully met and discharged. We, therefore, feel that, as a general proposition, the obligation of the master to exercise ordinary care to the end of furnishing reasonably safe appliances to be employed in a given work obtains the same in respect to simple appliances and simple work as in any other, unless it be in a case where the appliance and the contemplated use thereof are so very simple and commonplace that an ordinarily prudent person would not reasonably anticipate the danger entailed. Indeed, no one can doubt the general proposition that in every case the question of negligence—that is, the presence or absence of ordinary care—must be determined with reference to the dangers to be reasonably apprehended. *Bowen v. C. B. & K. C. Ry. Co.*, 95 Mo. 268, 8 S. W. 230.

There are numerous cases in this state where, the facts having precluded the master's escape on the grounds of contributory negligence or assumed risk, liability has been affirmed as for a negligent breach of duty in respect of furnishing a reasonably safe, simple appliance for a simple purpose. See the following: *Duerst v. St. Louis Stamping Co.*, 163 Mo. 607, 63 S. W. 827; *Robbins v. Mining Co.*, 105 Mo. App. 787, 79 S. W. 480; *Beard v. American Car Co.*, 72 Mo. App. 583; *Warner v. C. B. & K. C. Ry. Co.*, 62 Mo. App. 184; *Huth v. Dohle*, 76 Mo. App. 671; *Franklin v. M., K. & T. Ry. Co.*, 97 Mo. App. 473, 71 S. W. 540. There are also many cases where the appliance furnished is simple, but the work complicated or dangerous. Those cases will not be noticed, as they are not pertinent at this time to the question in judgment. Mr. Labatt says, if liability is to be escaped on the circumstances of a defective, simple appliance furnished for a simple use, it is preferable and more scientific to predicate the master's freedom from liability upon the obvious character of the danger and the servant's presumed acceptance of the risk or capacity for protecting himself in working with the defective appliance. See *Labatt, Master and Servant*, 143.

Notwithstanding the doctrine of our law to the effect that the obligation to exercise

ordinary care for the safety of the servant obtains generally with respect to the furnishing of simple appliances for the performance of contemplated labor, we believe there is a distinct doctrine with respect to the risks assumed by the servant, engaged in performing a commonplace work, with a simple appliance, the defect of which is well known to him, when the injury occurs through the mode or manner of using the appliance, and it might have been obviated by performing the task in another way. The case made by the proof, it seems, falls within the influence of this doctrine, and the right of recovery should be denied for the reason the plaintiff should be regarded as having taken the risk incident to throwing the weight of his body across the elevated end of the bar, and thus inducing his injury. It is very true, as argued, that such conduct on the part of the plaintiff in the circumstances of the case is not sufficient to preclude his recovery as a matter of law, on the score of contributory negligence. It is the doctrine with us that the plaintiff's right of recovery may not be denied by the court as a matter of law as for contributory negligence, unless the use of the bar in its known condition points glaring and imminent danger to his safety. *Garaci v. Hill O'Meara Construction Co.*, 124 Mo. App. 709, 102 S. W. 594; *Blundell v. Miller Elevator Mfg. Co.*, 189 Mo. 552, 559, 88 S. W. 103. Even though the plaintiff received his injury as a result of throwing the weight of his body across the elevated end of the clawbar, with full knowledge of its defective condition, instead of pressing down thereon with his hands, we believe his right of recovery ought not to be denied as a matter of law on the ground of contributory negligence, for if a reasonably prudent person might believe that he could perform the act with safety to himself, by using care on his part, then the question of his neglect or care in that behalf should be referred to the jury. *Garaci v. Hill O'Meara Construction Co.*, 124 Mo. App. 709, 102 S. W. 594; *Huhn v. Mo. Pac. Ry. Co.*, 92 Mo. 440, 4 S. W. 937; *Butz v. Murch Bros. Construction Co.*, 199 Mo. 279, 97 S. W. 895. Although the plaintiff received his injury as a result of his more or less careless act, such act was not so obviously dangerous as to threaten immediate and imminent peril.

It may be conceded, too, that plaintiff's right of recovery is not precluded as a matter of law by the general doctrine which obtains with us as to assumed risks, if we are to accept the full significance of language employed in some of the opinions as the rule in every case. It is no doubt true that, in many cases involving complicated machinery, complex mechanisms, and situations which inhere with dangers of considerable proportions, the servant is held not to assume such risks, even though the dangers are more or less obvious. In the present state of the law, if such defects threaten

imminent peril, they are generally referred for determination to the rule touching contributory negligence, instead of to that concerning assumed risk.

Under modern decisions in this state the substance of the rule touching the risk assumed in the circumstances last above referred to is that the servant assumes only such risks as are ordinarily incident to the employment, and regarded as reasonably within the contemplation of the parties at the time of entering into the contract of hire. Indeed the language employed in these cases indicates that in no circumstances may the servant be declared to have assumed a risk resulting from the negligence of the master. See *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167; *Pauck v. St. Louis Dressed Beef Co.*, 159 Mo. 467, 61 S. W. 806; *Wendler v. People's House Furnishing Co.*, 165 Mo. 527, 65 S. W. 737; *Blundell v. Miller Elevator Mfg. Co.*, 189 Mo. 552, 88 S. W. 103; *Dakan v. Chase & Son Mfg. Co.*, 197 Mo. 238, 94 S. W. 944. Be this as it may, there appears to be a number of recent adjudications by our Supreme Court to the contrary, even in cases presenting great dangers. It may be stated as a proposition entirely true that the jurisprudence of a state or country is established through the judgments of its courts given upon relevant principles rather than through the words or phraseology employed by the judges in the opinions. Whatever may be the language employed in other cases, it is certain that numerous recent judgments of our Supreme Court deny recoveries on the ground that the servant assumed the risk from which the injury complained of resulted, and this, too, when it appeared the master was negligent in failing to discharge his whole duty in the premises, and the situation presented danger in a high degree. Some of those cases proceed as for a breach of duty on the part of the master in respect of his obligation to exercise ordinary care to furnish the servant a reasonably safe place, and others, as to a reasonably safe appliance. Besides *Steinhauser v. Spraul*, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; *Holloran v. Union Iron & Foundry Co.*, 133 Mo. 470, 85 S. W. 260; *Mathis v. Kansas City Stockyards Co.*, 185 Mo. 434, 84 S. W. 66, touching upon the question of a simple appliance employed in a simple use, and for that reason to be hereafter adverted to, there are the cases of *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113, and *Knorpp v. Wagner*, 195 Mo. 637, 93 S. W. 961, which by the judgments given declare the servant to have assumed the risk when it appears the master was negligent. Indeed the doctrine of one of those cases (*Fugler v. Bothe*) is asserted, not alone by the judgment of the court to that effect, but by pointed and express words in the opinion as well, declaring such risk to have been assumed. There can be no doubt as to the master's negligence in

both of those cases. In fact, such seems to be conceded throughout the opinions, and it may be said, if the proof had failed to disclose negligence on the part of the master, it is to be presumed the court would have predicated its judgment of nonliability on that ground, instead of on the ground of assumed risk, as, without negligence, no cause of action existed in the first instance.

Now, let us examine those cases to the end of deducing the principle asserted and acted upon by the court. In *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113, the suit predicated on the master's breach of duty in respect of the obligation to exercise ordinary care to furnish the servant a reasonably safe place to work. It appears throughout the case that the master was derelict as to this duty, and that he had not only failed to provide such, but had restrained the plaintiff's husband and his companion from rendering the place reasonably safe for themselves by forbidding them to erect a scaffold. As a result, the plaintiff's husband, while performing the work of a carpenter, fell from his insecure position on a gutter, to his death. The court conceded the defendant's negligence, and declared that, as the danger was known to the deceased, and his death resulted from the mode and manner he conducted himself upon or used the defective place, he assumed the risk incident to such mode and manner of use. In principle the more recent case of *Holloran v. Union Iron & Foundry Co.*, 133 Mo. 470, 85 S. W. 260, is identical with that last cited; for, although it concedes the fault of the master, the servant is declared to have assumed the risk incident to the mode and manner of use, or the mode and manner in which he conducted himself in performing the task. In that case the thought is expressed by the court in the following language: "The manner of handling himself was under his own control."

In the more recent case of *Knorpp v. Wagner*, 195 Mo. 637, 93 S. W. 961, it was plaintiff's duty to drill holes for and explode blasts in a ledge of ore the face of which was 60 feet in length in a mine. Although several specifications of fault on the part of the defendant were rejected, it is conceded in the opinion that the master was shown to have been negligent in ordering plaintiff to perform the highly dangerous task of drilling across an old hole in which was lodged a quantity of unexploded dynamite, and that this negligent order involved an assurance of reasonable safety to him while so engaged. As a result of performing the work enjoined by the negligent order, partly as directed, and partly in accordance with his own discretion, the dynamite lodged in the old drill hole was exploded by the contact of his drill, and plaintiff injured. It is true the court said on these facts plaintiff could not have relied upon the assurances of safety from the master, and that in proceeding

in part on his own judgment and in part on that of the master there was a "concurrence" of "negligent judgments" of both plaintiff and defendant which rendered the injury not actionable. However, notwithstanding this, a study of the succeeding portions of the opinion reveals as well that plaintiff was thought to have assumed the risk because he exercised his own discretion in part as to how and when to drill. The thought to be gleaned from the concluding pages of that opinion and the judgment of the court clearly portrays the doctrine of assumed risk predicated upon the facts that plaintiff, knowing the defect and danger, prosecuted the work of drilling into the dynamite in a mode and manner chosen, in part at least, by himself. In concluding the court said, in substance, that the plaintiff could have worked elsewhere on the face of the 60-foot ledge of ore during the day, and could have exploded the old hole, in which was lodged the dynamite, at the close of the day's work had he elected so to do, but instead he exercised his own judgment, made his own inspection, and drilled the hole substantially in a spot to suit himself, with full knowledge of the fact that there was a quantity of unexploded dynamite contained in the old hole near which he was boring, and in these circumstances he was not entitled to recover. Although the words "assumed risk" are not used in this portion of the opinion, the doctrine reveals itself to have been the ruling thought in the mind of the court.

It is true these cases, instead of dealing with injuries resulting from the simple use of a simple appliance, declare the doctrine on facts presenting a situation which inhered with dangers in a high degree, and it may be that the court has receded from this position in such circumstances as in other more recent opinions, delivered in cases presenting dangerous situations, it is asserted that the servant never assumes the risk which may arise as a result of the master's negligence. Although such is the rule in this state, generally speaking, it is not entirely clear that the Supreme Court would decline to declare the doctrine of assumed risk again, even on facts presenting a highly dangerous situation, if its application were essential to attain the ends of justice. Suppose a servant, engaged in work which even inheres with considerable hazard, possessing full knowledge of the defect in the place or appliance, and understanding the dangers, is injured as a result of the way in which he voluntarily uses the defective place or appliance, under circumstances indicating conclusively that his injury would have been avoided entirely by the slightest circumspection on his part to the end of performing the task in another and safe way. In such circumstances it is clear the fault lies with the injured party, who voluntarily chose the dangerous mode or manner of use; for, though the mas-

ter is negligent, his negligence becomes remote in the chain of causation, and the voluntary act of the servant is the proximate cause of the injury. Upon the precise question being presented to that tribunal for judgment we apprehend that, in order to fulfill its high mission of awarding exact justice the Supreme Court will declare the servant, who thus conclusively appears to have induced his injury, to have assumed the risk incident to his voluntary act. A ruling to the contrary will essentially abrogate the principle of the recent cases of *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113, *Holloran v. Union Iron & Foundry Co.*, 133 Mo. 470, 35 S. W. 260, and *Knorpp v. Wagner*, 195 Mo. 637, 93 S. W. 961, besides *Steinhauser v. Spraul*, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441, and *Mathis v. Kansas City Stockyards Co.*, 185 Mo. 434, 84 S. W. 66, which distinctively deal with a simple appliance furnished for a simple use. However this may be, we all know the law of negligent torts is not essentially a set of codified rules which may find appropriate application for determination of any and all cases that arise, but it is a system of principles which seek to attain a just result in every instance. Fundamental to the entire doctrine which awards compensation for negligent injuries is the principle which inhibits the recovery from one person for an injury inflicted upon another by his own fault. That is to say, it is the policy of the law to forbid a recovery by the plaintiff if it appears that his own fault either induced or contributed to the hurt. Now, in keeping with this principle there seems to be a distinct doctrine of the law touching the matter of assumed risk which denies a recovery to a plaintiff injured through the use of a defective, simple appliance, in the performance of a simple task, if it appears he knew of the defect, and might have avoided the injury by pursuing another mode of operation, almost, if not quite, as convenient and practical. In such cases the principle which precludes a recovery on the theory of assumed risk is especially appropriate, for the reason the danger involved seldom, if ever, resides in either the appliance to be used or the work to be performed, but inheres rather in the mode and manner the appliance is used instead. No one can doubt that in almost every case common labor may be performed in a simple manner with safety, through the use of a simple appliance, even though defective, if only slight discretion is exercised on the part of the person performing the task. Then, too, it is to be remembered that when an appliance may be used in either a safe or a dangerous way, and the servant chooses the unsafe instead of the safe way to proceed, it is the servant, and not the master, who, through the voluntary action of his own senses, directs the movement resulting in his hurt.

We believe these suggestions to be pecu-

larly pertinent to the use of a simple tool for a simple purpose. It is obvious where the use of a simple appliance in the performance of commonplace labor is involved, and an injury results, that the circumstances will seldom present a case where a recovery should be denied as a matter of law on the score of contributory negligence, for to deny a recovery on this ground involves the idea that the danger must be imminent and threatening. Such dangers, as a rule, do not inhere in such simple appliances and commonplace labor, and, therefore, if the doctrine of contributory negligence alone were to be reckoned with, recoveries would frequently be allowed, violative of the principle prescribing such, when the loss accrues through the fault of the injured party. And then, too, not infrequently injuries occur through the use of defective, simple appliances in the performance of simple labor, which are, in fact, induced by the act of the servant in using the defective appliance, with full knowledge of the defect, in an unsafe manner, when he might have chosen the safe course instead, and the circumstances are such as to preclude the idea that the risk is one ordinarily incident to the employment. A recovery in instances of this character may not be precluded by the general rule as to assumed risk, which obtains in Missouri, if we are to accept the full meaning of broad language used in opinions as the rule, for the reason, as thus formulated, the rule seems to be inadequate to meet the ends of precise justice in every case. It is certain that to allow a recovery in such cases is violative of the fundamental principle heretofore referred to, which, like the polar star, points the true course for awarding or denying compensation under the law of negligent torts.

In keeping with this thought, the Supreme Court denied the right of recovery in *Steinhauser v. Spraul*, 127 Mo. 541, 23 S. W. 620, 30 S. W. 102, 27 L. R. A. 441, and predicated its action in that regard on the proposition that the plaintiff had assumed the risk. In that case the negligence relied upon for a recovery was that the defendant had furnished the plaintiff a defective ladder for the purpose of ascending into the loft of a barn to catch some pigeons to be used at table. The ladder was otherwise reasonably safe, except it was too long for the purpose intended, and the defect complained of was its unusual length. It is conceded throughout the case that the ladder was defective for the purpose furnished, but it is said that it was a simple appliance furnished for a very simple use; and, it appearing that the plaintiff knew and understood the defect, and that the injury resulted from the manner in which plaintiff used it, she must be regarded as having taken the risk incident to such use. In that case Judge Barclay said: "The only danger to plaintiff arose from the mode and manner of its use; and the mode and manner of using it, on the occasion in question, were

within plaintiff's own control. She had used it with safety before, and, undoubtedly, knew as much about its use for such purposes as did the defendant. In my opinion plaintiff cannot recover for an injury arising from the manner in which she saw fit to place the ladder in executing the order of defendant to get the pigeons."

In *Holloran v. Union Iron & Foundry Co.*, 133 Mo. 470, 35 S. W. 200, the plaintiff was injured by falling from the second story of the building while engaged in assisting his co-employees in moving an upright derrick on loose planks laid for that purpose across the uncovered iron girders of the floor. The plaintiff's complaint was that the defendant had not furnished enough planks for the purpose. Among other things, the court said, substantially, the appliances to move the derrick and the work being performed were simple and well understood by the plaintiff; he knew better than any one else whether he could handle himself safely in the position he assumed to aid in the work. And as he slipped and fell while aiding in the performance of such commonplace work, with such simple appliances, he must be regarded as having taken the risk incident thereto. To the same effect, see *Lucey v. Hannibal Oil Co.*, 129 Mo. 32, 31 S. W. 340. In the more recent case of *Mathis v. Kansas City Stockyards Co.*, 185 Mo. 434, 84 S. W. 66, the Supreme Court in banc ruled the case in judgment on the same doctrine, and adjudged the servant to have assumed the risk incident to the use of a defective appliance employed for the purpose of a scaffold in an engine room. In that case the plaintiff was an engineer in the defendant's employ. He was furnished a simple board or plank to be laid across parts of the machinery for the purpose of rendering him a support or scaffold to stand upon while engaged in turning or adjusting the governor of the engine that regulated certain steam pumps. The board, when in position, rested upon an uneven surface, and was liable to tip or tilt, as it did. The arrangement, the board, and uneven surface together, completed the appliance which was unsafe, and plaintiff knew of the defect. Plaintiff was injured by the board tipping and precipitating his fall. The case was ruled on the doctrine that the appliance was a simple one, and used for a simple purpose. It appearing that the plaintiff had full knowledge of the defect, and that he received his injury through the manner in which he adjusted or used the appliance, he assumed the risk incident to such use.

These cases are controlling authorities. An application of the principle they announce and portray to the facts in judgment here compels us to declare that the plaintiff assumed the risk of injury under the circumstances of his hurt. The relevant facts calling for an application of the doctrine are that the clawbar furnished, although defective, was a simple appliance,

well known and understood by any one who had worked with it for 30 minutes, or, for that matter, to any one who had seen it used a single time. The labor to be performed therewith was simple and commonplace as well, even though it was being performed upon a railroad. The plaintiff knew and understood the defective condition of the clawbar, for he testified that it had slipped one or more times from under the spike head every time he had used it, which, in all, was about 10 times, immediately preceding his injury. It appears from his testimony that the only way in which it could be made to perform at all was to drive it under the spike head with a maul, as they did in every instance. It appears, too, to be uncontroverted that it was possible to raise the spikes by means of pushing down on the bar with the hands, and that it was not absolutely necessary to throw the weight of one's body across it for that purpose. In performing this simple work, with a simple tool, and with full knowledge of the defect in the bar, the plaintiff saw fit to choose the more dangerous of the two modes of operation by throwing the weight of his body across the bar, which occasioned the injury. Under these circumstances he should be ruled to have assumed the risk incident to the mode and manner thus voluntarily chosen to perform the service.

It is argued by the plaintiff that numerous judgments, appearing in our reports, indicate that liability has been affirmed frequently on account of defective simple appliances, and no reference has been made to the effect that the plaintiff assumed the risk incident thereto. This is very true, indeed, but it will be discovered on referring to those cases that, while the particular appliance involved may have been simple, the use for which it was furnished, and in which it was being employed, was one which inhered with more or less danger. This fact presents an additional element to repulse the operation of the principle which invokes the doctrine precluding a recovery as a matter of law on the ground of assumed risk unless it appears the servant adopted a particular mode to use the instrumentality, and thus occasioned the injury by his voluntary act when it could have been avoided by the exercise of discretion on his part. The element referred to is not present here. In the case now in judgment the appliance, although defective, was a simple one, the labor to be performed therewith was simple, and the danger, instead of inhering in either the appliance or the work, arose rather from the manner in which the plaintiff saw fit to use the clawbar, when by exercising discretion he might have used it in a safe way.

It is said that this court recently affirmed a liability on the use of an appliance as simple as a common rope in *Dando v. Home Tel. Co.* (Mo. App.) 120 S. W. 644. Such is very true; but to advert a moment to the facts of that case: There the rope, which is said to be

a simple appliance, was used for the purpose of suspending a scaffold to a wire cable, probably 30 feet above the ground, and the plaintiff was required to work upon the scaffold, thus suspended high in the air, while mending another cable. The rope broke, and occasioned the injury sued for. It does not appear that the plaintiff knew the rope was defective. This alone eliminates an essential element for the application of the doctrine of assumed risk. Although the appliance was simple, the use intended, and for which it was being employed, was highly dangerous, and in such circumstances, even if the plaintiff knew the rope was slightly defective, his right of recovery was certainly not precluded on the ground of assumed risk, as for a simple appliance employed in commonplace work. The use for which the rope was intended and employed was neither commonplace nor simple; it was highly dangerous. Now, we believe had this identical rope involved in the *Dando Case* been furnished to the plaintiff for the purpose of drawing a small hand sled with a sack of meal thereon, the result would have been otherwise, that is, if plaintiff knew of the defect and understood the danger. Suppose the sled had become caught or its progress impeded by an obstruction in the highway, and the plaintiff had thrown his whole weight upon the rope to the end of dislodging the same, and thus received an injury, we apprehend it would have been declared that he assumed the risk incident to such a mode of performance voluntarily chosen by him.

*Reeder v. Crystal Carbonate Lime Co.*, 129 Mo. App. 107, 107 S. W. 1016, is pointed out by the plaintiff also as a case wherein this court recently affirmed a liability on the use of an appliance so simple as a rope. Upon examining the facts of that case, it appears an immense gin pole, 28 inches at the butt and 40 feet in length, was being erected by means of a certain block and tackle. A defective rope was used for the purpose of making this huge pole fast; as the lift increased, the defective rope separated, and the plaintiff was injured as a result of the falling of the gin pole. These facts certainly present no question of simple appliance employed in a simple or commonplace work, but, instead, present a situation which inhered with extraordinary danger. This element of danger arising from the circumstances and complications mentioned certainly removed the case from the influence of the doctrine of assumed risk, which obtains in respect to simple appliances being used for a single purpose by a servant who is entirely familiar with the defects.

Then, too, the case of *Denker v. Wolff Mill Co.*, 135 Mo. App. 340, 115 S. W. 1035, relied upon by the plaintiff, is distinguishable in that the use of the rope furnished was pregnant with a high degree of peril, and that it did not appear plaintiff was aware of the defect. The plaintiff was engaged in painting

an iron smokestack of a mill. For the purpose of suspending himself high above the earth, while performing the task, the employer furnished him with a defective rope, to be made fast to the top of the smokestack. Because of the defect in the rope, it separated, and plaintiff was injured through being precipitated to the roof of the engine house below. The rope separated from a latent defect in the inside strands, which the evidence conduced to show might have been detected by the exercise of ordinary care to that end on the part of the master. It appeared, too, as said in the opinion, "the weakness of the rope was not obvious and discernible in a casual inspection such as a servant might be called upon to make before he used it." It is obvious the case presented no such question as that now under consideration. Although the rope was a simple appliance, the use for which it was furnished and employed, instead of being simple in the sense of the law, was complicated and fraught with great danger. Besides the plaintiff was not aware of the defect, and it is certain that no risk is assumed unless the injured person knows of the defect. The entire doctrine rests upon the maxim "*Volenti non fit injuria*," and involves the idea of both knowledge and assent. *Lee v. St. Louis, M. & E. R. Co.*, 112 Mo. App. 372, 87 S. W. 12. Other cases relied upon by the plaintiff may be distinguished for like, or other valid, reasons. We have examined them all. Those who are interested may read for themselves. They are as follows: *Huth v. Dohle*, 76 Mo. App. 671; *Warner v. C., R. I. & P. Ry. Co.*, 62 Mo. App. 184; *Beard v. American Car Co.*, 72 Mo. App. 583.

The case of *Robbins v. Mining Co.*, 105 Mo. App. 78, 79 S. W. 480, relied upon by plaintiff, involved the use of an ordinary hammer. Plaintiff was injured while breaking stone therewith at the mine. It appears, too, that he knew of the defect in the hammer. The court held he was entitled to recover. The simple appliance doctrine was not urged upon the court as a ground of nonliability. However that may be, the doctrine was not pertinent on the facts of that case; for, although the appliance was simple, and the work being performed therewith was simple as well, and the plaintiff knew of the defect in the hammer, it appears, too, that he had complained to the superintendent because of the defective tool, and had been promised a new one. Under such circumstances the plaintiff would not be precluded from a recovery under our law until at least a reasonable time had expired. Until then the plaintiff was justified in continuing at the work with a defective hammer, and would not be adjudged to have assumed the risk while thus awaiting a reasonable time for the superintendent to fulfill his promise. *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Holloran v. Union Iron & Foundry Co.*, 133 Mo. 470, 480, 481, 35 S. W. 260; *Stephens v. H. & St. J. R. Co.*, 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336.

The same may be said of the case of *Duerst v. St. Louis Stamping Co.*, 163 Mo. 607, 63 S. W. 827. In that case the plaintiff was engaged in using a single steel hammer in pounding and bending wires used in connection with the manufacture of granite and tinware articles. In doing the work, the wire was laid upon a steel mandrel, whereon plaintiff would deliver strokes with the hammer. A sliver of steel separated from the hammer, and injured the plaintiff's eye. The case seems to be one where both the appliance employed and the work being performed were reasonably simple, although some danger essentially inhered. No question of assumed risk was presented because of a simple appliance being employed in a simple work. It appears the plaintiff knew of the defect in the hammer, and had complained thereof to his foreman, who examined the hammer, and assured him that it was sufficient for the purpose. On the following day the plaintiff was injured because of the defect mentioned. It appears, too, the plaintiff was an inexperienced man, and his employer and the foreman were experienced. These facts appearing, together with the fact that plaintiff had complained and been assured by his employer that the hammer was sufficient for the purpose, removed the case from the influence of the rule hereinbefore referred to with respect to assumed risks, for, as the court said in the opinion, "he had a right to believe that the foreman's superior knowledge of such tools gave him to know, after examining it, that although the hammer had chipped, yet it would not continue to do so, or that no danger from its use was to be apprehended." *Duerst v. St. Louis Stamping Co.*, 163 Mo. 607, 63 S. W. 827. See, also, *Sullivan v. H. & St. J. R. Co.*, 107 Mo. 66, 78, 17 S. W. 748, 28 Am. St. Rep. 388; *Stephens v. H. & St. J. R. Co.*, 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336.

There has been more or less said in this state touching the matter of simple appliances furnished by the master for a simple use, and some of the authorities seem to rest the doctrine of nonliability in such circumstances on one ground, and some on another. In this state of the law we have felt justified in treating the question at considerable length, to the end of contributing our mite toward elucidating and developing the principle, as we understand it, that it may be administered in a practical manner on such groups of facts as invoke its appropriate application.

It is thought proper, too, to point out that, notwithstanding a line of adjudication which is generally believed to have curtailed our law on assumed risk to the extent of casting upon the servant such risks only as are ordinarily incident to the employment, there still remains a parcel of the old doctrine, which is frequently, and we believe proper-

ly, applied when the appliance and the labor are simple, and the defect is known to the servant. In such circumstances, if the injury complained of results from the mode or manner in which the servant used the appliance, and might have been obviated by using it to the same end in another practical manner, the risk is still treated as one assumed, for of two modes, one reasonably safe and one unsafe, the servant appears to have voluntarily selected the one appearing unsafe, and thereby invoked the application of the doctrine portrayed in the maxim "*Volenti non fit injuria*."

The judgment should be reversed. It is so ordered.

REYNOLDS, P. J., concurs.

GOODE, J. (dissenting). I do not feel free to concur in the opinion of the court in this case. From the principles and general reasoning of the opinion, considered as abstract statements of the law, I might not dissent if the question was an open one in Missouri. However, in view of the inexperience of plaintiff in the work he was doing when hurt, and his entire ignorance according to his testimony, of what would be a good and safe clawbar, I doubt if the propositions could be justly applied to him in any event. But it seems to be settled in this state that an employé does not assume the risk of defective tools negligently furnished for his use by an employer. This has been decided in many recent cases. There might be some question about whether, even if the crowbar was defective, it was the kind of an instrument from which the defendant, in the exercise of ordinary prudence, should have anticipated mischief if an employé attempted to use it. But it seems the whole thing occurred under the eye of the foreman, and I am not sure such danger from its use would not have been anticipated by an employer of ordinary prudence so that plaintiff should be nonsuited on that ground as a matter of law. I deem the opinion in conflict with various decisions of the Supreme Court, including *Dakan v. Chase Merc. Co.*, 197 Mo. 238, 94 S. W. 944, and the cases cited in the opinion in that case on page 267 of 197 Mo., page 944 of 94 S. W., and still other opinions which are not cited. Wherefore I respectfully dissent from the conclusion of the majority, and ask that the case be certified to the Supreme Court for final determination.

#### MARSHALL v. MOORE.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

1. REPLEVIN (§ 57\*)—PETITION—SUFFICIENCY. Where, in replevin, the affidavit stated the value of the property, and that it had not been

seized under any process, execution, or attachment, the petition was sufficient, though it did not state such facts.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 207; Dec. Dig. § 57.\*]

2. PROPERTY (§ 4\*)—"REAL ESTATE."

A building is not necessarily part of the "real estate."

[Ed. Note.—For other cases, see *Property*, Cent. Dig. § 5; Dec. Dig. § 4.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 5939-5951; vol. 8, pp. 7778, 7779.]

3. APPEAL AND ERROR (§ 909\*)—PRESUMPTIONS.

In replevin for a building, it would be presumed, in support of a judgment for plaintiff, in the absence of proof, that it was personal property.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3675; Dec. Dig. § 909.\*]

Appeal from Circuit Court, Mississippi County; Henry C. Riley, Judge.

Action by W. T. Marshall against Mary H. B. Moore, as administrator of the estate of J. Handy Moore, deceased. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. R. Thompson, for appellant. Russell & Deal and Boone & Lee, for respondent.

GOODE, J. Replevin for one box warehouse, 80 feet long and 30½ feet wide, situated on the right of way of the Cairo Branch of the St. Louis, Iron Mountain & Southern Railway Company, where the same crosses section 38, township 27, range 18, in Mississippi county, Mo., at a railway station known as Hough's Station. It is alleged the warehouse was personal property, and was in the possession of respondent until November 22, 1905, when appellant's decedent, by his employes and agents, forcibly and wrongfully took possession of it, and thereafter withheld possession from respondent, to his damage in the sum of \$25. After an appeal was allowed, the original defendant, J. Handy Moore, died, and the action was revived in this court in the name of his administratrix, Mary H. B. Moore. There is no bill of exceptions, and the appeal is here on the record proper.

The point is made against the judgment that the petition does not allege the value of the property, or that it had not been seized under any process, execution, or attachment. Counsel for appellant say these averments do not appear in the petition, which is true; and, further, that no affidavit containing them was filed in support of the petition, as to which matter counsel is in error. Though the abstract of the record prepared by him does not show an affidavit and bond, the counter abstract filed by respondent does show both, and in the former the value of the property in dispute is laid at \$300, and it is averred the same had not been seized under any process, execution, or attachment against the property of respondent, but was wrongfully

detained by appellant. Stating these facts in the affidavit was sufficient. *Schaffer v. Faldwesch*, 16 Mo. 337. The court appears to have found the value above the amount stated in the affidavit, but no point has been made about this finding.

It is argued the judgment should be reversed, because the action is to recover a building, which was part of the realty. The petition avers it was personal property, and it might have been; for a building is not necessarily part of the realty. The one in question was on the right of way of the railroad company, and it ought to be presumed, in support of the judgment and in the absence of proof to the contrary, it was put there pursuant to some agreement between the owner and the railway company, which left it the personal property of respondent. *Cobbey, Replevin* (2d Ed.) § 364.

The judgment is affirmed. All concur.

#### STATE v. COWAN.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

COURTS (§ 231\*)—APPELLATE JURISDICTION—SUPREME COURT—CONSTITUTIONAL QUESTION.

Where a constitutional question is raised, it remains in the case so as to give the Supreme Court exclusive appellate jurisdiction, though it has been passed on by such court and is no longer a constitutional question in this state.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 658; Dec. Dig. § 231.\*]

Appeal from Circuit Court, Wayne County; Jas. L. Fort, Judge.

J. D. Cowan was convicted of violating the local option law, and he appeals. Cause certified to the Supreme Court.

The defendant in this case was indicted in the circuit court of Wayne county; two indictments being returned against him, the first containing one count, the second containing two counts, each indictment charging the defendant with willfully and unlawfully selling intoxicating liquor to three different parties at different dates, in violation of the local option law, which it is charged in each indictment, and in each count, has been adopted in the county of Wayne prior to the commission of the alleged offenses. The indictments were consolidated. Defendant, when arraigned, interposed a motion to quash, claiming that the local option law was in violation of the Constitution of this state and of the Constitution of the United States in various particulars set out. This was overruled; exceptions being duly saved. Defendant thereupon entered a plea of not guilty, went to trial, was convicted on two counts, his fine assessed at \$500 on each count, and judgment went against him for the fine assessed. Thereupon he filed his motion for new trial, which, among other

grounds, was founded on the alleged error of the court in overruling his motion to quash the indictment. This was overruled and exceptions duly saved. Motion in arrest of judgment was filed in due time, based upon the allegation that the indictment is insufficient in law, in that it does not charge any offense against the defendant "for the reasons set out in defendant's motion to quash heretofore filed herein." This was overruled, exception duly saved, and the case appealed to this court.

Abbington & Phillips, for appellant. J. F. Meador and O. L. Munger, for the State.

REYNOLDS, P. J. (after stating the facts as above). A full transcript of the record has been duly filed in this court, although no bond or order operating as a stay of proceedings appears in the record; leave, however, being given to file an appeal bond. There has been no compliance whatever with the rules of court or with the statute, so far as relates to filing abstracts or briefs; nor is there an assignment of or a joinder in error. This is a criminal case, and under section 2716, Rev. St. 1899 (Ann. St. 1906, p. 1595), neither an assignment of error or joinder in error is necessary, "but the court shall proceed upon the return thereof without delay and render judgment upon the record before them." In the record before us the constitutionality of what is known as the local option law, under the Constitution of this state and under that of the United States, is distinctly challenged, both by the motion to quash and by the motion for a new trial, as well as by the motion in arrest. While the constitutionality of the local option law has been passed on and that law sustained on practically all of the points here made, as far as we have looked into the record, and while it may be said of that question, as was said by the Supreme Court in the case of *Lee v. Jones*, 181 Mo. 291, loc. cit. 297, 79 S. W. 927, 103 Am. St. Rep. 596, referring to the law authorizing a verdict in civil cases on the concurrence of nine jurors, that this question concerning the local option law "is no longer a constitutional question in this state," the Supreme Court in the later case of *Meng v. St. L. & Sub. Ry. Co.*, 183 Mo. 68, 81 S. W. 907, held that, notwithstanding the decision of the Supreme Court as to the constitutionality of a law in a given case, while it was the law of that case, the former decisions "could no more eliminate the constitutional question from this case than the decision of any principle of law in one case could eliminate that question from another case." This latest decision of the Supreme Court seems to us to be controlling and to be in harmony with a long line of cases, commencing with that of *State ex rel. Campbell v. St. Louis Court of Ap-*

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

peals, 97 Mo. 276, 10 S. W. 874, down to State ex rel. Curtice v. Smith, 177 Mo. 69, 75 S. W. 625, in which latter case Judge Marshall, speaking for the court in banc, and referring to the rule of practice, announced by the Supreme Court of the United States in the case of New Orleans Water Works v. Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936, "that, when the constitutional question raised or necessarily involved has been explicitly decided in another case, it will not be regarded as properly in a subsequent case," holds (177 Mo., loc. cit. 96, 75 S. W. 625), that the practice in our Supreme Court is exactly the reverse, quoting, among other cases, State ex rel. Dugan v. Kansas City Court of Appeals, 105 Mo. 299, 16 S. W. 853, as well as several other cases to the same effect.

On the authority of these cases, which we hold to be the latest controlling decisions of the Supreme Court on the matter of which we have any knowledge, this cause is certified to the Supreme Court of the state, as a case which on the record involves the construction of the Constitution of the state of Missouri and that of the United States. All concur.

#### STATE v. COWAN.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

#### COURTS (§ 231\*)—APPELLATE JURISDICTION—CONSTITUTIONAL QUESTION.

Where no briefs are filed on an appeal, but the transcript discloses, in the motion for a new trial, an assignment of error to the overruling of a motion to quash the indictment for violating the local option law, based on the theory that the law was special and unconstitutional, it raises a constitutional question requiring transfer of appeal to Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 658; Dec. Dig. § 231.\*]

Appeal from Circuit Court, Wayne County; Jas. L. Fort, Judge.

J. D. Cowan was convicted of violating the local option law, and he appeals. Cause transferred to the Supreme Court for decision.

Abbington & Phillips, for appellant. J. F. Meador and O. L. Munger, for the State.

GOODE, J. Appellant was prosecuted on an indictment for violating the local option law charged to have been in force in Wayne county, by selling, on January 5, 1908, a pint of whisky to Mrs. C. Grandpierre; the same not being sold for wine or sacramental purposes, or, being pure alcohol, for medicinal or mechanical purposes. The trial resulted in defendant being found guilty and

fined, from which conviction he took this appeal.

No briefs have been filed, but we have read the transcript and looked into the motion for new trial for an assignment of errors. One error assigned is the overruling of the motion to quash the indictment. The motion proceeded on the theory the local option law was a special law and unconstitutional. This raises a constitutional question which was decided adversely to the appellant, and the cause will be transferred to the Supreme Court for decision, for the reason stated in State v. Cowan (case No. 11,674) 124 S. W. 586.

It is so ordered. All concur.

#### STATE v. COWAN.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

#### 1. CRIMINAL LAW (§§ 1103, 1104\*)—APPEAL WITHOUT SUPERSEDEAS—FILING TRANSCRIPT OR ABSTRACT OF RECORD.

Where an appeal is without a supersedeas, it is appellant's duty to file a full transcript or an abstract of the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2881; Dec. Dig. §§ 1103, 1104.\*]

#### 2. CRIMINAL LAW (§ 1182\*)—APPEAL—AFFIRMANCE—ERROR NOT SHOWN.

Where the only record before the court on appeal is the judgment following the verdict assessing a fine, and there is no error to be found therein, it will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3204, 3205; Dec. Dig. § 1182.\*]

Appeal from Circuit Court, Wayne County; Jas. L. Fort, Judge.

J. D. Cowan was convicted of violating the local option law, and he appeals. Affirmed.

Abbington & Phillips, for appellant. J. F. Meador and O. L. Munger, for the State.

REYNOLDS, P. J. In this case the only record before us is the judgment following the verdict of the jury, assessing a fine of \$1,200 against the defendant for selling intoxicating liquors in Wayne county on four different occasions. The certificate of the clerk sets out that after the rendition of the judgment, and on August 17, 1908, defendant filed an affidavit for appeal, and that the appeal was granted. No abstract of the record is on file. Nothing in the record before us shows that a supersedeas was asked or awarded. It is the duty of appellant, in such case, to file a full transcript of the record or an abstract thereof. State v. Caldwell et al., 21 Mo. App. 645. As he has not done so in this case, there is nothing before us but such of the record as is above recited.

Finding no error in that, the judgment of the circuit court is affirmed. All concur.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**BICK v. MAUPIN et al.**

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

**PROCESS (§ 61\*)—SERVICE OUTSIDE STATE.**

The service of process in another state on defendants residing there, in compliance with Rev. St. 1899, § 582 (Ann. St. 1906, p. 608), conferred no jurisdiction over them, where there was no averment in the petition that they were nonresidents, and no affidavit to such effect was filed.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 69; Dec. Dig. § 61.\*]

Appeal from Circuit Court, Monroe County; David H. Eby, Judge.

Action by J. J. Bick against W. A. Maupin and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

T. P. Bashaw and P. T. Barrett, for appellant. W. H. Barnes and J. H. Whitecotton, for respondents.

**GOODE, J.** This is a proceeding in equity to subject certain personal property of defendant F. M. Stalker, to the lien of a judgment for \$420 obtained against him by plaintiff in the circuit court of Monroe county April 20, 1901. The petition alleges an execution was sued out on the judgment December 2, 1901, and was levied by the sheriff on the personal property in controversy, the articles of which are not enumerated. Though the statements of the petition are vague, it charges in a way that defendant W. A. Maupin asserted a claim to a portion of the property levied on as his own, and a claim to a lien on the remainder to secure payment of the rent of a farm said Stalker occupied as tenant of Maupin, as some of the property consisted of crops grown by Stalker on the farm in the year 1901. In the petition a verified claim or notice of ownership of part of the property and of a lien on the remainder is set forth, with an averment that the notice had been served on the sheriff by Maupin, and thereupon the sheriff released the property to him. Two other defendants in the case are T. J. Buerk and Chas. T. Stalker. The petition says the rent due Maupin from Stalker had been paid by Buerk; that Maupin, Buerk, F. M. Stalker, and Chas. T. Stalker conspired and confederated to represent the rent had not been paid, and thereby prevent collection of plaintiff's judgment. It is prayed the four defendants be compelled to account for and show what money had been paid on the rent or security given therefor; that plaintiff be allowed a full accounting between defendants and himself, and for other proper relief.

Buerk and Maupin, who are residents of this state, were served personally with writs of summons; but the writs issued for Chas. T. Stalker and F. M. Stalker were returned by the sheriff of Monroe county, "Not found." The former resided in Van Buren county,

Iowa, and the latter in Coles county, Ill. So, after the non est return, process was issued to the sheriff of Coles county, Ill., commanding him to summon F. M. Stalker to appear and answer to plaintiff's cause on Monday, December 7, 1903, and the like summons was issued to the sheriff of Van Buren county, Iowa, for Chas. T. Stalker. These writs were served and returns made, verified by the affidavits of the foreign sheriffs in compliance with the statute of this state. Rev. St. 1899, § 582 (Ann. St. 1906, p. 608). The two Stalkers did not answer or appear, and plaintiff asked for a default judgment against them, which request the court refused, holding they had not been summoned, so as to confer jurisdiction over them. Plaintiff excepted to the ruling of the court, elected to stand on the service on said defendants, and refused to proceed against the defendants Maupin and Buerk. Wherefore the cause was dismissed for want of prosecution, and it was adjudged Maupin and Buerk have and recover of plaintiff their costs. From this judgment plaintiff appealed, and assigns for error that the writs of summons issued for the nonresident defendants were properly served and gave the court jurisdiction over said defendants.

This position is not well taken, because there was no averment in the petition the foreign defendants were nonresidents of this state, nor was an affidavit to that effect filed; hence process could not be issued for them. *Wright v. Hink*, 193 Mo. 130, 91 S. W. 933.

The judgment is affirmed. All concur.

**WADDELL v. CHICAGO & A. RY. CO.**

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

**1. RAILROADS (§ 484\*)—FIRES—EVIDENCE—SUFFICIENCY.**

In an action against a railroad, *held* a question for the jury whether a fire was set by one of defendant's locomotives.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 484.\*]

**2. RAILROADS (§ 464\*)—FIRES—CAUSE.**

Under Rev. St. 1899, § 1111 (Ann. St. 1906, p. 963), making a railroad liable for injuries by fire communicated by a locomotive, in an action for such injuries, plaintiff was bound to prove, not only that the damage came from one of defendant's trains, but from fire emitted from a locomotive, and not by fire which escaped in some other mode from the train.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 464.\*]

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Action by W. H. Waddell against the Chicago & Alton Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Scarritt, Scarritt & Jones, for appellant. Dempsey & McGinnis, for respondent.

GOODE, J. Plaintiff sued to recover for the loss of oats, hay in stack, a meadow of timothy and other grasses, and 50 rails, stated to have been destroyed by a fire set out by one of defendant's locomotives. A verdict and judgment were given in his favor for \$450, and defendant appealed, contending the evidence did not prove the fire was set by one of its locomotives. Stating the evidence in the phase most favorable to plaintiff, the facts shown are these: The fire broke out about noon of a day in October, or was discovered at that time. Defendant's railroad runs through plaintiff's farm, and some time from 20 minutes to half an hour after a freight train had passed plaintiff detected the fire. He said he knew it was before 12 o'clock, for he was eating an early dinner, was between half past 11 and a quarter to 12. He had been hauling posts, and while doing so saw a train going west just after 11 o'clock; could not state the time definitely; did not notice how many cars the train had or what kind of an engine; did not pay much attention to it; had a meadow in timothy, clover, red top, and blue grass. The wind was blowing from the northeast, which would carry the fire toward the southwest where the meadow burned. The weather was dry. Defendant's right of way had been mowed, but not raked, and there was dry grass over it. The fire started on the right of way and burned into plaintiff's fields. He could see where it started, where it caught on the right of way, thence burning into the fields and toward the south, caught on the right of way 20 feet from the railway track, burned 10 acres of the previous summer's grass, and then ran into a meadow where it burned 20 acres, and in so doing burned 3 stacks of hay and 10 tons of oats which had been ricked up in the field. Dead grass and weeds were still on the right of way where the fire started. The wind blew the fire out into the fields before it had burned much on the right of way. Another witness testified to seeing a freight train going east between 11 and 12 o'clock, and probably a half hour later he saw the fire burning "right along close to the fence at the right of way," and plaintiff's rick was burning. This witness said there was fire on the right of way and burning back toward it, but was not as much as in the meadow where there was high grass. The right of way had been mowed and the trash was on the ground, not having been raked off; could not tell what kind of a train he saw going east, as witness was three-fourths of a mile from it; was a freight train. This was between half-past 11 and 12 o'clock. Such, in substance, is the evidence regarding the source of the fire.

To our minds the evidence is quite persuasive that the fire was ignited from a spark or ember emitted from one of the locomotives which passed a short time before the

fire was seen. This was the probable origin of it, considering all the facts in proof, and probability is the most that can be established either by direct or circumstantial evidence. The direct testimony of witnesses is affected as to cogency by their liability to err intentionally or unintentionally, though, of course, that species of evidence is usually more satisfactory than circumstantial. The question is whether the probability raised by the evidence was of the degree of cogency which sufficed to send the case to the jury, and we think it was, both on principle and the weight of authority. In other cases we have reasoned about this question and reviewed many decisions touching it, which we will not examine again. *Gibbs v. Railroad*, 104 Mo. App. 276, 78 S. W. 835; *Big River Lead Co. v. Railroad*, 123 Mo. App. 394; 101 S. W. 636; *Manning v. Railroad*, 119 S. W. 464. At present we shall only refer to cases, the facts of which are enough like the facts before us, to make them authority on the question of whether the court should have directed a verdict for defendant or have left to the jury the issue of whether one of defendant's locomotives kindled the fire. If our opinion was opposed to this ruling, as it is not, we would feel controlled by the decision of the Supreme Court in *Redmond v. Railroad*, 76 Mo. 550, wherein the proof of the origin of the fire was like what we have here. The Supreme Court recited the evidence on the subject as given by two men who were a quarter of a mile from the place where the fire started, saw a train pass, and about 15 minutes afterwards observed the fire when it was 15 yards west of the right of way. The wind was blowing from the east, and the fire was then burning on the right of way. They saw no fire before the train passed. There was none on the east side of the railroad. The right of way was filled with very dry grass and weeds. The fire originated on the right of way, and the field where the damage was done lay in the direction from it the wind was blowing. On those facts, which do not differ from those in the present case, except that the fire was observed 15 minutes after the train passed instead of twenty or more, the Supreme Court declined to hold there was no evidence to prove the conflagration was started by the railroad company's engine. The difference in length of the intervals of time which elapsed between the passing of the trains and the detection of the fires does not suffice to take this case out of the authority of that one. The fire which damaged plaintiff's property must have been burning some moments at least before it was seen; for it already had burned over a portion of the right of way and had extended into the meadow. Other cases with like facts are *Fields v. Railroad*, 113 Mo. App. 642, 88 S. W. 134; *Sappington v. Railroad*, 14 Mo. App. 86; and *Holland v. Railroad*, 13 Mo. App. 585.

The latter case is not reported in full, but we have examined the record and find the decision was given on proof like that now presented.

Cases slightly different from the one at bar in their facts, but much resembling it, are *Kenney v. Railroad*, 70 Mo. 243; *Id.*, 252; *Wright v. Railroad*, 107 Mo. App. 209, 80 S. W. 927. No decision has been given by this court or the Supreme Court to our knowledge which favors the proposition that a verdict for defendant should have been directed, but perhaps two decisions of the Kansas City Court of Appeals do. *Peck v. Railroad*, 31 Mo. App. 123; *Peffer v. Railroad*, 98 Mo. App. 291, 71 S. W. 1073. If those cases are opposed to our view of the proper disposition of this one, they must yield as authority to the *Redmond Case*, which has not been overruled; and, indeed, we think the spirit of it pervades the recent well-considered opinion in *Root v. Railroad*, 195 Mo. 348, 92 S. W. 621, 6 L. R. A. (N. S.) 212. In *Smith v. Railroad*, L. R. 6 C. P. 14, the facts were about the same as here, and were held to be for the jury; and said case is instructive, not only on the point we have discussed, but on another one. Plaintiff was bound to prove, not only that the damage came from one of defendant's trains, but from fire emitted from a locomotive, and not by fire which escaped in some other mode from the train. *Rev. St. 1899, § 1111 (Ann. St. 1906, p. 963)*. In the English case it was suggested the fire, which started in heaps of grass piled on the right of way and extended thence to a cottage and burnt it, might have been ignited by a match dropped from a car window or a coal from a pipe smoked by some one on a passing train, or in some other manner than by a spark or coal from a locomotive. The court said that, though doubt existed as to the proper answer to those questions, there was ample evidence for the jury which rightly would have been left to them, tending to prove the fire was ignited from sparks from an engine. In *Railroad Co. v. Perry*, 65 Kan. 792, 70 Pac. 876, it was held upon review of the authorities a jury might find a damaging fire was caused by the operation of a railroad, if, soon after the passing of an engine, it started near the track in an inclosed field which was covered with a growth of highly inflammable vegetation, and traveled before a high wind in the direction away from the track, though it was not proved the engine emitted sparks or cinders, or was put to special exertion, "and without further proof excluding other possible origins." This doctrine was reiterated in *Railroad v. Blaker*, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81.

Counsel for defendant insist we will be advancing a step further than any appellate court of this state has gone if we sustain the verdict in the present case. With this warning before us, we have read the relevant de-

cisions, and are convinced they justify the submission of the case to the jury.

The judgment is affirmed. All concur.

# ROBINSON & CO. v. LIGON.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

## 1. EVIDENCE (§ 441\*)—WRITTEN CONTRACT—PRIOR NEGOTIATIONS—MERGER.

Where no fraud was charged in connection with the obtaining or execution of written orders of purchase, all previous understandings or arrangements between the parties or their agents were merged in the contracts.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1719-1845, 2030-2047; Dec. Dig. § 441.\*]

## 2. SALES (§ 87\*)—CONTRACT—CONSTRUCTION—EVIDENCE—ADMISSIBILITY.

In replevin for machinery sold under written orders of purchase, a catalogue describing the machinery was properly admitted in evidence as part of the sale contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 240; Dec. Dig. § 87.\*]

## 3. EVIDENCE (§ 400\*)—PAROL EVIDENCE—ADMISSIBILITY—SALE CONTRACT.

In replevin for machinery sold under written orders of purchase, parol evidence as to representations or warranties or other matters outside the sale order was inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1778-1793; Dec. Dig. § 400.\*]

## 4. SALES (§ 288\*)—DEFECTS IN GOODS SOLD—WARRANTIES—OBJECTIONS.

In replevin to recover machinery sold under written orders of purchase, where defendant pleaded that defects in the machinery had been fraudulently concealed, and that he did not discover them until long after the time specified in the contract for making reclamation on account thereof, an objection that defendant was concluded by the express warranty in the contract, and that he could not avail himself of the breach of it until he had complied with it on his part, was properly overruled.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 288.\*]

Appeal from Circuit Court, Lewis County; Chas. D. Stewart, Judge.

Replevin by Robinson & Co. against Daniel Ligon. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

This is an action in replevin to recover the possession of certain farm machinery, consisting of a traction engine, wind stacker, and sawmill and appliances. The writ being issued, defendant executed a retaining bond and kept possession of the property. In the answer upon which the case was tried, which was the third amended answer, after a general denial of the right of possession of the property in plaintiff or of plaintiff's right to recover, this answer sets up as a second defense that plaintiff is a corporation organized under the laws of the state of Indiana and not authorized to do business in the state of Missouri. This was abandoned at the trial. As a third defense it is averred that the plaintiff company is a member of a pool,

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

trust, and combination in violation of the laws of this state against formation of pools, trusts, and combinations. This was not sustained and was taken from the jury by an instruction of the court. As the fourth and substantial defense on the merits, the answer sets up that defendant purchased a complete threshing outfit for which he was to pay \$2,042.50, the payments evidenced by notes of various dates and amounts; that he gave the notes before the property was shipped to him and before he was in possession of it; that he bought the sawmill of plaintiff "complete as described in catalogue, and was to pay plaintiff \$465 therefor," and for which payments he gave notes of various amounts payable at different dates, and that, at the time of the sale of the threshing outfit, "plaintiff, by its agents, falsely and fraudulently represented to defendant that said machinery was new and complete; that it was up-to-date machinery with all of plaintiff's latest improvements; that same was free from flaws and defects of every kind, and that it was one complete threshing outfit; that in truth and fact it was not of the make or pattern, and did not have the improvements of the machinery represented to him by plaintiff's agents," setting out the various alleged defects and variances, and that parts of the machinery were second-hand, worn machinery, and the worn-out parts replaced by parts that did not fit; that the notes were given in reliance upon the representations of plaintiff and its agents, and defendant not being acquainted with the mechanism, and its defects being latent and hidden and of a nature and character known to plaintiff and its agent, but not to be seen and known by an inexperienced person like defendant, and that defendant did not discover the defects until some time after its delivery to him. Practically the same averments as to defects in the sawmill are also set up, and it is claimed that the machinery was not worth to exceed \$375, and it is averred that, in ignorance of the defects, defendant has taken up notes given on the machinery to the amount of \$1,142.50 and paid interest to the amount of \$41.25, and that the consideration of the notes has fallen in the sum of \$1,532.52, and that defendant is damaged by the false and fraudulent representations made to him and by excessive payments made in the sum of \$172.50, and he asks that the notes be declared satisfied and that defendant have judgment against plaintiff for the sum of \$172.50 and costs.

The reply, after a general denial of the new matter, and attacking as unconstitutional the law of Missouri requiring plaintiff as a foreign corporation to take out a license to do business in this state, and denying that plaintiff is in an unlawful pool or trust, sets up, as to the fourth defense, a specific denial of defects set up, and avers the purchase of all of the machinery under contracts signed by both parties, by which contracts it was

specifically provided that no agent or any person representing plaintiff had any power to alter the terms of the contract. It is also set up that the notes were secured by a chattel mortgage on the machinery. It denies specifically that the sawmill sold was represented or warranted by plaintiff to defendant as alleged, and sets up that it was purchased under a written contract which it pleads. It is not necessary in the view we take of the case to set up the pleadings any further.

When the case was called for trial, plaintiff demanded that it be tried by the court as a case in equity as to the fourth defense of the answer, and that the issue of that defense be tried separately from the issues presented by the other three defenses. This was overruled, and the case tried before the court and a jury. At the trial plaintiff on its part introduced in evidence what are called "orders for machinery," signed by defendant and accepted and approved by plaintiff, covering the machinery in dispute. While defendant was under examination as a witness in his own behalf, he was asked if he had seen or read what purported to be an order of contract for the goods he had purchased from Robinson & Co., and asked whether or not that writing contained all the terms of the contract that he made. This was objected to on the ground that it was not pleaded in the answer that there was any change or alteration made in the contract since defendant had executed it, and no charge that any fraud or deceit was practiced on him in the execution of the instrument; that the contract is plain and simple, and it cannot be contradicted by parol evidence, and, further, that the statute of frauds required a contract of this kind to be in writing, and it could not be varied by oral testimony. This objection was overruled by the court, plaintiff duly excepting, and defendant was permitted to testify as to what the contents of the contract were. Further objection was made to the defendant testifying on this line in attempting to vary or explain the contract, on the ground that the contract shows upon its face that it was made in the state of Indiana; that it shows upon its face that the goods were sold by an express warranty contained in the contract, and that the warranties contained in the contract were the only warranties on the machinery described therein, which is the machinery in controversy; that said warranty was a conditional warranty of which defendant could not avail himself until he had complied with it on his part, with what said warranty required him to do in case he claimed a breach of said warranty. This objection was overruled, plaintiff duly excepting.

The defendant then offered in evidence a catalogue which was objected to on the grounds above stated, the objection overruled and the catalogue admitted in evidence. Defendant then in course of his testimony stat-

ed that his understanding was that he was to get new goods, of 1903 make, and testified as to what the size of the separator was to be, and testified that he had used the catalogue when he was making the contract and had been governed by that, and he also testified that the goods he was buying or contracted for were selected as represented in the catalogue and that this was all talked over before he signed the contract. Objection was then made to all this line of testimony because the contract itself, being a written instrument, is the best evidence of what was agreed upon and the only evidence. This objection was overruled, and plaintiff duly accepted.

The jury returned a verdict that at the institution of the suit defendant was entitled to the possession of the property described in the petition, and judgment followed, together with a judgment for costs in favor of the defendant. Motion for new trial was duly filed, overruled, exception saved and appeal perfected to this court by the plaintiff.

B. W. Ray and O. C. Clay, for appellant. Jerry M. Jeffries, for respondent.

REYNOLDS, P. J. (after stating the facts as above). As the case will have to be remanded, it is unnecessary to pass on the action of the court in overruling plaintiff's motion to try the issues involved in the fourth count of the answer—that is, the issue as to the consideration of the notes having failed and which demanded a surrender and cancellation of the notes—as this point can easily be done away with and the objection obviated by the defendant striking out from its third amended answer the claim for affirmative relief involved in the cancellation of the notes which is all that it is claimed puts the case on the equity side of the court. If the defendant desires to so amend its third amended answer by doing this, the court should allow it to be done. To avoid any question as to the right to so amend, we refer to what we have held in *B. Roth Tool Co. v. Champ Spring Co.*, 122 Mo. App. 603, 99 S. W. 827, same case 123 S. W. 513. Of course if the defendant insists on a demand for a cancellation of mortgages and notes, which can only be done in equity, the cause should, as to this fourth count, be tried as in equity and not at law.

The only errors necessary to be noted in reversing the judgment in the case are those to which attention has been directed in the statement of the case, namely, in allowing the defendant to testify as to his understanding in connection with the purchase of the machinery. It was purchased beyond question under the two orders referred to, and as there is no fraud whatever charged in connection with the obtaining or execution of these contracts or orders of purchase in the first place, all previous understandings or ar-

rangements between defendant and plaintiff or any of its agents are merged in the contracts. The sole question for determination in this case is whether or not the articles purchased are of the kind and quality as set up in the contracts or orders of purchase, the failure of consideration for the notes, if any, and whatever defenses the defendant may have in the case must be founded upon failure of the plaintiff to carry out and perform these contracts. As part of the sale contract, the catalogue was properly in evidence, but any parol evidence as to the representations or warranties is inadmissible. All the oral testimony that was admitted in an attempt to go outside of the sales orders, was improperly admitted. The objection that the defendant was concluded by the express warranty contained in the contract and that he could not avail himself of the breach of it until he had complied with it on his part, was under the pleadings properly overruled. The plea was that the defects complained of had been fraudulently concealed from defendant and that he did not discover them until long after the time specified in the contract for making reclamation on account thereof. The plaintiff was, therefore, not entitled to the instruction which it asked, practically directing a verdict for it.

Referring to the instructions, we remark that they are too voluminous and of a character tending to confuse any jury. We do not comment on them in detail, as, if the case is retried, they may not be pertinent, any further than to say, as above, that the one asked, practically directing a verdict for plaintiff, was properly refused.

We will add here that there is a mass of irrelevant matter in the so-called abstract that must not appear if the case is again brought to this court. The 30 or more pages setting out the motion to try the cause as one in equity has no place whatever in the abstract. All that was necessary to save this point could have been condensed into one page at the outside.

For the errors above set out, the judgment in the case is reversed and the cause remanded. All concur.

#### IN RE LEAR'S ESTATE. TOMPKINS et al. v. LEAR.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

#### 1. DESCENT AND DISTRIBUTION (§ 109\*)— "ADVANCEMENTS."

Under Rev. St. 1899, §§ 2913, 2914 (Ann. St. 1903, pp. 1675, 1676), providing that when any of the children of an intestate shall have received in his lifetime any property by way of advancement shall choose to come into partition, such advancement shall be brought into hotchpot, etc., the doctrine of bringing "advancements," which are money or property, given to a child by the father, or any one in loco parentis,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in anticipation of inheritance, into hotchpot applies only in cases of intestacy.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 416, 419, 420; Dec. Dig. § 109.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 218-222; vol. 8, p. 7567.]

## 2. WILLS (§ 761\*)—CONSTRUCTION—ADVANCEMENTS.

Where testator declared in his will that he had prepared a statement of accounts with each of his children up to a designated date, contained in a book marked "Book of Charges and Advancements," and that such advancements should be considered in distributing the estate, as he intended to divide his estate equally among his children, the statement of the amount of the advancements as shown in the book was conclusive on the children, and evidence of mistakes in the amounts as set forth therein was inadmissible, in the absence of evidence of payments of later dates than the dates in the book.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1968, 1969; Dec. Dig. § 761.\*]

Appeal from Circuit Court, Ralls County; David H. Eby, Judge.

In the matter of the final settlement of the estate of James W. Lear, deceased. Ella G. Tompkins and another filed objections to the settlement of George E. Lear, executor. From a judgment sustaining exceptions, the executor appeals. Reversed and remanded.

One James W. Lear died February 16, 1903, leaving a will, which it seems was executed or dated June 1, 1901, and duly admitted to probate by the probate court of Ralls county, Mo., May 19, 1903. The first item provides for payment of debts. The second item reads: "Second: Intending to divide my estate equally and justly among my five children, to-wit: George E. Lear, Bettie Lear, Mary E. Maddox, wife of Shelyv Maddox, Ella G. Tompkins, wife of Weeden C. Tompkins, and Annie S. Strode, wife of George C. Strode, I have prepared a full statement of accounts with each and all of them up to December, 1900, intending the interest at five per cent. per annum (to which rate I voluntarily reduced the interest on Jan. 1, 1895) with all proper credits, if any, shall be continued up to my death. Said account is stated in a book with a leather back marked as follows: 'James W. Lear's Book of Charges and Advancements to his several children to be considered with my last will dated June 1, 1901. [Signed] James W. Lear.' No interest is intended to be charged on the sums of \$300 respectively given to Mary E. Maddox, Ella G. Tompkins and Annie S. Strode, but only the principal sum was or is intended to be charged. But neither my son, George E. Lear, nor my daughter Bettie Lear, \* \* \* has received anything. And in each and every case wherein I have advanced for or loaned to or in any wise become bound to pay any money for any one of the respective husbands, to-wit: Shelyv Maddox, W. C. Tompkins or George C. Strode of my said daughters, Mary E., Ella

G. or Annie S., all was done because they were such husbands, and to aid them mutually for their benefit of themselves and their respective families for the time being, so that any and all such advancements, loans or securities remaining unpaid or unsettled at my death were intended to be and must be charged as furnished or supplied for the aid and benefit for the wife of the husband so owing any such amount with interest as shown in said stated account in my said book, and on final settlement of my estate they shall be charged with and shall respectively refund to my estate all amounts necessary to make each of my said five children equal in the final distribution of estate." The third item gives to George E. Lear and Bettie Lear \$300 each to correspond with similar sums given to the three married daughters on their respective marriages, and \$500 each to George and Bettie for special services rendered by them which is not to be charged against them in the division. The fourth item reads as follows: "Item Fourth: To enable Weeden C. Tompkins to buy the Henry H. Bowles farm, on which he now lives, I advanced and paid for him twenty-seven hundred dollars, one-half of the purchase money, and took from him a deed, dated March 1, 1886 (not recorded), for one-half share and interest of said farm, but afterwards on January 2, 1898, said Tompkins and I entered into a contract in writing (in duplicate) in the nature of a lease and conditional sale, which I direct and wish to be executed in good faith according to its terms, except only, that from and since January 1, 1895, I voluntarily reduced the interest to five per cent. per annum, as will appear by the stated account in my Book of Advancements at page four and following." The fifth item appointed George E. Lear executor, giving him power to make necessary deeds and conveyances. The sixth and seventh items are not set out, and it is said in the appellant's abstract that they are not necessary to the understanding of the case. The eighth item is as follows: "Item Eight: *Subject to and in accordance with the foregoing seven provisions* I wish all the rest, residue and remainder of my estate of whatever kinds or nature to be so divided among my five children already named in the second clause or provisions hereof, so that they shall be provided for and made equal, earnestly desiring and requesting that all may be done and all matters be settled in a mutual and kind spirit and feeling, of course none are expected to refund more than enough to make all the others equal, which I feel assured will be done cheerfully." (The italics are not in the will.)

The "book of advancements" referred to in the will (and as to its identity there is no controversy whatever), which is copied in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 124 S.W.—38

full, on page 4 has this heading: "Ella G., and W. C. Tompkins, her husband in apc. to James W. Lear, for advancements, subject to the terms and conditions of my last will dated ——— 1901. All prior matters are settled and omitted except only \$300, cash advanced and paid to them when they were married." Then follows a statement of items showing the balance advanced to Ella G. and W. C. Tompkins down to December 31st, amounting to \$4,620.56. Following this is an entry of date September 27, 1902, crediting by check of \$56, so that, according to this book of advancements, the total advances, after proper credits have been allowed thereon, made respondents Tompkins and wife were \$4,570.56. The book also showed advances to Mrs. Maddox and her husband to the amount of \$3,025.63, to Mrs. Strode and her husband \$2,167.95.

The executor duly qualified, and after making first annual settlement submitted his final settlement. In his first annual settlement made November 12, 1904, he charged himself with \$5,934.22, which was made up of the amount of property turned over as per inventory, \$3,098.22 and \$2,836 received of W. C. Tompkins, he taking credit for payments amounting to \$2,023.65, which included payments of the legacies to George and Bettie, \$800 each, leaving a balance on hand at that settlement of \$3,910.77. In August, 1906, he presented his final settlement to the probate court, in which he charged himself with the balance of the first settlement \$3,910.77, and with \$598.06, the amount received from Maddox and wife, a total of \$4,508.83. He asked credit for \$372.57 for probate costs and his own commission, the latter amounting to \$326.61, and asked credit for \$691.96 paid Ella and W. C. Tompkins, \$295.04 paid Annie Strode, \$1,574.65 paid Bettie Lear, and a like amount paid George Lear, making total disbursements of \$4,508.87, four cents over the amount with which he charged himself. In brief the executor collected the assets, and made final settlement and paid out the money of the estate, on the theory that the book of advancements was conclusive, under the language of the will, as to the amounts of advances and credits thereon. Respondents here, Weeden C. Tompkins and wife, filed their objections to this settlement in the probate court, which, in substance, are founded on the claim that the amount appearing in the book of charges and advancements as standing against them is not correct, and is open to attack by them, and that they are entitled to show the real amount of charges and advancements which should be allowed against them, they claiming that they had discharged all of the loans and indebtedness and advancements, except about the sum of \$2,836, which sum they aver they had paid the executor, and which amount it was claimed paid off, settled, and

discharged all the indebtedness of W. C. Tompkins to the testator.

The probate court found in favor of the objectors in the amount of \$603. The executor duly prosecuted his appeal from this to the circuit court, where upon trial before a referee \$1,250.33 was allowed in favor of the objectors. On exceptions to this made by the executor the circuit court sustained the exceptions as to \$291.33 of the amount allowed by the referee, and allowed respondents \$968.89. The referee had allowed respondent Tompkins to testify as to certain payments, loss of checks, etc., and to covering the alleged payments. On exceptions to this in the circuit court the exception was sustained, and the court ordered that the final settlement of executor be modified accordingly, and that an order of distribution be made in conformity with this finding. From this the executor has duly perfected an appeal to this court.

Reuben F. Roy, for appellant. James O. Allison and David Wallace, for respondents.

REYNOLDS, P. J. (after stating the facts as above). From the forgoing statement it will appear that the sole question involved in this case is whether or not the entries in the "book of advancements" of the account between the testator and his daughter Ella and her husband, W. C. Tompkins, are conclusive as to the amount of advancements with which they are chargeable, corrected by any credits accruing between its date, December, 1900, and the date of the death of the testator, which occurred February 16, 1903. Whether money or property passing from father to children is to be held to be a gift or an advancement has been a question of much learned discussion, and has been passed upon in many cases. No such question is here involved; the testator has very clearly settled that by his will, and has therein clearly specified into what class the moneys from time to time passing from him to his children are to fall. Nor are we to treat this case as one in which the assets and property are thrown into hotchpot. For, as said by Judge Black in *Turpin v. Turpin*, 38 Mo. 337, loc. cit. 340: "The doctrine of bringing advances into hotchpot applies only in cases of intestacy. 4 Kent, Com. (13th Ed.) p. 418; 2 Williams, Ex. (Am. notes) p. 1608. \* \* \* In this state the matter is governed by statute, and the statute only applies to children of persons dying intestate." Reference is made to sections 2166, 2167, Rev. St. 1879, now sections 2913, 2914, Rev. St. 1899 (Ann. St. 1906, pp. 1675, 1676). See, also, *In re Estate of Williams*, 62 Mo. App. 339, where a very learned and full discussion of the law of advancements, and some account of the meaning and origin of the term "hotchpot," will also be found; the adopted meaning of the term "advancement" being "money or prop-

erty given to a child by the father, or any one in loco parentis, in anticipation of inheritance." See, also, 2 Woerner, Am. Law of Administration (2d Ed.) bottom page 1322. "Hotchpot is, in English, a pudding," and "by this housewifely metaphor, our ancestors meant to inform us that the lands, both those given in frank marriage and those descending in fee simple, should be mixed and blended together, and then divided in equal portions among all the daughters." Recurring then to the main question in the case, namely, whether the statement of the amount of advancements, as made out by the testator in his book of advancements, is conclusive on these respondents, we hold that it is. In *Turpin v. Turpin*, supra, Judge Black (88 Mo., loc. cit. 341), after stating that the children of the testator are "all provided for in the will; one is by the will charged with the advancement, the others are not, though two were advanced before the date of the codicil"—says, "The will must control."

In *Ray v. Loper*, 65 Mo. 470, Judge Henry, speaking for our Supreme Court, says: "When the parent gives property to the child he may, at the time, fix upon it what value he pleases as an advancement, or he may do so in his will, or probably by a memorandum charging it against the child as an advancement." In *Nelson v. Nelson*, 90 Mo. 460, 2 S. W. 413, Judge Black, citing *Ray v. Loper*, says: "Of course, the parent can, at any time, charge the child, by will executed in accordance with the statute, with moneys as advancements." In *Ladd v. Stephens*, 147 Mo. 319, loc. cit. 333, 334, 48 S. W. 915, Judge Marshall cites and quotes approvingly *Ray v. Loper*, supra, as laying down the rule that the parent, at the time he gives property to the child by way of advancement, may fix upon it whatever value he pleases, or he may do it by will; and the court holds that value so fixed conclusive on the heir. In *re Estate of St. Vrain*, 1 Mo. App. 294, the court, citing the statute (now section 2913, Rev. St. 1899) as providing that a child, having received any of the real or personal estate of the ancestor by way of advancement, "shall take no part of the estate descended unless they bring such advancements into hotchpot with the estate descended," held that the probate court in making order of distribution properly took into consideration advances made to certain heirs who had received advances, but did not throw them into the estate for distribution, and committed no error in excluding such heirs from participation in the distribution. Affirmed in *re Estate of Elliott*, supra, and in *Turpin v. Turpin*, supra, and *Estate of Williams*, supra.

It is true that Judge Woerner, 2 Am. Law of Administration, foot page 1332, says: "So where a testator has provided that such sums as were charged to his children in his books should be deducted, it was allowed to be shown that charges so made had been re-

paid before the testator's death, or were false." The learned judge cites but two cases in support of this general declaration, namely, *In re Musselman's Estate*, 5 Watts (Pa.) 9, and *Hoak v. Hoak*, 5 Watts (Pa.) 80. We are reluctantly compelled to say that an examination of those cases does not sustain the text, if the text is to be taken as the declaration of a general rule. In the *Musselman Case* the court found that the will did not, by its own terms, make the book of advancements conclusive. It is said in the opinion, after noting this, that the testator might, doubtless, "have peremptorily directed the book, in whatever condition found at his death, to be taken for conclusive proof of the state of the accounts; but he has not done so, and we are not to intend that he meant to leave the adjustment of the shares of his offspring to the arbitrament of chance."

In *Hoak v. Hoak*, 5 Watts (Pa.) 80, loc. cit. 82, the will of the testator provided that each of his legatees should be "charged in the distribution with what I have given them, or shall have given them, at the time of my death, and with which I have charged them in my book and in my foregoing will and testament." Evidence was offered tending to show that the sums charged in the book had not been actually given, paid, or advanced by the testator to them, but that a much smaller sum had been given them. This evidence was objected to on the ground of its being irrelevant, because the charges in the testator's book were conclusive. The trial court sustained the objection, but the Supreme Court held that the objection was well taken. Calling attention to the language of the will, the court says: "Now it is abundantly clear from this clause that the testator never thought of charging his children, whom he had made his legatees, with what he had never given to them, but intended merely to charge them, severally, with that which he had given, or thereafter should actually advance and give to each. It is also manifest that he directed this to be done for the purpose of making them equal participants in his estate, by taking into the account as well what he had given them in his lifetime as what he should leave them at his death. It must be observed that he does not direct that they shall be charged with what he had given or charged in his book, which possibly might have afforded some pretense for making the charge sufficient without the gift; but he has directed that each shall be charged with what he had given to him, or should thereafter give, and charge in his book, thus coupling the gift or actual advancement of the thing, with the charge, by the conjunction 'and,' and making most clearly, as it were, the former the only ground for the warrant of the latter, so that the latter cannot exist without the former."

In *Schell's Estate*, a case reported 15 Pa. Co. Ct. R. 372, also 3 Pa. Dist. R. 738, and

arising in the orphans' court of Philadelphia county, a later Pennsylvania case, and it is true, not in the Supreme Court, the court lays down the proposition that in disposing of an estate the testator is at liberty to subject his legatees to whatever terms he may in his discretion impose. Where a testator fixed by his will certain sums set forth in his account books as the amounts due him from his sons, and directed that those sums should be deducted from their respective shares of his estate, this was conclusive on the sons' claim under the will; that in disposing of his estate the testator is at liberty to subject his legatees to any terms in his own discretion. He could use the entries in his books, whether they were true or fictitious, as an arbitrary measure of his sons' share in his estate; and, in the case before the court, he did this when he made the accounts a part of his will. If the legatees did not choose to accept or be bound by the terms of the will, it was open to them to contest it; but, claiming under the will, they were bound by its provisions.

In *Re Aird's Estate*, also cited *Aird v. Quick*, 12 Ch. Div. (1879) 291, it was held that where a testator by his will gave a legacy, and by a codicil, after reciting that he had advanced to the legatee a certain sum, directed that sum to be considered as a payment on account of the legacy, it was held that the sum mentioned would be deducted from the legacy, though the advance in fact made was less than that sum. In deciding the case *Sir Edward Fry*, Justice, said that, it appearing in fact that the sum named by the testator as having been advanced to the heir had not in fact been advanced by the testator at the date of the codicil by which it was charged, and that the recital that that sum had been advanced was therefore erroneous, the question then arises, said the justice, as to whether the legatee is bound by that recital, and whether the sum named, or so much as should not have been repaid, shall be deemed to have been advanced on account of his share. "In my judgment," says the justice, "he is so bound. If he had been able to show a repayment of any sums subsequently to the date of the codicil, of course that defense would have been admissible, but it is not contended that there has been any actual repayment of any of the advance made. It appears to me that in that codicil I have a direction that £4,000, or so much of £4,000 as is not repaid, should be taken in reduction of the share. If the testator was in error in the view in which he was proceeding, it appears to me that the error is binding on those who benefit under his will." This decision has been criticised, and is said to have been overruled in *Re Taylor's Estate*, also cited as *Tomlin v. Underhay*, 22 Ch. Div. L. R. (1883) 495. It is true that in the case *In re Taylor's Estate*, the case *In re Aird's Estate* is not followed,

but it is not overruled, and examination of the two cases discloses a different state of facts, and different provisions in the will in the one case than in the other.

In the case of *In re Kelsey*, 74 L. J. (1905) Ch. Div. 701, Mr. Justice Eady, passing on the *Taylor Case* and the *Aird Case*, both of which were called to his attention, notes this difference; for he says: "I think that the cases dealing with the question raised resolved themselves into two classes, namely: One where the testator by apt words directs a legatee to bring into account a particular sum. He may recite—perhaps erroneously—that a particular sum has been advanced, and direct a legatee to bring into account the sum 'hereinbefore recited to have been advanced,' or he may by other appropriate language show an intention that the legatee shall absolutely and in any event bring into account the sum mentioned in the other part of his will. In other words, the testator directs that the legatee shall only take upon the footing that he brings a particular sum into account, and then shall only receive the balance that would be payable to him on that footing. In the other class of cases the testator recites the debt owing from the legatees—again he may recite it erroneously—and then directs that the debt, or so much as shall remain unpaid at the time of the testator's death, shall be deducted and brought into account. In the second class of case the testator really intends that there shall be brought into account the debt or balance thereof which is actually owing at the time of the testator's death." He holds that the case presented in *Re Taylor's Estate* falls under the second class above mentioned, whereas the case in judgment in *Re Aird's Estate* falls under the first, and he cites in confirmation of the distinction between the two cases, and that the decisions in each of them can stand, the opinion of Mr. Justice North in the later case of *Wood*, *In re*, 55 L. J. Ch. 720; a. c. 32 Ch. D. 517.

The Supreme Court of Ohio, in *Younce v. Flory*, 77 Ohio St. 71, 83 N. E. 305, speaking of a suit somewhat similar in character to the present proceeding, and in which it was endeavored, in considering advances, to establish them without regard to the provisions of the will, says in substance: "The effort of the respondents is for the reformation of the will because of an alleged mistake affecting the provisions in the will charging respondents with advances according to the advance book kept by the decedent. By the clear terms of the will the amount of these advances is distinctly set out as the amount to be charged to his several children on their shares in the estate; and to change the amount from that designated in the will into another one is, in effect, to overturn or set aside the will itself, which it is unnecessary to say cannot be done in a proceeding such as this. The will has been duly probated, and

must be executed exactly in accordance with its terms, and this provision as to advancements is no more entitled to correction than any other clause in the will itself, for it is a well-settled principle that equity cannot reform a will."

Redfield on the Law of Wills (2d Ed.) vol. 8, top of page 49, says: "The question of the power of courts of equity to reform wills came under consideration in the case of *Box v. Barrett*, where the testator distributed his property unequally among his daughters, upon the declared ground of equalizing their portions, reciting that two of them would become entitled to settled estates, upon the testator's decease, when, in fact, they were all equally entitled under the settlement. Lord Romilly held that no case of election arose, because the will did not profess to affect the settled estates, and, upon the question of reforming the instrument, said, 'Because the testator has made a mistake, you cannot afterwards remodel the will, and make it that which you suppose he intended, and as he would have drawn it if he had known the incorrectness of his supposition.' It is no sufficient ground to refuse the probate of the will that error in matter of fact has been committed by the testator, unless it be of a character to defeat his testamentary intentions."

In *Vitt v. Clark*, 66 Mo. App. 214, this court has laid down as an elementary proposition that a testator's will speaks as of the date of his decease. If between the date of the will and date of decease conditions have changed, it must be presumed that these changes were in the testator's mind when he died; and, in view of the fact that he made no changes in the will, the meaning of terms used therein must be interpreted in the light of conditions existing at the later date.

Whether the amount appearing on the books of advancements and charges of this testator was correct or not, we consider that the rules which shall govern in this case are those which apply where the testator had made a definite disposition of his estate, charging his children with definite amounts, as by way of advancements. In effect it is to say, even if these amounts are not the correct amounts actually advanced, that in the disposition of his estate this daughter and her husband are to be held to have had that much advanced to them. It was within the power of the testator to do that. If it is incorrect in amount, the court has no power to correct it, and treat the will as in force. The amount of the advances to these two respondents, his daughter and her husband, while not stated in the will, is stated so completely and definitely, and with such certainty by reference to his account, or "book of advancements," that it is easy to make it certain, and that amount with which the testator has charged respondents is \$4,570.56, and

he directs his estate to be distributed on the theory or assumed fact that these respondents should be charged with that amount, and, that and the named advances to other children being brought in, that the estate be divided equally between all of his children. If this one account is to be opened up and the book of advancements discredited as to respondents, why not also as to all the other children? To do this as to any one or as to all does away with the provisions made by the will itself, and practically causes the testator to become intestate. In the view that we take of the case we do not think that parol evidence was admissible, any evidence for that matter, to show mistake in the amount as set out in the book of advancements, there being no sufficient evidence of payments of later date than the dates in the book of account, any more than evidence would be admissible to show a mistake in any other portion of the will itself. We have been invited by counsel to read the whole record, and have done so. From that reading we can come to no other conclusion than that the testimony offered and admitted to surcharge the account of advancements, as that account is made out by the testator himself, evidently a very careful, intelligent, and competent man, wholly fails to do so. We cannot say that it even tends to do that. As we understand, the final settlement of the executor is drawn up in entire accord and with the provisions of the will, and it should be approved.

The order of the probate court and the judgment of the circuit court in sustaining the objections to the final settlement of the executor were erroneous, and this case is reversed and remanded, with directions to the honorable circuit court of Ralls county to enter up judgment overruling the objections to the final settlement and approving it. All concur.

#### PRYOR et al. v. CRUM.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

#### 1. WORK AND LABOR (§ 30\*)—ACTION FOR LABOR PERFORMED—INSTRUCTIONS.

In an action to recover for different items of labor performed upon defendant's farm, an instruction that if the jury found that the plaintiffs rendered the service sued for or any part of it, at defendant's request, then "the law presumes such service so requested by defendant is to be paid for, and the law implies a promise on the part of defendant to pay for the same," and, unless they found that plaintiffs agreed not to charge for such service, they were to find for plaintiffs for each item of service so rendered unless they further believed that such items were included in a final settlement between the parties, was not erroneous because of the use of the quoted portion, but was a correct statement of the law.

[Ed. Note.—For other cases, see *Work and Labor*, Dec. Dig. § 30.\*]

## 2. APPEAL AND ERROR (§ 1005\*)—FINDINGS OF JURY—CONCLUSIVENESS.

Where the instructions as a whole properly presented the issues to the jury, and there was evidence sustaining the theories of the respective parties, the weight to be given to the testimony and the right to draw proper conclusions therefrom were solely for the jury, and their finding, confirmed by the trial court, is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948-3954; Dec. Dig. § 1005.\*]

## 3. APPEAL AND ERROR (§ 173\*)—REVIEW—DEFENSES NOT PLEADED.

Where a defense was not pleaded in the answer or otherwise, it cannot be noticed upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1079; Dec. Dig. § 173.\*]

## 4. PLEADING (§ 426\*)—ELECTION BETWEEN CAUSES OF ACTION—MOTION TO COMPEL—ABANDONMENT.

Where a defendant, after his motion to require plaintiffs to elect had been overruled, answered over and went to trial on the merits, his action amounted to an abandonment of the motion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1425-1427; Dec. Dig. § 426.\*]

Appeal from Circuit Court, Audrain County; Jas. D. Barnett, Judge.

Action by William Pryor and another against Mathias Crum. Judgment for plaintiffs, and defendant appeals. Affirmed.

By petition filed in this case in the circuit court of Audrain county plaintiffs aver that in the years 1906 and 1907 they were engaged as partners in farming and doing certain work on two farms rented from defendant; the renting or leasing for 1906 being in the name of William alone, that for 1907 in the names of both. The work on the leased premises in both years, however, is alleged to have been done by the two brothers as equal partners. Attached to the petition is the account which is for ordinary work on a farm, such as plowing, harrowing, setting out trees, sowing seed, hauling lumber, rock, sand, and posts, rebuilding sheds and barn, etc. The amount of labor claimed to have been done in 1906 is set out to be worth \$82.75, that done in 1907 \$64.83, making a total of \$147.58.

The amended answer on which the case was tried was duly verified, and denied the partnership, denied that the work done in 1906 was done by plaintiffs as partners, and states that, if there was anything due for the work done that year, it was due to William Pryor alone. "Wherefore," says this count of the answer, "defendant states there is a misjoinder of parties plaintiff." The second defense avers the leasing of the farm to William Pryor for a term beginning March 1, 1906, and ending March 1, 1907, that as part of the consideration for the lease William Pryor agreed to do certain work, and that there was a complete settlement of all matters between William Pryor and defendant under that lease. The answer then admits

that plaintiffs were partners, engaged in farming during the year 1907, and that in February, 1907, defendant leased to the plaintiffs two farms consisting of 250 acres for a term of one year, beginning March 1, 1907, and ending March 1, 1908; that as part consideration of said lease plaintiffs agreed to prepare a small tract of land for an orchard and assist in setting out trees and to cultivate and care for and protect the same and also without charge to do all necessary hauling of lumber, posts, etc., and build all necessary inside fencing and necessary outside fencing, for which outside fencing plaintiffs were to receive 12½ cents per rod, and admits that plaintiffs during 1907 did perform labor upon the lands and did hauling thereon. Defendant avers that he has no knowledge or information sufficient whereof to form a belief as to what part of the labor performed or hauling was done under or by reason of the terms of the contract of lease made with plaintiffs for the year 1907, and has no knowledge or information as to whether plaintiffs furnished any seed oats and demands proof. Defendant then sets up four counterclaims or set-offs: First, that plaintiffs agreed to pay cash as rent for the grass land on the two farms, and to cultivate the remainder in corn and oats, for which parts so cultivated they agreed to pay as rent one-half of all the corn and two-fifths of all the oats raised during the year, and it is averred that plaintiffs failed and refused to cultivate all of said lands which were not in grass, but allowed about 8 acres thereof to remain idle and unproductive, that the reasonable value of the 8 acres for that year is \$25, for which defendant asks judgment. As a second counterclaim defendant demands judgment for the value of 13 bushels of seed grass furnished on the farm in 1907, claimed to be worth \$13. As a third counterclaim, defendant avers that plaintiffs are indebted to him in the sum of \$6 for hauling two loads of wheat, and he asks judgment for that. The fourth counterclaim charges that during the year 1907, while plaintiffs were in possession of the farm, they, without consent of defendant, tore away and removed from the premises about 40 rods of woven wire fencing which inclosed 6 acres of new meadow and exposed the meadow to their stock, which they allowed to graze thereon, to the damage of defendant in the sum of \$18, and for which he also asks judgment. The reply was a general denial. The testimony in the case was directed to these issues, and it may be said of it, without going into a recital of it, that there was ample evidence to sustain the verdict at which the jury arrived.

At the instance of plaintiffs the court gave three instructions. The first, in substance, told the jury that if they found from the evidence in the case that the plaintiffs rendered

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the service sued for, or any part of it, at the request of defendant, then the law presumes that such service so requested by defendant is to be paid for, and the law implies a promise on the part of the defendant to pay for the same, and, unless the jury find that the plaintiffs agreed not to charge for such service, then they will find for the plaintiffs for each item of service so rendered for the fair and reasonable value thereof as shown by the evidence. To which was added: "Unless you further believe from the evidence that such items were included in a final settlement made between plaintiffs and defendant." The second instruction told the jury, in substance, that, if they found from the evidence that the defendant requested the service or any part of it charged for by plaintiffs and promised to pay for the same, the jury should find for plaintiffs for each item so charged, unless they further found that such item or items were included in a final settlement made between plaintiffs and defendant. The third instruction told the jury that it was wholly immaterial in this case whether the farm was rented for the year 1906 to William Pryor alone or to him and his brother, Curtis Pryor, provided the jury found from the evidence that the services were rendered by both plaintiffs jointly with the knowledge of defendant. Defendant duly excepted to the giving of these instructions.

At the request of the defendant, the court in a lengthy instruction set out the claim of plaintiffs, as that claim is itemized in the account filed and totaling \$82.75 for work and labor, etc., in 1906, and \$64.83, for work and labor done in 1907. The instruction then tells the jury that defendant admits plaintiffs were entitled to recover for certain items in the account, amounting to \$35.58, and the jury are instructed to allow plaintiffs the sum of said items so admitted by the defendant. It then told the jury that defendant denies that he is liable to pay for the work and labor which plaintiffs alleged they performed in the year 1906, and that defendant pleads that, under the rental agreement between them, the plaintiffs agreed to perform such labor as a part of the rent which they were to pay for the use of the barn on one of the farms, and, if the jury believed from the evidence that such was the contract and agreement between plaintiffs and defendant, they could not allow anything to plaintiffs on account of any work and labor performed during the year 1906. The instruction, taking up several items in detail, states the facts which must be found to entitle plaintiffs to recover for them, and tells the jury that in determining the case they should first ascertain the amount which they believed from the testimony under the instructions plaintiffs were entitled to recover, and it would then be their duty to take up and determine the counterclaims or offsets filed by defendant. It informs the jury that there are four

separate and distinct counterclaims or offsets and instructs the jury as to the first, second, and third counterclaims. In giving the part of the instruction relating to the fourth counterclaim, the court added to it that they might give a verdict for the value of the grass consumed by plaintiffs' stock, "provided you further believe from the evidence that said fence, in connection with other fences, completely inclosed said six-acre tract." These words last quoted were added by the court. The defendant also asked the court to instruct the jury that, as to all the items claimed for the year 1906, defendant pleads a settlement, and that, if the jury believed there had been a settlement and adjustment of those matters, plaintiffs could not recover as to the 1906 items, to which the court added: "But, before you can find that there was a settlement between plaintiffs and defendant, which would prevent a recovery on the ground of settlement alone, you must find from the evidence that both plaintiffs and defendant understood that the transaction was a full and complete settlement of all accounts and charges between them." Exception was duly saved to the modification of these two instructions. Defendant further asked an instruction to the effect that, although the jury might believe that defendant agreed to pay for the work done in 1906, yet if they believed from the evidence that some time in the early part of 1907 defendant asked the plaintiffs to allow such amount to be credited on the rent for the year 1907, and plaintiffs agreed to do so, then the jury are instructed that plaintiffs cannot recover for the work of the year 1906 in this action, to which the court added: "Unless you further believe from the evidence that afterwards defendant repudiated such agreement and denied any and all indebtedness to plaintiffs on account of such work." The abstract as to this last instruction notes that it is refused in its original form, "given as amended, permitted to be withdrawn by defendant in its amended form." The only exception to the refusal of instructions is at the end of all the instructions, and is as follows: "To which action of the court in refusing said instructions defendant then and there excepted and saved his exceptions at the time."

It appears from the abstract of the record that defendant moved the court to require plaintiffs to elect upon which count they would stand. Apparently no action was taken on this motion, at least none is preserved in the record, and no exception is saved to any action on it, if had, unless it may be said to have been preserved in the motion for new trial, where one of the grounds set up is that plaintiffs improperly united two separate, independent and distinct causes of action in one count and that the court erred in failing to make plaintiffs elect.

At the conclusion of the trial, and after the giving of the instructions, the jury returned a verdict in favor of plaintiffs for \$147.58 and

for the defendant on its first and second counterclaim in the sum of \$15.79, finding in favor of plaintiffs on the defendant's third and fourth counterclaims. Whereupon judgment was entered for plaintiffs for \$131.88, with interest and costs. Defendant in due time filed his motion for new trial, which was overruled, exceptions saved, appeal prayed for, which defendant has duly prosecuted to this court.

P. H. Culken and F. R. Jesse, for appellant.  
Robertson & Robertson, for respondents.

REYNOLDS, P. J. (after stating the facts as above). There are no points of law arising on this record requiring any very serious consideration. It is strenuously and ably argued by the very learned counsel for the defendant that the first instruction given at the instance of the plaintiff was erroneous, in that it told the jury that, if they found from the evidence in the case that plaintiffs rendered the services sued for at the request of defendant, "the law presumes such service so requested by defendant is to be paid for, and the law implies a promise on the part of the defendant to pay for the same." If this instruction had stopped at that, it might be subject to the objection made to it, but it is followed with the further statement that the jury should so find, unless the jury found that the plaintiffs agreed not to charge for the service, and, if they found that as a fact, then they should find for the plaintiffs for each item of service so rendered for the fair and reasonable value thereof as shown by the evidence, unless the jury further believed from the evidence that the items were included in the final settlement. This is a correct statement of the law and could not possibly have misled the jury, particularly so in connection with the instructions given at the instance of defendant himself, which unmistakably left it to the jury to determine whether or not the services rendered were to be paid for, or whether they were rendered on an agreement not to charge for them. Defendant's own instructions placed the case before the jury in a very fair and full manner and with unusual particularity. On examination of the whole record in the case, we can say that it rarely happens that a case involving so comparatively small an amount has been so carefully and well tried and briefed on each side. Considering the instructions as a whole the issues were fairly, fully, and clearly presented to the jury. There was evidence sustaining the theories of the respective parties. The weight to be given to the testimony and the right to draw proper conclusions therefrom were for the jury, who as to these were the sole judges, and their finding, confirmed by the learned trial judge, is conclusive on us.

It is complained in the brief of the very

able counsel for the defendant that the suit was prematurely brought, that the testimony showed that the adjustment of whatever remained over from the rent of 1906 was to be taken up in 1907 and settled for at the end of the term of the lease for 1907. It is sufficient to say of this that if a defense relied upon, it is one which should have been pleaded. It was not pleaded by the answer or otherwise and cannot now be noticed.

The point made that it was error to fail to require plaintiffs to elect is not well taken, even if we grant that proper exception was made to the action of the court in overruling the motion. The action of appellant in answering over and going to trial upon the merits of the case amounted to an abandonment of that motion. This has so often been decided by our Supreme and appellate courts that it seems hardly necessary to notice it. See for last decisions of Supreme Court *Hof v. St. Louis Transit Co.*, 213 Mo. 445, loc. cit. 486, 111 S. W. 1166, of this court, *Barrie v. United Railways Co.*, 138 Mo. App. 557, 119 S. W. 1020.

The judgment of the circuit court is affirmed. All concur.

#### LITTLE et al. v. ST. LOUIS UNION TRUST CO. et al.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

#### JUDGMENT (§ 314\*)—AMENDMENT—COSTS AND FEES.

Plaintiffs sued defendant, claiming that it held funds belonging to them. Defendant filed an answer and counterclaim in the nature of a bill of interpleader, disclaiming any interest in the fund, alleging that it was claimed by another, and asking that the claimants to the fund be interpleaded. The court rendered a decree forbidding further proceedings against defendant, and discharging it from all liability, but not dismissing it as a party, and ordering that it be allowed costs and counsel fees to be determined later. This decree was affirmed on appeal by the Supreme Court. *Held* that the trial court had power, at a term subsequent to that at which the decree of interpleader was rendered, to allow defendant its expenses and attorney's fees.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 612; Dec. Dig. § 314.\*]

Reynolds, P. J., dissenting.

Appeal from St. Louis Circuit Court; Matt G. Reynolds and Wm. M. Kinsey, Judges.

Action by William C. Little and others against the St. Louis Union Trust Company, in which the National Bank of Commerce was interpleaded. From a judgment awarding defendant costs and fees in the proceeding, the National Bank of Commerce appeals. Affirmed.

This appeal grew out of a suit instituted in 1902 in the circuit court of the city of St. Louis by plaintiffs, in behalf of themselves and other stockholders of the Kansas &

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Texas Coal Company, against the St. Louis Union Trust Company, wherein plaintiffs asserted they and other stockholders of said coal company were entitled to a fund of \$34,870 held by the St. Louis Union Trust Company. In response to the suit the latter company filed an answer and counterclaim in the nature of a bill of interpleader, disclaiming any interest in the fund, alleging it was claimed as against plaintiffs by the National Bank of Commerce of St. Louis, and asking to be permitted to deposit the money in court, and for an order compelling plaintiffs and the Bank of Commerce to interplead for the money, and that the trust company be discharged with an allowance for its costs, including a reasonable fee to its counsel. The trust company paid the fund into court, but its right to maintain a bill of interpleader and an answer in the nature of a cross-bill, to compel the rival claimants of the fund to interplead for it, was contested by the Bank of Commerce on the theory the bank's right to the fund was so evident as to exclude the case from the equitable jurisdiction of bills of interpleader. Said court held otherwise, and by a decree entered November 17, 1903, ordered and adjudged the plaintiffs and the Bank of Commerce interplead for the fund, and that said parties be restrained from maintaining or prosecuting further proceedings against the trust company; that said company be discharged from all liability to plaintiffs and all other parties to the suit in respect of the fund, and the trust company be allowed its costs, paid or incurred, to be taxed by the clerk, a reasonable fee to its counsel for answering and prosecuting its answer and cross-bill, said fee to be fixed and ordered by the court thereafter, and that said costs, including the fee, be paid by the clerk to the trust company out of the fund in the hands of the clerk. As the language of the decree is significant, we will copy it, omitting the caption and an irrelevant paragraph:

"And now at this term, upon consideration thereof, and the court being fully advised in the premises, doth find the issues joined upon the counterclaim or cross-bill in favor of the defendant St. Louis Union Trust Company. It is therefore ordered, adjudged, and decreed that the plaintiffs and all the persons and corporations heretofore by order of the court made defendants to said counterclaim or cross-bill of St. Louis Union Trust Company be and appear in this court in this cause, on or before the first Monday of February, 1904, and then and there interplead with each other severally, or in such groups or associations as they may be advised, and set forth their respective rights and claims to, upon, and in respect of, the certain fund of \$34,870, mentioned in the said counterclaim or cross-bill, and heretofore, by leave of court, deposited by St. Louis Union Trust Company with the clerk, and now in his hands.

"It is further ordered, adjudged, and decreed that St. Louis Union Trust Company be, and it is hereby, allowed its costs, paid or incurred by it herein, and to be taxed by the clerk, and also that it be, and it is hereby, allowed a reasonable fee to its counsel for making its answer and bringing and prosecuting its counterclaim or cross-bill herein. Said fee to be hereafter fixed and ordered by the court, and all said costs, including said fee, to be paid by the clerk to St. Louis Union Trust Company out of the said fund in the hands of the clerk.

"It is further ordered, adjudged and decreed that the defendant be, and it is hereby, discharged from all liability to the plaintiff, and to all the other parties to said counterclaim or cross-bill or to this suit, in respect of the said fund and of every part thereof, and in respect of the six hundred and thirty-four shares (634) shares of the capital stock of the Kansas & Texas Coal Company, standing in the name of W. P. Heath, treasurer of said Kansas & Texas Coal Company, and in respect of the certain certificate or receipt of St. Louis Union Trust Company given the said Heath, treasurer, on the 7th day of March, 1902, for said 634 shares.

"It is further ordered, adjudged, and decreed that the plaintiffs and all other parties to this suit, and each and every one of them, be and they are hereby enjoined and restrained from further prosecuting or bringing any suits or suit against the said St. Louis Union Trust Company for recovery of the said fund or in respect thereof, or upon the aforesaid certificate or receipt or in respect thereof."

An appeal was taken by the Bank of Commerce from that decree to the Supreme Court, where it came on to be heard at the April term, 1906, and was affirmed (94 S. W. 890); the mandate of the Supreme Court, omitting the title of the cause, being as follows: "Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said circuit court of the city of St. Louis rendered, be in all things affirmed, and stand in full force and effect, and that the said respondent recover against the said appellant its costs and charges herein expended, and have therefor execution." After said mandate had been sent down to the circuit court, and at the October term, 1906, the trust company filed in said court a motion for an allowance of costs and fees, averring the controversy, as far as concerned the right of the trust company to interplead therein, had been finally determined by the Supreme Court of the state, motion for rehearing denied, mandate filed with the clerk of the circuit court, and averring further the trust company had expended in cash, in the

course of the litigation, as court costs and for other items of expense, \$371.74, for which it asked reimbursement; that it had at all times been represented by counsel, who were entitled to a reasonable fee for their services, and praying an order of the court that expenses and attorney's fees in a reasonable sum be taxed as costs in the proceeding and paid out of the fund deposited with the clerk. The National Bank of Commerce contested the application of the trust company for an allowance to cover its expenses and counsel fees, on the ground the circuit court had lost jurisdiction of the proceeding by rendering a final decree at the December term, 1903, and could not therefore alter, modify, or amend said final judgment or decree so as to allow costs and attorney's fees. The application for the allowance was submitted on an agreement that if the trust company was entitled to have its costs taxed, it would be able to show it had paid out items of expense amounting to \$371.74; that the amounts of the several items were reasonable, and \$1,500 would be a reasonable fee for services rendered by its counsel in the progress of the case. This agreement as to the facts was made by the Bank of Commerce with the reservation that it should not prejudice in any manner the contention of the bank against the power of the court to allow the fees and expenses at a term subsequent to the one when final judgment had been entered. The circuit court sustained the application of the trust company, allowing it \$1,500 counsel fees and \$371.74 as its costs, all to be taxed in the proceeding, and the National Bank of Commerce appealed from the order or judgment to this court. A full statement of the facts of the main controversy, including the contention of the bank against the right of the trust company to compel an interpleading, will be found in the report of the decision by the Supreme Court. *Little v. Union Trust Co.*, 197 Mo. 281, 94 S. W. 890. Suffice to say said court held it was a proper case for interpleader, and the bank was wrong in its position. The effect of the judgment and mandate of the Supreme Court was to affirm in all things the previous judgment of the circuit court in favor of the trust company, and to leave the case standing in the latter tribunal for further proceedings between the plaintiffs and the Bank of Commerce as competitive claimants of the fund.

Edw. I. D'Arcy and Geo. L. Edwards, for appellant. Rowell & Zumbalen, Jos. S. Laurie, and Chaplin & Blayney, for respondents.

GOODE, J. (after stating the facts as above). As already said, the position of the Bank of Commerce as appellant in this branch of the case, raises only one question, whether the circuit court had power, after the term in which the judgment was given for an interpleading, to make an order for

an allowance in the trust company's favor of its reasonable expenses and attorney's fee. This question is to be determined with reference to several prominent facts. The decree for an interpleading did not, it will be observed, dismiss the trust company as a party to the proceeding, though it is the defendant, and is adjudged to be discharged from all liability to the plaintiffs and other parties to the suit in respect of the fund in controversy. It will be observed, too, the decree contained an order for the allowance to the trust company of a reasonable attorney's fee and its other costs incurred in the proceeding, and the payment of the allowance out of the fund in the hands of the clerk. And, still further, it is to be observed the decree, instead of fixing the counsel fee, expressly reserved that matter for future determination in this clause: "Said fee to be hereafter fixed and ordered by the court." The party which appealed from the decree before the amount had been fixed was not the trust company, but the Bank of Commerce.

The remedy by bill of interpleader is, as was said by the Supreme Court in the present case, a creation of the chancery courts, and, in this state of blended common-law and equity jurisdiction, it is administered upon principles of equity and, in some measure at least, according to chancery procedure. The theory of the chancery courts is that a disinterested stakeholder of a fund or property, who is threatened by rival claimants with actions regarding it, is not at fault in any way, and should be allowed to protect himself against two or more harassing litigations by filing a bill of interpleader, or a cross-bill of that kind if action is begun by one of the claimants before he files a bill. Occupying, as the stakeholder does, the position of a party who is not resisting any person's right in the property or fund, but is only endeavoring to ascertain who has the right, the chancery courts have always remunerated him for reasonable expenses and counsel fees incurred in the proceeding for an interpleading, which allowance is paid out of the fund in controversy, and ultimately adjudged against the wrongful claimant. *MacLennan, Interpleader*, p. 286, and citations. This rule of chancery is followed by the Missouri courts. *Glaser v. Priest*, 29 Mo. App. 1; *Franco v. Joy*, 56 Mo. App. 433. That it is the law is not questioned by appellant; the contention being the trust company lost the right to have expenses and counsel fees allowed in consequence of the circuit court failing to fix and ascertain the amount of them in its decree for an interpleading. Counsel for appellant cite an array of cases in support of this proposition. *State ex rel. v. Railroad*, 176 Mo. 443, 75 S. W. 636; *Berberet v. Berberet*, 136 Mo. 671, 38 S. W. 551; *Jackson v. Railroad*, 89 Mo. 104, 1 S. W. 224; *State ex rel. v. Railroad*, 78 Mo. 575; *Ladd v. Cousins*, 52 Mo.

454; Dulle v. Diemler, 28 Mo. 583; Wilson & Co. v. Stark, 47 Mo. App. 116; Bosley v. Parle, 35 Mo. App. 232; Mann v. Warner, 22 Mo. App. 577. The effect of those precedents, most or all of which were given in proceedings at law, is that, though costs which are specifically prescribed by a statute may be retaxed on a motion filed after the term in which final judgment is rendered, if said judgment included the costs, and they were not taxed, or were erroneously taxed at the term of the judgment, but if the item of costs asked to be taxed or retaxed at a subsequent term is of a nature to require judicial ascertainment, and is not arbitrarily prescribed by law, then the court has no power to tax or re-tax it at a later term, because this would be to modify the final judgment in the cause, which cannot be done at a subsequent term if no motion or other proceeding has carried the matter over.

There is another line of cases, involving matters originally of equity cognizance, which support the proposition that expenses and allowances of the kind in controversy here may be allowed at a term after final judgment, or, at any rate, after a judgment final in the sense the one before us is; for it must be remembered the proceeding was still in court, and the judgment already given, if final at all, was only so as regards the trust company and its right to invoke the remedy of interpleader. *Clark v. Hill*, 83 Mo. App. 116; *Turner v. Butler*, 66 Mo. App. 380; *Assignment of Gregg*, 74 Mo. App. 58; *State ex rel. Gray v. Loan Ass'n*, 102 Mo. App. 675, 77 S. W. 171; *Schawacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935; *Padgett v. Smith*, 207 Mo. 235, 105 S. W. 742. In several of those cases the question was adjudged of the right to tax a referee's fees, which must be fixed by the court, after the term final judgment was given in the cause; in others the question of the power to allow an attorney's fee in a partition suit or a receivership case, and only one related to allowing costs to a party who filed a bill of interpleader (*Assignment of Gregg*). Still the principle regulating the allowance in the different cases must be the same, for they all involved an order at a term after judgment for costs which were not fixed by law, but required ascertainment by the court.

The most recent decision in point is *Padgett v. Smith*, which is conceded to be against the bank's position in the present case, but said to conflict with prior decisions of the Supreme Court not expressly overruled by it. Wherefore it is argued those should be followed instead of it. From the statement and opinion we learn *Padgett* had instituted a suit against *Smith*, to establish a resulting trust in certain lands held by the latter, and for partition of the lands. The plaintiff prevailed in the trial court, where a fee was allowed his attor-

neys. The defendant appealed to the Supreme Court, and there the plaintiff's attorneys filed briefs in support of the judgment, which was affirmed. Afterwards those attorneys presented a motion to be allowed a fee for services rendered in the Supreme Court, asserting the trial court had lost jurisdiction over the cause by the defendant's appeal, and that, when the judgment was entered in said court, it could not have been foreseen an appeal would be taken, and, even if it could have been, the reasonable value of the additional fee for services in connection with the appeal could not have been estimated. On this state of facts the Supreme Court refused to order an allowance for a fee to compensate for services rendered in said court, and held the application should be made to the circuit court, which would have jurisdiction to hear evidence about the nature and extent of the services of the attorneys, and their reasonable value, and power to allow the proper amount as costs in the plaintiff's behalf. An order was entered, dismissing the application without prejudice to the right of the plaintiff to apply in the circuit court. We regard that authority as controlling the case at bar, and cannot think of disregarding it. This proceeding calls even more cogently for a like ruling because the case never has been finally determined, as even the decree for an interpleading did not dismiss the trust company from the case, and, moreover, expressly reserved the right to ascertain and fix the amount of the attorney's fee which was allowed in general terms in favor of the trust company. If we did not have the express authority of *Padgett v. Smith*, we think there could be no doubt about our duty in the premises. It is said the reservation only reserved the power to fix the fee thereafter during the term; but, as the bank appealed, the trust company would be entitled to a fee for services on the appeal, if not defeated, and these could not be estimated in advance, because the work which would be required could not be known. The appeal might be dismissed, or it might be prosecuted. The more reasonable interpretation of the decree is that it reserved power to fix the trust company's fees whenever they could be ascertained. However, under *Padgett v. Smith*, which is in accord with *Fritz v. Hobson*, 14 Ch. Div. 542, the court had power to do this without a reservation.

It is worth while to remark that, if the reservation was deemed erroneous, it could have been attacked in the Supreme Court, and a decision taken upon its meaning and effect. If that court thought the circuit court had exceeded its power, it could have reversed or modified the decree; perhaps would have ordered the circuit court to ascertain and fix the fee, as was done in *Kendall v. Marsters*, 2 De G. F. & J. 200. In the case last cited the Chancellor altered on the appeal the judgment given by the Vice

Chancellor, because it contained only permission for the parties to apply to the court as they should be advised, and it was thought this reservation would not permit an application by the plaintiff for an allowance of costs. The Chancellor took for granted that if such a reservation had been inserted in the decree, costs might have been allowed after the decree had been passed, and therefore altered the decree by inserting it. It seems to be the chancery practice in England to make orders allowing costs and expenses of different kinds, after a decree has been passed in gross, and even when the power to do so is not reserved. 2 Dan. Chy. Prac. (6 Am. Ed.) \*993 et seq.; Fritz v. Hobson, 14 Ch. Div. 542. See, too, Forgay v. Conrad, 6 How. 203, 12 L. Ed. 404. And the reservation in the decree of power to do this is regarded by said courts as not rendering the decree an interlocutory one, or preventing it from being final in the sense that an appeal may be taken from it. In Forgay v. Conrad, supra, the decree appealed from was one adjudging certain deeds fraudulent and void, and directing money to be paid over to the complainant, but directing the master to take an account of the profits of the property ordered delivered from the time of the filing of the bill until it was delivered and of money and notes received by the defendant in fraud of creditors. Notwithstanding this reservation, the decree was held to be final in the sense an appeal would lie from it, as it decided the right of the property in contest. In the present case the Supreme Court entertained the appeal, and must be taken, for the purposes of the proceeding, to have held the judgment was final in the sense that an appeal would lie from it. But if final for all purposes, according to the doctrine of Padgett v. Smith, and the rule of chancery generally, and especially in view of the reservation in the decree, the circuit court had power to tax this allowance at a subsequent term.

The judgment is affirmed.

NORTONI, J., concurs.

REYNOLDS, P. J. (dissenting). I am compelled to dissent from the conclusion arrived at in this case by my very learned Associates. As will be noticed by the very clear statement of facts by my Brother GOODE, the sole question in the case is whether the circuit court had jurisdiction, after the affirmation of its judgment by the Supreme Court, the Supreme Court neither reversing nor modifying the judgment, nor remanding the cause, to enter up any other or further orders, or assume any further jurisdiction in the case. Whatever may be said of the form of the judgment on which the appeal was taken to the Supreme Court, it must be held that it was a final judgment. It was so treated by all the parties in the case,

was accepted and acted on as such by the Supreme Court, and was affirmed by that court. That the circuit court when the cause was within its jurisdiction did not dispose of the question of costs in the case by allowing and taxing fees for the attorneys for the trust company did not render the judgment in the cause any less a final judgment. When the appeal was prayed for and granted and perfected, the circuit court lost all jurisdiction of the cause. I have always thought this elementary law in our state. The reservation in the decree of a right to tax costs thereafter, in my opinion and on an almost unbroken line of authority, was a matter beyond the power and jurisdiction of the court. City of St. Louis v. Crow, 171 Mo. 272, loc. cit. 280, 281, 71 S. W. 132. No court can in one breath dispossess itself of jurisdiction, as by allowing an appeal, and in another retain jurisdiction for any purposes. The attempt to ingraft onto our practice a rule which in effect is to say "once in court, always in court," is to my mind contrary to the spirit of our age and the practice of the courts.

I think that the opinions of our Supreme Court in St. Louis v. Crow, 171 Mo. 272, 71 S. W. 132, and State ex rel. O'Briant v. K. & W. Ry. Co., 176 Mo. 443, 75 S. W. 636, are controlling, and settle the propositions here put forward. It is true that in the case of Padgett v. Smith, 207 Mo. 235, 105 S. W. 742, the Supreme Court, in an opinion per curiam, held that the circuit court that tried the cause had jurisdiction to hear evidence as to the nature and extent of the services and their reasonable value, and to make a proper allowance therefor, to be taxed as costs after its judgment had been affirmed by the Supreme Court; but I find nothing in this later case to show that the question was presented to the court and adjudicated by it as to whether or not jurisdiction still remained in the circuit court. It does not appear that counsel were heard, or that there was any opposition to the motion, or that the prior adjudications of the court on the matter were in any way called to the attention of the court; and, while it is true the Padgett Case is the last decision of the Supreme Court on the subject, I cannot think that it is the controlling one. M., K. & T. Ry. Co. v. Smith, 154 Mo. 300, 55 S. W. 470. On the contrary, I think that the last controlling decision where the matter was directly before the court is State ex rel. v. K. & W. Ry. Co., 176 Mo. 443, 75 S. W. 636. I do not wish to be understood as holding that a decision of the court, rendered in a matter in which counsel has not been heard, is not binding and authoritative. What I do mean is that it lends some color to the claim that the court itself did not have in mind, and so did not intend to overrule, other decisions. Nor do I think that because the trust company cannot come in by motion in a case which is no longer before the court,

and recover fees for services rendered in that case, that it is entirely shut out from obtaining compensation for those services. I see no reason why action should not lie directly for the recovery of those services against the parties liable for them. My position here is that they cannot do that by motion in a cause which is no longer in court; cannot do it in a court which has lost jurisdiction of the cause in which the motion is made. Being very clearly of the opinion that the conclusion arrived at by my learned Associates is in conflict with the last controlling decision of the Supreme Court above referred to on this matter, I am compelled to ask that the cause be certified for determination to the Supreme Court.

### SILLS et al. v. BURGE et al.

(Kansas City Court of Appeals. Missouri. Jan. 10, 1910. Rehearing Denied Jan. 24, 1910.)

#### 1. BROKERS (§ 84\*)—ACTIONS FOR COMMISSIONS—BURDEN OF PROOF.

In order to recover commissions for procuring a purchaser for property, the burden is upon plaintiff to show that the owners employed him to procure a purchaser, and that his services were the procuring cause of the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 104, 105; Dec. Dig. § 84.\*]

#### 2. APPEAL AND ERROR (§ 1031\*)—HARMLESS ERROR—RULINGS ON EVIDENCE.

Where the evidence on a material question of fact was so conflicting as to leave it doubtful on which side it preponderated, substantial errors in rulings on evidence will be considered prejudicial and reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.\*]

#### 3. BROKERS (§ 85\*)—ACTIONS FOR COMMISSIONS—ADMISSION OF EVIDENCE.

Where the evidence tended to show that a letter written by real estate agents to the owners of property, stating that the brokers would like to talk to the owners about the property as soon as the latter could call, as they had some possible investors in view, and that the owners received and acted upon the letter by sending an agent to discuss the sale of the property, the letter was admissible in an action for commissions for procuring the sale of the property, being the initiatory act which resulted in the brokers' employment.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106, 112; Dec. Dig. § 85.\*]

#### 4. EVIDENCE (§§ 71, 100, 265\*)—MAILING LETTER.

In an action by a broker for compensation the receipt of a letter by a property owner from real estate brokers, which was part of a broker's contract of employment, could be proved by showing that it was properly addressed, stamped and deposited in the mail, which would raise a presumption that it was received by the addressee, or by the latter's subsequent admissions that he received it, or by circumstances showing that fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 92, 123½, 1029-1050; Dec. Dig. §§ 71, 100, 265.\*]

#### 5. EVIDENCE (§ 71\*)—PRESUMPTIONS—RECEIPT OF LETTER.

Where there was no evidence that a letter constituting a part of a contract was mailed; that the writer testified that he dictated it to his stenographer and according to the usual course of business it must have been mailed, did not raise a presumption that it was received by the addressee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 92; Dec. Dig. § 71.\*]

#### 6. BROKERS (§ 86\*)—ACTIONS FOR COMMISSIONS—SUFFICIENCY OF EVIDENCE.

In a broker's action for commissions for procuring the sale of property, evidence held to show that defendants received plaintiff's letter stating that he desired to have defendant call with a view to selling the property.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 86.\*]

#### 7. APPEAL AND ERROR (§ 837\*)—REVIEW.

In determining whether a copy of a letter written by plaintiff addressed to defendant was properly excluded when offered by plaintiff on the ground that the evidence did not show a delivery, the evidence as to delivery of the letter should be viewed from the standpoint of plaintiff's evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 837.\*]

#### 8. EVIDENCE (§ 241\*)—AGENTS—ADMISSIONS.

In an action by brokers against several defendants for commissions for procuring a purchaser for property after plaintiffs had introduced evidence tending to show that one of defendants authorized his son to communicate with plaintiff as to the sale of the property, which action of such defendant was with the knowledge and consent of the other defendants, evidence was admissible as against all of defendants as to statements of the son of such defendant to plaintiffs relating to the sale of the land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 887-892; Dec. Dig. § 241.\*]

#### 9. PRINCIPAL AND AGENT (§ 23\*)—RELATION—SUFFICIENCY OF EVIDENCE.

In a broker's action against several defendants for commissions for procuring the sale of realty, evidence held to sustain a finding that one defendant authorized negotiations for the sale by another defendant, and that the latter and his son were the agents of another defendant in the transaction.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.\*]

#### 10. TRIAL (§ 252\*)—ACTIONS—INSTRUCTIONS—CONFORMITY TO ISSUES.

In a real estate broker's action for commissions for procuring the sale of land, where there was much evidence to show plaintiffs' employment to make the sale, and that they procured the purchaser, and plaintiffs' evidence did not justify an inference that they abandoned the employment or negotiations with the final purchaser, so that all of those questions were issues, an instruction that, if plaintiffs discontinued further negotiations with the purchaser and defendants afterwards made a sale through another, the jury should find for defendants, was erroneous, as injecting an issue not made by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

#### 11. TRIAL (§ 194\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where, in an action for commissions for procuring the sale of land, there was evidence tending to show that the person whom defendants claimed made the sale was brought into

the action for the purpose of depriving plaintiffs of their commissions, it was error to instruct that there was no evidence that such person was used by defendants to deprive plaintiffs of their commissions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

Appeal from Circuit Court, Jackson County; T. J. Seehorn, Judge.

Action by Albert M. Sills and another against Richard H. Burge and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

Ball & Ryland, for appellants, Peak & Strother, for respondents.

JOHNSON, J. Plaintiffs, real estate agents in Kansas City, brought this action to recover a commission of \$4,500, alleged to be due them on account of the sale of certain real estate in Kansas City belonging to defendants. A trial to a jury resulted in a verdict and judgment for defendants. Numerous errors are assigned by plaintiffs, who bring the case here by appeal. These assignments relate either to the instructions or to rulings on the admission or rejection of evidence. The issue of the employment of plaintiffs as agents to sell the property was warmly contested, as was also the issue of whether or not their efforts were the procuring cause of the sale. Both parties adduced substantial evidence in support of their respective contentions. Material facts disclosed by the evidence of plaintiffs thus may be stated:

Defendants Burge and Mary E. Long, brother and sister, inherited two tracts of land in Kansas City, one of 40 acres, the other of 80 acres. Defendant Robert J. Long is the husband of Mary. In 1899 defendants gave an option to purchase the land to a Mr. Gulona, and he enlisted the services of plaintiffs to aid him in making an advantageous sale. He failed to accomplish his purpose, and the option expired. Plaintiff Sills states that, acting on behalf of his firm, he wrote a letter to defendant Robert J. Long in February, 1900, about the sale of the land, and that a few days later David Long, son of Robert and Mary, called on him in response to the letter. Sills testified: "He [David] said that his father received a letter from us in reference to the sale of the property. I told him that I wanted a price on both the 40 and 80 acres. He said he would see his father and Mr. Burge, and let me know in a day or two. \* \* \* He came in in a day or two and gave me a price \* \* \* of \$1,500 per acre for the 80 acres and \$2,000 per acre for the 40 acres. He asked me previous to this what the commission would be. I told him 2½ per cent." The letter which plaintiffs claim initiated the transaction was dated February 13, 1900, and was addressed to defendant Robert J.

Long. Its contents were as follows: "We would like to talk to you about some of your acre property as soon as you can find it convenient to call at our office, 820 Walnut St. We have parties in view who have some money to invest, and we might be able to sell them some of your property."

Plaintiffs made strenuous and repeated, but unsuccessful, attempts to introduce this letter in evidence, and the refusal of the court to admit it constitutes one of the principal errors assigned. The original letter was not produced, but plaintiffs had a copy and endeavored to lay the foundation for its admission. Mr. Sills testified that he dictated the letter to his stenographer, and claims that in the usual course of the business of his office it must have been mailed, but he cannot state that he mailed it, and no witness testified to having mailed it. The parties to whom the letter referred as prospective purchasers composed a syndicate that afterward was incorporated under the name of the Abington Land Company. After David Long had given plaintiffs a price on the land, Sills obtained an offer of \$100,000 for the 80-acre tract from one of the syndicate—George D. Ford—and went to the home of defendant Long, where he saw Mr. Long and told him of the offer. Sills testified: "Mr. Long said that he would see. He first asked me what our commission would be. I told him 2½ per cent. I also stated to him before I made that offer that his son David Long had left the property with me for sale. He said, 'Yes; I know he has.' Then he asked me what our commission would be. I told him 2½ per cent. He said, 'I will see Mr. Burge and talk with Mrs. Long, and let you know soon.'" A short time after this conversation, David Long called on Sills and told him that defendants would not take less than \$1,500 per acre for the tract. Sills communicated this information to the syndicate. Afterward the syndicate purchased both tracts from defendants for \$1,500 per acre. The sale was consummated without the intervention of plaintiffs, and defendants rejected the claim of plaintiffs to the commission. This suit followed.

Defendant Long denies that he received the letter plaintiffs claim to have sent him; that he sent his son to see plaintiffs in response to the letter; that he employed or authorized his son to employ plaintiffs; that he acknowledged to Sills that he had authorized his son David to employ plaintiffs; that he asked Sills what his commission would be, or in any way treated him as the agent of defendants, or that plaintiffs had anything to do with selling the property. In fine, he denies the whole story of plaintiff Sills except the fact that Sills called at his house and offered him \$100,000 for the 80-acre tract. David Long likewise repudiates

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in toto his connection with the transaction as detailed by plaintiffs. Defendants all admit that nothing was done by any of them in relation to the sale of the land without the knowledge and consent of the others, but they say that the sale was brought about through the services of a Mr. Johnson, a stone mason, who operated a quarry on the land, and that to him they paid a commission of one and one quarter per cent.

We have stated only those facts which give a general view of the issues. The record is voluminous, and teems with circumstances of more or less importance. The burden which plaintiffs labored hard to sustain was to show, first, that defendants employed them; and, second, that their services were the procuring cause of the sale. A careful reading of the record leaves us in the situation of being unable to form an opinion on the subject of which side has succeeded in tipping the evidential scale with the greater weight of the evidence. The conclusion urged by plaintiffs that they were employed to sell the property, did sell it, and are being deprived of their reward under the specious pretext that they were not employed, and that a stone mason made the sale, is just as permissible under the evidence—but no more so—than the insistence of defendants that plaintiffs are mere interlopers.

With the evidence in this condition, we are constrained to say that, if the trial court committed substantial error against plaintiffs in the rulings on evidence, such error must be deemed prejudicial, since we must assume that, with evidence so evenly balanced, a little weight added to either side would give the preponderance to that side. Consequently, should we find that the court improperly excluded the letter plaintiffs claim they sent defendant Long on February 13, 1900, we must hold the error prejudicial. Reasonably construed, that letter was an application for employment. It was the initiatory act that resulted in the relation of principal and agent between the parties, and its exclusion by the court could not fail to impress the jury with the idea that plaintiffs were lame in their proof, and that in the mind of the court they could not lay the foundation stone on which the superstructure of their case must rest. The fact that the letter had been mailed to Mr. Long and received by him could be proved in two ways: First. That the letter properly addressed and stamped had been deposited in the United States mails. With proof of that character, the presumption of law would arise that the addressee received the letter. Second. If unable to produce competent evidence on which to found a constructive delivery, plaintiffs still might prove the fact of delivery by the subsequent admissions of Mr. Long, the addressee, that he had received the letter, or by facts and circumstances tending to show that he had received it.

The learned trial judge was right in ruling that plaintiffs had failed to show a constructive delivery. Recently we have dealt with this subject in three cases—*Goucher v. Novelty Co.*, 116 Mo. App. 99, 91 S. W. 447; *Ward v. Morr*, 119 Mo. App. 83, 95 S. W. 964; *Grain Co. v. Railway*, 120 Mo. App. 203, 96 S. W. 681—and we refer to those decisions for the reasons which support the present ruling. But we think the court erred in excluding the letter for the reason that the evidence of plaintiffs tends to show that Mr. Long actually received it and acted on it. Proof of a constructive delivery is but a legal substitute for proof of actual delivery, and, with proof of the latter character, what difference can it make that plaintiffs are unable to adduce competent evidence of a constructive delivery? The real thing is always better than the substitute. We admit the fact testified to by plaintiff Silles that the son of Mr. Long called and stated he came in response to the letter would not of itself establish the fact that the letter had been received, but the admission of defendant Long to the effect that he had sent his son to attend to the business certainly justifies the inference that he sent his son in response to the letter, and therefore had received the letter. Such inference is strengthened by the subsequent conversation which proceeded on the basis of the existence between the parties of the relation of principal and agent. Of course, we are viewing the facts from the standpoint of plaintiffs' evidence, but this is the position that should be occupied in the consideration of the question of the admissibility of the letter. We think its exclusion was error.

Further, we think the court erred in sustaining the objections of defendants Burge and Mrs. Long to evidence of the statements of David Long to plaintiffs relating to the business of selling the land, offered after plaintiffs had introduced evidence tending to show that defendant Long had selected his son as a channel of communication with plaintiffs, and that whatever defendant Long did in the way of effecting a sale was with the full knowledge and consent of his codefendants. Before many of these objections were sustained, the following testimony of Burge, given at a former trial, had been introduced: "Mr. Burge, I am not certain whether I asked you or not, but it is true, isn't it, that, whenever Mr. Long or any of you put a price on your property for sale, it was done after a conference among all of you and with authority of all of you? A. Yes, sir; they would all be consulted about it. Q. Any prices that were put on the property was with the authority of all? A. Yes. Q. And if it was put in the hands of any agent at a certain price to sell, if that was done by Mr. Long, or either of you, why that was satisfactory to Mrs. Long, or to you? A. We always met and consulted.

Q. Before you did that? A. Yes, sir." Mr. Burge denied knowledge of the employment either of David Long or of plaintiffs, but the jury were entitled to infer that plaintiffs were telling the truth, and that Burge did authorize all that was done in the matter by defendant Long. There is ample evidence in the record of the fact that Mrs. Long had made her husband and her son her agents, and we think that evidence of the statements and acts of David were admissible as to all of the defendants.

Objection is offered to the following instruction given at the request of defendants: "The court instructs the jury that, if they find from the evidence that after the proposition from the witness Ford was rejected, neither of the plaintiffs had any further negotiations with the witness Ford or those associated with him, but that plaintiffs then and there dropped said negotiations, and that afterwards the defendants through the witness Johnson negotiated a sale of the land mentioned in the evidence to the witness Beals and those associated with him, and that, by the terms of such sale, the one-half acre tract used for school purposes and the three-quarter acre tract on which defendant Burge's house was situated were excluded from such sale, and that the rest of said land was sold for the sum of \$180,000, then the verdict of the jury must be for the defendants." As we have said, there is ample evidence that plaintiffs were not employed at all by defendants, but, on the other hand, there is abundant evidence of the employment and of the fact contended for by plaintiffs that they procured the purchasers to whom defendants sold the land. Under the hypothesis presented by the evidence of plaintiffs, we find no justification in the record for a reasonable inference that plaintiffs abandoned the employment or dropped negotiations with the syndicate. The main issues of fact were few and were clearly defined by the evidence. Plaintiffs either were employed as agents, or they were not employed. They either found the purchaser and began the negotiations that culminated in the sale, or they did not. The instruction was erroneous for the reason that it injected an issue into the case not made by the pleadings and evidence.

Objection also is made to this instruction given for defendants: "The court instructs the jury that there is no evidence in this case that the witness Johnson was used by any of the defendants for the purpose of depriving or attempting to deprive the plaintiffs of a commission upon the sale of the property described in the petition." That instruction is bad for the reason—if for no other—that facts and circumstances in evidence do support very strongly the conclusion that Johnson was imported into the transaction for no other purpose than that

of depriving plaintiffs of a commission justly due them. Plaintiffs were entitled to argue to the jury, and the jury would have been justified in believing, that Johnson was set by defendants in pursuit of game flushed up by plaintiffs. He was not a real estate agent, but a stone cutter. He was a tenant on the land, had been patronized by defendants, and accepted employment in a business outside his calling for half the compensation plaintiffs had agreed to accept. Such facts are suggestive of collusion and sharp practice, and plaintiffs should have been left free to comment on them. The instruction before us deprived them of this privilege, and therefore is erroneous.

We have noticed the only errors we find in the record. The judgment is reversed, and the cause remanded. All concur.

### BENNETT v. CRYSTAL CARBONATE LIME CO.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1910.)

#### 1. MASTER AND SERVANT (§ 107\*)—INJURY TO SERVANT—SAFE PLACE IN WHICH TO WORK—OBLIGATION OF MASTER.

Where the place in which a servant works is reasonably safe, and it is the particular work done that renders it unsafe, and the dangers are transitory and inherent in the manner in which the work is done, and the servant performs the work in his own way, the rule requiring a master to furnish a reasonably safe place does not obtain.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 107.\*]

#### 2. MASTER AND SERVANT (§ 107\*)—INJURY TO SERVANT—SAFE PLACE IN WHICH TO WORK—OBLIGATION OF MASTER.

Where the place in which a servant works is reasonably safe in itself, and the master negligently orders a servant's act which renders the place unsafe and occasions an injury to the servant, a prima facie liability arises because of the negligent order, unless the dangers are so obvious as to preclude recovery on the theory of contributory negligence or of assumption of risk, considering that the order of the master implies an assumption that the place is reasonably safe.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 107.\*]

#### 3. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

A servant in a stone quarry was directed by the foreman to remove a particular rock from a body of stone shattered by blasting. On the removal of the rock another stone supported by it rolled out and injured him. The foreman by the exercise of ordinary care could have seen the probable result, which was not obvious to the servant. The direction of the foreman was peremptory. Held, that the negligence of the master was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.\*]

**4. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.**

The question of the servant's contributory negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

**5. MASTER AND SERVANT (§ 288\*)—INJURY TO SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.**

The question of the servant's assumption of risk was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

**6. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

A servant doing an act under the express direction of the master's foreman may not be declared negligent as a matter of law, unless the dangers incident to the act are so threatening and imminent as to portray obvious peril, and, where it appears that he may safely perform the act by exercising care on his part, the question of contributory negligence is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

**7. MASTER AND SERVANT (§ 203\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.**

Generally a servant does not assume the risks from the master's negligence, however obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 538; Dec. Dig. § 203.\*]

**8. MASTER AND SERVANT (§ 222\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.**

A servant must obey the reasonable orders of the master, and, where he is directed to perform a task which apparently he may safely do without injury to himself, he does not as a matter of law assume the risk, especially where the order is repeated in an urgent manner, and the servant is not given an opportunity to reflect, for in assumption of risk there must be present the element of assent, express or implied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 648-651; Dec. Dig. § 222.\*]

**9. MASTER AND SERVANT (§§ 101, 102\*)—SAFE PLACE TO WORK—OBLIGATION OF MASTER.**

The duty of a master to furnish a reasonably safe place in which to work is discharged where he exercises ordinary care in furnishing the servant a place as reasonably safe as the character of the work permits.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 171-192; Dec. Dig. §§ 101, 102.\*]

**10. MASTER AND SERVANT (§ 291\*)—INSTRUCTIONS—EVIDENCE.**

Where, in an action for injuries to a servant in a stone quarry, the evidence showed that the foreman ordered the servant to pry out a rock from a stone ledge shattered by blasting, when by the exercise of ordinary care he could have foreseen the probable result, which the servant could not foresee from his position, necessitating, in order to authorize a verdict for the servant, that the jury find that the foreman knew or by the exercise of ordinary care might have known that the removal of the rock as directed by him would cause another one to fall and injure the servant, an instruction requiring a finding that the master knew that the stone ledge had become insecure and dangerous because of his negligence and liable to fall on and

injure the servant was erroneous because of the absence of evidence on which to predicate it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133-1147; Dec. Dig. § 291.\*]

**11. MASTER AND SERVANT (§ 296\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

Where the danger to a servant is threatening, glaring, and apparent, the court may determine as a matter of law his contributory negligence, but a jury may acquit the defendant on the ground of contributory negligence where nothing more appears than that plaintiff encountered a risk which a person of ordinary prudence would have avoided, so that an instruction which requires a finding of freedom from contributory negligence unless the conditions around plaintiff were "such as to threaten such glaring, apparent, and immediate danger that a person of ordinary care and prudence would have refused to work" under the circumstances was erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

Appeal from Circuit Court, Lincoln County; James D. Barnett, Judge.

Action by George Bennett against the Crystal Carbonate Lime Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

McKelghan & Watts and W. R. Gentry, for appellant. Dudley & Palmer, for respondent.

**NORTONI, J.** This is a suit for damages accrued to plaintiff on account of personal injuries received through the alleged negligence of the defendant. The plaintiff recovered, and defendant appeals.

While in defendant's employ and engaged as a laborer in its stone quarry, plaintiff was seriously injured as a result of a large stone rolling upon his limb. It appears that while he was engaged under the immediate direction of his foreman in prying a particular stone out of a large mass another stone, which had theretofore been held in position by the one which plaintiff sought to remove, was thereby precipitated forward and occasioned his injury. The evidence tends to prove, too, that the act in which plaintiff was engaged at the time did not threaten immediate peril, although the result might have been foreseen by the foreman who directed the work.

To a complete understanding of the case, it will be necessary to state the facts somewhat extensively. Defendant owns and operates a stone quarry in a bluff on the Missouri river in Lincoln county. The quarry faces toward the east, and has been worked from the top of the bluff to a point near about the level of the river bank. The depth of the quarry is about 50 feet. After the stone is quarried, it is reduced to small particles, to the end of running it through a crushing machine. The work of reducing the stone to small particles is done by the laborers with sledge hammers, and this is the work

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for which plaintiff was employed, although he assisted otherwise about the quarry as well. Through the means of explosives, defendant had separated from the ledge of rock in the bluff a portion thereof, say 40 or 50 feet in length, about 6 or 7 feet in width, and probably the same in depth. This mass of stone, the larger portion of which had been shattered by the blasting, lay upon the floor of the quarry, and the laborers had been engaged for several days in reducing the same and clearing it up for the crusher. It seems the entire mass had been cleared up and disposed of except a portion in the northwest corner of the quarry, which is described to be about 12 feet in length, 7 feet in width, and 6 feet in height. This particular portion of the stone had been severed from the ledge in a solid mass; that is to say, although other portions had been considerably crushed and crumbled as a result of the heavy blast, the portion referred to was lifted bodily from its place in the bluff without being dissevered into fragments. Such, we infer, was a frequent occurrence in the quarry, for it appears to have been the custom in vogue, when the heavy charges of dynamite failed to crumble the rock, large portions like this one were drilled and blasted a second time by what is known as "pop shots"; that is, lesser blasts. A day or two before his injury the plaintiff had assisted another employé in thus drilling and blasting the portion of stone referred to. What is known as "pop shots" were exploded therein and the mass of stone 12 feet long, 7 feet wide, and 6 feet deep was shattered, to the end that it might be reduced for the crusher. It seems that, although this body of stone was cracked and shattered by the "pop shots" referred to, it remained standing as before; that is to say, it was not scattered over the floor of the quarry, but remained in position, shattered and cracked throughout. The plaintiff and other laborers, about a dozen in all, having completed the task of clearing up the floor of the quarry, approached this body of stone with the purpose of dismembering and reducing it. The plaintiff laid aside a shovel with which he had been working, and took up a crowbar for the purpose of prying out portions of the blasted stone which were parcel of the huge mass before him. He hesitated for a moment, as he said, to "hunt it"; that is, as we understand it, he hesitated with a view to looking out a proper place to commence the work.

The men engaged at the quarry each bear a number, by which, instead of by name, they were addressed by the foreman. The plaintiff's number was 12, and the foreman usually so addressed him. Plaintiff says, while he was standing with the crowbar in his hand and viewing the mass of stone or "hunting it," the foreman said, "Twelve, bar out that rock," indicating a particular stone near the corner of the body, and about two feet above the floor of the quarry; that he hesi-

tated an instant longer to make an examination, and the foreman repeated, "Twelve, I tell you to bar out that rock under that one there," whereupon he inserted the crowbar and lifted the stone from its position. Upon the stone which he lifted with his bar receding before the lift another one supported by it rolled out of the mass upon his leg and inflicted the injury. In this connection plaintiff says that the foreman was standing to the side and in the rear on a slight elevation in a position to see the danger incident to barring out the stone referred to. Plaintiff says from the position in which he himself stood at the time he was ordered to remove the particular rock and while engaged in the act it was impossible for him to discover the likelihood of the three-cornered stone above and slightly in the rear of the one he removed being precipitated forward upon him, and that the foreman could have seen it from the position he occupied at the time the order was given.

At the conclusion of the testimony on the part of the plaintiff, the defendant requested the court to peremptorily direct a verdict for it. This request having been denied, the defendant introduced no evidence whatever on its part, contenting itself to stand on the proposition that plaintiff had failed to make a prima facie case. It is argued here that the court should have directed a verdict for the defendant, for the reason the testimony fails to disclose a breach of its obligation to exercise ordinary care, to the end of furnishing the servant a reasonably safe place to work. Rather, the precise argument is that in the circumstances of the case the rule requiring the master to exercise ordinary care to the end of furnishing the servant a reasonably safe place to perform his labor does not obtain, and that the plaintiff must be declared to have taken the risk for the reason he received his injury from a peril ordinarily incident to the employment in which he was engaged. We are not persuaded by this argument on the facts in proof, for the reason it appears the defendant retained control of the men and directed their movements in and about the work. This is especially true in this case for the reason it appears plaintiff received his injury while performing the very act which he was directed to perform by defendant's foreman in charge. It is no doubt true that there are cases where the rule requiring the master to furnish the servant a reasonably safe place does not obtain, such, for instance, as where the place in and of itself is reasonably safe, and the particular work being prosecuted is one which renders it unsafe. The doctrine is frequently applied to cases where the servant is employed in dismantling and tearing down a building or prosecuting a particularly hazardous work in a mine or about a quarry, or undermining an embankment. It seems to be especially pertinent in those instances where the dangers are transitory and passing only and inhere rather

in the mode and manner in which the work is being prosecuted than in the place itself. And then, too, an element of nonliability frequently adverted to in such cases is the fact that the master has given the work entirely in the charge of the servant, and permits him to perform it in his own way. In such circumstances, if the servant is injured as a result of a transitory peril which inheres in the work for which he was employed, and is prosecuting, according to his own discretion, without a pointed direction or other specific negligence on the part of the master, it is frequently declared that the rule requiring a reasonably safe place does not obtain or that the servant has assumed the risk as one ordinarily incident to the employment. *Henson v. Armour Packing Co.*, 113 Mo. App. 618, 88 S. W. 166; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; *Bradley v. Chicago, Milwaukee, etc., Ry. Co.*, 138 Mo. 293, 39 S. W. 763; *Bloomfield v. Worster Construction Co.*, 118 Mo. App. 254, 94 S. W. 304; *Bradley v. Forbes Tea Co.*, 213 Mo. 320, 111 S. W. 919; *Zeigenmeyer v. Goetz Lime, etc., Co.*, 113 Mo. App. 330, 88 S. W. 139; *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 297, 319, 91 S. W. 460. However that may be, the rule which generally obtains in this state is that it is the duty of the master to exercise ordinary care to the end of furnishing the servant with a place as reasonably safe to perform his labor as the character of the work, considering its hazards, will permit. *Bradley v. Chicago, Milwaukee, etc., R. R. Co.*, 138 Mo. 293, 39 S. W. 763; *Livengood v. Joplin, etc., Lead & Zinc Co.*, 179 Mo. 229, 77 S. W. 1077; *Kelty v. Construction Co.*, 121 Mo. App. 53, 97 S. W. 998; *Keegan v. Kavanaugh*, 62 Mo. 230.

Now, the precise question for decision does not relate alone to the fact that the plaintiff was engaged in rendering a place reasonably safe in itself to be an unsafe place, but it reveals the fact as well that the master ordered him to pry out a certain rock, the result of which might have been foreseen by the exercise of ordinary care on the part of the master as fraught with probable peril to plaintiff, and which danger appears not to have been obvious or patent to the plaintiff. Although the mass of stone had been shattered by the "pop shot" blast referred to, it stood intact and appears to have been reasonably safe in and of itself. The danger involved, instead of residing in the place as it stood, rather inhered in the act of prying out and removing the particular stone on which rested another and precipitating it forward. It is true the act was performed by the plaintiff himself, but it was at the urgent direction of the foreman, who, according to the testimony, could, by exercising ordinary care, have seen the probable result which was not obvious to the plaintiff. In this view, instead of the case presenting a question where the injured party himself renders a reasonably safe place to be an unsafe one, it presents, instead, the as-

pect of the master negligently directing and urging the servant to render a reasonably safe place an unsafe one to his injury and hurt. In such circumstances, even though the place is reasonably safe in itself, if the master negligently orders and directs the servant's act which renders it unsafe and occasions an injury, a prima facie liability arises on account of the negligent order, unless the dangers are so obvious and imminent as to preclude the right of recovery on the theory of contributory negligence, or it appears the risk is one assumed by the servant. In the circumstances stated, the order of the master implies an assurance that the place is reasonably safe. *Keegan v. Kavanaugh*, 62 Mo. 230; *Bloomfield v. Worster Construction Co.*, 118 Mo. App. 254, 94 S. W. 304; *Bane v. Irwin*, 172 Mo. 306, 72 S. W. 522; *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 297, 319, 91 S. W. 460. According to the evidence, the plaintiff was unable to discover from the position he occupied the latent danger in removing the particular stone referred to, and he says the defendant's foreman might have seen it, as he was standing at another part of the yard upon a slight elevation. This proof, together with the fact that the foreman repeated his order in rather emphatic terms to the plaintiff to remove the stone mentioned, tends to show negligence on the part of the defendant, and that plaintiff was reasonably careful in the premises. The plaintiff may not be declared negligent as a matter of law unless the dangers incident to the act were so threatening and imminent as to portray obvious peril. *Blundell v. Miller Mfg. Co.*, 189 Mo. 552, 88 S. W. 103; *Garaci v. Hill O'Meara Construction Co.*, 124 Mo. App. 709, 102 S. W. 594. If it appeared that he might safely perform the act directed by exercising care on his part, then the question of his contributory negligence is one for the jury. *Huhn v. Missouri Pacific Ry. Co.*, 92 Mo. 440, 447, 4 S. W. 937. It may be, had the plaintiff performed the act voluntarily on his own account without being directed so to do by the foreman, that he should be declared to have taken the risk in so doing, but the negligent order to perform it under the circumstances given in evidence removes the case from the category of assumed risks for the want of a voluntary and free action of the mind on the subject.

Generally speaking, it is the law of this state, as declared by the Supreme Court, that the servant no longer assumes the risks arising from the master's negligence, however obvious. *Dakan v. Chase, etc.*, 197 Mo. 238, 94 S. W. 944; *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167; *Pauck v. St. Louis Dressed Beef, etc., Co.*, 159 Mo. 467, 61 S. W. 806. Be this as it may, it is the duty of the servant to obey such reasonable orders as are given by the master, and when he is directed, as in this case, to perform a task which it appears he may safely do without injury to himself, it cannot be declared as a matter of law that

he assumed the risk. Especially is this true in the present instance, where the order was repeated in an urgent manner, and the plaintiff not given an opportunity to reflect. In every instance of assumption of risk there must be present the element of assent thereto, either express or implied, on the part of the servant. *Adolf v. Columbia Pretzel & Baking Co.*, 100 Mo. App. 199, 73 S. W. 321; *Lee v. Railroad*, 112 Mo. App. 372, 87 S. W. 12. The question of defendant's negligence, together with those of the plaintiff's contributory negligence and assumption of the risk, were for the jury.

Notwithstanding the defendant's exception, the court gave, at the instance of the plaintiff, the following instruction, which covered the whole case: "The court instructs the jury that it was the duty of the defendant lime company to use all reasonable precautions to avoid exposing plaintiff to danger, and to use ordinary care and diligence to provide him a safe place to work, and if you believe from the evidence that a large body or ledge of stone in defendant's quarries had been broken and loosened from the natural walls of defendant's quarry by drilling and blasting the same, and that said ledge or body of stone had been permitted to stand and become insecure and dangerous on account of defendant's negligence, and liable to fall upon and injure plaintiff while working at a point below and near the base thereof, and that the defendant knew, or by the exercise of ordinary care and attention could have known, of the dangerous and unsafe condition of said ledge or body of stone, and if you believe from the evidence that the superintendent or foreman of the defendant lime company, having power and authority to manage and control plaintiff and the men working in said quarry, and direct them as to the place and manner of performing their work, ordered the plaintiff into said position of danger, and directed the plaintiff to do the work at which he was engaged at the time he was injured, and that the plaintiff, in reliance on said order and in obedience thereto, undertook and engaged in said work at the place and in the manner directed by said foreman, and that while plaintiff was so engaged in said work a portion of said ledge or body of broken and loosened stone fell upon and injured the plaintiff, then the plaintiff is entitled to recover in this cause, unless you further believe and find from the evidence that the condition of said ledge or body of stone below which plaintiff was so working was such as to threaten such glaring, apparent, and immediate danger that a person of ordinary care and prudence would have refused to work around it under the circumstances." The instruction is faulty and susceptible to criticism in several respects. In the first place, it informs the jury that it was defendant's duty to furnish the plaintiff "a safe place to work." This is not the law. Even on the theory of the case attempted to

be incorporated in the instruction, the defendant discharged its duty in that behalf if it exercised ordinary care to the end of furnishing the plaintiff a place as reasonably safe as the character of the work to be prosecuted would permit. However, if other portions of the instruction clearly defined the obligation, this of itself might not constitute reversible error. *Bradley v. Chicago, Milwaukee, etc., R. R. Co.*, 138 Mo. 293, 39 S. W. 763, is a case in point. A leading error in the instruction is that it predicates a liability on a hypothesis of fact that is not presented by the proof. It will be observed that the instruction informs the jury in substance that, if it believed defendant had broken a large body of stone and permitted the same to stand and become insecure and dangerous on account of defendant's negligence and liable to fall upon the plaintiff while working thereabout and defendant knew, or by the exercise of ordinary care could have known, of the dangerous and unsafe condition of such body of stone, and the foreman directed plaintiff into a position of danger to do the work on which he was engaged, etc., then under other circumstances recited therein the finding might be for the plaintiff. The proof wholly fails to support the theory of the instruction and on which, together with the order of the foreman, it seems to predicate liability; that is, that defendant had negligently permitted a large body of stone to stand and become insecure and dangerous. The fact is the body of stone referred to stood intact as it had been blasted and appeared to present no dangers whatever. The entire danger in the situation resulted from the fact that plaintiff removed one stone, which permitted another to fall upon him. The element of liability presented by the proof is that the foreman ordered the plaintiff to perform this act when by exercising care he could have foreseen the probable result which plaintiff said he was unable to foresee from his position. However, before the plaintiff is entitled to recover on this score, it is incumbent on the jury to find that the foreman knew, or by exercising ordinary care might have known, that the removal of the stone he directed to be removed would occasion another one to fall and likely injure plaintiff. There is not a word in the instruction under review requiring the jury to find that defendant's foreman either knew, or by exercising ordinary care might have known, this fact. It is true the instruction requires a finding to the effect that the defendant knew the body of stone had become insecure and dangerous on account of defendant's negligence and liable to fall upon and injure the plaintiff, but this proposition is not relevant to the question of defendant's liability under the proof, for the facts wholly fail to disclose any negligence whatever in permitting the body of stone to remain standing in the quarry.

Another feature of the instruction calling

for condemnation is that, as to plaintiff's contributory negligence, it tells the jury the finding should be for him unless the condition of the body of stone where he was working was "such as to threaten such glaring, apparent and immediate danger that a person of ordinary care and prudence would have refused to work around it under the circumstances." This is not the rule by which the plaintiff's contributory negligence should be determined and its statement in this manner infringed the rights of the defendant. The point has been expressly ruled as reversible error on an instruction containing the identical language. *Bradley v. Chicago, Milwaukee, etc., R. R. Co.*, 138 Mo. 293, 39 S. W. 763. When the danger is threatening, glaring, and apparent, the court may declare contributory negligence as a matter of law, for in such circumstances it is obvious the plaintiff's injury results from his own want of care. But a jury may acquit the defendant on the score of contributory negligence if nothing more appears than that he encountered a risk which a person of ordinary prudence would have avoided. The declaration of the rule contained in the instruction was erroneous in the extreme, in that it permitted the jury to find for plaintiff even if his conduct fell short of an ordinarily prudent person under the circumstances, and declared that he might be defeated on the score of contributory negligence only on it appearing the dangers were so glaring and threatening of immediate danger that a person of ordinary prudence would not encounter the same. It certainly goes beyond a declaration of the true rule authorizing a verdict for defendant on the ground of contributory negligence if plaintiff is found to be remiss in exercising the degree of care attributable to an ordinarily prudent person. See *Bradley v. Chicago, Milwaukee, etc., R. R. Co.*, 138 Mo. 293, 39 S. W. 763.

It appears the identical error mentioned is incorporated in plaintiff's instruction No. 5 as well. Upon a retrial the instructions should be rewritten and modified in accordance with the views herein expressed.

The judgment should be reversed and the cause remanded. It is so ordered. All concur.

#### NASHVILLE RY. & LIGHT CO. v. NORVELL et al.

(Supreme Court of Tennessee. Jan. 29, 1910.)

#### 1. TAXATION (§ 58\*) — BACK-ASSESSMENT — STATUTES.

Laws 1907, c. 602, a general assessment law, repealing the former general law, Laws 1903, c. 258, and Laws 1907, c. 602, § 30, providing for the back-assessment of property, thereupon became the only provision for such assess-

ment, and property cannot be back-assessed under the act of 1903.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 134; Dec. Dig. § 58.\*]

#### 2. TAXATION (§ 113\*) — BACK-ASSESSMENT — CONSTRUCTION OF STATUTE—RETROSPECTIVE EFFECT.

Laws 1905, c. 513, providing a new method of assessing the property of street-railway companies, is wholly prospective in operation, and does not authorize a back-assessment for a period antecedent to its taking effect, though it provides that no assessment of property shall be made in any other manner than provided by the act.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 207; Dec. Dig. § 113.\*]

#### 3. TAXATION (§ 113\*) — BACK-ASSESSMENT — CONSTRUCTION OF STATUTE.

Laws 1907, c. 602, § 1, provides that all property except that exempted under section 2 shall be taxed. Section 5, subsec. 4, addressed to the basis of assessment, excepts such properties as are assessable by the railroad assessors. Section 21, referring to the assessment of quasi public corporations, expressly exempts the property of street railway companies, interurban and electric railways, etc., because assessable under "other laws." Section 31, relating to back-assessments, applies only to "property or properties included in this act." Held that, street railway property being assessable by the railroad assessors, under Laws 1905, c. 513, § 1, it was not the intent of Laws 1907, c. 602, to provide for either the assessment or back-assessment of such property.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 113.]

Appeal from Chancery Court, Davidson County; John Allison, Chancellor.

Action by the Nashville Railway & Light Company against W. E. Norvell and another. Decree for complainant, and defendants appeal. Affirmed.

Charles T. Cates, Jr., E. E. Barthell, L. A. Ligon, and T. B. Lytle, for appellants. J. M. Anderson and J. C. Bradford, for appellee.

NEIL, J. This is a proceeding to test the right of the trustee of Davidson county to back-assess the property of the complainant for the year 1904. We need not refer to the facts more particularly than to say that we may assume that the assessment of 1904 was insufficient to a degree that would make it the duty of this court to hold that there should be a reassessment by the trustee of Davidson county, if he has jurisdiction in the matter under the statutes of the state. He was about to make the back-assessment when he was enjoined by the chancellor. On final hearing this injunction was made perpetual. From this decree the county trustee, and the revenue agent, James R. Jetton, who was also made a defendant, appealed to this court.

The back-assessment which was about to be made was attempted under chapter 602 of the Acts of 1907. The complainant contends that no power existed under that act because by its terms the property of street railway

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

companies was excluded from its operation. It also insists that the power did not exist in the county trustee, because it was vested in express terms in the board of railway assessors by chapter 513 of the Acts of 1905. Defendants insist that a decision of this court rendered in 1907 (*State ex rel. v. Taylor*, 119 Tenn. 229, 104 S. W. 242) held that the power existed under chapter 253 of the Acts of 1903, and that chapter 513 of the Acts of 1905 did not vest the power in the board of railway assessors. It is also insisted by defendants that the power exists under chapter 602, Acts of 1907.

As preliminary to a disposition of the questions suggested we shall briefly trace the history of the back-assessment law as it appears in our statutes.

The first act was chapter 79, Acts 1879. By this act all collectors of taxes were made assessors, to assess all property which by mistake of law or fact had not been assessed. This act was amended by chapter 181 of the Acts of 1883, so as to provide that all collectors of taxes, so made assessors, should back-assess, in case of omitted assessments, not only for the year for which such collector was acting, but for any previous year or years, and "for all the years for which taxes ought to have been paid upon such property." This latter act was amended by chapter 23 of the Acts of 1885, so as to provide that the back-assessment should not extend more than three years prior to the current year. The statutes of the same year contained an act (chapter 1) which provided (section 25) that, should it, at any time after the assessments for the current year had been made, come to the knowledge of the chairman or judge of the county court, the clerk of the county court, the county trustee, sheriff, or tax collector of any county of the state that any taxable property had not been assessed, as contemplated by the particular act, or had been assessed inadequately, the officers referred to should proceed to make adequate assessments. Similar provisions, confined to the current year, are found in several succeeding acts, viz.: Acts 1887, p. 34, c. 2, § 24; Acts 1889, pp. 157, 158, c. 96, § 26, and also section 48 of same act; Acts 1895, c. 120, § 35; Acts 1897, p. 19, c. 1, § 26. It should be noted, however, that Acts 1889, c. 96, was so amended by chapter 27 of the special session of 1890 as to substantially make it general in its terms; that amendment being in substance the same as chapter 23, Acts of 1885, forbidding reassessments to be made further back than three years in addition to the current year. The sections upon the subject of back-assessments in the acts for all of the remaining years down to and including 1907 are general in their terms, each containing a complete scheme upon the subject, and by implication, if not in direct terms, repealing prior acts upon the subject: Acts 1899, pp. 1112-1115, c. 435, § 32; *Id.* p. 1159,

§ 82; Acts 1901, pp. 334-336, c. 174, § 31; *Id.* p. 376, § 85; Acts 1903, p. 660, c. 258, § 31; *Id.* p. 708, § 81; Acts 1907, pp. 2079-2082, c. 602, § 30; *Id.* p. 2132, § 79. There was no general assessment law passed by the Legislature of 1905. Each one of the successive acts last referred to operating as a repeal of prior acts upon the same subject, it resulted that when the act of 1907 became a law there remained no law but that act for the back-assessment of any property covered by it. There could therefore be no back-assessment under the act of 1903. The proceedings for back-assessment under that act which were considered in *State ex rel. v. Taylor*, supra, were begun in 1906, and so were saved by Shannon's Code, § 61, which provides that "the repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceedings commenced, under or by virtue of the statute repealed." *Richardson v. State*, 3 Cold. 122; *State v. Nashville Savings Bank*, 16 Lea, 111, 118; *Wallace v. Goodlett*, 104 Tenn. 670, 681, 684, 53 S. W. 343; *Shelby Co. v. R. R. Co.*, 16 Lea, 401, 410, 1 S. W. 32; *State v. R. R. Co.*, 14 Lea, 56, 63.

The view suggested and urged in complainant's brief is not a sound one, to the effect that the act of 1905 would prevent an assessment either under the act of 1903 or 1907, because it provides that all back-assessments of street railroad properties must be made under it. If such were the correct view, the court could never have decided *State ex rel. v. Taylor* as it did. No such view was argued, or even suggested, by the very able and experienced counsel who appeared for the street railway company in that case. Both court and counsel correctly assumed in that case that the act of 1905 was wholly prospective in its operation, as statutes usually are unless the contrary clearly appears. That act provided a new method of assessing the property of street railway companies, not previously applicable to them, and a new set of officers who before that had no jurisdiction over them. It would have been most remarkable if these officers had been required to back-assess street railway properties for a period anterior to 1905, since they would have been compelled to employ a method different from that laid down in prior acts; that is, they would have been compelled to employ the method provided by the act of 1905, and so, in case of a prior insufficient assessment, have compelled the same taxpayer to submit to two different forms of assessment of the same property for the same year. It would have to appear very clearly to the court that such was the intention of the Legislature before we would recognize such a course of action. Moreover, if such were the intention of the Legislature, it is far from certain that two methods so different could be administered together, and it would probably be true that the act so construed would

be ineffective because incapable of enforcement.

So the case recurs upon the question whether this property can be back-assessed under the act of 1907. The solution of this question depends upon whether that act applies to street railway property. It is insisted for defendants that it does so apply. We are of the opinion that it does not. It is true that section 1 of the act provides that all property, real, personal, and mixed, except that exempted under section 2, shall be taxed; that section 3 provides that personal property, privileges, and polls shall be assessed annually, and real estate every two years; and that section 4 provides that all property shall be assessed at its actual cash value. But section 5, which is addressed to the basis of assessment, excepts, in subsection 4 thereof, such properties as are assessable by the railroad assessors, providing, however, in respect of one of these, street railway property, that it shall be assessed in the city or town wherein the principal part of it lies, although the office of the company be outside of the said city or town; and section 21, which is specially directed to the method of assessing quasi public corporations, expressly exempts, in its proviso, the property of street railway companies, interurban electric railways, telegraph, and telephone companies, because assessable under "other laws." It is true the same proviso excepts from the operation of the section building and loan companies, and insurance, manufacturing, and banking companies, but does this on the ground that they are covered by sections 22 and 23 of the same act. On turning to these sections we find such to be the fact. When we turn to section 31, which, as supplemented by section 38, con-

tains the law of back-assessments, we see that it applies only to "property or properties included in this act." We have found that street railway properties are not included in the act, because they are of the class to be assessed by the railway assessors. Compare *State v. Railroad*, 96 Tenn. 385, at pages 407 and 408, 34 S. W. 1023. We have examined all of the sections of the act of 1907 referred to in the brief of learned counsel for defendants, and, indeed, the whole act, and, while there are expressions here and there favoring defendants' contention, we think it very clear from the whole act that it was not the purpose of the Legislature to provide for either the assessment or back-assessment of street railway property under this act, but that the lawmaking body had in mind chapter 513 of the Acts of 1905, and did not intend to take from the officers therein referred to the assessment of the class of property therein provided for. We think that in so drawing the act the Legislature overlooked the fact that there could be no back-assessment of this class of property for the year 1904, that year falling in a chasm, as it were, between the acts of 1903 and 1905, after the emasculation of the former act by the passage of the act of 1907; but this cannot change the legal result. To conclude: There can be no back-assessment of the property in question for the year 1904, under the act of 1903, because that act is no longer in force, and the proceedings to back-assess were not begun before its repeal, and there can be no back-assessment under the act of 1907 because it does not cover the class of property in question.

It results that the decree of the chancellor must be affirmed.

**FALFURRIAS IMMIGRATION CO. v. SPIELHAGEN.**

(Supreme Court of Texas. Feb. 2, 1910.)

**COURTS (§ 247\*)—APPELLATE JURISDICTION—TEXAS.**

From an interlocutory order of a district judge appointing a receiver, an appeal was taken to the Court of Civil Appeals, and that court certified to the Supreme Court for decision the questions whether the allegations of the petition were sufficient to authorize the appointment of a receiver; and, if so, whether the judge was authorized, notwithstanding the sworn denial of defendant, to appoint a receiver upon the sworn petition of plaintiff, unsupported by any additional affidavit. Jurisdiction has been given the Court of Civil Appeals of appeals from orders appointing receivers, and makes the judgment of that court conclusive on such appeal. *Held* that, to answer the questions submitted, the Supreme Court would have to determine the entire case, and that the statute regulating the certifying of questions does not authorize the transfer of an entire case to the Supreme Court so as to substitute its jurisdiction for that of the Court of Civil Appeals, and the certificate should therefore be dismissed.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 247.\*]

**Certified Questions from Court of Civil Appeals of First Supreme Judicial District.**

On G. R. Spielhagen's petition for the appointment of a receiver for the Falfurrias Immigration Company, and from an interlocutory order of the district judge appointing a receiver, an appeal was taken to the Court of Civil Appeals, which court certified the case to the Supreme Court for the decision of the two questions. Certificate dismissed.

G. R. Scott & Pape, I. Lovenberg, Jr., and Kleberg & Neethe, for appellant. James B. Wells and F. W. Seabury, for appellee.

**WILLIAMS, J.** From an interlocutory order of the district judge, appointing a receiver for the appellant company, on the petition of appellee, an appeal was taken to the Court of Civil Appeals for the First District. That court has certified to us for decision these two questions:

"First. Were the allegations of the petition sufficient to authorize the trial judge to appoint a receiver for the defendant corporation?

"Second. If the petition be held sufficient, was the judge authorized, notwithstanding the sworn denial of the defendant before set out, to appoint a receiver upon the sworn petition of the plaintiff, unsupported by any additional affidavit?"

The certificate also contains a full statement of the allegations of the petition and of the answer. It is obvious that the entire case has been certified.

In answering the questions this court would have to determine whether or not the petition stated a cause of action; and, if so, whether or not it is one the enforcement of which

may be aided by the appointment of a receiver, and, if so, whether or not the facts essential to such appointment are sufficiently stated. If all these questions should be resolved in the plaintiff's favor, then the only question remaining would be that put to us as the second.

This court from the first has held that the statute regulating the certifying of questions does not authorize the transfer of an entire case to this court so as to substitute its jurisdiction for that of the Court of Civil Appeals, but only authorizes the certification of particular question, or questions, of law upon which the decision depends. *Shoe Co. v. Insurance Co.*, 87 Tex. 112, 26 S. W. 1063; *Laughlin v. Insurance Co.*, 87 Tex. 115, 26 S. W. 1064; *Bassett v. Sherrod*, 89 Tex. 272, 34 S. W. 600; *Mann v. Dublin Oil Co.*, 91 Tex. 617, 45 S. W. 373.

The statute gives an appeal to the Court of Civil Appeals from an order appointing a receiver and has made the judgment of that court conclusive of such appeal. It certainly was not intended that the judgment of this court, upon an entire case, should be substituted for that of the court to which the appeal is allowed. While we do not intimate that particular questions of law, arising in that class of appeals, may not be certified to this court, we do hold that it would be inconsistent with the purposes of both the statute authorizing and limiting such appeals and that regulating the certifying of questions to entertain certificates the effect of which is to transfer to this court a jurisdiction lodged exclusively with another.

Certificate dismissed.

**DAVIDSON et al. v. RYLE et al.**

(Supreme Court of Texas. Jan. 26, 1910.)

**1. VENDOR AND PURCHASER (§§ 233, 235\*)—BONA FIDE PURCHASER.**

To entitle a subsequent purchaser to have a prior unregistered conveyance postponed to his conveyance, it must appear that he was a bona fide purchaser without notice, actual or constructive, of the title of the prior purchaser, and that the purchase money was bona fide and truly paid, and the facts must be consistent with the conduct of ordinary men supposed to act with reference to their own interest.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 563, 568; Dec. Dig. §§ 233, 235.\*]

**2. VENDOR AND PURCHASER (§ 244\*)—BONA FIDE PURCHASER—PAYMENT OF PRICE—EVIDENCE.**

The recital in a deed subsequent to an unregistered deed, that the purchase money has been paid does not alone prove the payment required to constitute the grantee a bona fide purchaser, but is a circumstance to be considered.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 611; Dec. Dig. § 244.\*]

**3. VENDOR AND PURCHASER (§ 244\*)—BONA FIDE PURCHASER—EVIDENCE.**

In determining whether a subsequent purchaser was a purchaser in good faith without

notice of a prior unregistered conveyance, the good or bad faith of the vendor may be considered, and, where the vendor believed he had the title and sold to the subsequent purchaser in good faith, the latter presumptively believed that he obtained a good title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 609; Dec. Dig. § 244.\*]

**4. VENDOR AND PURCHASER (§ 230\*)—RECITALS—CONCLUSIVENESS ON PURCHASER.**

The recitals in the act of sale by a remote grantor are binding on a subsequent grantee claiming through it.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 502; Dec. Dig. § 230.\*]

**5. VENDOR AND PURCHASER (§ 230\*)—RECITALS—CONSTRUCTION.**

A declaration in an act of sale that the grantor, who apparently held under a conveyance from C., conveys as agent of C., empowered by procuration delivered to the grantee, authorizes a finding that the real ownership remained in C. until the sale was made, and that the act of sale from C. to the grantor was in fact intended as a power of attorney.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 509; Dec. Dig. § 230.\*]

**6. VENDOR AND PURCHASER (§ 244\*)—BONA FIDE PURCHASER—EVIDENCE.**

C., an owner claiming directly from the government, conveyed the land on condition that the grantee should pay the government dues, and by an act of sale which might be found to have been intended as a mere power of attorney. The grantee therein lived in a sister state, and there subsequently sold the land by deed which was not registered. More than 10 years after the conveyance by C., he sold the premises to a third person. At that time the government dues had not been paid. No one was in the actual possession of the land, and there was no record of an adverse title. Held to justify a finding that C. believed that the land belonged to him at the time of the sale to the third person, and that he sold the same in good faith, justifying the presumption that the third person purchased in good faith without notice of the unregistered conveyance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 609; Dec. Dig. § 244.\*]

**7. VENDOR AND PURCHASER (§ 244\*)—BONA FIDE PURCHASER—NOTICE.**

The character of the warranty in a deed may be considered on the question whether the grantee therein purchased in good faith without notice of a prior unregistered conveyance, but it is not conclusive.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 610; Dec. Dig. § 244.\*]

**8. VENDOR AND PURCHASER (§ 230\*)—BONA FIDE PURCHASER—NOTICE.**

A warranty in a deed executed by one claiming directly under the government which embraces any previous sale by him, but does not include any defect in title based on a previous grant by the government, is not such a warranty as will excite suspicion in the mind of the purchaser, and does not authorize a finding that he was not a bona fide purchaser without notice of a prior unrecorded conveyance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 502; Dec. Dig. § 230.\*]

**9. VENDOR AND PURCHASER (§ 244\*)—BONA FIDE PURCHASER—PAYMENT OF PRICE—EVIDENCE.**

Evidence held to show that a subsequent purchaser without notice of a prior unregistered conveyance paid the price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 610; Dec. Dig. § 244.\*]

**10. EVIDENCE (§ 342\*)—COPIES OF RECORDS—ADMISSIBILITY.**

An indorsement made on an original grant of land on file in the General Land Office and signed by the chief clerk thereof, showing that the government dues have been paid on the grant, is an archive of the office, and a certified copy of the indorsement is admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1302-1314; Dec. Dig. § 342.\*]

**11. EVIDENCE (§ 471\*)—OPINION EVIDENCE—CHARACTER.**

The testimony of a witness that a person was an honest man is inadmissible as the opinion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

**12. VENDOR AND PURCHASER (§ 243\*)—BONA FIDE PURCHASER—EVIDENCE—ADMISSIBILITY.**

On the issue whether a subsequent purchaser was a bona fide purchaser without notice of a prior unregistered conveyance evidence of what he did after the purchase was inadmissible.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 607; Dec. Dig. § 243.\*]

**13. DEEDS (§ 42\*)—DESCRIPTION—CERTAINTY—DATES.**

The variance between the date of an original grant from the government dated May 27, 1835, and the statement in an act of sale by the original grantee to a purchaser describing the land as in the original grant from the government, but giving the date of that grant as on May 28, 1835, does not render the act of sale to the purchaser so uncertain in describing the land that it will be inadmissible in evidence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 85-87; Dec. Dig. § 42.\*]

Error from Court of Civil Appeals of First Supreme Judicial District.

Trespass to try title by Reuben Ryle and others against John Davidson and others. There was a judgment of the Court of Civil Appeals (116 S. W. 823) reversing a judgment for defendants and rendering judgment for plaintiffs, and defendants bring error. Reversed and remanded to the district court.

George C. Greer, Greers & Nall, and A. D. Lipscomb, for plaintiffs in error. Robertson & Whittaker and J. J. O'Fell, for defendants in error.

**BROWN, J.** This suit involved the title to the west half of a league and labor of land situated in Jefferson county, Tex., the grant to which was issued by Jorge Antonio Nixon, special commissioner for the Mexican government, on the 27th day of May, 1835, to Manuel Chireno as a colonist in Zavalla's colony.

Plaintiffs and defendants all claim title under Chireno. The title to the plaintiffs below was deraigned from the grantee through these conveyances:

(1) An act of sale before Louis Ruiz, judge of the first instance of the town of Nacogdoches, Tex., on the 15th day of September, 1839, whereby Manuel Chireno conveyed the

entire league to Juan Leplicher for a recited cash consideration of \$100. The instrument was in the Spanish language, and upon trial a translation was introduced in evidence. In that act of sale the description of the land was the same as given in the original grant, except that it stated that the grant was made on the 28th day of May, 1835, whereas the original grant was dated the 27th day of May, 1835. The act of sale contains this language: "It being a condition expressly agreed upon that the above-mentioned purchaser remains obligated to make the payments to the government for the league of land above mentioned, and to comply also with the rest of the requisites to which it is subject according to law."

(2) By an act of sale made and entered into in the city of New Orleans, state of Louisiana, on the 2d day of May, 1839, Juan Leplicher conveyed the entire league granted to Chireno to Daniel Berlin for a cash consideration of \$442.80, the receipt of which was acknowledged. The description in this act of sale was by metes and bounds as given in the original grant. It was not recorded in Jefferson county, Tex., until July 8, 1847. The act of sale contained this language: "Personally came and appeared Juan Leplicher of this city, agent of Manuel Chireno, duly appointed by procuracion in the possession of the purchaser hereinafter named." Leplicher, however, by the terms of the instrument, conveyed all of his interest in the land to Daniel Berlin of the republic of Texas.

(3) On September 1, 1852, Daniel Berlin, by deed duly executed in the state of New York, conveyed 1,628 acres of the land to John Ryle in the form of a square in the southwest corner of Manuel Chireno's league which deed was placed of record in Jefferson county, Tex., on the 19th day of February, 1854. Ryle having died, his heirs were plaintiffs in the suit and the heirship was proved and undisputed.

(4) On December 22, 1854, Daniel Berlin by deed conveyed to Jacob Berlin the league, less 1,628 acres sold to John Ryle.

(5) On September 26, 1853, in the state of New York, Jacob Berlin and wife conveyed 2,000 acres out of the northwest corner of the league of land to W. H. Perrine, which deed was recorded in Jefferson county on the 26th day of December, 1854. Perrine was a plaintiff in this suit.

The defendants claimed title under the following conveyances:

(1) A deed executed by Manuel Chireno on the 9th day of January, 1846, in Nacogdoches county to Arnold Thouvenin for a recited consideration of \$500, conveying to said Thouvenin the entire Chireno league. The payment of the consideration was acknowledged in the deed. This deed was recorded in Jefferson county on the 2d day of June, 1846. The deed was witnessed by Chas. S. Taylor and W. W. Barrett, and was

proved up by the latter before A. W. Wingfield, chief justice of Nacogdoches county. In the month of September, 1846, Arnold Thouvenin conveyed the east half of the league of land to two citizens of France by the name of Bessard.

(2) The defendants introduced a copy from the General Land Office of the original grant to Chireno and a copy of a receipt attached to the original grant in the General Land Office, whereby it appeared that on the 6th day of May, 1846, the government dues in the sum of \$56 had been paid, but did not give the name of the person making the payment. In the same record book of Jefferson county in which the deed from Chireno to Thouvenin was recorded, on the next page, a certified copy of the original grant to Chireno was of record. The plaintiffs objected to the introduction of the copy of the receipt: (1) Because it does not appear to whom the receipt was given. (2) Because it is a certified copy, not the original. (3) Because the loss of the original is not shown. (4) Because it was not a record authorized to be kept in that office.

(3) The death of Arnold Thouvenin was proved, and that his heirs conveyed the land to the defendants Brooks and Pope. It is unnecessary to recite other muniments of title, for they are undisputed, and have the effect to place the title of A. Thouvenin to the west half of the league in the defendants.

It was proved by the defendants below that Manuel Chireno, A. W. Wingfield, W. W. Barrett, and Chas. S. Taylor all died many years before this suit was begun. Arnold Thouvenin was a native of France, his only brother was in Texas, and Arnold Thouvenin left France for the purpose of joining his brother in America. The date of his arrival in Texas is not shown by the evidence. One witness testified that it was in 1848 or 1849, but this is evidently a mistake, as the conveyance to him was dated prior to that time. It was proved by a witness who at the time of giving her deposition lived in France that she lived with her father in the city of New Orleans about 1848 or 1849 and up to 1859; that A. Thouvenin went to Texas to buy land, and that his brother then lived in Texas; that Thouvenin frequently visited her father in New Orleans, and she had heard him speak often of buying land in Texas, and knew that her father had loaned him money during that time with which to pay for the land which he purchased in Texas. The evidence shows that Thouvenin returned to France in the year 1859, and died there in 1863. M. Derise, mayor of the city of Mirecourt, France, testified that he knew Thouvenin well before he came to Texas and after his return, and that Thouvenin was in easy circumstances and an honest man. His wife, who was the witness that knew him in New Orleans, testified to the same fact. Derise also testified that Thouvenin showed to witness maps and plats of

land which he had purchased in Texas. A. Thouvenin did not sell any part of the west half of the league and his heirs sold none of it until the year 1892. The land was rendered for taxes in the name of A. Thouvenin from and including the year 1849 until the year 1865, and from and including the year 1866 until 1877 it was rendered in name of the heirs of Thouvenin; and from 1877 to 1892, when it was sold by the heirs, it was rendered in the name of the estate of Thouvenin.

Starr & Co. and some other agents at other times rendered the land after Thouvenin's death and had oversight and control of it. In about the year 187-, the agents who had control of the land, Starr & Co., employed a man who lived on land adjoining that claimed by Thouvenin to take the oversight of it and to protect it from trespassers, and to prevent them from cutting timber and carrying it away. That man had a very small portion of the land in his field by mistake, and held it, not as his own, but as the property of Thouvenin's heirs until it was sold by them. The west half of the land was not occupied by any person until it was sold to the present defendants Williams, when a house was built upon it for them, and it was rented occasionally as their property, but not occupied continuously.

The Bessards, to whom Thouvenin sold, had their deed recorded in Jefferson county on the — day of —, 1846. About 1864 the claimants under the Bessards' title erected improvements upon the property, the east half of the league, and occupied it continuously until it was subsequently sold, and the purchasers have occupied it since their purchase. This land is not in controversy and the facts are stated in connection with the contention made by the attorneys for plaintiffs in error that the possession and occupancy of the east half of the land should be considered in determining the issue of non-claim. We are of opinion that the evidence is not sufficient to present the issue of abandonment by the plaintiffs of their claim to the land. Therefore the possession of the east half by the vendees of Thouvenin did not affect the right of plaintiffs to the west half of the league.

For convenience the parties will be designated as plaintiffs and defendants, as in the trial court.

In *Watkins v. Edwards*, 23 Tex. 448, the court said: "To entitle a subsequent vendee to have a prior unregistered conveyance, postponed to his subsequent conveyance, it must appear (1) that he was a purchaser bona fide; (2) that he purchased without notice, actual or constructive, of the title of the prior vendee. It must appear that the purchase money was bona fide and truly paid. A recital of that fact in the deed is not sufficient. It must be proved by evidence, independently of the recitals in the deed." The extract expresses the established

rule in Texas, and it is unnecessary to add authorities. We note that the recital in the deed that the purchase money was paid "is not sufficient" to prove that fact, and that "it must be proved independently of the recital." The character of the proof, however, is not limited to direct evidence, but each necessary fact may be proved by circumstantial evidence. The recital in the deed may become a potent circumstance in connection with other circumstances. In *Rogers v. Pettus*, 80 Tex. 428, 15 S. W. 1094, the court, by Judge Stayton, laid down as the rule for judging of such matters that the facts must be "consistent with the conduct of ordinary men, who must be supposed to act with reference to their own interest." That is a sound test.

Did Thouvenin buy the land in good faith and without actual notice of the sale to Leplicher or Berlin? In order to decide that question, the good or bad faith of Chireno may well be considered. The recitals in the act of sale by Leplicher to Berlin are binding on plaintiffs because they claim through it. In that act of sale Leplicher declares that he conveys as agent for Chireno empowered by "procuration" which was delivered to Berlin. This recital would authorize the jury to believe that the title remained in Chireno until the sale was made to Berlin, and that the act of sale from the former to Leplicher was, in fact, intended to be a power of attorney. Leplicher lived in New Orleans, La., and the sale to Berlin occurred there. More than 10 years had passed since the power to sell was given, but no conveyance was on record in Jefferson county. In the act of sale to Leplicher it was expressed as a condition that he should pay the government dues, but the dues had not been paid when Thouvenin bought. A jury might conclude from these facts that Chireno believed the land had not been sold, and that the title was still in him, and that he sold the land to Thouvenin in good faith for the purpose of converting it into money. Such action would be "consistent with the conduct of ordinary men, who must be supposed to act with reference to their own interest." There being no one in actual possession of the land, no record of an adverse title, and the sale to Berlin having been made at New Orleans, La., there was no source from which Thouvenin could acquire information of the unrecorded instrument. Both parties and the witnesses to the deed being dead, it would be impossible to prove a want of actual notice more definitely.

If Chireno believed he had the title and sold in good faith to Thouvenin, the latter may be presumed to have believed that he was getting a good title from the original grantee of the government. It is suggested that the special warranty indicated a doubt of the title. The character of the warranty is a fact which the jury may consider on the question of good faith. *White v. Frank*, 91

Tex. 70, 40 S. W. 962. It is not conclusive, however, and, taking the most favorable view of that fact for defendants, a jury might believe that it did not indicate want of confidence by Thouvenin in this title, because the deed was made by the person to whom the government granted the land, and the special warranty embraced any previous sale by Chireno. The only character of defect not included in the warranty would be the invalidity of the title or a previous grant by the government, which were improbable. There being no circumstances calculated to excite suspicion in the mind of the purchaser, such facts would authorize a jury to find that Thouvenin bought the land in good faith.

Did Thouvenin pay the purchase money? This was a transaction between a Mexican, farming in a small way, and a Frenchman, who had recently come to Texas to buy land. There is no evidence that the men were previously acquainted. They were not related to each other by blood, marriage, or friendship, and there is no apparent reason why the Mexican should have made a gift of the land to the Frenchman. Ordinary men do not usually do so. Neither is there a circumstance to indicate that Chireno was indebted to Thouvenin, in payment of which debt the conveyance might have been made. No circumstance in the case indicates that to defraud his creditors Chireno conveyed the land to Thouvenin. This eliminates every probable purpose on the part of Chireno in the making of the conveyance but one; that is, to convert the land into money by a bona fide sale for a valuable consideration, which is consistent with "the conduct of an ordinary man, who must be supposed to have acted with reference to his own interests." While it is the law that the recital in the deed of payment of the consideration is not sufficient alone to prove the fact of payment, such recital may be a circumstance to be considered in connection with other circumstances in determining the issue of payment. Would Chireno, an ordinary man, acting with a view to his own interests, have conveyed the land to a stranger on time payment, reciting in the deed that the money was paid? A conclusion that he would not would be sustained by the evidence in this case and would be consistent with the conduct of ordinary men. Assuming that Thouvenin acted in good faith in buying, having no actual notice of the previous conveyance, the further facts that the government dues were paid in a short time thereafter, and that a copy of the original grant was procured from the General Land Office and recorded in connection with Chireno's deed to Thouvenin, are consistent with the conduct of a purchaser who had purchased in good faith and paid the purchase money, a conclusion that Thouvenin did those things would be sustained by the evidence, and would be consistent with the conduct of a man who believed he had a good title. Consistent with such belief

are the facts that Thouvenin did not sell the land, that excepting a few years the land was rendered for taxation, including the year 1849, to the year 1892, in the name of A. Thouvenin, while he lived, and, after his death, it was rendered in the name of his estate, together with the employment of agents to render the land and pay taxes, to look after and protect it from trespassers, constitute conduct consistent with the action of an ordinary man who was looking to his own interest, and who, believing he had a good title, had paid for the land. The lapse of more than half a century from the making of the deed to Thouvenin before any adverse claim was asserted to the land gives strength and cogency to the recited circumstances, and would support a finding that the recital of the payment of the consideration in the deed was true.

The evidence being sufficient to sustain a finding by the jury that Thouvenin bought the land in good faith, without actual notice of the sale to Leplicher or Berlin, and that he paid the purchase money, the Court of Civil Appeals erred in rendering judgment for the plaintiffs, for which the judgment of that court will be reversed and this cause remanded. In view of another trial, we will pass upon some assignments which present questions that may arise again.

Defendants offered as evidence a certified copy of an indorsement made on the original grant on file in the General Land Office and signed by the chief clerk thereof, showing that the dues to the government had been paid on the Chireno grant. Plaintiffs objected because it was a private paper, not properly in the land office. The grant was an archive of that office, and the commissioner was authorized to collect the government dues. 1 Pasch. Dig. Laws, pp. 115, 116, arts. 69, 70, 71. The indorsement that the commissioner received payment was a record of the office and a certified copy of it was admissible in evidence.

The defendants offered the deposition of Mrs. De Ries to the effect that Thouvenin was an honest man, that he was in easy circumstances, and that he borrowed money from her father to pay for land in Texas. The evidence that Thouvenin was honest was an opinion of the witness, and not admissible. The other statements concerned matters which occurred after the purchase from Chireno, and could not bear upon any issue in the case.

The defendants objected to the introduction of the act of sale from Chireno to Leplicher because it did not contain a description by which the land could be identified. The ground of the objection was the variance in date between that given in the original grant, "May 27, 1835," and the statement in the act of sale to Leplicher that the land conveyed was that granted to Chireno on the "28th day of May, 1835"—the only variance being in the day of the month. The ob-

jection was properly overruled. There were other questions raised during the trial and presented here, but will not probably arise again.

That we may not be misunderstood we state that we have not expressed our conclusion as to the effect to be given to the evidence, but have stated what we believe to be conclusions which the law would permit a jury to deduce from the facts.

Judgment of the Court of Civil Appeals reversed, and cause remanded to the district court.

### FIDELITY & DEPOSIT CO. OF MARYLAND v. WISEMAN et al.

(Supreme Court of Texas. Feb. 2, 1910.)

#### 1. TRUSTS (§ 95\*)—CONSTRUCTIVE TRUST—PROPERTY OBTAINED BY FRAUD.

The holder of property obtained by fraud is a constructive trustee of the person defrauded.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145-147; Dec. Dig. § 95.\*]

#### 2. CORPORATIONS (§ 310\*)—OFFICERS—LIABILITY TO CORPORATION—SALE OF STOCK.

Whether the president of an insurance company willingly or unintentionally, by culpable negligence, ostensibly received for the company's benefit forged municipal bonds in exchange for its stock, he is responsible to make good the default.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1353; Dec. Dig. § 310.\*]

#### 3. HUSBAND AND WIFE (§ 273\*)—COMMUNITY PROPERTY—ADMINISTRATION—PROPERTY OBTAINED BY FRAUD.

Where the wife of the president of an insurance company, who either willingly or unintentionally, by culpable negligence, ostensibly received for the company's benefit forged municipal bonds in exchange for its stock in his possession at the time of his death, received, as survivor of the community estate before the discovery of the fraud, new shares of the company, and sold them for cash, the purchaser took a good title thereto, and only the amount received by her remains subject to make good what the company lost in the transaction.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1012; Dec. Dig. § 273.\*]

#### 4. EXECUTORS AND ADMINISTRATORS (§ 55\*)—ASSETS OF ESTATE—PROPERTY OBTAINED BY FRAUD—PROCEEDS—DISTRIBUTION AMONG GENERAL CREDITORS.

An executor or administrator, securing money and treating it as funds of the estate, is estopped to deny the capacity in which they are held where no other person has a better claim thereto; but, as against the claim of one whom deceased defrauded, the proceeds of the property fraudulently obtained cannot be held for distribution among general creditors.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 306; Dec. Dig. § 55.\*]

Error to Court of Civil Appeals, Fourth Supreme Judicial District.

Suit by S. Wiseman against Mary F. Swain and another. A judgment for defendant was reversed by the Court of Civil Appeals, and defendant the Fidelity & Deposit Company of Maryland brings error. The judgment of

the Court of Civil Appeals is reversed, and the judgment of the district court is affirmed.

Andrews, Ball & Streetman, for plaintiff in error. Baker, Botts, Parker & Garwood and I. M. Standifer, for defendants in error.

GAINES, C. J. This suit was brought by S. Wiseman against Mary F. Swain and the Fidelity & Deposit Company of Maryland. The object of the suit was to recover upon a judgment rendered against W. J. Swain, in his lifetime, for \$4,477.13, in the district court of Collin county, against Mrs. Swain as survivor of the community estate of herself and her deceased husband, W. J. Swain, and against her codefendant as surety upon her bond, given under the statute for the administration of that estate.

The facts as developed by the testimony upon the trial were as follows: William J. Swain inaugurated the enterprise of establishing and promoting the Houston Fire & Marine Insurance Company, and became president of the company. The charter was obtained, and a very small portion of the stock was subscribed for. Thereupon Swain repaired to New York, and, upon his return, reported that he had sold to John C. Preston 1,080 shares of stock in the company, and had received therefor bonds of the city of Austin of the par value of \$135,000. These purported bonds were brought back to Houston, and turned over to the Insurance Company. Mrs. Swain, upon the death of her husband, applied to the county court of Harris county for the right to administer the community estate of herself and her deceased husband, and her codefendant, the Fidelity & Deposit Company of Maryland, signed her bond as such survivor. The inventory returned by her showed as the property of the estate, as follows:

Cash in bank.....	\$ 426 00
10½ shares stock H. F. & M. I. Co.	1,312 50
30 shares stock H. F. & M. I. Co....	3,750 00
8 shares stock H. F. & M. I. Co.	
20 per cent. paid.....	200 00
1,080 shares stock H. F. & M. I. Co. (transferred to him by J. C. Preston) .....	135,000 00

The property was appraised by appraisers appointed by the court at the sums, respectively, set opposite the property on the foregoing list. Whereupon Mrs. Swain gave bond for the administration of the estate in the sum of \$145,000 (being the value of the community estate), with the Fidelity & Deposit Company of Maryland as her surety.

Upon the trial of the cause the bonds which were given for the stock were indisputably proved to be forgeries, and the evidence leaves the gravest doubt as to whether any such person as John C. Preston ever existed. But after the death of W. J. Swain there was found among his papers a purported transfer

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the J. C. Preston stock, signed and acknowledged by the latter, to Swain. After her qualification to administer the community estate of herself and her deceased husband, Mrs. Swain demanded and received new stock in the company in lieu of the old 1,080 shares purported to have been bought of Preston, believing the shares to be genuine. She subsequently sold 1,120 shares of the stock of the company for \$75,000, and received the consideration except five thousand and some hundred dollars. She testified that when she received the money for the stock she distributed one-half of it to the heirs of the estate, except one-sixth, which was payable to a minor heir, whose guardian did not receive the money. When one has been defrauded of property, as in this case, he may sue for the property itself, or in case it has been sold to an innocent purchaser, he may recover the proceeds. Whether of the property or of its proceeds, the holder is considered a constructive trustee. Hence the beneficiary—that is, the party defrauded—is entitled to the fund, and no one else until he is satisfied he is entitled to any part of it. In this case W. J. Swain, as president of the Insurance Company, either willingly or by culpable negligence, by which the forged bonds were ostensibly received for the benefit of the company, made the transaction, but, whether willingly or unintentionally, he would be in either case responsible to make good the default. Mrs. Swain, as survivor of the community estate, having before the discovery of the fraud received new shares of the company, and having sold them for cash, the purchaser took a good title to the shares, and only the amount received by her for them remains subject to make good to the Insurance Company what it lost in the transaction.

We have failed to find any sufficient answer to the question, How is the defrauded party to be satisfied if the fund, as in this case obviously not enough for the purpose, is payable upon the general debts of the party committing the fraud? It seems to us that to permit this is to allow a fund which belongs to one person to be appropriated to the payment of the debts of another. The authorities on this question are not uniform. Some hold that because the executor or administrator has secured the money, and has treated it as funds belonging to the estate, he is estopped to deny the capacity in which he held it; and this will do where there is no other person who has a better claim to the fund. Such is the case of *Portis v. Cummings*, 21 Tex. 285, where the parties, having recovered a sum of money belonging to their ward, were not permitted to deny as between themselves and the ward that they had so received it. On the other hand, in the case of *the American Sugar Refining Co. v. Fauber*, 145 N. Y. 552, 40 N. E. 206, 27 L. R. A.

757, a vendor of personal property sold to the vendee upon false representations as to the solvency of the firm. The vendees having sold a part of the goods in due course of trade, and having assigned the remainder in an assignment for the benefit of creditors, it was held that the defrauded vendor had the right of recovery of the assignee the proceeds of the sale of the goods assigned. Let us suppose, then, for the sake of argument, that the vendees, instead of assigning for the benefit of creditors, had died, could their administrators claim these goods or their proceeds for distribution among their general creditors? We think not. In *McPike v. McPike*, 111 Mo. 216, 20 S. W. 12, the administrator in Missouri collected rent upon a mill in Alton, Ill., and also sold the mill. The court held that, since the law of Illinois was not proved, it would be presumed that the common law was in force there, and that under that law the administrator had nothing to do with real estate, and decided that he was not chargeable as administrator with the rents or the proceeds of the mill.

It appears from the statement of facts that the defendant the Fidelity Company offered to prove that the Houston Fire & Marine Insurance Company had filed a suit against Mary F. Swain and the surety upon her bond, upon the theory that John C. Preston was a mythical person, and that Swain, by using his name in subscribing for the stock, bound himself, and that the Insurance Company now sues her and the surety upon her bond for the entire proceeds of the sale of the stock. The court received the evidence announcing that he would admit it, provided counsel should show any authority for its admission, but no bill of exception was filed either for its acceptance or rejection. From all this we can see that the Insurance Company had a suit against Mrs. Swain and the surety on her bond for the entire proceeds of the sale of the stock.

Accordingly the judgment of the Court of Civil Appeals is reversed, and the judgment of the district court affirmed.

#### IN RE TRANSFER OF CAUSES BETWEEN COURTS OF CIVIL APPEALS.

(Supreme Court of Texas. Feb. 2, 1910.)

#### COURTS (§ 485\*)—STATE COURTS—TRANSFER OF CAUSES—STATUTES.

Under Act March 10, 1909 (Acts 31st Leg. c. 42), entitled "An act to amend article 99a, c. 12, title xxvii, of the Revised Civil Statutes of the state of Texas," providing that cases transferred from any Court of Civil Appeals to another be taken from the cases appealed from the counties nearest the place where the court to which they are transferred is held, cases from a county in which a Court of Civil Appeals is actually sitting may have to be transferred to a Court of Civil Appeals sitting in another county where the county from which they are ap-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pealed is the nearest county to the place where the court to which they are transferred is held.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 485.\*]

In the matter of the transfer of causes from one Court of Civil Appeals to another.

**GAINES, C. J.** In the matter of the transfer of causes from one Court of Civil Appeals to another for the purpose of equalizing the dockets of said courts.

This being the first instance in which we are called upon to put in force an act entitled "An act to amend article 994a, chapter 12, title xxvii, of the Revised Civil Statutes of the state of Texas and declaring an emergency," approved March 10, 1909 (Acts 31st Leg. c. 42), we deem it proper to vouchsafe some remarks in justification of our action in the transfer thus made. It is to be noted that, with the exception of providing that we shall transfer cases from those Courts of Civil Appeals having a greater amount of business upon their dockets to the Courts of Civil Appeals having a less amount of business upon their dockets, the act announces but one rule, and that is that "cases transferred from any Court of Civil Appeals shall be taken from the cases appealed from the counties nearest to the place where the court to which the cases are transferred is held." To comply with this last requirement we have found it necessary to select a county from which a transfer is to be made—that is nearest to the court to which the transfer is to be sent—and to transfer all cases from such county or so many as is necessary to make the quota, and, if not sufficient to make the quota, to take the county that is next nearest to the court to which the transfer is to be made and proceed in the same manner, until the quota is filled. Proceeding in this manner we have in this instance had to transfer over 60 cases from Tarrant county where the Court of Civil Appeals for the Second district sits to Texarkana, where the Court of the Sixth district holds its sessions, a result not contemplated by the gentlemen who framed the act. But so the law is written. It is noticeable that the act passed both houses of the Legislature without a dissenting vote in either, from which it would seem that "in the multitude of counsel there is wisdom," provided it results in some debate.

We venture to suggest that, when the Legislature comes to amend the act again, it occurs to us that it would be well to have the Supreme Court to require the several clerks of the Courts of Civil Appeals to send up a list of the undisposed of cases, omitting those that have been submitted or set down for submission, and then to require the Supreme Court to designate the number of cases that are to be transferred from one Court of Civil Appeals to another, and to leave it to

the courts from which the transfers are to be made to select the cases and to actually make such transfers.

## METROPOLITAN LIFE INS. CO. v. LENNOX.

(Supreme Court of Texas. Feb. 2, 1910.)

### 1. INSURANCE (§ 668\*)—ACTIONS ON POLICY—EVIDENCE—QUESTION FOR JURY.

In an action to recover the balance due on a life insurance policy, evidence held not to conclusively show that the insured in his application misstated his age, and hence a motion for a directed verdict was properly overruled.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1759, 1765; Dec. Dig. § 668.\*]

### 2. INSURANCE (§ 668\*)—ACTIONS ON POLICY—EVIDENCE—QUESTION FOR JURY.

In an action to recover the balance due on a life insurance policy, where the company set up that the insured had misstated his age, and that under a provision of the policy the beneficiary should receive only the amount of insurance that the premiums paid would buy under the company's rates for the correct age of the insured, evidence held insufficient to raise an issue for the jury as to whether the insurance company waived this condition of their policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1761; Dec. Dig. § 668.\*]

### 3. COURTS (§ 247\*)—CERTIFIED QUESTIONS—FINDING OF FACTS.

The Supreme Court will not answer a certified question as to whether the facts of a case bring it within the provisions of a statute, where the Court of Civil Appeals made no conclusions of fact, merely certified the evidence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 749-765; Dec. Dig. § 247.\*]

### 4. RELEASE (§ 58\*)—VALIDITY—CONSIDERATION—QUESTION FOR JURY.

In an action to recover the balance due on a life insurance policy, where the company paid only part of the sum called for by the policy, claiming that that was all that was due, and plaintiff executed a release which stated that she accepted the sum paid in full satisfaction of her entire claim, evidence held not to conclusively show a valuable consideration for the release, so as to require a directed verdict for defendant.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 110; Dec. Dig. § 58.\*]

### 5. INSURANCE (§ 668\*)—ACTIONS ON POLICY—EVIDENCE—QUESTION FOR JURY.

In an action to recover the balance due on a life insurance policy, evidence held sufficient to take the question of defendant's liability for the balance due under the terms of the policy to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1732-1770; Dec. Dig. § 668.\*]

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Mrs. Lydia Lennox against the Metropolitan Life Insurance Company. From a judgment for plaintiff, defendant appeals. Questions certified to the Supreme Court from the Court of Civil Appeals. Questions answered.

Locke & Locke, for appellant. Houston Wood, for appellee.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

BROWN, J. Certified questions from the Court of Civil Appeals for the Fifth District, as follows:

"This suit was brought by Mrs. Lydia Lennox to recover from Metropolitan Life Insurance Company \$203.97 as the balance due on a policy of insurance issued by it in her favor on the life of her husband. She sought to recover also \$24.50 for statutory damages and \$50 for attorney's fees. The company defended upon the ground that it had paid her all that the policy promised, there having been an understatement of five years in the age of the insured; and that she had surrendered the policy for cancellation. A request for a peremptory instruction in favor of the company was denied by the court, and the case was submitted generally to the jury. Upon their verdict, a judgment was entered in favor of the plaintiff for \$290.40. The company thereupon appealed the case to this court. The petition alleged the execution by appellant of a policy of insurance for \$1,000, and admitted a credit of \$796.03, and sought to recover the balance alleged to be due thereon of \$203.97. The defendant answered, among other things, as follows: The policy sued upon was issued in pursuance of, upon the faith of, and in consideration of, a written and printed application made therefor under date of March 6, 1905, by Samuel D. Lennox and the plaintiff. By a clause appearing upon the face of said policy, it was provided that all of the answers and statements contained in said application should constitute warranties, and should be a part of the contract. Said application consists of two parts, designated respectively as parts A and B. Part A constitutes the application proper, and consists of certain printed questions propounded to the said Samuel D. Lennox and the plaintiff and their written answers thereto. Part B consists of statements of the said Samuel D. Lennox to the medical examiner of the defendant. At the foot of part A of said application, underneath the questions and answers, and above the signatures of the said Samuel D. Lennox and the plaintiff, is their agreement (so far as the same is material to this litigation) substantially as follows: 'It is hereby declared, agreed and warranted by the undersigned that the answers and statements contained in the foregoing application \* \* \* shall be the basis and become part of the contract of insurance with the Metropolitan Life Insurance Company; that they are full and true and are correctly recorded; \* \* \* that any false, incorrect or untrue answer \* \* \* shall render the policy null and void, and forfeit all payments made thereon.'

"Among the questions and answers contained in part A of said application, and above said agreement and the signatures of the said Samuel D. Lennox and the plaintiff, is the following: '(5) Date of Birth—Year—

Month—Day—Age—Nearest Birthday. 1856—June—20—49.' By reason of said answer the said Samuel D. Lennox and the plaintiff stated and warranted to the defendant that the said Samuel D. Lennox was born on the 20th day of the month of June in the year 1856, and that his age at nearest birthday at the time of said application was 49. In reliance upon said answer and statement the policy sued upon was issued by the defendant in consideration of the payment to it of a quarterly premium of \$10.43 on or before the delivery of said policy and of a like amount on or before the 20th day of March, June, September, and December of each and every year during the life of said Samuel D. Lennox. The defendant's premium charges at the time of said application and issuance of said policy were graduated according to the age of the insured, and increased with each added year of age.

"The promise of the defendant to pay the plaintiff, if living, the sum of \$1,000 upon the receipt and approval by it of proofs of death of the said Samuel D. Lennox, was made upon the condition, among others, which was printed upon the reverse side of said policy, and which was referred to upon its face and expressly made a part thereof, as follows: 'Fourth. The company will admit the age of the insured upon satisfactory proof; failing such proof, if the age shall have been understated the amount of insurance or other benefit will not be more than the premium charge will purchase by the company's rates in use at the date hereof for the true age of the insured; and absolute proofs of age may be required with proofs of claims hereunder.'

"The insured under said policy referred to in said condition was the said Samuel D. Lennox. Upon the death of the said Samuel D. Lennox, the defendant furnished to the plaintiff blank forms upon which to make proofs of her claim under said policy. In said forms inquiries were made and spaces were provided for information with reference to the date of birth and the age at death of the said Samuel D. Lennox; and the plaintiff was required to furnish such information. She did not do so, however. The proofs submitted by her contained merely estimates upon the part of two attending physicians and an undertaker with reference to the age of said Samuel D. Lennox at his death, which estimates varied from 50 to 54 years, and were accompanied by the plaintiff's declaration that she did not know the date of his birth.

"The plaintiff having failed and refused to furnish proofs of age, the defendant at its own expense made an investigation in Canada into the family history of the said Samuel D. Lennox and was informed that the date of his birth was June 20, 1851, and that said date appeared in the family Bible. Believing such information to be true, and in fact it was true, the defendant communicated the

same to the plaintiff and offered to pay her in full settlement of said policy the sum of \$796.03, which was the amount of insurance that the premium charge on said policy, to wit, the quarterly premium of \$10.43, would purchase under the premium rates in use by the defendant on the date of said policy to wit, March 20, 1903, for the true age of the said Samuel D. Lennox, which was 54 years. The plaintiff under date of May 14, 1907, accepted said sum, surrendered said policy to the defendant, and executed to it an instrument whereby she acknowledged the receipt of said sum and released and discharged the defendant from all claims arising under or by reason of said policy.

"Said settlement was not effected in consideration of the promise of the defendant or defendant's agent to pay the plaintiff any further sum upon any condition whatever. On the contrary, the plaintiff was distinctly informed that if said sum of \$796.03 should be accepted by her it should be in full and absolute settlement of all of her claims against the defendant, and she accepted it accordingly. It is true that in the course of the negotiations she made inquiry of the defendant's agent as to whether it would pay the balance of the face of the policy if she should afterwards prove to it by the records of Richibucto, which was the birthplace of the said Samuel D. Lennox, that his age was as it had been stated in the application; but she was informed by said agent that he could not and would not make any promise to that effect as a consideration for her acceptance of the sum offered in full settlement of her claims, but that he was sure that his company as an honorable company would gladly pay the difference if such proofs were presented to it. Said statement upon the part of the defendant's agent was not made as a promise, and did not purport to be such, but was merely a statement of his opinion. After said settlement had been effected and the policy and the plaintiff's receipt in full had been delivered to the defendant, said statement was reported to it, and it fully ratified and confirmed the same, and the plaintiff was notified that it would be pleased to consider any authentic information which she might furnish that the age as stated in the application was correct; but no information of any kind was presented by the plaintiff to the defendant at that time, and none has ever been presented to it; nor has the good faith of the defendant nor the authenticity of the information obtained by it in Canada ever been denied by the plaintiff. At all times since the death of the said Samuel D. Lennox, the defendant has been ready and willing to pay the balance of the face amount of said policy upon any proper and sufficient showing that the age of the said Lennox was as stated in said application; and, under the circumstances hereinbefore set forth, it has not failed to pay said policy, or any portion

thereof, within the time specified therein after demand made therefor within the meaning of article 3071 of the Revised Statutes of the state of Texas.

"The appellee to this answer filed a general denial and pleaded a waiver by defendant of the provision in the policy as to the age of assured.

"The policy on its face reads:

<p>Number. 373335A Amount. \$1000. Age, 49. <math>\frac{1}{4}</math> Annual Premium, \$10.43.</p>	<p>IN CONSIDERATION OF THE ANSWERS AND STATEMENTS contained in the printed and written application for this Policy upon the life of Samuel D. Lennox, of Dallas, State of Texas, hereinafter called the Insured, all of which answers and statements are hereby made warranties and are hereby made part of this contract, and of the payment of the quarter annual premium of Ten Dollars and Forty-three cents on or before the delivery of this Policy, and of a like amount on or before the Twentieth day of March, June, September and December of each and every year during the life of the Insured, DOTH HEREBY AGREE, subject to the condition set forth on the reverse side hereof, each and all of which are hereby made part of this contract and are accepted by the Insured and Assured as part thereof as fully as if herein recited, to pay at its Home Office, in the City of New York the sum of One Thousand Dollars, to Lydia Lennox, wife of the Insured, herein called the Assured, if living, otherwise to the legal representatives of the Insured, upon the receipt by the Company at its Home Office and its approval of the proofs of death of the Insured made in the manner, to the extent and upon the blanks required by condition Sixth, and upon the surrender of this Policy.</p>
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"On the reverse side are several conditions, among others, the following: 'The company will admit the age of the insured upon satisfactory proof; failing such proof, if the age shall have been understated, the amount of insurance or other benefit will not be more than the premium charge will purchase by the company's rates in use at the date hereof for the true age of the insured; and absolute proofs of age may be required with proofs of claim hereunder.'

"The application for insurance was in writing and dated March 6, 1905, and signed Samuel D. Lennox. The application gave the date of birth of Samuel D. Lennox June 20, 1856, and his age at nearest birthday 49 years.

"Robert L. Lennox, residing at Roxton, New Brunswick, Dominion of Canada, testified that he was a brother of Samuel D. Lennox, that he did not know the year of the birth of Samuel D. Lennox, but that he was about four or five years younger than witness, who was 61 years of age. Mrs. H. Wathen testified that she resides in Kent county, New Brunswick, and is a sister of Samuel D. Lennox, that she knew her father and mother kept in a family Bible a record of the dates of the birth of herself and brothers and sisters, and such Bible was kept and used

by them as authentic record of the family history; that the Bible was not in her possession or control, and she does not know whether or not it is in existence; she last saw it 25 years ago in the possession of her brother, who resided on the homestead formerly owned by her father. H. Wathen of Kent county, New Brunswick, Dominion of Canada, testified that he was 68 years of age and the husband of the witness, Mrs. H. Wathen, whose maiden name was Mary Lennox. He further testified: 'I have in my possession a note book containing a memorandum of the dates of birth of my wife, and of her brothers and sisters. The memorandum was prepared by myself and was copied by me from a record in the family Bible belonging to my wife's family on March 24, A. D. 1880. The said memorandum was prepared by me because the Bible containing the original record was in a very dilapidated condition, and I wished to preserve the record for future use. It was prepared by me from said Bible on March 24, A. D. 1880. The dates of birth contained in said note book are absolutely true and correct copies of the entries of such dates contained in the said family Bible, of which I have testified above. The said note book containing the said memorandum has been kept by me and used by me and my wife's family to refer to through me as a true and authentic record of the Lennox family history. I refuse to attach the said note book containing the said memorandum and have not done so, because I do not wish to let the same go out of my possession, as it contains other private memoranda. I herewith attach a true and carefully prepared copy of all entries in the said note book relating to the birth of my wife, of her brother, Samuel D. Lennox, and her brother Robert L. Lennox, said copy hereto attached being marked "A," for identification.'

"The memorandum Exhibit A attached gives the date of the birth of Samuel D. Lennox as June 20, 1851. It also gives the date of birth of his brother Robert, April 30, 1846, and William as May 4, 1846, which evidently cannot be true in the natural course of events. One of the physicians' certificate to the proofs of death stated his age at time of death as about 40 years and another about 51 years. The appellant's medical examiner's report made before the policy was issued shows that he carefully examined the applicant, and he placed his apparent age at 49 years, the same as stated by him. The attending physician's statement was that deceased was about 50 years old, and that his apparent age was 50 years. Joe Wills testified that he had been intimately acquainted with Samuel D. Lennox about two or three years at the time of his death and he took him to be about 45 years old. On cross-examination he shows that this statement was only an estimate or guess. On the question as to whether there was a waiver of the condition pleaded by defendant as to proof of age, the plaintiff tes-

tified: That about two weeks after her husband's death, she and one Wills went to the office of defendant's agent, in Dallas, to see about collecting the policy. That the agent had the blanks and filled out the blank proofs, and during the time asked her the age of her husband when he died. That she was unable to tell him, and so informed him. That the agent filled out the blank himself. That she could not write. That after the agent filled out the blanks he requested her to go before an officer and made affidavit to them. That she the next day went before an officer and made the affidavits, and returned the proofs of age, and did not at that time require her to make proof of age, other than he asked her the age. That nothing was said by the agent about reducing the amount of the policy. That the agent said he would get it through. That he thought she would get it right away. That she never saw the agent any more until on the day she received the check. The date of the proofs was March 28th; the date of the check was May 14th. Wills testified that he was present when the agent made out the proofs in evidence. He testified substantially as did plaintiff, and, in addition, stated that he suggested, as Mrs. Lennox could not then recall the age of her husband, that the agent wait another day, but the agent refused to wait, and insisted on completing the proof then, and the agent said: 'No, we will go ahead and fill this out anyhow, and you can take it to a notary public, and make affidavit to it, and bring it back to me, and I will forward it to the insurance company with special instructions that they immediately return the draft, and I want to collect it just as quick as possible for you.' Wills also testified the agent remarked, at the time the age was being considered, that it was a mere matter of form. The proofs made out by the agent on that day are in the record, and show that her answer to age question as 'don't know.' Upon receiving the check, appellee executed a receipt as follows:

" 'Claimant's Receipt and Release.

" 'Amount Paid \$796.08.

" 'Policy No. 373335A

" 'Life of Samuel D. Lennox.

" 'In consideration of the sum of Seven Hundred Ninety-six 08-100 Dollars lawful money of the United States, to me in hand paid by the Metropolitan Life Insurance Company, of the City of New York, have remised, released, and forever discharged, and by these presents do, for myself, my heirs, executors, and administrators, remise, release, and forever discharge the said The Metropolitan Life Insurance Company of and from all manner of action and actions, cause and causes of action, suits, debts, judgments, claims and demands whatsoever, in law or in equity, which against the Metropolitan Life Insurance Company I ever had, now have, or which my heirs, executors or administrators hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever, to the day of the date of these presents, and particularly all claims arising under or by reason of the above described policy issued under and governed by the laws and statutes of the State of New York.

" 'In witness whereof, I have hereunto set my hand and seal the 14th day of May, 1907.

her  
" 'Lydia X Lennox. [L. S.]  
mark.

" 'Signed and delivered in the presence of W. Felton, C. L. Appellate.'

"Plaintiff testified that after she delivered the proofs of the claim to the agent he never had any other communication with her until the day she accepted the check. She received a notice the day before she received the check, from the company, giving the amount due under the policy as \$796.03. She could not read it, and called on a neighbor to read it, and he did so. She went next day to the agent's office. She had never been called on to make proof of the age of deceased, but had been assured by the agent that the money would be paid. She called on the agent, and he told her the company had found that her husband had understated his age, and that the company did not owe her but \$796.03. She testified: 'When I went down there I asked him if he would explain it to me about the age, and how it was they got it turned around, and why they didn't come to me and let me know. He said it was on account of different ones giving the age in, and me not knowing the age to give in. He said the company had taken the thing in hand and got the age from the record. I asked him, if I should accept this money, would it make any difference in my getting the other money? He said it would not make any difference at all; when they got the thing straightened out it would be all right. I did not understand that I was signing it in full. He said he would keep the check or send it back, or he would leave it with me, and he said if he sent it back, he didn't know whether I would get it back without having to go to more trouble, and I thought I would take it, because I had two children to take care of, and I thought it would not make any difference, and I signed the receipt.'

"Mr. Applegate, the insurance agent who conducted the whole proceeding, testified that: 'In response to her inquiry that in the event the company was not correct in the settlement, and it was proven to the company that the age in the policy was the true one, I told her the company, with the greatest of pleasure, would cheerfully pay her the difference. I advised the company, when I forwarded the policy and release, that I had settled the claim with Mrs. Lennox, with the understanding that it was in settlement of all her claims under the policy, but that I had stated to her, in the event she could prove that the company was mistaken, it would gladly reconsider the matter, and pay her the difference. The company replied that I acted rightly.'

"The appellant presents but one assignment of error—that the court erred in refusing its special charge instructing a verdict for defendant.

"Question 1. Does the evidence conclusively show that Samuel D. Lennox in his application for insurance misstated his age?

"Question 2. Was the evidence sufficient to raise the issue that the appellant company waived the condition of the policy as to the

age of the insured and the proof of the same?

"Question 3. Is article 3096ee, chapter 69, Laws 1903 (Sayles' Supp. 1904, p. 292), applicable to the facts of this case, and, if so, can appellant urge the matters plead by it to defeat a recovery by plaintiff?

"Question 4. Does the evidence conclusively show a consideration for the release?

"Question 5. Did the trial court err in refusing appellant's charge instructing a verdict for defendant?"

Answer to the first question: The evidence does not show "conclusively" that Samuel D. Lennox, in his application, misstated his age. If the original record in the family Bible had been produced, it would not have been "conclusive," but might have been controverted and the entry shown to be incorrect. There was evidence that tended to show that the age of Lennox was not understated.

Answer to the second question: The evidence does not show that the insurance company waived the condition of the policy under which it claimed a reduction of the amount which it was obligated to pay, but Mrs. Lennox was not precluded from recovery if the proof showed that the age was correctly given.

Answer to the third question: The honorable Court of Civil Appeals did not find conclusions of fact from the evidence upon the issue presented in this question, but certified the evidence to this court. We are unable to determine whether the facts, if found from the evidence, would make the statute referred to applicable to this case. We therefore cannot answer the question.

Answer to the fourth question: The evidence does not "conclusively" show that there was a valuable consideration paid for the release executed by Mrs. Lennox. If her testimony is true, there certainly was not such consideration. Under the belief that she was receiving the full amount she signed the release and was assured that, if the age given in the policy should be found to be correct, she would receive the remainder, which left the matter open for adjustment.

Answer to the fifth question: The trial court did not err in refusing to give the charge, instructing the jury to return a verdict for the defendant. There was sufficient evidence to sustain the verdict. The liability was a question of fact which the law commits to the jury for decision.

#### SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. SMITHDEAL.

(Supreme Court of Texas. Feb. 2, 1910.)

1. EMINENT DOMAIN (§ 69\*)—DAMAGES TO PROPERTY ABUTTING STREET—EXEMPTION FROM LIABILITY.

A foreign telephone company is not exempt from payment of damages to abutting

property by construction of its lines in a street under a permit from the state and a city.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 171-179; Dec. Dig. § 69.\*]

**2. EMINENT DOMAIN (§ 119\*)—TELEPHONE LINES IN STREET AS ADDITIONAL BURDEN.**

Where telephone lines are constructed in a street, the structure is an additional burden.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 312; Dec. Dig. § 119.\*]

**3. EMINENT DOMAIN (§ 100\*)—TELEPHONE LINES IN STREETS—LIABILITY FOR DAMAGES.**

A telephone line may have been constructed by authority of law and with due care, yet, if its presence on the street causes or contributes to a depreciation of the "market value" of abutting property, the company is liable for such damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 256-267; Dec. Dig. § 100.\*]

**4. EMINENT DOMAIN (§ 100\*)—TELEPHONE LINES IN STREETS—LIABILITY FOR DAMAGES.**

An abutting lot owner has a right to grow trees on the sidewalk, and if they are damaged by telephone wires, which contributes to a depreciation of the market value of the property, the injury should be considered as if caused by the structure.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 256-267; Dec. Dig. § 100.\*]

**5. DAMAGES (§ 159\*)—MARKET VALUE OF LOT—INJURY TO TREES.**

An action being for depreciation in the market value of a lot, injury to trees can only be considered as it affects such value.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 447; Dec. Dig. § 159.\*]

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by C. M. Smithdeal against the Southwestern Telegraph & Telephone Company. From a judgment for plaintiff, defendant appealed to the Court of Civil Appeals, which, pending a motion for rehearing, certifies questions to the Supreme Court. Questions answered.

A. P. Wozencraft, W. E. Spell, and W. S. Bramlitt, for appellant. Morrow & Smithdeal, for appellee.

**BROWN, J.** Certified question from the Court of Civil Appeals for the Fifth District, as follows:

"In the above-entitled cause, which is pending on motion for rehearing, the following issues of law arise, which this court deems it advisable to present to the Supreme Court of the state of Texas for adjudication.

**"Nature of Suit.**

"This suit was instituted by appellee to recover of appellant damages occasioned him by the construction of appellant's telegraph and telephone lines over and along Franklin and Ivy streets, in the city of Hillsboro, on which appellee's homestead is situated, and also prayed for a mandatory injunction requiring the removal of certain structures.

The appellant answered by general and special exceptions, general denial, and specially, in effect, that it is a foreign corporation, and holds a permit from the state of Texas to do business therein; that in conformity with said permit, and with the authority of said city of Hillsboro, it constructed its lines along said streets and the sidewalk thereof, and operates a local and long-distance exchange in said city for telegraph and telephone purposes; that said business is conducted as a public service, and its poles, wires, etc., are so placed along said streets so as not to discommode the public in the use of said streets; that they were properly and skillfully erected and maintained; that said line was constructed before the trees were planted on the sidewalk adjoining appellee's premises, and if there is any interference with said trees it accrues by reason of the growth of same, etc.

**"Statement.**

"Appellant was a foreign corporation and held a permit from the state of Texas to construct and operate a telegraph and telephone line in said state. Under said permit, and with the permission of the city council of the city of Hillsboro, Tex., it had constructed and was operating such a line in said city for public use and had established local and long-distance exchanges therein. The construction of said line in said city, as far as relates to this case, consisted of large and tall poles set at intervals along the sidewalks in the streets, some of which were stayed by guy posts and wires. On the poles were placed crossbeams upon which were strung wires and cables. Part of this structure was placed on the sidewalks adjoining appellee's lot and other parts on the sidewalks across the street just opposite said lot. There were no more poles set nor wires strung in the construction of the line than was necessary for the operation of said business. On said lot was a residence, and appellee and family occupied the same as a homestead, and it was not shown that said lot had any value for other purposes than that of homestead. That said construction was unsightly and interfered with the view from the residence, and the line ran through and injured the branches of his trees growing on the sidewalk planted for ornamental purposes. The line was constructed before plaintiff acquired the lot, and the wires were placed above the trees; but the trees have since grown, and the branches thereof come in contact with said wires. The testimony showed the property to be damaged by the construction and maintaining of said line to the amount of the sum found by the jury. The court charged the jury the measure of damages, in effect, to be the difference in the value of the property just before the act

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of defendant, and its value as affected by said structure. It was shown that the wires could be placed 10 or 15 feet higher on the poles then erected, which would be above the trees and not interfere therewith. The appellant, at the instance of appellee, before the institution of this suit, promised to raise said wires above the trees, but failed to comply with said promise.

"On the issue submitted to the jury whether or not it was necessary for the cables to remain in the boughs of the trees, they found it was not.

"Question 1. Is the appellant such a public service corporation as is exempt from liability for damages for the construction of its line under a permit from the state and city under the facts stated?

"Question 2. Does the unsightliness of the structure and the interfering with the occupants' view entitle the plaintiff to recover damages where such depreciates the value of the property?

"Question 3. Has the plaintiff the right to grow trees on his sidewalk, and is appellant liable for damages to same as shown by the foregoing?

"Question 4. Was appellee entitled to the mandatory writ of injunction under the foregoing circumstances?"

Answer to Question 1: The telephone company was not exempted from the payment of damages caused to abutting property by the construction of its lines. The structure of the telephone company is an additional burden upon the street. *Telegraph & Cable Co. v. Eaton*, 170 Ill. 517, 49 N. E. 365, 39 L. R. A. 722, 62 Am. St. Rep. 390; *Telephone Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; 27 Am. & Eng. Enc. 1008, note 12; *Id.* p. 150, note 4. We could cite many additional authorities, but it is unnecessary to do so.

Answer to Question 2: The telephone line may have been constructed by authority of law and with due care, yet, if its presence on the street caused or contributed to a depreciation of the "market value" of abutting property, the company is liable for such damages.

Answer to Question 3: The plaintiff had the right to grow trees upon the sidewalk, and if the trees were damaged by the telephone wires, which contributed to a depreciation of the market value of the property, such injury should be considered as if caused by the structure. This being an action for depreciation in the market value of the property, the injury to the trees can be considered only as it affects such market value. 27 Am. & Eng. Enc. 150; *Bell Tel. v. Francis*, 109 Ala. 224, 19 South. 1, 31 L. R. A. 193, 55 Am. St. Rep. 935; *Evans v. Gas Co.*, 148 N. Y. 112, 42 N. E. 513, 30 L. R. A. 651, 51 Am. St. Rep. 681.

Answer to Question 4: This question asks

if appellee was entitled to "the mandatory writ of injunction"—that is, the writ granted—but the statement does not disclose what the writ granted commanded the telephone company to do. Therefore we cannot ascertain whether the writ was properly issued.

HOLMES, County Judge, v. ROBISON, Land Com'r, et al.

(Supreme Court of Texas. Feb. 2, 1910.)

PUBLIC LANDS (§ 173\*)—DISPOSAL OF LANDS BY STATES—TEXAS—SCHOOL LANDS.

Act 1881 (Acts 17th Leg. c. 61), provided for a reservation of public lands out of which each of the unorganized counties of the state, when organized, should be entitled to four leagues for school purposes, and, as each unorganized county was organized, such county should be entitled to the first four leagues out of the reservation which shall not have been patented to other counties for free school purposes. The act of 1883 (Acts 18th Leg. c. 55) recited that 325 leagues had been surveyed under the act of 1881, and that the surveys of four leagues of school land previously made for some of the organized counties conflicted with older surveys, and provided for the satisfaction out of these 325 leagues of counties so situated, as well as of the unorganized counties as before. *Held*, that the act will be construed to give each new county, as organized, whether the same was an unorganized county at the time of the passage of the act of 1881, or was formed from territory included within another county, four leagues of land for school purposes.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 544-551; Dec. Dig. § 173.\*]

Application by W. Holmes, County Judge, for a mandamus to compel J. T. Robison, Land Commissioner, to issue to Yoakum county for its school fund patents for four leagues of land, and others are made parties as claimants of the land. Mandamus refused.

James & Yeiser, for relator. Hill, Lee & Hill, for Coke County. Jewell P. Lightfoot, Atty. Gen., and L. A. Dale, Asst. Atty. Gen., for the State. Morrow & Smithdeal, for Simmons.

WILLIAMS, J. This is an application in behalf of Yoakum county for a mandamus to compel the commissioner to issue to the county for its school fund patents for four leagues of land. Coke county and certain individuals are made parties as claimants of the land. The refusal to issue the patents is based upon the fact that the same land has been patented as school land to Coke county by which it has been sold to other parties under whom the other co-respondents claim.

The question arises under the Act of March 23, 1881 (Acts 17th Leg. p. 65, c. 61), and that of April 7, 1883 (Acts 18th Leg. p. 45, c. 55). It is asserted by relator that those acts reserved from the public domain with which to supply the school lands to the unorganized

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

counties which had previously been established and were then existent, of which Yoakum county was one, the 300 leagues for the surveying and setting apart of which provision was made by the first-named act, so that no part thereof could lawfully be granted by the officers of the state to counties subsequently created and organized, as was Coke county, to constitute their school lands; and that hence the patents to Coke county are nullities and constitute no bar to the selection and appropriation of the land embraced in them by Yoakum county. The position of all the respondents is that the laws referred to had no such effect, but that they set apart the lands for appropriation as well by counties to be created and organized after the enactment of the statutes as by those then having legal existence, but unorganized.

The act of 1881, as passed, was entitled "An act to provide for designating and setting apart three hundred leagues of land out of the unappropriated public domain for the benefit of the unorganized counties of the state and to provide for the survey and location of the same." Its first section provided for the survey of 300 leagues "which shall constitute a reservation out of which each of the unorganized counties of this state, as it may be organized, shall be entitled to four leagues for school purposes." Section 7 is as follows: "Each league of land shall be numbered in the order it is surveyed by the contractor or contractors, beginning at number one and extending to number one hundred, and as each of the unorganized counties in the state shall be organized, such county shall be entitled to the first four leagues out of the reservation authorized by this act, which shall not have been patented to other counties for free school purposes, upon the payment to the treasurer of the state the actual costs of the surveying fees and legal interest thereon from time of payment by the state; and upon the payment of the cost of surveying and patent fees, the commissioner of the general land office is hereby required to issue patents to said county for four leagues of land as above provided; provided, any county that fails to pay surveying and patent fees under this act, within three years after its organization, shall forfeit all claims to the lands herein donated."

The act of 1883 recited that 325 leagues had been surveyed under the act of 1881, and that the surveys of four leagues of school land previously made for some of the organized counties conflicted with older surveys, and provided for the satisfaction out of these 325 leagues of counties so situated as well as of the unorganized counties as before. Further statement of the provisions of this act is unnecessary, since it is not contended, and we cannot see, that there is anything in them to make the question before us different from what it would be under the act of 1881 alone.

It must be admitted that the construction of counsel for relator is readily and naturally suggested by the language of the act last mentioned. When it was passed, some of the counties were organized, and some were unorganized; but all had legal existence. The phrase, "the unorganized counties of the state," if there were nothing to modify its meaning, would seem to refer to those which were in existence and thus known. Undoubtedly the language does refer to and include them; but the question is: Does it discriminate between them and counties afterwards to be established and organized? Was it really the legislative purpose that the mere fact that parts of the territory of the state had been segregated from the rest by boundaries and had received names, as counties, should give them a preference over others afterwards to be established in the enjoyment of the provision for the support of free schools which the constant policy of the republic and of the state had extended to every county as it came into existence and established a county government? It is easy to see why the Legislature would reserve from the rapidly diminishing public domain lands with which to continue the established policy of the state. The reason is also plain why a reservation would not be made for the benefit of organized counties further than was done. They had already received their lands, or were in a condition to receive them at once. But it was important to save from the impending exhaustion of the public land some with which eventually to supply those counties which could not otherwise be provided for at once; and this consideration was as cogent with reference to counties to be created and organized later as with reference to those already created but unorganized. No reason can be seen why the Legislature would consciously include one class and exclude the other class from the benefits of the provision made.

There is nothing in the previous legislative history, nor in the nature or language of this particular provision, but the mere use of the phrase above quoted, to suggest that such a discrimination would purposely be made. From the time when the municipalities, with their vast territories, were constituted the first counties, the Legislature had, as the settlement of the country demanded, constantly created new counties out of territory included within the old. As these new counties were organized, four leagues of land for the support of schools were granted to each. This course was never at all disturbed by the fact that the parent county had already received a like grant. No policy of the republic and state has been more fixed and constant than this. The Constitution itself recognized it and assured to the counties the title to lands "heretofore or hereafter" granted to them.

When the act of 1881 was passed, there was in force a statutory provision, in which

this policy was enforced, that "each county shall be entitled to four leagues out of the vacant and unappropriated public domain, for free school purposes," and providing the manner in which each organized county which had not received such grant might obtain it "upon application of the commissioners' court." Rev. St. 1879, art. 4032. Under this any county, newly created and organized, could have received certificates for its four leagues and have appropriated them out of any land unappropriated anywhere in the state. If the construction of the acts of 1881 and 1883 contended for by relator be the correct one, they absolutely removed from the reach of all counties, but those then existent and unorganized and those organized ones whose locations had failed or should fail, all the land embraced in the survey of 325 leagues. We think what we have said justifies the assertion that this would not have been done intentionally; that, if the language used forces the conclusion that it was done at all, it is to be explained only by the supposition that the legislators thought no more counties would be created, or that the possibility of such creation did not present itself to their minds. With counties of such vast extent as that of Tom Green and others in existence, out of which more than 20 new ones have been created, such an assumption as the first would hardly be justified. That it, as well as the other, is excluded, clearly appears from action taken on the act of 1881 in its passage through the Legislature. In the caption of the bill, as it was introduced, was the word "present" before "unorganized counties," which would have expressed relator's contention exactly; but that word was stricken out by amendment in the House. This clearly shows that the very question was considered, and that the intention was not to restrict the benefits of the provision to the (then) present unorganized counties. This is further indicated by the number of leagues to be surveyed and reserved. There were 60 unorganized counties whose claims would have been satisfied by 240 leagues. Three hundred, enough to provide for 15 additional counties, were reserved. This is not accounted for, as suggested by counsel, upon the supposition that the Legislature merely made an unnecessarily liberal provision to be sure of its sufficiency. The number of counties and the number of leagues which each was to receive were definitely known, and the reservation was not of an indefinite quantity or area of public lands, but of so many leagues to be surveyed and specially set apart. Had it been the purpose merely to secure the leagues to the existing counties, the land to which others must look for satisfaction of their rights would surely not have been depleted to a greater extent than was necessary to that purpose.

These reasons argue very strongly against the contention that, by the use of the lan-

guage, "the unorganized counties," the Legislature referred only to those then existing, and intended a reservation for their benefit to the exclusion of others which might subsequently be formed, and suggest that a broader meaning should be given to those words. We think it plain that the leading purpose of the act was not so much to provide for particular counties as it was to preserve the means with which to carry out the established policy with reference to all counties. The organized counties either had received their lands, or could do so without delay; such as needed further protection were eventually provided for. The other class, those which were not in a situation to receive grants at once, were the ones for whose benefit a reservation was needed, and this necessity existed with reference to all that were to organize in the future, to those that were both to be created and organized as well as to those that were only to be organized. It is not unreasonable to say that the Legislature, looking forward to organizations to take place in future, referred to all counties which should thereafter organize as "the unorganized counties," without any reference to the time of their creation. The reservation was made because of the fact that for want of organization alone lands could not be supplied to all counties at once, and the intention, we think, was to make all of them the beneficiaries as they should organize, and the language may be so construed as to effectuate this intention. The language of section 7 is especially suggestive of this construction: "As each of the unorganized counties in the state shall be organized, such county shall be entitled to the first four leagues \* \* \* which shall not have been patented to other counties for free school purposes." To express fully the meaning contended for by relator, the first clause of this sentence should have read, "as each of the present unorganized counties," as the original caption did, and the last clause should have read, "which shall not have been patented to some other of such counties." As it is, the language can operate in favor of any county as it is organized and assumes that at any time land applied for by one county may have been patented to some other county. Any county coming into existence at a date subsequent to the enactment of these statutes would first be created by law and then organized. Between the creation and organization it would be an unorganized county and come within the language and spirit of the act.

The construction of these statutes, which we adopt, has been that steadily and consistently acted upon by the commissioners of the land office and the Governors of the state since 1885 in issuing patents for lands out of this reservation to counties created after 1883 as they were organized. No question has ever been raised, so far as we are advised, of the correctness of their action,

until this suit was brought. If we were doubtful, we should probably regard the case as one in which this executive construction should be followed; but, after giving the question mature thought, we are clearly of the opinion that the action of the officers was correct, that the reservation was intended for the benefit of all counties afterwards organized, without regard to the date of their creation. The result has proved that enough land was not reserved to satisfy all counties. This is much to be regretted, especially so if no way can be found to supply the loss to those which have received nothing. But the mistake cannot be remedied by giving to one county that which another, equally entitled, has already received in accordance with law.

Mandamus refused.

### HARDEMAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

#### LARCENY (§ 40\*)—ISSUES, PROOF, AND VARIANCE.

An indictment for theft, which alleges a joint ownership and possession of three persons, a copartnership, is not sustained by proof of ownership and possession by two of such persons, and that the third had neither the possession nor a part ownership.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 104; Dec. Dig. § 40.\*]

Appeal from Van Zandt County Court; Jno. S. Spinks, Judge.

Bud Hardeman was convicted of petty theft, and he appeals. Reversed and remanded.

Wynne & Wynne and Alex Collins, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

McCORD, J. This is an appeal from a conviction for petty theft; the punishment being assessed at \$5 fine and one hour in the county jail.

The bill of indictment alleged that the appellant unlawfully and fraudulently took from the possession of B. F. Starnes, Earl Slaughter, and Mrs. Tom Cheatom, a firm composed of said Starnes, Slaughter, and Cheatom, 100 feet of fencing wire, of the value of \$2, the same being the corporeal personal property of and belonging to the said Starnes, Slaughter, and Cheatom, and without the consent of them, or either of them, and with intent, etc. There is no controversy but that the property was the property of Starnes and Slaughter, and that Mrs. Tom Cheatom had no interest whatever in the property, nor was the property in her possession at the time it was taken. In the trial of the case in the court below, appellant requested the court to charge the jury that, the state having alleged the own-

ership and possession of the stolen property to be in B. F. Starnes, Earl Slaughter, and Mrs. Tom Cheatom, and the proof having shown the ownership and possession of said property to be in B. F. Starnes and Earl Slaughter, they would acquit. This charge was refused. Also appellant requested the court to charge the jury that before they could convict the appellant the proof must show beyond a reasonable doubt both ownership and possession of the property to be in Starnes, Slaughter, and Mrs. Tom Cheatom. This charge was also refused, and this action of the court is complained of by appellant.

The court in its main charge told the jury that if the appellant fraudulently took from the possession of Starnes, Slaughter, and Mrs. Tom Cheatom, or either of them, the wire described in the indictment, and that the wire was the property of Starnes, Slaughter, and Mrs. Tom Cheatom, or either of them, they would convict. We think the court erred in giving this charge, as well as refusing the charges requested by appellant. The bill of indictment alleged a joint ownership in a copartnership composed of three persons, and the proof of ownership of a partnership of three persons cannot be sustained by proof of possession by two persons, where the proof is positive that one of the parties had neither the possession nor a part ownership in same.

For the errors of the court in giving the charge he did, and the refusal of the requested charges by the appellant, the judgment of the lower court is reversed, and the cause is remanded.

### CLARK v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### CRIMINAL LAW (§ 1091\*)—CONTINUANCE—BILL OF EXCEPTIONS—REVIEW.

In the absence of the application for continuance on the ground of the absence of witnesses, the bill of exceptions stating that accused issued a subpoena for the witnesses, without showing that he complied with the law other than the statement that he had issued process, and without alleging that the witnesses were not absent by the procurement or consent of accused, or that the application was not made for delay, is too indefinite to require consideration on appeal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1091.\*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

Abe Clark was convicted of burglary, and he appeals. Affirmed.

John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for burglary; the punishment being assess-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

ed at five years' confinement in the penitentiary.

The witness Walker, alleged owner of the burglarized house, stated that he lived on a farm five miles from Dallas; that on the 10th of April he and his wife came to the city; that as they were leaving their house they met appellant and another boy about 400 yards from their residence; that they lived on the Caruth farm; they returned about 6 o'clock that evening, and found their house had been entered, and the clothing of his wife and daughter taken; that a bed that was used as a prop to one of the doors had been pushed aside, and by this means entry had been made. His wife locked the door. Witness did not lock the door, but shut down the windows, and all the rest of the doors and windows were closed by him, except one door, which was locked by his wife. They recovered two of the children's dresses from Bell Newsom. Other witnesses testified to the fact that appellant went to the Walker house, or within 75 feet of it, to the well, and got a drink of water; that the other boy mentioned was with him at the time; that they went from there up a little branch. Bell Newsom testified that she knew the defendant, and he sold her two dresses that later on a negro woman claimed; that he came to witness' house, and had the dresses and some other things, and wanted to sell them to witness, and witness would not buy them at first, but finally did buy the two dresses. She identified appellant as the party who sold them. This was on the day of the alleged burglary. Appellant testified in his own behalf, and introduced other witnesses to prove an alibi, the substance of which was that he spent the day in the city of Dallas, which is shown to be five miles from the Caruth farm, and that he was not at the place of the burglary on the day alleged; that he was at 109 Hawk street, and at the railroad, and that he did not leave there all day; that several parties, boys whose names he gave, were with him, and played with him on the railroad all that day. He denied selling Bell Newsom a dress or anything else.

Appellant reserved a bill of exceptions to the action of the court overruling his application for continuance. The application itself is not in the record. The bill of exception recites that defendant caused subpoenas to be issued for Charlie Armstrong and Clarence Edwards, who reside at 111 Hawk street, Dallas, Tex., Ella Clark and Louisa Bingham, who both reside at 109 Hawk street, Dallas, Tex., both of whom were temporarily out of the city at the time of the trial, and Isaac Giles, also at 109 Hawk street; that each of these witnesses would have testified that the defendant was in their company on that date at different times of the day, and that he would not have had time to go 10

miles in the country and commit the offense of burglary. This bill is too indefinite to show any error on the part of the court. It does not show when the process was issued, or anything in connection with it. The statement in the bill is that he issued subpoenas for the following named witnesses, by whom he expected to prove that he was not at the place where the alleged burglary took place, but was at a different place at the time of the commission of the crime of which complaint was made, and that by these witnesses he could prove he was with them at different dates on that day. In fact, the bill of exceptions fails to show that he complied with the terms of the law, otherwise than the bare statement that he had issued process. It does not allege or show in the bill that they were not absent by his procurement or consent, or that the application was not made for delay. In fact, the matter is too indefinite to require consideration, in the absence of the application for continuance.

We are of opinion the evidence is sufficient, and the judgment is affirmed.

#### WATERHOUSE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

##### 1. WEAPONS (§ 7\*)—CARRYING WEAPONS.

If accused had previously carried a pistol to the place where he was employed, and his employer asked him to take the pistol home, and on his way home with it he stopped at a store to buy supplies for supper, and while waiting for some one to wait on him was arrested, he was not guilty of unlawfully carrying a pistol.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 6; Dec. Dig. § 7.\*]

##### 2. CRIMINAL LAW (§ 369\*)—EVIDENCE—FORMER INDICTMENT.

In a prosecution for unlawfully carrying a pistol, evidence that accused had been previously indicted in the county for a like offense was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 822; Dec. Dig. § 369.\*]

##### 3. CRIMINAL LAW (§ 719\*)—TRIAL—ARGUMENT OF PROSECUTOR.

In a prosecution for unlawfully carrying a pistol, a statement by the prosecutor that the reason that accused's attorney had objected to a question asked accused as to whether he had been previously indicted in the county for a like offense was that he did not want the jury to have the facts, and that it was not the first time accused had been indicted in the county for carrying a pistol, was improper argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.\*]

Appeal from Shelby County Court; W. D. White, Judge.

Will Waterhouse was convicted of unlawfully carrying a pistol, and appeals. Reversed and remanded.

S. H. Sanders, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

RAMSEY, J. Appellant was charged by complaint filed in the county court of Shelby county on the 5th day of June last year with unlawfully carrying a pistol on and about his person. Thereafter in the same court on the 23d day of July, 1909, he was convicted of the offense charged, and his punishment assessed at a fine of \$200.

That he had this pistol on his person in the store of one Johnson Washington was undenied. His defense was that he had some time before this carried this pistol to the home of Dr. Sims, where he was working and that on the day in question Dr. Sims had asked him to take the pistol home, and that he had started home, and stopped by the store, as he was on his way to where he lived, to get some fish for supper, and had been in the store but a moment, and was waiting for some one to wait on him, when he, with a number of other persons, was arrested by the sheriff. We think, as presented, the account as given by appellant of the transaction would, if believed, constitute a defense.

On cross-examination, over objection of his counsel, appellant was asked and compelled to answer the following question: "Isn't it a fact that you have been indicted in the district court of Shelby county, Tex., on more than one occasion, for carrying a pistol—on another occasion than the one you are on trial for now?" To which he replied that he had been indicted one other time besides the one he was on trial for in the courts of Shelby county. The question asked and the answer sought to be elicited thereby was objected to for the reason that it was not germane to the case relied upon by the state and had no connection with it; that these facts constitute an entirely different transaction, and that he (defendant) could not be forced to criminate himself in regard to other cases than this one on trial; that it was an attempt to impeach the defendant by showing other and distinct offenses for carrying a pistol—offenses of like character; that the defendant was on trial for carrying the pistol as alleged in the indictment, and for the state to show other offenses of like character was immaterial, irrelevant, inadmissible, remote and prior offenses, which tended to prejudice the minds of the jury against him, and caused them to assess a greater punishment against the defendant than they might have done, had such testimony been excluded.

It was shown, further, that in the closing argument of the case the county attorney, referring to this question and answer, made the following statement: "The reason Mr. Sanders (Sanders being the attorney representing the defendant) objected to the question (the question being asked as above stated) was that Mr. Sanders did not want the jury to have the facts and the truth in this case that this was not the first time this de-

fendant had been indicted in the courts of Shelby county for carrying a pistol," to which statement of the county attorney at the time it was made the defendant objected, and asked the court to instruct the county attorney not to use argument like that before the jury, as it was clearly an inadmissible question, even if the court did permit it to go to the jury, and asked the court to instruct the jury not to consider same, to which objection of the defendant the court replied that he thought it was a legitimate argument. That this question, the answer sought to be elicited thereby, and the argument of the county attorney, were inadmissible and improper, is too clear for discussion. *Terrell v. State*, 55 Tex. Cr. R. 282, 116 S. W. 569. There was some other language used by the county attorney in his discussion of the case that we could not approve. It is to be hoped that this will not be repeated on another trial.

For the error pointed out, the judgment is reversed, and the cause remanded.

#### DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### CRIMINAL LAW (§ 1090\*)—RULINGS ON APPLICATIONS FOR CONTINUANCE—REVIEW—BILL OF EXCEPTIONS.

Refusal to grant a continuance, contested on the issue of diligence, cannot be considered, in the absence of a bill of exceptions reserved to the ruling.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2812; Dec. Dig. § 1090.\*]

Appeal from Wise County Court; C. V. Terrell, Judge.

Dave Davis was convicted of violating the local option law, and he appeals. Affirmed.

Frank J. Ford, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for violating the local option law. The record is without bills of exception.

The motion for new trial raises two questions: First, the court erred in refusing the motion for continuance; and, second, that the evidence does not show the local option law to have been in force in the county. In respect to the application for continuance it is sufficient to state that, while there was quite a contest over it in regard to diligence, it cannot be considered, because a bill of exceptions was not reserved to the court's refusing to grant the motion. In regard to the second ground, we are of opinion that the evidence shows that the law was in force. The statement of facts as now before us cures the defects in the statement of facts as originally copied in the transcript in respect to the publication of the result of the election in a newspaper. Without going into a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

discussion of the matters further, we hold that the statement of facts as now presented is sufficient, and shows clearly that the fact of the publication was preserved and formed a part of the original statement of facts.

There being no error in the record, the judgment is affirmed.

McCORD, J., not sitting.

#### DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

Appeal from Wise County Court; C. V. Terrell, Judge.

Dave Davis was convicted of violating the local option law, and he appeals. Affirmed.

Frank J. Ford, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for violating the local option law. The record is in the same condition as the record in cause No. 82 (this day decided) 124 S. W. 634. On the authority of that case, the judgment herein is affirmed.

McCORD, J., not sitting.

#### DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

INTOXICATING LIQUORS (§ 236\*)—VIOLATION OF LOCAL OPTION LAW—EVIDENCE—SUFFICIENCY.

Evidence held to show a sale of liquor in violation of the local option law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

Appeal from Wise County Court; C. V. Terrell, Judge.

Dave Davis was convicted of violating the local option law, and he appeals. Affirmed.

Frank J. Ford, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for violating the local option law.

Two of the questions suggested in the motion for new trial are the same as in causes Nos. 82 and 83 (this day decided) 124 S. W. supra. An additional ground is relied upon, to wit, that the evidence is not sufficient to justify the conviction. The facts were introduced on the part of the state through the witnesses Roberts and Gholston. Roberts testified that Gholston gave him one dollar with which to buy some whisky; that he took the dollar and went to appellant's barber shop in Alvord, Wise county, and bought a pint of whisky, for which he paid him 50 cents; that appellant went into his bathroom, connected with the barber shop, and got the pint of whisky, and delivered it to the witness. Gholston testified to giving

witness Roberts the dollar with which to purchase a bottle of whisky, and that Roberts brought it back to him and they drank it.

We think this testimony is sufficient to make out a case, and the judgment is affirmed.

McCORD, J., not sitting.

#### HUMPHRIES v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

WEAPONS (§ 17\*)—CARRYING WEAPONS—PROSECUTION—BURDEN OF PROOF—DEFENSES.

In a prosecution for carrying a pistol, the burden was upon the state to prove the crime beyond a reasonable doubt, but not upon accused to prove his defense beyond a reasonable doubt; and a charge that if the jury believed beyond a reasonable doubt that accused was handed his pistol in a restaurant, and immediately proceeded to take it to his home by the most direct route practicable, he should be acquitted, was erroneous.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 26; Dec. Dig. § 17.\*]

Appeal from McLennan County Court; Tom L. McCullough, Judge.

Kid Humphries was convicted of unlawfully carrying a pistol, and appeals. Reversed and remanded.

Williams & Williams, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

McCORD, J. Kid Humphries was convicted in the court below of carrying on and about his person a pistol, and his punishment assessed at \$100 fine and 30 days in jail.

The facts, as disclosed from the record, show that on the night of the 2d day of December, 1907, R. C. Buchanan, a police officer in the city of Waco, arrested appellant while sitting in a restaurant eating supper. Sitting at the same table with the appellant was a girl who is claimed to be a common prostitute. The officer arrested the appellant and the girl, because appellant was found in company with a lewd woman, which was made a violation of the city ordinance, and when they reached the police station it was discovered that appellant had a pistol on him. The appellant claimed that he was interested, or part owner, in this restaurant where he was taking supper; that it was on the way from his place of business to his home; that his place of business was some 100 yards from this restaurant; that he was running a saloon, and that a witness, Brit Halford, came to him and asked him for his key to go in the saloon, appellant's place of business, and he gave him the key, and told him to look on the shelf and bring him his pistol; that the witness Halford brought him the pistol, and that he was going directly from his place home, but stopped in the restaurant to get something to eat, and was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the restaurant when he told witness Halford to bring him the pistol, and when it was delivered to him; and that this was some five minutes before his arrest.

The court, among other things, charged the jury as follows: "Now if you believe from the evidence beyond a reasonable doubt that defendant was handed his pistol in the restaurant, and that he immediately and without tarrying at said restaurant proceeded to take his pistol to his home by the most direct route practicable, then you will find him not guilty, and so say by your verdict." This charge was objected to at the time given, complained of in motion for new trial, and earnestly insisted upon in this court. We think the court below erred in giving this charge, and that the same was hurtful to appellant. It was an issue in the case as to whether the appellant at the time had the pistol unlawfully. The court required the appellant to prove his defense beyond a reasonable doubt before the jury would be authorized to acquit. This was not only erroneous, but fundamentally wrong. In no case is the burden on the defendant to prove his defense beyond a reasonable doubt. The burden rests upon the state to prove the crime beyond a reasonable doubt. It is not necessary to cite any authorities upon this subject.

Several other questions are presented in the record, not necessary to notice, as they will not likely occur upon another trial.

For the error indicated, the judgment is reversed, and the cause is remanded.

#### AUSTIN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

##### 1. CRIMINAL LAW (§ 814\*)—TRIAL—INSTRUCTIONS.

Accused was charged in an indictment with cursing and swearing at a public place, and, further, that he cursed and abused a certain person under circumstances reasonably calculated to provoke a breach of the peace. After the evidence had been introduced, the county attorney elected to prosecute on the first count only. *Held*, that it was error to instruct as to both counts, and authorize a conviction under either one of such counts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1980; Dec. Dig. § 814.\*]

##### 2. DISORDERLY CONDUCT (§ 12\*)—INSTRUCTIONS.

In a prosecution for swearing in a public place at the residence of a person named, where people were assembled for the purpose of innocent amusement, much of the evidence tended to show that the persons present were there by invitation. *Held*, that the court should have given a requested charge that if the place charged in the indictment was not a public place, but a private residence, and those assembled were there by invitation, then accused would be entitled to an acquittal.

[Ed. Note.—For other cases, see Disorderly Conduct, Cent. Dig. § 19; Dec. Dig. § 12.\*]

Appeal from Gregg County Court; J. H. McHaney, Judge.

Ben Austin was convicted of swearing in a public place, and appeals. Reversed and remanded.

J. N. Campbell, Edwin Lacy, and F. B. Martin, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged, by indictment filed in the county court of Gregg county, with cursing and swearing at a public place, to wit, the residence of one Finley, where people were assembled for the purpose of innocent amusement, and, further, that in the presence and hearing of Mack Goforth he cursed and abused the said Goforth under circumstances reasonably calculated to provoke a breach of the peace.

1. It appears by bill of exceptions that after all the evidence had been introduced the county attorney elected to prosecute on the first count only, and made the following statement touching said matter to the court and jury: "I here elect to prosecute on the first count in said indictment only." It further appears by the bill of exceptions that there was no argument made to the court or jury by the counsel for the defendant, or the county attorney for the state, on the second count in said indictment. It is also shown by the bill, as well as by the court's charge, that the court instructed the jury in respect to both counts in the indictment, and authorized a conviction under the charge with reference to either one of such counts, as the jury might find. There was in the case a general verdict. We think, in view of the election of the county attorney and the apparent acquiescence of the court therein, considered in connection with the fact that neither the state nor counsel for appellant discussed the facts touching the offense charged in the second count, that the court should not have instructed the jury and authorized a conviction on the count which had been in terms abandoned by counsel for the state. To hold otherwise would be to permit a conviction on a count which had been by the state abandoned, and where, acting on such abandonment, there had been no discussion or defense made by defendant's counsel in respect thereto. The fact that the court made no objection to this action of counsel for the state was in substance an acquiescence in and consent to such abandonment, and justified counsel for appellant in directing their argument and making their defense with respect to that count in the indictment on which the state elected to prosecute.

2. The evidence showed that the facts constituting what is claimed to be the offense under the first count occurred at the residence of one Finley. Much of the evidence tends to show that the persons present were there

by invitation, and not otherwise, though there is some evidence that some persons closely related to the parties attended, and there is also a statement by other witnesses that no one who had gone there was forbidden to enter. However, the issue was squarely raised that the persons present were there strictly by invitation, and that the house was not thrown open to the public generally. In this condition of the record we think the court should have given the special charge requested by counsel for the appellant, to the effect, in substance, that if they believed and found from the evidence that the place charged in the indictment was not a public place, but a private residence, and that those assembled at such place were there by invitation, then appellant would be entitled to an acquittal. This position seems well sustained by the recent case of *Pugh v. State*, 55 Tex. Cr. R. 462, 117 S. W. 817.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

#### OLIVER v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

##### 1. CRIMINAL LAW (§ 1099\*)—STATEMENT OF FACTS—TIME OF FILING.

A statement of facts, not filed within the time fixed by law for filing statements of facts after the adjournment of the term of court, cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2876; Dec. Dig. § 1099.\*]

##### 2. CRIMINAL LAW (§ 1092\*)—BILL OF EXCEPTIONS—FILING.

A bill of exceptions, which does not appear to have been filed, cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2846; Dec. Dig. § 1092.\*]

##### 3. THREATS (§ 8\*)—INSTRUCTIONS—ISSUES.

Where the information charged intimidation by threatening words and acts of violence, and by the firing of guns, a charge as to the use of threatening words was not open to the objection that the information charged that the offense was committed by the firing of guns alone.

[Ed. Note.—For other cases, see Threats, Cent. Dig. § 13; Dec. Dig. § 8.\*]

Appeal from Taylor County Court; T. A. Bledsoe, Judge.

George Oliver was convicted of intimidating, and he appeals. Affirmed.

Wagstaff & Davidson, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

**RAMSEY, J.** This appeal was prosecuted from a judgment of conviction rendered in the county court of Taylor county some time in the early part of 1909, convicting appellant for intimidating one Garrett Cooper by threatening words and acts of violence, and intimidation by the firing of guns.

The record shows that the court adjourn-

ed on the 6th day of March, 1909. What purports to be a statement of facts was filed and approved on the 19th day of May, 1909, 43 days after the adjournment of the term. We are not at liberty under the law to consider such statement of facts.

Bill of exceptions No. 2, which relates to the cross-examination of appellant's wife, does not appear from the record ever to have been filed, and, of course, cannot, therefore, be considered.

Bill of exceptions No. 1 complains of a verbal charge of the court, and excepts to same because the court charged the jury with reference to the use of threatening words, for the reason, as it is claimed, that the information charges that the offense was committed by the firing of guns. This exception is not justified by the record, which charges intimidation to have been accomplished by the use of "threatening words and acts of violence, and intimidation by the firing of guns."

Finding no error in the record, the judgment of conviction is affirmed.

#### McLENDON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

##### INTOXICATING LIQUORS (§ 236\*)—LOCAL OPTION LAW — VIOLATION — SUFFICIENCY OF EVIDENCE.

That accused sold prosecuting witness peaches, to be delivered to one R., who owned a still, and that afterwards witness obtained from R. a gallon of brandy, did not support a conviction for violating the local option law; it not appearing that accused was interested in the manufacture of the peaches into brandy.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

Appeal from Upshur County Court; Albert Maberry, Judge.

Bud McLendon was convicted of violating the local option law, and appeals. Reversed and remanded.

Warren & Briggs, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** Appellant was convicted of violating the local option law; his punishment being assessed at a fine of \$25 and 20 days' imprisonment in the county jail.

J. M. Smith is the alleged purchaser. The evidence for the state is through the witness Smith. The testimony of this witness discloses that in the fall he bought 10 bushels of peaches from appellant. The peaches were to be delivered to a man by the name of Reynolds. For the peaches Smith paid appellant the sum of 30 cents a bushel or \$3. The peaches as stated were to be delivered by appellant to Hex Reynolds who the testimony discloses owned a still. Appellant de-

livered the peaches in accordance with the contract to Reynolds. Some time afterwards Smith obtained from Reynolds a gallon of brandy which he pronounced very good. He says he never bought any brandy or intoxicating liquor from appellant of any sort. His testimony shows his transaction had with appellant is in substance as above stated. Appellant took the stand and testified that he sold the 10 bushels of peaches; that, as stated by the witness Smith, they met in town one day, and Smith wanted some peaches, of which he had quite a lot, and he made a trade with him, selling the 10 bushels at 80 cents a bushel, to be delivered to Reynolds; that he had a considerable orchard, and was raising peaches to sell to everybody, and that he shipped quite a lot of peaches to the market; that in accordance with his contract with Smith he hauled the 10 bushels of peaches and delivered them to Reynolds, and that was the last he knew of the matter, or heard of it, until he was arrested under this charge; that he never sold Smith any intoxicating liquors. The evidence from appellant and another witness shows that the sale of the peaches to Smith occurred in the latter part of August or in September. None of the witnesses were right definite as to the time. There are numerous exceptions reserved by appellant, both as to the introduction of evidence and to the charge of the court as given, and special instructions refused, several of which are well taken.

1. One of the charges asked, and refused, is as follows: "You are charged, at the request of defendant, that a sale of peaches to witness J. M. Smith is not a violation of law, and you must acquit if you find he only sold peaches, and not intoxicating liquor." This charge was also asked, and refused: "If you find from the evidence in the case that the defendant sold to J. M. Smith 10 bushels of peaches, to be by him delivered to Hez Reynolds, or at Reynolds' still, you must acquit the defendant, unless you further find that at the time Hez Reynolds delivered to J. M. Smith one gallon of brandy, if he did so, the defendant was interested in the brandy delivered, and that the claimed sale of peaches was fictitious and simulated." Some of the exceptions, we think, to the charge, are well taken; but we notice those quoted to illustrate the idea that the case was not submitted to the jury as, in our judgment, it should have been.

It is unnecessary to discuss the application for continuance, as it may not arise upon another trial.

2. It is contended the evidence is not sufficient. We are of opinion this contention is correct. The best the state could make of the testimony through its witness Smith was that he had bought peaches from appellant, and in pursuance of the contract appellant

had delivered the peaches to Hez Reynolds at his still. Smith does not say the peaches were to be manufactured into brandy; but, concede that was his reason for the purchase of the peaches, this would not constitute a sale of intoxicating liquors by appellant to Smith. The peaches were not intoxicating liquor. It is true they may have been subsequently manufactured into brandy; but, if so, they were manufactured by Reynolds, and not by appellant, and under any of the testimony he was not interested in the sale of it, as we understand this record. It will not do to hold that every time a party sells peaches or fruit, out of which brandy may be manufactured, he would be guilty of violating the local option law in the sale of intoxicants, unless he was interested in the manufactured article, and he was interested in the manufactured article at the time it was sold. There is no evidence here showing that appellant was. It certainly would be carrying the doctrine far afield of the law to hold that every time the producer sells his product or produce, out of which intoxicants in any form can be made, therefore, he is guilty of violating the law, if subsequent to his parting with the title to the produce it should be manufactured into an intoxicant and thereafter sold. We are of opinion this evidence does not show that appellant was in any wise connected with the sale of brandy to Smith. Smith swore that he did not purchase it from him; appellant swore he did not sell him anything but the peaches; and this is the state's case, and appellant's case.

It may be well enough to distinguish this case from the case of *Stanley v. State*, 43 Tex. Cr. R. 270, 64 S. W. 1061. The points in the two cases are not analogous, and the facts are entirely different. Had Hez Reynolds been indicted for selling brandy to state's witness Smith, it might have raised the question decided in the *Stanley Case*, supra. A majority of the court held, in the case of *Barnes v. State*, 88 S. W. 804, 805, that where a party delivered peaches or fruit to the owner of a still, and the fruit was manufactured into brandy, the owner of the still retaining one half of the manufactured article, and the owner of the peaches taking the other half, this was a sale by the owner of the still of that portion of the brandy received by the party who carried the peaches to the still out of which the brandy was made. Those cases and this case are entirely different. In this case the testimony excludes any idea of sale of intoxicants by the seller of the peaches. He only delivered the peaches at the still in accordance with his trade with Smith.

The judgment is reversed, and the cause is remanded.

McCORD, J., not sitting.

## AUSTIN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

## 1. BREACH OF THE PEACE (§ 1\*)—FIGHTING IN PUBLIC PLACE—WHAT CONSTITUTES "PUBLIC PLACE."

Pen. Code 1895, art. 333, provides for the punishment of persons who fight together in a public place, and article 335 defines a "public place" as "any public road, street or alley of a town or city, or any inn, tavern, store, grocery or workshop, or place at which people are assembled, or to which people commonly resort for purposes of business, amusement, recreation or other lawful purpose." *Held*, that a private residence may become a "public place," within the statute, by throwing it open to the public generally for a single entertainment, and persons who engage in a fight during such entertainment may be prosecuted under the statute.

[Ed. Note.—For other cases, see *Breach of the Peace*, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5806-5813; vol. 8, p. 7773.]

## 2. CRIMINAL LAW (§ 825\*)—INSTRUCTIONS—REQUESTS.

In a prosecution for fighting in a public place, the court charged that the law defines a public place as any place at which people are assembled for the purpose of business, amusement, recreation, or other lawful purposes; that a private residence cannot be a public place, unless it is made public by being open to the public; that a place may be public at one time and private at another; that if the jury find that the house at which accused was charged with fighting was a public place, and that accused fought there with other persons, they should find him guilty. *Held*, that the instruction sufficiently presented the proposition that if people were assembled at a house by special invitation, and the public generally not invited, the place was not a public one, in the absence of a request for a more specific charge.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2005; Dec. Dig. § 825.\*]

Appeal from Gregg County Court; Judson H. McHaney, Judge.

Ben Austin was convicted of fighting in a public place, and appeals. Affirmed.

Edwin Lacy, J. N. Campbell, and F. B. Martin, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

MCCORD, J. This is an appeal from a conviction for fighting at a public place.

The indictment alleged that appellant and others, on or about the 2d day of April, 1909, in the county of Gregg and state of Texas, did then and in a public place, to wit, at the house of J. W. Finley, a place where people had then and there assembled for the purpose of public amusement and conducting themselves in a lawful manner, did then and there unlawfully and willfully fight together, against the peace and dignity of the state. The testimony showed that on the 2d day of April, 1909, there was a dance at the residence of J. W. Finley at night, and that there was a large crowd at the dance. Some of the witnesses testified that they were there without invitation, and some that there were invitations extended. Several of the

witnesses testified that they had no invitations. While they were assembled, the appellant engaged in fighting with other parties.

The court charged the jury as follows: "If any two or more persons shall fight together in a public place, they shall be punished by fine not exceeding \$100." The law, in defining a public place, among other things, defines it as being any place at which people are assembled for the purpose of business, amusement, recreation, or other lawful purposes. A private residence cannot be a public place, unless it is made public by being thrown open for access to the public. A place may be public at one time and private at another. Now, bearing in mind these instructions, if you find that the defendant, in Gregg county, Texas, on or about the time alleged, at the house of J. W. Finley, and that such house was then and there a public place, did fight together with another person or persons, then find defendant guilty, and assess his punishment at a fine of any sum not exceeding \$100." Appellant requested the following special charge, which was by the court refused: "Before you can convict the defendant, you must believe from the evidence beyond a reasonable doubt that the defendant fought at the house of J. W. Finley, and at the time of fighting, if any, said house was one commonly resorted to for the purposes of amusement, and unless you so find then you will acquit the defendant."

We are inclined to think the court did not err in refusing to give this special charge. Neither the allegation in the indictment nor the proof raised the issue that the house of Finley became public by reason of being commonly resorted to. The statute (Pen. Code 1895, art. 333) says: "If any two or more persons shall fight together in a public place, they shall be punished by fine not exceeding one hundred dollars." Now article 335, in defining a public place, within the meaning of article 333, says: "A public place, within the meaning of the two preceding articles, is any public road, street or alley of a town or city, or any inn, tavern, store, grocery or workshop, or place at which people are assembled, or to which people commonly resort for purposes of business, amusement, recreation or other lawful purpose." The place may be made public by reason of the fact of the people assembling there for any innocent amusement, or may be made public by reason of being a common resort for the same purpose. There is no question in this case that people were in the habit of commonly resorting to the home of Mr. Finley for amusement, or for any other purpose. The facts rather indicate that the house on this night was thrown open to the public, and people had assembled there for the purpose of amusement and recreation, and under this state of the facts we think

that the charge of the court was correct, and that the charge requested was properly refused.

The facts of this case are unlike the facts in *Pugh v. State*, 55 Tex. Cr. R. 482, 117 S. W. 817. In that case Pugh was indicted for being drunk at a public place. The facts in the case showed that, if appellant was drunk, it was at the private residence of Charlie Knox, who had an entertainment at his house, where Pugh, as well as all the guests, were specially invited. The court in that case properly held that that was not a public place within the meaning of the law. A private residence is not a public place, but may be made to partake of the nature of a public place if for the time being it is thrown open to the public for the purposes of recreation or amusement. If a special charge had been requested in this case to the effect that if the people were assembled at Mr. Finley's house by special invitation, and the public generally not invited, and if the jury so found, to acquit, we think, under the facts of the case, the court should have given such a charge. But in the absence of such requested charge it was an issue of fact properly submitted by the general charge, and the finding of the jury will not be disturbed.

Finding no error in the record, the judgment is in all things affirmed.

#### LONG v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

##### 1. CRIMINAL LAW (§§ 419, 420\*)—EVIDENCE—HEARSAY.

In a prosecution for selling liquor on Sunday, testimony by the officer who took the liquor from T., who purchased it, that he asked him where he got it, and he took him to the back end of a saloon, and told him that that was where he got it, was objectionable as hearsay, where not made in the presence of defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.\*]

##### 2. CRIMINAL LAW (§§ 419, 420\*)—EVIDENCE—HEARSAY.

But testimony of the officer identifying the place shown him by the witness was not objectionable as hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 973; Dec. Dig. §§ 419, 420.\*]

Appeal from McLennan County Court; Tom L. McCullough, Judge.

Tom Long was convicted of selling liquor on Sunday, and appeals. Reversed and remanded.

O. L. Stribling, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged, and on hearing was convicted, in the county court of McLennan county on March 5, 1909, of selling whisky on Sunday in violation of law.

It was shown by the testimony of one Richard Todd that he was in Waco on Au-

gust 9, 1908, having arrived that day on an excursion train; that about 3 o'clock that afternoon he went to a shed in an alleyway, where there was a hole about eight or nine inches square, down near the ground in the back end of a building next to the alley, and knocked, and heard some answer on the inside; that he then said, "I want a bottle of gin," and stuck 25 cents in the hole, and in about a minute a bottle of gin was handed out to him through the hole. He did not know who it was, nor did he recognize appellant. Appellant denied the sale, or having any knowledge or connection with it, or that the place where the whisky was received was any part of the saloon building where his employer carried on his business. He testified, further, that a few days before this a policeman, whose name he gave, had brought an old negro by the name of Bates, whom he found sick and disabled, and had put him in one of these rooms.

Over the objection of appellant the state was permitted to prove that, when the officer took the bottle from Richard Todd, he asked him where he got the bottle of gin; that he said he did not know, but took him to the back end of Clark's saloon, and told him that that was where he got the gin, and showed him how he got it, and where he put the money; that he stated he put the money in a hole in the wall, and showed him the hole. This was objected to as hearsay, immaterial, and irrelevant, not binding on defendant, and because defendant was not present at the time of the making of such statements by the said Richard Todd to this witness. It would have been competent for the officer to have identified the place shown him by the witness. The conversation and details of the matter testified to in appellant's absence would not be admissible. We think this case comes clearly within the rule laid down by the following authorities: *Newman v. State*, 55 Tex. Cr. R. 376, 116 S. W. 1156; *Gormer v. State*, 52 Tex. Cr. R. 24, 105 S. W. 200; *Trinkle v. State*, 52 Tex. Cr. R. 42, 105 S. W. 201; *Efird v. State*, 44 Tex. Cr. R. 447, 71 S. W. 957; *Patrick v. State*, 45 Tex. Cr. R. 587, 78 S. W. 947.

We feel, in addition to this, that we should say that, under the facts as here presented, it may well be doubted whether the verdict is supported by the evidence.

For the error pointed out, the judgment is reversed, and the cause is remanded.

#### BORDEAUX v. STATE.

(Court of Criminal Appeals of Texas. June 2, 1909. Rehearing Denied Jan. 26, 1910.)

##### 1. HOMICIDE (§ 300\*)—SELF-DEFENSE—ABANDONMENT OF CONFLICT—INSTRUCTIONS.

Though it is immaterial on the question of self-defense whether the abandonment of the conflict by deceased was in good faith, defendant may not complain of the instruction that if deceased in good faith abandoned the conflict,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and fled, and defendant was then in no danger of violence from deceased, and, knowing he was in no danger, shot deceased, he could not justify the killing on the ground of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 800.\*]

**2. HOMICIDE (§ 114\*)—SELF-DEFENSE—MUTUAL COMBAT.**

Where defendant and deceased engaged in a fight with the agreement that it should be with their fists, and defendant engaged therein intending to use a deadly weapon, and pursuant to such intention, after entering the combat, shot and killed deceased, he could not justify on the ground of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 153, 154; Dec. Dig. § 114.\*]

**3. CRIMINAL LAW (§ 778\*)—INSTRUCTIONS—SELF-DEFENSE—BURDEN OF PROOF.**

That the court, after fully instructing on self-defense, in undertaking to instruct with reference to issues made by the state's evidence, which, if sustained by the proof, would or might deny him the benefit of his plea of self-defense, such as mutual combat, defendant's provoking the difficulty, and deceased's abandonment of the difficulty, instructed requiring these facts to be found true beyond a reasonable doubt, in order to abridge his right of self-defense, does not shift the burden of proof to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1857; Dec. Dig. § 778.\*]

**4. HOMICIDE (§ 339\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

Exclusion of evidence of statements of deceased long before the difficulty in which defendant killed him, in which he told witness that defendant had refused to let him have some whiskey for a sick boy, and that he had no use for such a man, and that it was defendant who was interfering with his conversations over the telephone, and that no one else would treat him so, even if error, was harmless; the matters being of so little importance, and defendant being told that he could prove the existence of any former ill feeling, but not the details thereof, casting no light on the transactions immediately preceding the homicide.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 339.\*]

Appeal from District Court, Eastland County; J. H. Calhoun, Judge.

John Bordeaux was convicted of manslaughter, and appeals. Affirmed.

D. G. Hunt, and Earl Conner, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**RAMSEY, J.** Appellant was indicted in the district court of Eastland county charged with the murder of one Hiram McCleskey, alleged to have been committed on the 4th day of December, 1907. He was put upon his trial at the January term of the district court of said county, and was on February 10, 1908, convicted of the crime of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of 2½ years.

The appellant and the deceased were both farmers living some five miles from the town of Eastland. Their relations had not been very friendly for something like two years, although there had been no open rupture, and the grounds of the unpleasantness

between them were not very substantial. On the day of the homicide appellant left his house with a load of seed cotton en route to the town of Eastland. On the same day the deceased, McCleskey, was returning from Eastland, and they met in the public road about 80 yards south of the residence of one J. J. Frost. The deceased when found was in a country road, about 37 steps from where the wagons were, injured by a shot which entered behind, about two inches from the backbone, and which had passed entirely through him in a slightly upward range. A part of the difficulty was seen by two ladies, Mrs. J. J. Frost and her daughter-in-law, Mrs. Fannie Frost. The last-named witness saw most of the difficulty. She states: That, when she first saw the parties, they were in the road directly south of the house. That she did not then recognize them, but heard some very rough language used. That one of them told the other to get out of the wagon, and that he would whip him. That she thought this was the man who was going towards Gunsight, which from the position of both parties would mean deceased. That both men got off of their wagons, and one asked the other how he wanted to fight; that she did not hear any reply, but they started to fight, and one of them knocked the other down. That the man coming down the road towards Eastland was knocked down. This from the position of the parties would mean appellant, and the other man seemed like he was stamping the one knocked down. That one of them asked the other if he was satisfied. That she heard no reply to this, but the man who was down got up and that she then went to the place where her mother-in-law was washing. That the men then talked together, and one of them threw out some rough language. That she thought it was the man going towards Gunsight. That he told the other that he would not allow him to call him any such. That thereupon deceased went towards appellant who drew a pistol, when deceased asked him not to do that because he did not have any gun, and that the man with the pistol fired. That she immediately ran towards where her husband and other members of the family were working in the field. That there was another shot fired, but she did not see the parties at the time. The testimony of Mrs. J. J. Frost in a general way supports that of her daughter-in-law, Mrs. Fannie Frost, except that she states that after the pistol was fired the deceased ran behind his wagon, stooped down, and then raised up and then made a motion as if he was throwing. She did not see the second shot fired.

The state also introduced J. J. Frost, who at the time of the homicide was some 200 or 300 yards in the field. He went almost immediately to where deceased was, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
124 S.W.—41

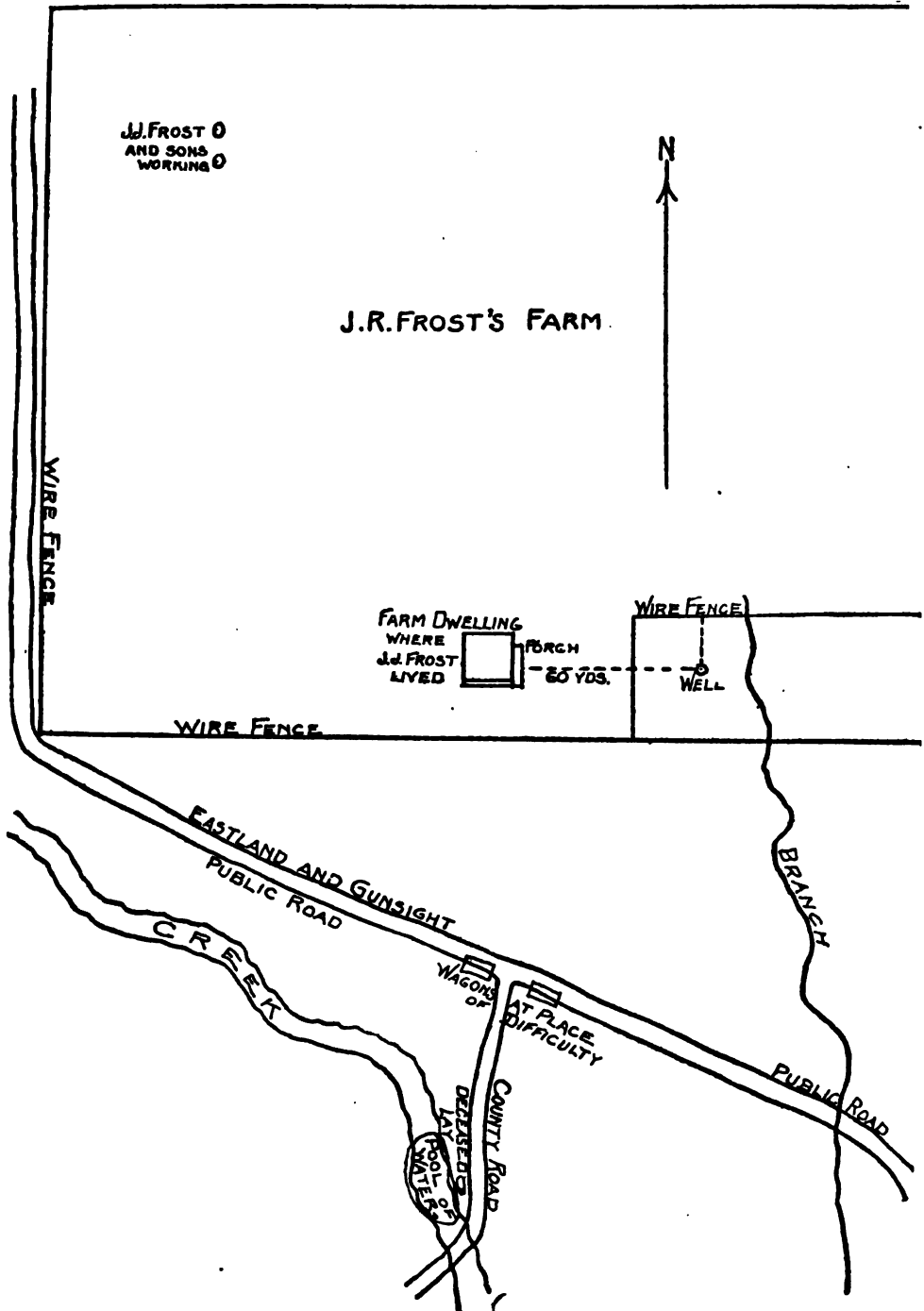
found him 37 steps nearly south of the place where the wagons had been stopped, and about 10 yards from a pool of water between a neighborhood road and the creek. His testimony touching the whereabouts of deceased and his statement is as follows: "He was about 10 yards from a pool of water and between a neighborhood road and the creek. This road entered the public road where the wagons were standing. When I found him, he seemed to be suffering greatly. I think he was shot in the back through the hipbone, and the bullet came out in front a little to the left on the other side. I afterwards saw the wounds on the body of deceased. When I got to the wagons on my way to McCleskey, both wagons and teams had turned outside of the roadway towards the south. Mr. Bordeaux's wagon was pointed in a southerly direction, and had no team hitched, and Mr. McCleskey's team was headed in a southwesterly direction. My recollection is that Mr. Bordeaux's wagon was almost opposite Mr. McCleskey's wagon and team. Mr. Bordeaux's team had in turning apparently raised the hind wheel of his wagon six or eight inches from the ground in turning out. Mr. McCleskey had cotton seed on his wagon, and Mr. Bordeaux a load of seed cotton on his. I know the character of the road where the wagons met. There was plenty of room for either of them to have passed the other. My recollection is that Mr. McCleskey was traveling slightly uphill. I do not think it was over six minutes from the time of the shooting until I got to McCleskey. I saw no one at or near where the deceased was lying, and no one going from that place, and I am sure I was the first one to get to him after the shooting. When I first got to McCleskey, my recollection is I first asked him how much he was hurt, and he replied that he was so badly hurt that he did not think he would ever get over it. He said Bordeaux had shot him. He said that he was freezing to death. I asked him how he came to be so wet. He said that he had gone into a hole of water to try to stop the blood. He said he was shot right there where I found him, which was about 35 yards or more from the public road, and a little west of south from where the wagons were. The pool of water was about 10 steps from where he was then lying, just on the other side of a little bank. He said he was running away from Bordeaux trying to get over the bank when Bordeaux shot him. He said he had gone into the pool of water to stop the flow of blood, and had gotten back to where I found him, and had given down, and could not get any further. There was blood where he was lying, and blood between him and the pool of water. I asked McCleskey how the difficulty occurred. He said, 'I was coming out from Eastland towards home, and met Mr. Bordeaux with a loaded wagon. I pulled out and gave half of

the road, but Bordeaux would not give any of the road. I told him that he would have to give part of the road. He cursed me, and said I had run over him as long as I was going to. I told Mr. Bordeaux if he would get off of his wagon that I would give him the worst whipping he ever had in his life in a pair of minutes. We both got off the wagon about the same time and started toward each other. We passed several licks, and I knocked Bordeaux down with my fist, and kicked him and asked him if he had enough. He said that he had or was satisfied. I then started back toward my wagon, and Bordeaux called me a son of a bitch. I turned around towards him, and said that I would not take that. He pulled his pistol. I told him not to shoot, and that I was unarmed. He shot at me. I ran around the wagon and picked up a rock, and threw it at him and missed him. I saw he was going to shoot me. I ran off down here thinking that I could get into the creek before he could shoot me. When I had got down here, he shot the second time and hit me.' This conversation all occurred immediately after I got to the deceased, not more than 10 minutes after the shooting. I think my son Dallas Frost was the next man who came up. Then two other men came along in a mail hack, and together we all carried Mr. McCleskey to my house. I could not say how long a time intervened between the two pistol shots, but it didn't seem very long. I did not charge my mind with it at the time, and I know of nothing that would enable me of my own knowledge to give the length of the interval. There was probably 15 seconds between the two shots or even more than that. There was considerable blood where I found the deceased lying and a trail of blood from where he was lying to that pool of water, but I could find no other blood anywhere except between where he was lying and the water. I made a careful examination for blood several hours after the shooting, of the ground between where the wagons were standing and where I found the deceased, but I could find no blood nor trace of blood anywhere around there except where deceased was lying and between him and the pool of water. I have stepped some distances since the examining trial, that are mentioned in the testimony. It is 82 yards from the porch of the house south to where the wagons were standing. It is 100 yards from the well or wash place southwest to where the wagons were standing at the time of the difficulty. And the well is 60 yards east of the porch of the house. My wife and daughter-in-law, Fannie, showed me the place they were getting under the wire fence when the second shot was fired. That place is 13 yards from the well. The place where the wagons stopped is in plain view of the dwelling house and of a person at the well. There are only a few trees

there. There is a common wire fence in front of the dwelling and along the south line of the J. R. Frost farm, there. After the deceased was carried to my house and given some attention, I designated and pointed out to Dr. Boon, Dr. Downtain, J. W. Steele, and probably other persons the place at which I found the deceased lying just after he was shot, and they examined the

blood spot or pool of blood where he was lying and also the trail of blood between there and the pool of water and looked for blood at other places there."

Perhaps it will aid in understanding the location of the parties by inserting a map of the roads, house, and especially the place where deceased lay. The following is approximately a correct map of the situation:



There was testimony that there was a trail of blood from the water's edge to the point where deceased was said to have been found after being wounded, but the testimony tended to show there were no blood stains except from where he came out of the water to the place where he was found. Appellant was shown to have suffered right severe injuries in the encounter. Dr. Downtain testified that about 11 o'clock on the day in question appellant came to his office in Eastland, and he dressed his wounds; that he had blood on his face and upper part of his clothing; that his face was swollen and bruised and one eye was completely closed; that he had a wound on his face and one on his left temple, which was cut to the bone and about half an inch long; that his face was bruised and blackened to some extent, but the skin was not otherwise broken. Appellant proved an excellent reputation as a peaceable, law-abiding citizen, and a like reputation for truth and veracity by the sheriff, treasurer, tax assessor of the county and several other persons. The testimony also showed that deceased was not as tall as defendant, but a little heavier.

Appellant became a witness in his own behalf, and gave the following account of the difficulty: "My team was a pair of ponies, and I could not keep them going, but had to rest them occasionally. Just before I got in front of the Frost home, I had to pass through a sand bed and the rain had made the road bad. The ruts were cut deep. I stopped my team just where the difficulty took place to let them rest. No one was seen by me at the time I stopped. I could probably see 100 yards southeast along the road towards Eastland. Soon after I stopped, I noticed a two-horse wagon coming to meet me, but did not notice or recognize who it was. He usually worked a pair of mules, but this team was a mule and a horse, and I did not recognize his team at first, but later recognized Mr. McCleskey. He came on to within 30 or 40 yards. He commenced saying something. I did not know what he said until he got near. The first words I recognized were he said 'get out of the road.' He was waving his hands and said get out of the road. He drove up nearer and our wagons were in the same wagon ruts. He stopped near me, and said: 'You get out of this road or I will get down and whip you right here in a minute.' I said: 'Well, Mr. McCleskey, there is no use for you to cut up that way. I have not refused to give you the road.' He crawled right off of his wagon, threw off his overcoat and gloves, and started towards my wagon where I was seated. He then said: 'I will whip you right here. Get down from there.' I got off, and, when I got even with my horses, he struck me here (indicating over his eye). See the gash here? He knocked me down, knocked me insensible for several minutes, and I did not know anything for several seconds, and, when I did

know anything, he was standing straddle of my back with something in his hand. Then he struck me here (indicating his cheek bone), and he finally stepped off of me, and I got up and staggered to my team. My horses had cut out of the road as far as they could turn. I saw how they were and tried to pull them straight. My back was towards McCleskey. He went on north side of road. The horses were on south side. I said to Mr. McCleskey: 'This is all uncalled for.' He said: 'I see you have not got enough yet. I will finish my job on you,' or something like that. When he said that, I turned, facing him. He was advancing on me. He had his right hand thrown back. I said: 'McCleskey, you hold up. I have taken all off you I am going to.' He never stopped—I reached for my revolver and pulled it. He threw a rock at me, and I pulled out the revolver and shot. I shot to keep him off of me. To the best I could tell the revolver fired and the rock was thrown about the same time. I was then 10 or 12 feet from him. He was just on the north side of the road and I was on the other. McCleskey's horses and wagon were still in the road as I remember. He was walking rapidly towards me, and was a little above his horses' heads. He then went east on north side of wagon, and got behind it, and, when he got to the southeast corner, he threw another stone at me, and I jumped back to the north side, and kept the wagon between me and him. He came up to the front wheels and threw across the wagon at me again. He then wheeled in this position, like (defendant here indicated) appeared to be reaching for a rock, and I fired again. I was 12 or 15 feet from him just across the road, he on the south and I on the north. He said: 'Don't shoot any more. You have shot me. Don't shoot any more.' He kind of laid or fell over and got on his hands. He got up and started south and went a few steps and fell again. He said: 'John get me some help. Phone for a doctor.'"

Responding to this evidence, the court gave a charge to the jury in which he submitted to them murder in the first degree, murder in the second degree, manslaughter, self-defense, as well as the law in reference to abandoning the difficulty, provoking the difficulty, and mutual combat. The charge of the court in reference to self-defense is not seriously criticised, and was, we think, a fair and liberal presentation of that issue in the case. The charge of the court in respect to the other matters is seriously and vigorously criticised, and they are the important matters and questions in the case. These instructions are as follows: "If you find that the deceased used violence upon the defendant and put defendant in fear of his life or serious bodily harm, if you further find that the deceased, Hiram McCleskey, in good faith abandoned said conflict and fled from the defendant, and that the defendant was in no

danger of violence then from the deceased, and that the defendant knew the same, and that, knowing the same, defendant shot and killed the deceased, he cannot justify such killing on the ground of self-defense or because he had been assaulted, but the defendant would be guilty of manslaughter or of a higher grade of homicide as herein charged. If you believe from the evidence beyond a reasonable doubt that the defendant, being armed with a deadly weapon of his own accord or upon being challenged to a personal combat by the deceased, intentionally entered into a personal combat with the deceased, intending at the time to use said deadly weapon upon the deceased, and that pursuant to such intention, after entering said combat, he shot and killed the deceased, he cannot justify such killing on the ground of self-defense, but he would be guilty of manslaughter or of a higher grade of homicide, owing to the other facts and circumstances, if any, connected with such killing considered in connection with other parts of this charge defining manslaughter and higher grades of homicide. If you believe from the evidence beyond a reasonable doubt that the defendant and the deceased entered into a personal combat, or that the deceased assaulted the defendant, and that such assault and battery or said personal conflict had ceased, and that the defendant knew that such conflict or assault had ceased, and that the defendant being then armed with a deadly weapon, and knowing that said assault or combat had been abandoned if it had been abandoned, he intentionally invited or renewed said difficulty or intentionally entered into a renewal of said conflict armed with such deadly weapon, intending at the time to slay the deceased or to do him serious bodily harm therewith, and that the defendant did willingly enter into a renewal of such combat or begin such combat and did shoot with a pistol and thereby kill the said Hiram McCleskey, the defendant cannot justify such killing on the ground of self-defense, but the defendant would be guilty of manslaughter or of some higher grades of homicide. However, if you do not find from the evidence beyond a reasonable doubt that the defendant entered into said personal encounter intentionally intending to use said deadly weapon upon the deceased, or that after he had been assaulted by or had a personal conflict with the deceased, and said conflict ceased, that he voluntarily or intentionally invited or renewed said conflict intending to kill or inflict serious bodily injury upon said Hiram McCleskey, then you will not consider that the defendant's right or plea of self-defense, if any, is abridged or in any manner impaired, if, in fact, he acted in self-defense at the time the deceased was shot as it then appeared to the defendant." We think the dying statement of McCleskey, taken in connection with the physical facts on the ground, demanded and required the court to charge on

these issues, and, while the charge may be subject to some criticism, it occurs to us that the instructions as a whole are not subject to serious complaint.

Criticism is made of the first paragraph of the above-quoted instruction, in that the jury were required to find that McCleskey in good faith had abandoned said conflict. If this clause stood alone, it might be subject to criticism, but the court instructed the jury that if they found that McCleskey in good faith had abandoned said conflict and fled from defendant, and that he was in no danger of violence from the deceased, "and that the defendant knew the same, and that, knowing the same, defendant shot and killed the deceased, he cannot justify such killing on the ground of self-defense." It is undoubtedly true that if there had been an abandonment of the difficulty by the deceased, whether in good faith or bad faith, yet, if the jury should also find, as under this instruction they were required to do, that appellant was in no danger of violence from the deceased, and that he knew he was in no danger of violence, and with this knowledge he shot and killed deceased, he could not justify on the ground of self-defense. It is also true that if the parties engaged in the mutual combat with the agreement, as suggested by some of the evidence, that they were to have a fist fight, and appellant at the time of so engaging in such encounter intended to use a deadly weapon, and that pursuant to such intention, after entering said combat, he shot and killed deceased, he could not justify such killing on the ground of self-defense. The facts to our minds also clearly raise the issue of abandoning the difficulty, and in this connection the jury were instructed and required to believe before they could deny to appellant his perfect right of self-defense that he knew that such conflict or assault had ceased, and, knowing that it had been abandoned, he intentionally renewed said difficulty, intending at the time to slay the deceased, or to do him serious bodily injury, and that he willingly entered into such renewal, or began such combat, and shot McCleskey. Some criticism is made of these charges on the ground that the jury were required to find beyond a reasonable doubt that not only deceased and defendant entered into a personal combat, or that the deceased assaulted defendant, and that the charge has the effect of shifting the burden of proof from the state to the defendant, and in support of this proposition we are referred to the case of *Huddleston v. State*, 54 Tex. Cr. R. 93, 112 S. W. 64. It is not believed, however, that that case supports the proposition here. In the same connection and in support of the same proposition we are also referred to the case of *Rockhold v. State*, 16 Tex. App. 585. We do not think this case is in point. As we understand the matter, the rule laid down in the case of *Pitts v. State*, 29 Tex. App. 374,

16 S. W. 189, is applicable here. It must be remembered that the court had already fully instructed the jury in respect to the law of self-defense. In the paragraphs of the court's charge complained of the court was undertaking to instruct the jury with reference to issues made by the state's evidence, which, if sustained by the proof, would or might deny him the benefit of his plea of self-defense. It was these incriminating facts which by these instructions were required by the court to be found to be true beyond a reasonable doubt. In the Pitts Case, *supra*, the court instructed the jury as follows: "If the defendant had been informed that said Stern had used insulting language about his (defendant's) wife, and when defendant heard of said language the same created in the mind of the defendant such passion as to render his mind incapable of cool reflection, and acting under the impulse of said passion, if any, he with a gun shot and killed the said Stern the first time he met him after he had been informed that Stern had used insulting language about his (defendant's) wife, then you are instructed he would be guilty of manslaughter. And, if you believe from the evidence beyond a reasonable doubt that the defendant did kill said Stern in the manner and under the circumstances as before explained in this paragraph, then you will find the defendant guilty of manslaughter, and assess his punishment." And complaint was made of the charge because it required the jury to believe beyond a reasonable doubt all the facts necessary to reduce the homicide to manslaughter before they could reduce the grade of the offense, and reference is had to Rockhold's Case, 16 Tex. App. 577. In this case the court say: "We think that the complaint is unwarranted and untenable. The court has evidently disposed of the higher grades, and is now instructing as between manslaughter and self-defense. As between these two issues, the jury must find manslaughter beyond a reasonable doubt. He is not applying the reasonable doubt to manslaughter as a lesser degree, but to manslaughter as a crime, as against self-defense, or no crime at all, and in such case the jury are properly told they must find manslaughter beyond a reasonable doubt to warrant a conviction of that crime." The case, as we believe, presented all the issues upon which the court charged. In the nature of things, in order to defeat appellant's right of self-defense, the burden rested on the state to show mutual combat, provoking the difficulty, or abandonment of the difficulty by the deceased; and it is inconceivable that any jury could have been misled by the language of the court's charge. This case is quite similar to that of Howard v. State, 53 Tex. Cr. R. 378, 111 S. W. 1038, in which we said: "Counsel for appellant sometimes overlook the fact that it is just as necessary and as much required of the court to submit to the jury issues raised by

the state's evidence, and on which, under the law, a conviction could be had and ought to be had, as it is to submit matters wholly defensive. If it were true that Crump had abandoned the difficulty, was standing some 30 feet from appellant, and was making no demonstrations to assault appellant, and if it be true, as some of the evidence indicates, that appellant returned to where deceased was, and while he was committing no hostile act, or making any demonstration to commit a hostile act, shot and killed him, it would not be in self-defense, and, the evidence raising such issue, the learned trial court not only was justified, but was required, to submit the phase of the case, and seems to have done so very clearly and in a manner which furnished no just or fair ground of criticism or complaint. In the case of Garner v. State, 34 Tex. Cr. R. 356, 30 S. W. 782, it appeared that the defendant there, after being attacked by the deceased with a knife in a difficulty arising over a game of cards, left the room, and returned to the door, where he struck deceased. The evidence was conflicting, it seems, as to whether deceased pursued defendant. In that case it was held that if Garner, after having gained a place of safety and without grounds for anticipating further injury from deceased, armed himself and returned to the conflict, he could not defend on the ground of self-defense, and that a charge submitting this issue was not ground for reversal, as being unwarranted by the evidence, where the court also charged that said defendant, if reasonably apprehensive of death or serious bodily harm from deceased, and if it reasonably appeared to him that deceased had not abandoned the attack and he was still in danger, had the right to return and kill the deceased." It is a matter of some difficulty to present these issues in the light of the decisions of this court without an impairment of appellant's right of self-defense, but the court seems, as we believe, to have acquitted himself well of the task thus imposed upon him.

Appellant requested a number of special instructions, which were refused by the court. These we have carefully examined, and do not think there is any error in respect to any of them.

Complaint is made that the court erred in declining to permit appellant to prove by the witness Shepard a statement made by deceased, some two years or more before the homicide, in respect to appellant. This witness, if permitted, would have testified that appellant told him that he had sent his minor son to appellant's house a few mornings before that to get some whisky for a sick boy, and that defendant refused to let him have the whisky, and that he, McCleskey, had no use for a man who would treat him in any such way. This testimony was offered for the purpose of corroborating the defendant's statement as to the origin of the

ill will of the deceased towards the defendant; and was also offered, not as the details of former difficulty for there had been none, but as declarations of the deceased about a matter which under the circumstances no reasonably prudent person could take exceptions to and as illustrating the character of the deceased, and the knowledge of appellant of such character at the time he met the deceased. This bill is allowed by the court with the explanation that at the time offered he told the attorneys for the appellant that the existence of any former trouble or ill feeling in the past up to the time of the killing might be proven, but that the details of former trouble or ill feeling that were not explanatory of, or cast no light on, the transactions immediately connected with the fatal difficulty beyond the mere existence of ill feelings, were irrelevant and could not be introduced, and the court permitted the defendant to prove by witnesses Shepard and Long that ill feeling existed between the parties or by the deceased towards the defendant. We think, in the first place, it is a matter not of any special importance, and, as explained by the court, his action in this matter was not reversible error. A similar question was raised in respect to the testimony of W. R. Long, who, if permitted, would have testified that he heard deceased tell W. A. Davis that it was appellant who had been interfering with his conversations over the telephone and no one else but appellant would treat him, deceased, in such a way. The court allowed this bill with this qualification: "The alleged conversation showed no threats, was remote from the fatal difficulty, and seemed to be more of an effort to attack the deceased's character by giving special conversations or special acts of the deceased that throw no light on the fatal difficulty except that ill feeling existed at that time, which the court had already allowed to be testified to by said witness." It is true, indeed, that the testimony showed that there was ill feeling between the parties; in fact, wholly out of proportion to the gravity of the cause on which it seems to have been based and if admissible at all, the introduction of these trivial matters could not, as we believe, have aided appellant. The case is one peculiarly of fact. Under appellant's statement, the jury were well justified in acquitting him. If the dying statement of the deceased is to be believed, and if when he was shot he had abandoned the difficulty, was unarmed, and was seeking refuge in flight, and was at a distance of 35 or more yards from appellant when shot, still fleeing, and the jury so believed, there was no escape from a conviction of at least manslaughter.

From a careful examination of the record, we are convinced there was no error committed on the trial for which we ought to

reverse the case. The jury have passed on the questions of fact, and have found adversely to appellant, and their verdict has received the sanction of the trial court, and must and should be affirmed, which is hereby done.

### MOSS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

CRIMINAL LAW (§ 48\*)—RESPONSIBILITY FOR CRIME—MIND UNBALANCED BY DRUGS.

Pen. Code 1895, art. 41, providing that intoxication produced by the voluntary recent use of intoxicants will not justify an acquittal of a criminal act while the mind is influenced by such intoxicants, though that fact may be considered in mitigation, does not apply to a morphine fiend, whose mind at the time of an offense was in an unbalanced condition; but if, from the use of morphine, his mind was incapable of rational action, he would not be responsible therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 53-58; Dec. Dig. § 48.\*]

Appeal from San Augustine County Court; W. O. Ramsey, Judge.

J. W. Moss was convicted of unlawfully carrying a pistol, and appeals. Reversed and remanded.

Foster & Davis, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for unlawfully carrying a pistol.

The facts disclose that appellant was keeping a hotel in San Augustine, and had been down to the grocery store of Miller Bros., and had borrowed a pistol to carry with him on a trip he had in contemplation to Panola county. Returning to his hotel from where he had borrowed the pistol, he passed the business house of T. W. Blount a few feet, 20 or 25 perhaps, when he returned to Blount's store, and he and Blount went inside, and sat down at a table.

The witness Blount testified: "We were sitting, one on each side of my desk. He started the conversation with me, and asked me if I owned any interest in the hotel he was running. I told him I did. He finally says, 'I don't believe you have got any interest in the hotel,' and cursed me, and rose up from where he was sitting down right in front of me, at the same time reaching his hand in his pocket, and pulled out his pistol. About the time he got his pistol out of his pocket, and before he had a chance to present it, we, another man who was there and myself, grabbed him and got the pistol, and it went off in the floor. We took the pistol away from him, and about the time we got the pistol some other parties came and took hold of him and carried him home." This witness testified, when appellant passed his store, he was traveling the usual and most

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

direct route from Miller Bros.' store to his home, the hotel, which was situated directly south of witness' place of business; Miller Bros.' store being directly north. I. L. Miller testified to the fact that he had loaned appellant the pistol, and that when he got the pistol he stated that he was going to make a trip to Panola county, and was going off on the evening train. Shortly after this he said he heard of the trouble between Blount and appellant.

Appellant testified in his own behalf, and corroborates the witness Miller as to borrowing the pistol, and his intention of going to Panola county, and that it was for that purpose he borrowed the pistol, and that he was going off that evening on the northbound train. He further testified that he had taken a dose of morphine about an hour before he went to Miller to borrow the pistol, and that it must have been an overdose; that he could not tell; that he intended to go to Panola county for the purpose of raising money on his farm to buy out the witness Blount's interest in the hotel that he was running; and that he had no other purpose in borrowing the pistol. He says, after leaving Miller, en route home, he met a party on the street—does not remember his name—and the man remarked to him, "I am going to take supper with you to-night." At this point appellant testified: "I have no recollection of anything that occurred from that time until about 12 or 1 o'clock that night. I was crazy. When I gained consciousness, I was at my home, with Dr. Rawls present, waiting on me. He was injecting something in my arm. I did not recover for about two weeks. I was confined to my house for about two weeks. As soon as I could walk around, acting on the advice of my physician and family, I went to the Moody Sanitarium at San Antonio, where I was treated for the whisky and morphine habit. I have been a victim of that habit for eight years. I was a confirmed morphine fiend." He further states he remained at the sanitarium until he was pronounced cured, after which he returned to San Augustine, and has since lived there, and he further states he is now cured of the habit; that he has not indulged in either morphine or whisky since leaving the sanitarium. Further testifying, he said he had no recollection of ever meeting Mr. Blount, or seeing him, or having a conversation with him. He says: "I do know before that time I had talked of buying out his interest in the hotel that I am now running, and was then running, in the town of San Augustine. And I had in my mind to go to Panola county and dispose of some property there, and take the proceeds and buy out Mr. Blount's interest; but I have no recollection of having any conversation with him that afternoon. I had nothing against Blount at the time, and have nothing against him now."

The witness Rawls testified he is a practicing physician and surgeon, and was at the

time of the incident mentioned, and was well acquainted with appellant, and had occasion on a number of times prior to that to treat him professionally; that he was what would be termed a morphine and whisky fiend. This witness treated appellant while he was sick after the transaction which occurred between Blount and himself; that appellant was confined to his bed for some time; that he afterwards went to the Moody Sanitarium at San Antonio for the purpose of being treated for the morphine and whisky habit; and that he did this under the advice of witness as his family physician.

Frank Blount testified that he knew where the store of T. W. Blount was located, and that it was about 20 or 22 feet from the building that the Farmers' & Merchants' State Bank was in; that it was about 40 or 45 feet from the door of the store that Blount was occupying to the door of the bank building. Appellant was somewhere about the bank building when he turned back and went into the store of T. W. Blount, where he exhibited his pistol.

The court charged the jury as follows: "You are further instructed that if you find from the evidence in this case beyond a reasonable doubt that at the time defendant carried the pistol, if he carried it, that his mind, from the use of morphine or drugs, was in an unbalanced condition, that this fact would not avail him of a defense, but may be considered by you in mitigation of his punishment only." Objection was urged to this, and special instruction requested, in substance, submitting to the jury the question of his insanity; that is, the court was requested to instruct the jury, in substance, that if by the use of morphine his mind was incapable of rational action, or knowing what he was doing at the time, they would give him the benefit of this and acquit. We think there was error in the court's charge, and in refusing to give the special instruction as requested by appellant. The court's charge seems to be predicated upon article 41 of the Penal Code of 1895, which provides that intoxication produced by the voluntary recent use of intoxicants would not justify an acquittal for a criminal act while the mind is influenced by such intoxicants, but that fact may be considered in mitigation. The terms of that article do not apply to the character of case like the one in hand. The evidence here shows that this party had been addicted to the use of morphine for quite a number of years, as well as intoxicants, and it is testified by appellant himself that he had no recollection or knowledge of having engaged in a difficulty with Blount, and had no recollection of the fact that he was in his store, and that he was sick subsequent to that, confined to his room. His family physician corroborates his statement that he was addicted to the use of morphine and whisky, and sufficiently strong to draw the conclusion that he was what might be popularly termed a

"morphine fiend." The physician says he was two weeks confined to his bed from the time of this trouble on, and that he had him take a course of treatment in the sanitarium. The terms of article 41, *supra*, do not apply to this state of facts.

This case is not a novel one. See *Edwards v. State*, 38 Tex. Cr. R. 386, 43 S. W. 112, 39 L. R. A. 262; *Edwards v. State*, 54 S. W. 590; *Terrill v. State*, 74 Wis. 288, 42 N. W. 243; *Otto v. State*, 47 Tex. Cr. R. 128, 80 S. W. 525, 122 Am. St. Rep. 682; *Cannon v. State*, 41 Tex. Cr. R. 467, 56 S. W. 351; *Erwin v. State*, 10 Tex. App. 700; *Burkhard v. State*, 18 Tex. App. 622; *Smith v. State*, 19 Tex. App. 110. These are a sufficient number of cases to indicate the question has been settled in Texas under this character of case that the jury should be instructed that if the party was insane he should be acquitted. The court's instruction was that this would not avail him as a defense, but could only be considered by them in mitigation of his punishment. This was a very important phase of this case, perhaps the most important. Here appellant and Blount had been friends. There was no occasion for any such conduct on his part. If his mind was not unbalanced, and if he was rational at the time, it would show an unprovoked and unnecessary assault upon Blount, and doubtless for the purpose of killing him. If his mind was unbalanced, as his testimony would show, then it was the act of an unbalanced and irrational mind, and these issues should have been clearly submitted to the jury. The court, therefore, was in error in giving the charge he did, and also in error in refusing to instruct the jury as requested in writing by appellant.

The judgment is reversed, and the cause is remanded.

McCORD, J., not sitting.

### WIGFALL v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### 1. CRIMINAL LAW (§ 597\*)—CONTINUANCE—ABSENT WITNESSES—CREDIBILITY AND EFFECT OF TESTIMONY.

In a prosecution for arson, defendant testified that on the evening of the crime he was at a certain hotel until 7:30 or 8 o'clock, and the evidence in his behalf did not show that at any time he was with either of the H. brothers. An application for continuance for one of the H. brothers, as witness, stated that defendant expected to prove that on the night of the crime he was in the barber shop of this witness, and that he was sitting up with a brother of the witness, who was sick. *Held*, that the application was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1331, 1332; Dec. Dig. § 597.\*]

#### 2. CRIMINAL LAW (§ 822\*)—INSTRUCTIONS—INSTRUCTIONS AS A WHOLE.

An instruction that, where a fire is communicated to a house by means of setting fire to

some combustible material which was close enough to communicate therewith, etc., was not objectionable as intimating that the burning might be sufficient, though not willfully done, where the whole charge taken together presented this question, and defined arson as the willful burning of a building.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

#### 3. ARSON (§ 41\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

On prosecution for arson, the owner of the house testified that, hearing an alarm, she rushed to the door and found her house on fire; that it was all ablaze; that her brother poured water on the fire and put it out; and an eyewitness testified that she saw some one strike a match and set fire to some combustibles by the house, and that the house was afire and blazing. *Held*, that a requested instruction that it was insufficient to show that the house was simply scorched or smoked was properly refused, as not called for by the evidence.

[Ed. Note.—For other cases, see Arson, Dec. Dig. § 41.\*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

Steve Wigfall was convicted of arson, and appeals. Affirmed.

John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for arson; the punishment assessed being nine years' confinement in the penitentiary.

The state makes out a case by showing that appellant rolled some matting under the edge of a house, that there was kerosene oil on the matting, and it was set on fire, and the fire communicated to the building. He was recognized as the party who set the matting and house on fire. He denied being present, and stated that he was not at the house of Ella Mayfield on the night of the fire; Ella Mayfield being the owner or occupant of the house in question. He said he had been intimate with the woman, and had paid the rent on the house most of the time she lived in it, and was engaged to be married to her. He further states that he was working at the Oriental Hotel at the time, and worked on the evening of the fire until about 7:30 or 8 o'clock; that he scrubbed the floors at the hotel. The state shows that about 8 o'clock he was at the house that was a few moments later set on fire, which was in a different part of the city from the hotel.

1. Appellant presented an application for a continuance on account of the absence of a witness named Hawkins, a negro whose address is given at H. Foster's barber shop on Elm street, and he says on the 21st of May he caused to be issued for this witness a subpoena, which subpoena was returned "Not found or located in Dallas county." He says that he has been incarcerated in jail, had no attorney, and that he expected to prove by this witness that he was at this barber shop on the night on which the alleged burning oc-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

curring; and he further alleges that another negro named Hawkins, a brother of the other witness, was sick in bed on the night which it is alleged the offense was committed, and with whom this defendant sat up during the night and until about 6 o'clock in the morning. By the first-named Hawkins he expected to prove that he (appellant) was at the barber shop where Hawkins worked on the night on which it is alleged the burning occurred, and he says that both witnesses would testify he was not present at the place it is alleged the arson was committed, but that he was with said Hawkins brothers, at the barber shop with one, and sitting up with the other one, who was sick. The application for continuance is in the record, but not sworn to, and these matters are set up in the bill of exceptions. The court approves the bill with the explanation that only one witness was claimed to have issued for, and the witness is not shown to reside in Dallas county, nor was the county of his residence given, and that there was no diligence exercised, and, besides, the explanation calls attention to the fact that defendant on the trial swore as a witness that he was at the Oriental Hotel, not at the Hawkins residence at all. We notice that the evidence as given by appellant in his own behalf did not place him at any time with either of the Hawkinses; but he does state in his testimony before the jury that he was at the Oriental Hotel until about 7:30 or 8 o'clock. As the bill presents the matter, there is nothing in it of sufficient merit to require a reversal. It will be noticed, also, in addition to the judge's explanation, that the recitals in the bill of exceptions would place appellant at two different points, one at the place where one of the Hawkinses was sick, sitting up with him, and the other at the barber shop. We are therefore of opinion that the court did not err in not granting the continuance as the matter is presented.

2. Some portions of the charge are criticized, but viewed as a whole we are of opinion these criticisms are without merit. We are of opinion that the criticism of the charge on alibi is without merit. It is a stereotyped form, which has been followed by the courts of this state. In the case of *Gallaher v. State*, 28 Tex. App. 247, 12 S. W. 1087, this particular form of charge was reviewed very elaborately, and held to be sufficient.

3. Another portion of the charge is criticized, to wit: "Where a fire is communicated to a house by means of setting fire to some combustible material which was close enough to communicate therewith," etc. Appellant objects to this charge because it instructed the jury that the burning might be sufficient, although it was not willfully done. The court's charge is sufficiently full in regard to this matter, and instructed the jury fully

that the burning must be willful. Taking the whole charge together, this question was fully presented. The court instructed the jury that "the offense of arson is the willful burning of any house, which is defined to you as any building, edifice, or structure inclosed within walls, whatever may be the material used for the building." Then, applying the law to the facts, the court instructed the jury that before they could find appellant guilty they must believe beyond a reasonable doubt that he unlawfully and willfully set fire to and burned the house belonging to the alleged owner.

4. The court refused appellant's requested instruction in which it was sought to instruct the jury that it was not sufficient for the state to prove the house was simply scorched or smoked, as follows: "Such proof, if there is any such proof, is insufficient to sustain a conviction. You are therefore instructed that, if you find that the house was simply scorched or smoked, then you will acquit the defendant. If you have a reasonable doubt in your mind as to whether or not there was any burning, in addition to being scorched or smoked, if it was smoked or scorched, you will resolve such doubt in favor of the defendant." We are of opinion this charge is not called for by the evidence. The alleged owner testified that on the night of the day, about 8 or 9 o'clock, she heard some one call or scream, and she rushed to the door, and found her house on fire; some one had set fire to a lot of matting, and pushed it under the kitchen; it was all ablaze, and the house caught on fire; that some one had poured coal oil on the matting; that her brother snatched the matting away, and poured water on the fire and put it out. She said her house had been set on fire a few nights before by appellant; but, when closely examined in regard to the former fire, she was not so clear about it. Another witness, Roxie Mays, testified that she lived just behind Ella Mayfield, the owner of the house that was set on fire, and was at her woodhouse locking the doors on the night of the fire, and heard a noise, and looked and saw some one strike a match and set fire to some old matting that was under the house. "It blazed up, and I saw the defendant by the light it made. I know it was him, because I saw his face in the light. He walked to the fence, and stepped over into my yard, and then ran out at my front gate. The house was afire and blazing. I holloed three times, as soon as he struck the match and it blazed up." She says it did not burn a hole in the house; but it was blazing, and the walls were blazing. We do not believe the evidence called for the charge requested by appellant, and there was, therefore, no error in refusing to give it.

The judgment is affirmed.

## BOYD v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

1. CRIMINAL LAW (§ 594\*)—CONTINUANCE—APPLICATION—SUFFICIENCY.

An application for a continuance of a trial for an indictment for burglary, returned November 30th, showed that the applicant caused subpoenas to be issued on January 4th and that the trial occurred on January 8th. The process was issued to Dallas county, but on motion for new trial it appeared that three of the witnesses were at Ft. Worth in business, and the whereabouts of others were unknown. The application was indefinite as to the position of the witnesses at the time the crime occurred, and the testimony as to whether or not they were present was conflicting. *Held*, that the application did not make a sufficient showing and was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.\*]

2. BURGLARY (§ 2\*)—ELEMENTS—VALUE OF PROPERTY.

Where defendant broke open the side of a railroad car, and entered in person, and took out some property, he was guilty, under the general statute, declaring one guilty of burglary who breaks and enters with intent to commit a felony or theft, and the value of the property was immaterial, as Pen. Code 1893, art. 841, was not applicable.

[Ed. Note.—For other cases, see Burglary, Dec. Dig. § 2.\*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

Will Boyd was convicted of burglarizing a railroad car, and appeals. Affirmed.

John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglarizing a railroad car; his punishment being assessed at two years' confinement in the penitentiary.

The state makes out its case mainly through the witnesses Wyght and Gatiliss, who were respectively conductor and brakeman on the Santa Fé Railroad. The railroad car was what the witnesses term a "caboose." The two witnesses mentioned had been on the train which had come in from Cleburne to the city of Dallas. The caboose had been switched to one side on one of the tracks. The two railroad men were asleep in the car, and heard a noise, and Wyght went to see what was the matter, and found appellant and another negro boy in what they called the cellar of the car, getting some brass which was in the cellar. The conductor dressed, and went and got an officer, and had appellant arrested. The other boy ran away. They did not succeed in catching him. Appellant did not have the brass at the time he was arrested, and when questioned about it he refused to give his name. The other boy was chased about a mile. The brass was found about 50 or 75 yards from where the breaking occurred. Appellant denied having

anything to do with the matter, and said he called the attention of the officers to two boys who ran by where he was, and showed the officers the way they went, and that the officers saw and ran them for some distance. The officers stated only one boy ran away whom they chased. Conductor Wyght positively identified appellant as the party who entered the car.

1. Appellant filed his application for continuance on account of the absence of Charlie George, Will Jefferson, Will Wood, Son Mackey, Arthur Armstrong, Percy Cooper, and Jim Candy, who he says all resided in Dallas county. He further states on the 4th of January he caused subpoena to be issued for the above-named witnesses, giving their names, street number, and residence, and same was placed in the hands of the sheriff on the 4th day of January. The bill of indictment was returned into court on November 30th, previous to the issuance of the process. The trial was had on the 8th day of January, four days after the process is alleged to have been issued. He says he expects to prove by Charlie George that defendant was not at the place of the burglary, and that he (George) would admit that he opened the door, which was unfastened, to a little box under the car; that the other witnesses will testify that he was with them, and was at the time of the commission of the offense looking at the circus paper near the oil mill; that they were looking at the paper at the time, and each will testify that defendant was with them, and did not go near the car; that these witnesses were not absent by procurement or consent of the defendant, etc. It will be noticed this application is very indefinite, especially the facts in regard to the location of the parties, and the time that these parties were with the appellant, and their position in regard to the transaction. The application in fact is quite indefinite. The diligence is not sufficient, and no excuse is given why process was not issued earlier.

It is alleged that process was issued to Dallas county, in which process names of the streets were given and numbers. Upon the motion for new trial it is made to appear that three of these witnesses were in Ft. Worth in business, and the whereabouts of the others was unknown. It would seem that slight diligence would have indicated to appellant where he could find these witnesses; but he makes no showing as to why he issued process to Dallas county, when the witnesses were in Ft. Worth, Tarrant county. Viewed from the standpoint of the motion for a new trial, and in the light of the facts, the evidence in regard to the position of these parties is unsatisfactory. Appellant himself testified that some of these witnesses were there, and he was with them; but the officers and some of the witnesses for the state testify they were not together, they were some

15 feet apart, and that there was a crowd of negroes there, and others watching the Bailey-Barnum circus unload their animals. It would seem that under the circumstances, if these facts were true, appellant would have had no trouble in producing quite a number of witnesses. The officer who arrested him stated that appellant refused to give his name, and pointed out another negro who was running away, and whom the officer chased. Under all the circumstances, we are inclined to the opinion the court did not err in overruling the application for continuance.

2. Appellant insists the court should have instructed a verdict of not guilty, because the amount of brass taken from the burglarized car was less than \$50 in value; his insistence being that this comes under article 841 of the Penal Code of 1895. We are of opinion there is no merit in this contention. Appellant broke and entered the side of the car, and took out the brass, and went into it in person, and under the general statute of burglary he would be equally guilty of burglary where the property is under \$50 as if the property taken was of sufficient value to constitute a felony. The statute provides that he is guilty of burglary who breaks and enters a house with intent to commit a felony or the crime of theft. The value of the articles stolen or intended to be stolen, under the general statute, is immaterial. Without discussing article 841, *supra*, we hold that it is not applicable to this case in any event.

Finding no error in the record, the judgment is affirmed.

#### VINSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

##### 1. GAMING (§ 72\*)—BETTING ON CARD GAME IN PRIVATE RESIDENCE.

One may be prosecuted for betting on a game of cards played in a private residence.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 183; Dec. Dig. § 72.\*]

##### 2. GAMING (§ 71\*)—OFFENSES—EXHIBITING BANK.

One cannot be convicted of playing or betting on a game of cards upon evidence showing that he, as banker, exhibited a monte bank at which the other players bet, since he could not bet at his own banking game.

[Ed. Note.—For other cases, see Gaming, Dec. Dig. § 71.\*]

Appeal from Angellina County Court; J. T. Maroney, Judge.

Felix Vinson was convicted of playing at a game of cards, and appeals. Reversed and remanded.

W. J. Townsend, Jr., for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The pleading charged appellant with having played at a game of cards.

1. The indictment is attacked because it failed to state that the game was not played at a private residence. Under the authority of *Purvis v. State*, 52 Tex. Cr. R. 342, 107 S. W. 55, and *Singleton v. State*, 53 Tex. Cr. R. 625, 111 S. W. 736, this point is not well taken, and the court did not err in overruling the motion to quash.

2. That the evidence does not support the conviction is also urged for reversal. In this we think appellant's contention should be sustained. The uncontroverted facts show that appellant did not play at a game of cards, or bet at a game of cards; but it is shown conclusively that appellant exhibited a monte bank at which the other players bet. Under the authorities, appellant could not bet at his own banking game. The owner of the banking game is one against the many, and, of course, takes all bets that are offered on his game or bank. He cannot bet at his own bank, but accepts the bets of those who are betting at it. In one sense of the term, of course, he is betting, because he accepts the bets of the others; but this idea does not obtain where the banker is exhibiting his gaming bank or table, as has been frequently decided. *Askey v. State*, 20 Tex. App. 443; *Averheart v. State*, 30 Tex. App. 651, 18 S. W. 416; *Shaw v. State*, 35 Tex. Cr. R. 394, 33 S. W. 1078.

We are of opinion, therefore, that the evidence does not sustain the conviction. Appellant, if he exhibited the gaming bank, or monte bank, could not be convicted under this form of indictment. The statute makes the exhibition of this character of game an entirely different offense, and punishes it differently from playing cards.

The judgment is reversed, and the cause is remanded.

#### FIELDS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

##### 1. LARCENY (§ 78\*)—MISTAKE OF FACT—INSTRUCTIONS.

An instruction, on a trial for hog theft, that if, in taking the hog, accused acted under a mistaken claim of right, in good faith believing the hog to be his own property, or if the jury had a reasonable doubt as to whether he acted under such mistake, he was entitled to an acquittal, was sufficient on the issue of mistake of fact.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 78.\*]

##### 2. CRIMINAL LAW (§ 814\*)—ACCOMPLICES—INSTRUCTIONS.

A witness, testifying that he saw accused and a third person coming out of a field as if they were driving something, that they went out in the bed of a creek where a gun was fired, that when witness came in view of accused and the third person they picked up a hog and threw it in the creek, that the hog belonged to the witness, was not an accomplice with accused and the third person in the larceny of the hog, so

that the refusal to charge on the subject of accomplice was proper.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 814.\*]

3. LARCENY (§ 55\*)—EVIDENCE—SUFFICIENCY. Evidence held to support a conviction of hog theft.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 55.\*]

Appeal from District Court, Shelby County; James I. Perkins, Judge.

Jackson Fields was convicted of hog theft, and he appeals. Affirmed.

D. M. Short & Sons, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the district court of Shelby county on the 24th day of February, 1909, of the theft of a hog, and his punishment assessed at confinement in the penitentiary for a term of two years.

The hog in question was alleged to belong to one Henry Davis. The evidence showed that about the 27th day of November, 1907, appellant and one Eddie McCoy shot and killed a black and white spotted hog, the property of the witness Davis. On examination of the hog after it was shot by one of the persons, it seems to have been conceded that it was the property of Davis. He testifies that on the day in question he saw appellant and one Eddie McCoy come out of the field like they were driving something, and he stopped to see what they were going to do; that they went out in the bed of the creek, where a gun was fired; that at this time he was 40 or 50 yards from them, and when he came in view of them they picked up the hog and threw it in the creek; that he went towards where they were, and they were running, trying to get across the creek, and went down the bottom as fast as they could, looking back at him, and after they got out of shooting distance of him he started to go to where they threw the hog, when they came back towards him, and said they had shot a hog and didn't know where it went to, and he stated that probably it fell in the creek; that they said, "Let's go and see," and immediately they went to the edge of the creek, and Eddie said, "There it is," and witness said, "Yes, and it is mine;" they said, "Now, what will you charge not to tell on us;" that witness replied, "Not a thing will I charge you not to tell it," and that they then said, "We will give you a hog if you will not tell this on us;" and that he (witness) stated that that would not satisfy the court at all, and stated that, if called on before the grand jury in the spring, he would tell it on them; that he was not going to hide anything; that after this Harrison Bryant, Winslow Thompson, and Elmo Thompson came, and then he said to them, "These boys have driven my hog out of the field, and killed it, and thrown it in the

creek;" that he (the witness) said, "One of you go at a time, and look in the creek, and see if it is my hog;" that one of them went up and looked at it, and called back, "It is your hog," and this was repeated by all these persons. He also states positively that in the course of the conversation at the time they killed the hog they knew it belonged to him (Davis).

Appellant undertook to show by testimony of many witnesses, as well as by his own testimony, that he had some hogs running in that neighborhood, and among others a hog of a somewhat similar description of the one killed, belonging to Davis, and urged that the hog was shot under the mistaken belief that it belonged to him. After defining theft, and what is meant by the word "taking," and also defining the term "principal," the court thus instructed the jury: "Now, if you believe from the evidence beyond a reasonable doubt that the defendant, Jackson Fields, acting as a principal with Eddie McCoy, did, in Shelby county, Texas, on or about the time charged in the indictment, fraudulently take one hog belonging to Henry Davis from his possession, without his consent, with the intent to deprive the owner of the value of such hog and to appropriate it to the use or benefit of himself, the defendant, or of himself and Eddie McCoy, you will find the defendant guilty as charged in the indictment, and assess his punishment at confinement in the penitentiary not less than two nor more than four years. If you believe defendant took or participated as a principal in the taking of Henry Davis' hog, but believe he so acted under a mistaken claim of right, in good faith believing the hog to be his own property, or if you have a reasonable doubt as to whether or not he acted under such mistake, you will acquit the defendant."

It is urged that the submission of the issue of mistake of fact was not sufficiently clear and explicit. We cannot accede to this contention. The jury are positively instructed that if in taking the hog in question he acted under a mistaken claim of right in good faith, believing the hog to be his own property, or if they had a reasonable doubt as to whether or not he acted under such mistake, he would be entitled to an acquittal. It is not seen how this could have been rendered clearer by the use of any language which the court could have reasonably employed.

2. It is further urged that the court should have instructed the jury that the witness Henry Davis was an accomplice. The issue of accomplice was not raised by the evidence, and it would not have been proper for the court to have so instructed the jury.

3. Finally, it is urged that the verdict is unsupported by the evidence. We cannot accede to this contention. If the testimony of the witness Davis is to be believed, the case

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was clearly and conclusively established against both parties.

Finding no error in the record, the judgment is in all things affirmed.

### VANNORT v. STATE

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### CRIMINAL LAW (§ 372\*)—EVIDENCE—OTHER OFFENSES OR TRANSACTIONS — SYSTEM OR HABIT.

Prosecutor testified that he gave defendant money and directed him to procure whisky, and that defendant brought prosecutor whisky, on which proof the state claimed defendant guilty of violating the local option law. *Held*, that evidence that on a later occasion defendant asked witness if he was going to order whisky, stating that he intended to order some himself, whereupon witness told him he wanted to go in on the order, gave defendant 70 cents, and that thereafter witness and defendant divided a quart of whisky, did not in itself show a violation of the local option law, and was therefore inadmissible to illustrate the transaction under investigation, as showing defendant's system or habit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372;\* Intoxicating Liquors, Cent. Dig. § 286.]

Appeal from Mills County Court; L. E. Patterson, Judge.

Luther Vannort was convicted of violating the local option law, and he appeals. Reversed and remanded.

John A. Mobley, Asst. Atty. Gen., for the State.

McCORD, J. This is an appeal from a conviction for a violation of the local option law, resulting in a conviction of appellant in the court below, with a penalty of \$20 fine and 20 days' imprisonment in the county jail.

On the trial of the case in the court below the witness Dick Brinson took the stand, and testified that he gave the appellant \$1.25, and told him to get him (witness) some whisky; that appellant went off, and returned shortly, and brought him a bottle of whisky; that this occurred in Mills county on the 16th day of December, 1907. The state further proved that the local option law was in force in said county. Here the state rested, and appellant took the stand in his own behalf, and stated that what the witness Brinson had testified was correct, and that he took the money and went to a whisky peddler, who was in his (appellant's) horse lot the day before, and who told him he had whisky to sell, and from him purchased the quart of whisky; that he took the said quart of whisky, and returned, and gave it to the said state's witness Brinson; that the man from whom he procured the whisky was a small, dark-complected fellow; that he (appellant) did not know his name, nor did he ask him his name; and that he had not heard of nor seen the party from that day until this.

The state then recalled Dick Brinson, and over the objection of the appellant the witness Brinson was permitted to testify that a few days after the above transaction he met the appellant about the post office in Goldthwaite, and either he asked the appellant or the appellant asked him (witness) if he was going to order some whisky; that the witness told him that he had no money to order with, but would like to order some. Appellant said that he was going to order some for himself, and the witness told the appellant he wanted to go in on the order, and that afternoon appellant paid the witness 70 cents to go in on the order, and still owed him a nickel, and on that night, after the train arrived, the witness met appellant near the blacksmith shop, and appellant told him he had the whisky; that it was in a quart bottle, and the witness accompanied appellant to his home, and appellant procured a bottle, and they divided the whisky. A bill of exceptions was reserved to this testimony.

The court, in its charge to the jury, among other things, charged them as follows: "You are further charged that you can only consider the evidence of the second whisky transaction testified to by the witness W. L. Brinson for the purpose of shedding light, if any it does, on the first whisky transaction testified to by said witness—that is, the transaction involving a quart of whisky on which the state relies for conviction; the said transaction involving a half a quart of whisky only being admitted for your consideration, to be considered by you together with the other facts on the question as to whether the said quart transaction was a sale, or simply a purchase by defendant from another of said quart of whisky as agent for the said witness."

It has been held that, in order to establish the identity of an offense, the system by which the offense is committed, or the intent of the party, the state may be permitted to introduce testimony of extraneous crime; and where the testimony shows a peculiar method of committing the crime, it is always admissible to introduce extraneous crimes that are committed in the same way by the same party. And whenever the intent of the party is left in doubt, extraneous crimes may be introduced to develop the intent. But we are confronted with a more serious question than that in this case, and that is whether the transaction mentioned in the bill of exceptions and the charge above quoted, in regard to the appellant and the state's witness ordering some whisky, was an offense or not. We are of opinion that the facts, as stated by the witness, did not constitute an offense, and therefore, if they did not constitute an offense, it could not illustrate any part of the transaction under investigation, and we hold that the court erred in permitting the testimony to go to the jury, and also erred in

the charge which was given to the jury as quoted above.

For the errors above indicated, the judgment is reversed, and the cause is remanded.

### RUPE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### CRIMINAL LAW (§ 761\*)—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS—ASSUMPTIONS.

Accused was indicted in three counts; the first for larceny, and the third for receiving stolen property. The second count was quashed, and the evidence to support the other two was circumstantial. The court charged on circumstantial evidence as to the first count, and then instructed that, if the jury found defendant not guilty on the first count, they might consider the third, and thereupon defined the offense of concealing and receiving stolen property, but gave no charge on circumstantial evidence as affecting that offense. *Held*, that such failure was erroneous as equivalent to an assumption by the court that there was direct evidence of guilt of the offense of receiving.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 761.\*]

Appeal from District Court, Midland County; S. J. Isaacks, Judge.

J. G. Rupe was convicted of unlawfully receiving stolen property, and he appeals. Reversed and remanded.

John B. Howard, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Martin county, charged with the theft of certain jewelry therein described, alleged to be the property of one C. S. Robinson. The court upon his own motion changed the venue of said cause to Midland county.

There were three counts in the indictment. The first count charged theft of property from the possession of Robinson; the second, the theft of said property from one W. E. Bowmer, who was holding same for Robinson; and the other charged appellant with unlawfully receiving and concealing said property from some person to the grand jurors unknown. The second count in the indictment was on motion quashed. The first and third counts were submitted on the trial to the jury. Appellant was found guilty under the third count. The case is somewhat similar to the case of *W. E. Bowmer v. State*, 55 Tex. Cr. App. 416, 116 S. W. 798. The facts show briefly that Robinson was the owner of a small jewelry establishment in Stanton, in Martin county, and also manager of the local telephone company, and that Bowmer was his clerk, and engaged about his jewelry business. Appellant seems to have been a painter. About the time charged in the indictment a considerable quantity of jewelry was taken from the store, and on the morning thereafter Robinson found

the store door open, the safe door open, and much of the property gone. Among others, appellant was arrested about a month thereafter, and quite a quantity of the jewelry found in his possession. His contention was, in substance, that Robinson had said to him that he was in failing condition and had been compelled to make over or fix a lien on the property in favor of Bowmer, to delay, if not defraud, certain of his creditors; that he had some apprehension that Bowmer would undertake to hold the property adversely to him, and asked appellant to hold and retain possession of the jewelry until matters could be adjusted; and that in pursuance of this arrangement he brought the jewelry to appellant's house. This was all denied by Robinson, who disavowed any connection with this arrangement, or any knowledge or complicity in any abstraction or taking of the goods. The investigation took a right wide range, and there are a large number of bills of exceptions in the record, some of which we do not quite understand. They are all quite brief and general, and we are not prepared to hold that there was any error in the action of the court in respect to any of the matters therein noted.

We think, however, the case must be reversed for the failure of the court to charge the law of circumstantial evidence, as this rule would affect appellant's guilt under the third count in the indictment. In the court's charge the jury are thus instructed: "In this case the state, in the first count, relies for a conviction upon circumstantial evidence, and in order to warrant a conviction upon such evidence each fact necessary to establish the guilt of the accused must be proved by competent evidence beyond a reasonable doubt, and the facts and circumstances proved should not only be consistent with the guilt of the accused, but inconsistent with any other reasonable hypothesis or conclusion than that of his guilt, and producing in your minds a reasonable and moral certainty that the accused committed the offense." The court then instructs the jury that, if they should find the defendant not guilty under the first count in the indictment, they may consider the third count of same, and thereupon defines the offense of receiving and concealing stolen property, but gives no charge on circumstantial evidence as affecting this offense. In this condition of the record it is contended by counsel for appellant, and was made a ground of his motion for new trial, that not only should a charge on circumstantial evidence have been given in respect to the last count in the indictment, but that the giving of such charge as to the first count, and applying the rule directly thereto, and giving no such charge as to the third count, was particularly harmful, and was in effect equivalent to an assumption by the court that there was direct and posi-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tive testimony touching the last count in the indictment, though not upon the first count therein. If the language of the charge on circumstantial evidence had been applied to the case generally it would have been sufficient; but where, as in this case, the charge was limited to the first count only, we think it must be held that it was erroneous, and most probably harmful to the rights of appellant. On the issue of receiving and concealing stolen property it was essential for the state to prove theft, and in addition thereto that the same was fraudulently received and concealed by appellant, knowing same to be stolen. The testimony in respect to both issues was circumstantial, and this rule of law should have been applied to both counts in the indictment.

For the error pointed out, the judgment is reversed, and the cause remanded.

### STUART v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### 1. INDICTMENT AND INFORMATION (§ 122\*)—VARIANCE FROM AFFIDAVIT.

An information for aggravated assault, which charged that defendant "did strike," is not fatally variant from the affidavit, which charged "did then and there strick."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 321-325; Dec. Dig. § 122.\*]

#### 2. INDICTMENT AND INFORMATION (§ 203\*)—HARMLESS ERROR—VERDICT ON GOOD AND BAD COUNTS—VARIANCE BETWEEN AFFIDAVIT AND INFORMATION.

Where, in a prosecution for aggravated assault, the verdict is general, and the affidavit and information contained two counts, that one count in the information is at variance with the affidavit will not be noticed, where the other count is good.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 651-656; Dec. Dig. § 203.\*]

#### 3. CRIMINAL LAW (§ 778\*)—INSTRUCTIONS—BURDEN OF PROOF.

In a prosecution for aggravated assault, a charge that if defendant assaulted prosecutrix, but at the time of so doing she had made an attack on him which caused a reasonable expectation or fear of death or bodily injury, and that, acting under such fear, he assaulted her, then he should be acquitted, is erroneous, as placing the burden of proof on defendant to establish his defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847-1849; Dec. Dig. § 778.\*]

#### 4. CRIMINAL LAW (§ 1173\*)—PREJUDICIAL ERROR—INSTRUCTIONS.

Where, in a prosecution for aggravated assault, a charge, not excepted to at the time as given, is erroneous, as placing the burden of showing self-defense on defendant, the refusal of a request to charge that, if the jury had reasonable doubt as to whether the prosecutrix fired on defendant before he struck her, then he was entitled to such reasonable doubt, is prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.\*]

Appeal from Burnet County Court; J. G. Cook, Judge.

M. E. Stuart was convicted of aggravated assault, and he appeals. Reversed and remanded.

J. F. Taulbee, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

McCORD, J. Appellant was tried under an information charging him with an aggravated assault, resulting in his conviction, and a fine of \$100, from which he has appealed.

The information contains two counts; one charging an assault upon Sue Hampton with a gun, the same then and there being a deadly weapon, and the second count charging an assault upon Sue Hampton, he then and there being an adult male, and the said Sue Hampton being a female. There was a right sharp conflict in the testimony in the case—the prosecuting witness, Mrs. Sue Hampton, testifying that on the 10th day of June she, seeing her two daughters and her husband in a difficulty with appellant, his wife, and his brother, close to appellant's house, and seeing appellant with a gun, she secured her pistol and rushed to the scene where they were in a difficulty; that her two daughters were chopping cotton across the road from Jess Stuart's garden, and that her husband was plowing close by, and that when she reached the scene her daughter, Kate Hampton, was on the ground, and Mrs. Jess Stuart on top of her, they were fighting, and that her husband was on the ground, and that Jess Stuart was on top of him, was striking him on the face and head with a rock, and that her daughter Pearl and appellant were standing by; that appellant had a Winchester rifle in his hand, and that appellant started towards her with the Winchester in his hand, and told her to give up the pistol; that she refused to do so, when he struck her a violent blow with the Winchester across the head, which caused pain, and produced a scar; and that she then fired her pistol at him, and tried to kill him. Appellant contended that, when he struck Mrs. Hampton with the gun, it was accidental; that when she started to shoot he threw up the gun, and tried to grab the pistol, and that Mrs. Hampton shot; and that if he struck her with the gun it was purely in self-defense, and that whatever he did in striking or assaulting her (Mrs. Hampton) was after she fired, or was in the act of firing, the pistol.

1. Appellant in the court below moved to quash the complaint and information upon the ground that the affidavit charged the defendant "did then and there strick" the said Sue Hampton, and the information charges "did strike"; that this was a fatal variance, and that "strick" and "strike" do not mean the same thing. We do not think, however, that there is any merit in this contention.

Conceding, however, that there might be merit in it, still there were two counts in the affidavit and information; one charging an aggravated assault by being committed upon a female by a male, and the other by striking with a deadly weapon. The verdict of the jury is general, and, if one of the counts is bad, the verdict could be sustained upon the other count; hence we think that this contention of appellant is without merit.

2. The court in its charge to the jury gave the following: "If from the evidence you believe the defendant assaulted the said Mrs. Sue Hampton, but further believe that at the time of so doing the said Mrs. Sue Hampton had made an attack on him which, from the manner and character of it, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant assaulted the said Mrs. Sue Hampton, then you should acquit him." This charge was excepted to by appellant in his motion for new trial, and he requested the court to give special charge No. 3, which the court refused to give, to the effect that, if the jury had a reasonable doubt as to whether Mrs. Hampton fired upon the defendant before he struck her, then he was entitled to such reasonable doubt, and should have been acquitted. We think that in the charge given by the court the burden of proof was put upon the appellant to establish his defense and while we would not be disposed to disturb the findings of the jury upon this erroneous charge, standing alone, and no exception taken at the time, but in view of special charge No. 3 requested by appellant, to the effect that, if the jury had a reasonable doubt as to whether he struck her in self-defense or not, they would acquit, we think this charge should have been given, and the failure of the court to so charge the jury requires a reversal of the case.

3. The other points in the case are not of sufficient importance to require consideration of same, as they will not likely occur upon another trial of the case.

For the error pointed out, the judgment is reversed, and the cause is remanded.

#### CHAPPEL v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

##### 1. FORGERY (§ 29\*) — INDICTMENT—EXPLANATORY AVERMENTS.

Explanatory averments to explain the instrument set forth in an indictment for forgery are proper to explain what may not otherwise be intelligible.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 77-81; Dec. Dig. § 29.\*]

##### 2. FORGERY (§ 29\*) — INDICTMENT — SUFFICIENCY.

An indictment for uttering a forged instrument, alleging that accused uttered a forged in-

strument of the tenor as follows: "Bartlett, Tex. (meaning thereby Bartlett, Texas). Receipt of cotton seed Sept. 9/30/07 (meaning thereby September 30, 1907), Three dollars & 65¢ (meaning thereby Three & <sup>65</sup>/<sub>100</sub> dollars), 3.65 (meaning thereby \$3.65). [Signed] Rev. Peach (meaning thereby Lewis Pietzsch)"—is sufficient; the explanatory averments explaining what might otherwise be unintelligible.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 77-81; Dec. Dig. § 29.\*]

Appeal from District Court, Bell County; John D. Robinson, Judge.

James Chappel was convicted of passing a forged instrument, and he appeals. Affirmed.

John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment contained three counts. The first charges forgery; second, passing as true a forged instrument; and, third, knowingly having in possession the false instrument described, etc. The court submitted to the jury only the second count, to wit, passing the forged instrument. The charging part of this count is as follows: That "James Chappel did unlawfully, willfully, and fraudulently utter and pass as true to Otto Paschel a certain false and forged instrument in writing, the tenor thereof is as follows, to wit: Bartlett, Tex. (meaning thereby Bartlett, Texas). Receipt of cotton seed Sept. 9/30/07 (meaning thereby September 30, 1907), Three dollars & 65¢ (meaning thereby Three & <sup>65</sup>/<sub>100</sub> dollars) 3.65 (meaning thereby \$3.65). [Signed] Rev. Peach (meaning thereby Lewis Pietzsch)."

There are several grounds urged why this indictment should be quashed; and that the instrument is not sufficient to form a predicate for conviction. To these we cannot agree. The instrument as set out and explained is sufficient under the authority of *Rollins v. State*, 22 Tex. App. 543, 3 S. W. 759, 58 Am. Rep. 659; *Womble v. State*, 39 Tex. Cr. R. 24, 44 S. W. 827; *King v. State*, 22 Tex. App. 650, 3 S. W. 342; *Simms v. State*, 32 Tex. Cr. R. 277, 22 S. W. 876; *Daud v. State*, 34 Tex. Cr. R. 460, 31 S. W. 376; *Shannon v. State*, 109 Ind. 407, 10 N. E. 87; *Baysinger v. State*, 77 Ala. 63, 54 Am. Rep. 46; *Henry v. State*, 35 Ohio St. 128; *State v. Wheeler*, 19 Minn. 98 (Gil. 70). The *Womble* Case, supra, was reversed for want of explanatory averments; but it refers to and reaffirms the doctrine laid down in the *Rollins* Case, supra. The case of *Forcy v. State*, 55 Tex. Cr. R. 545, 117 S. W. 834, from some of the expressions used, seems to be somewhat at variance to these views; but we do not believe that case is authority for holding contrary to the doctrine laid down in the *Rollins* Case, supra, and the other cases cited.

The language of the *Forcy* Case, supra, indicates that the tenor and purport clauses

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were blended, and that this could not be done in describing the instrument in an indictment for forgery or passing a forged instrument. The tenor and purport clauses are different, and, whether that statement in the Forcy indictment be correct or not, the averments here were explanatory of the otherwise not readily understood statement in the forged instrument. Explanatory averments are always in order to explain an instrument that is not clear and explicit in forgery cases, and explanatory or innuendo averments are not to be confounded with what is termed the "purport clause." The tenor of an instrument is one thing; the purport of that instrument may be another; but neither are explanatory averments. The explanatory averments are intended to explain what might not otherwise be intelligible. Under the authorities cited, we are of opinion that the indictment in the case is sufficient. *Forcy v. State*, supra, is overruled.

The evidence is not sent up in the record, nor are there any bills of exception incorporated. This being the only question relied upon for reversal, we think it is not well taken.

Therefore the judgment is affirmed.

#### CHAPPEL v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

Appeal from District Court, Bell County; John D. Robinson, Judge.

James Chappel was convicted of crime, and he appeals. Affirmed.

John A. Mobley, Asst. Atty. Gen., for the State.

**RAMSEY, J.** This is a companion case to the one this day decided by this court. There is no statement of facts or bill of exception in the record, and the only question raised on the appeal is the validity of the indictment.

This indictment was held valid in case No. 324, *James Chappel v. State*, 124 S. W. 657, this day decided. We think there is no doubt of the correctness of the opinion therein rendered. In this state of the record, there is no other question which we can review.

The judgment is affirmed.

#### BURK v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### 1. INDICTMENT AND INFORMATION (§ 161\*) — ERRONEOUS DATE—AMENDMENT.

An original information, bearing the date "Filed the 9 day of Oct. 19 8," may be amended to show that the date meant was "1908," after trial, and after motion in arrest of judgment, in that the information showed that it was not filed within two years next after the commission of the offense, where the evidence showed that both the affidavit and information

were filed at the same time, and on the 9th day of October, 1908.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 516-523; Dec. Dig. § 161.\*]

#### 2. INDICTMENT AND INFORMATION (§ 50\*) — CONCLUSION.

Under Code Cr. Proc. 1895, art. 458, an information need not in terms aver that the acts complained of were contrary to the form of the statute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 159, 160; Dec. Dig. § 50.\*]

#### 3. WITNESSES (§ 244\*)—RELUCTANT WITNESS —LEADING QUESTIONS.

In a prosecution for an aggravated assault, where the prosecutrix is a reluctant witness, and states that her memory is bad, the state, to refresh her memory, may ask her leading questions, and interrogate her touching her conference with the county attorney when the original complaint was made, and also as to allegations contained in a divorce proceeding filed by her against accused.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 848; Dec. Dig. § 244.\*]

Appeal from Grayson County Court; J. W. Hassell, Judge.

J. S. Burk was convicted of aggravated assault, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

**RAMSEY, J.** Appellant was convicted on May 24, 1909, of aggravated assault upon the person of Cora Burk, who had theretofore been his wife.

The original information filed in the case bore this date: "Filed the 9 day of Oct. 19 8." After trial, motion in arrest of judgment was made on the ground that, as shown by the information, the same was not filed within two years next after the commission of the offense. Thereupon the county attorney made a motion for authority to correct the date of the information, on the ground that the same was a manifest clerical error, and that in fact both the affidavit and information were filed at the same time, and on the 9th day of October, 1908. The court heard proof touching these matters, and the evidence showed beyond dispute, or without question, that the facts set out in the state's motion were true. This action of the court was entirely proper, and has been authorized by many decisions of this court. *De Olles v. State*, 20 Tex. App. 145; *Boren v. State*, 32 Tex. Cr. R. 637, 25 S. W. 775.

2. Again complaint is made that the information did not in terms aver and state that the acts complained of are contrary to the form of the statute. This is not required. See article 458, Code Cr. Proc. 1895.

3. Complaint is also made of the action of the court in permitting counsel for the state to ask the witness leading questions, and to interrogate her touching her conference with the county attorney when the original complaint was made, and also as to the allega-

tions contained in a divorce proceeding filed by her against appellant. In allowing the bill touching this matter the court certifies, what is perfectly obvious from an inspection of the statement of the facts, that the witness was an unwilling and reluctant, if not, indeed, a hostile, witness, and had testified in answer to a question of the county attorney that her memory "was bad to-day," and also that she had stated in answer to a number of questions that she did not remember. Thereupon the county attorney asked the questions complained of, stating that it was as a matter of inducement and to refresh the witness' memory, and that thereafter she did answer that she remembered the matters complained about. The witness was evidently very reluctant to state the facts. She was unfriendly to the state, and disposed, as far as possible, to shield appellant. Being confronted with this situation and condition of affairs, to the end that the real truth might be known and justice reached, it was proper for the court to admit wide latitude to counsel for the state, with a view of refreshing the witness' memory and inducing her to disclose the real facts touching the matter complained of. We think that, under the facts as presented, there was no abuse of the discretion of the court in this matter, nor any error for which the judgment ought to be reversed.

Finding no error in the record, the judgment is affirmed.

McCord, J., not sitting.

#### THOMPSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

#### CRIMINAL LAW (§ 1131\*)—APPEAL—REINSTATEMENT AFTER DISMISSAL.

Where it is determined after the dismissal of an appeal that the term of court in which defendant was convicted was not legally held, and for that reason the conviction was void, the appeal will not be reinstated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2985; Dec. Dig. § 1131.\*]

On motion for reinstatement of appeal. Denied.

For former report, see 120 S. W. 196.

DAVIDSON, P. J. The appeal in this case was dismissed at the last term of the court for want of notice of appeal given and entered of record in the trial court. 120 S. W. 196. It is now sought to reinstate the case by having the notice of appeal entered at a subsequent term of the trial court nunc pro tunc.

It is unnecessary, in the condition of the case, to notice that question, for the reason that this case has been disposed of under recent decision in *Ex parte Thompson*, 123 S. W. 612. In that case it was held that the

term of court at which appellant had been convicted was illegal, and, the conviction having been obtained at a time when the court could not be legally held, appellant was ordered to be discharged from the penitentiary, to be tried at a proper term of the court. This is the same case disposed of in that opinion—the same proceedings, and the same conviction.

It would be useless to reinstate the case under the circumstances. The conviction being illegal, there is nothing for this court to try, and, the matter having been disposed of under the decision in *Ex parte Thompson*, the rehearing will here be denied. This case will pass off the docket under the decision discharging him from the penitentiary.

For the reasons stated, the case will not be reinstated upon the docket, and rehearing will therefore be denied, without detriment to appellant in any future trial in the district court.

McCord, J., not sitting.

#### GRACY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

#### 1. CRIMINAL LAW (§ 1129\*)—APPEAL—ASSIGNMENTS OF ERROR—INSUFFICIENCY.

An assignment that the court erred in giving instructions, which does not point out why the court erred and assign a reason therefor, is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.\*]

#### 2. CRIMINAL LAW (§ 1038\*)—APPEAL—PRESERVING QUESTION FOR REVIEW—OMISSION OF SPECIAL CHARGE.

To take advantage of the omission of a special charge in a misdemeanor case, it should have been asked, and exception taken to the refusal to give it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.\*]

Appeal from Lampasas County Court; M. M. White, Judge.

Robert Gracy was convicted of violating the local option law, and he appeals. Affirmed.

John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was had for an alleged violation of the local option law.

The evidence discloses that Walker Stokes, John Skinner, and G. H. Jones were on a fishing excursion on the Colorado river, some distance from the town of Lampasas. While there they exhausted their supply of whisky, and G. H. Jones went to the town of Lampasas to secure an additional supply. Stokes and Skinner gave him a couple of notes, one

to Richey for \$3.75, and the other addressed to appellant, the purpose of which was to secure the whisky. The note or order for \$3.75 was delivered, together with the other note. Jones secured a gallon of whisky and returned. En route he stopped at the residence of Landers, who had given him \$1.25 with which to purchase a bottle of whisky for him (Landers) while he (Jones) was in Lampasas. Appellant received the \$5; \$3.75 obtained for the purchase of the whisky for Skinner and Stokes, and \$1.25 given him by Landers. On Jones' return from Lampasas to the river, Landers got his bottle of whisky, and also took another bottle from the buggy, stating he would make it all right with Stokes and Skinner.

Appellant testified that he was working on a building, and Skinner came by and inquired if he had any whisky, and he gave Skinner a drink. Skinner then requested appellant to order him a gallon of whisky, stating he was going out to the ranch and would be back before long. He further stated that he had no money, and asked appellant to order him the whisky and pay for it, or, rather, to loan him the money, and pay for the whisky. and that he would return the money. Appellant consented to do this, and ordered the whisky from Temple. It came by express about the 18th. On the 18th Jones was in Lampasas and got this whisky. Appellant's contention was that he had ordered the gallon of whisky for Skinner under the circumstances stated.

Harris testified that he was the express agent at Lampasas, that he represented the only express company doing business at that place, and that his books showed on the 18th of January appellant received a package of liquor weighing 150 pounds; that it was shipped from Warren, at Belton, and the expenses on it were not prepaid; that appellant paid same, which amounted to \$1.35; that one gallon jug of whisky weighs about 13 pounds; that he found no other shipment to appellant, either directly before or after the large shipment mentioned, except one bottle of whisky weighing 5 pounds, which was taken out by defendant on the 16th of January. Appellant had testified that he ordered the whisky which came from Warren. He stated he did not send the money, but that the whisky came express prepaid.

Appellant was recalled after the express agent testified, and asked by his attorney to explain his meaning when he stated that he had received one gallon of whisky prepaid on the 18th. He stated that this entire package, weighing 150 pounds, was consigned to him, and that he only had one gallon of whisky in it; that he carried the entire amount to an Ino store, where he opened it and got out his whisky, but did not know who ordered the balance of the whisky in the package;

that to save express charges sometimes several parties would club together and order, and as thus ordered it would all be shipped in one name; that in this way the freight or express charges are cheaper. This is about the substance of the testimony.

The court charged the jury, in regard to appellant's theory of the case, as follows: "Should you believe from the evidence, or should have a reasonable doubt, that the defendant, acting as the agent for the witness John Skinner, ordered and came into the possession of the intoxicating liquor, and in good faith delivered the same to witness Jones as the property of the said Skinner, and that defendant had no interest in, nor received, nor was promised, anything of value for so ordering and delivering such intoxicating liquors to the said Jones, you will acquit the defendant."

Appellant asked the court to charge the jury as follows, which the court refused to do: "If the defendant, Bob Gracy, only acted as the agent for Jack Skinner in procuring for him intoxicating liquors, and procured the same from a third party as an act of accommodation to said Skinner, and had no pecuniary interest in the price paid for same, then in that event you will find defendant not guilty." Again, he asked the following charge, which was refused: "\* \* \* Now, in order to convict defendant, you must believe from the evidence beyond a reasonable doubt that the defendant was acting as agent of the whisky dealer, from whom same was ordered, in procuring said sale, or was interested in the sale of said whisky."

Appellant insists the court was in error in not giving these charges. The only manner in which this matter is presented is found in the motion for new trial, in which it is stated that the court erred in not giving the special instructions. Why this was error is not pointed out, and in fact no reason is assigned why it is error. This is not sufficient. These matters are too general to point out any error, or supposed error, on the part of the court.

The motion for new trial further states the court was in error in omitting to charge the definition of a sale. There was no special charge asked in this respect, and, this being a misdemeanor, in order to take advantage of this omission, a special charge should have been asked, and exception taken to the court's charge, and the refusal to give special instruction. This is well settled. As the matter is presented, we are of opinion that this court cannot review these matters.

As the record is before us, we are of opinion there is no sufficient reason why the conviction should be set aside, and the judgment reversed. Therefore it is ordered that it be affirmed.

## PIPER v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

## 1. CRIMINAL LAW (§ 1141\*)—RULINGS ON MOTIONS FOR NEW TRIAL—REVIEW—PRESUMPTIONS.

Where the affidavit in support of the motion for a new trial on the ground of newly discovered evidence averred facts with great particularity, so that the state could easily meet it, had the facts been untrue, and there was no attempt by the state to meet it, the court on appeal will presume that the matters are correctly stated in the affidavit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3014, 3015; Dec. Dig. § 1141.\*]

## 2. CRIMINAL LAW (§ 940\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Where, on a trial for aggravated assault, the evidence was conflicting on the issue whether accused swore at and threatened prosecutrix, and ran after her with an ax, and attempted to strike her, a new trial, on the ground of newly discovered evidence disclosing the fact that a third person had told prosecutrix that she must swear that accused took up an ax and attempted to strike her, should be granted, because the newly discovered evidence showed a conspiracy of the third person and prosecutrix to bring about a conviction on perjured testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324, 2325; Dec. Dig. § 940.\*]

## 3. ASSAULT AND BATTERY (§ 96\*)—AGGRAVATED ASSAULT—EVIDENCE—INSTRUCTIONS.

Where, on a trial for aggravated assault, accused showed that he was not within the reach of prosecutrix, accused was entitled to an affirmative charge submitting his side of the case, though his testimony was controverted.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 148; Dec. Dig. § 96.\*]

Appeal from Ellis County Court; J. T. Spencer, Judge.

Bob Piper was convicted of aggravated assault, and he appeals. Reversed and remanded.

Clyde F. Winn, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an aggravated assault upon Mahala Drake, a woman.

The state's case is sustained by the testimony of the witness Mahala Drake, who testified about as follows: That appellant and two other white men came by her house in a buggy. She remarked to them: "This ain't a public road through here. Mr. Harbin had told us not to let anybody pass through the farm." Appellant replied: "I don't give a damn." She said: "You talk so bigoty about it. I was just going to tell you the way through here." Appellant said: "Damn you." Witness says: "He acted sorter like he was going to come towards me. I said: 'Don't come, or I'll blow your brains out.' I don't know when he jumped out of the buggy. He said: 'What in the hell and God damnation do I care for your gun? You damn black

bitch, I'll cut your head open with this ax.' He was picking up the ax when he said this. I ran. I have no idea at all how far off my husband was. Bob Piper ran up to the front door of the house in which I was standing when we were talking to each other, and I turned and ran out of the back door of the house. Bob Piper came in at the front door. He struck at me two times with the ax, but did not hit me. When he got into the front door, I ran out of the room through the middle door. It was a small room. Bob Piper did not run out of the back door after me. When I got out of the back door, I called to my husband." The road these men were traveling ran in about 8 or 10 feet of the house, and had been used by the public for 15 years or longer.

The two Tittle boys were in the buggy with appellant. As soon as the trouble came up, they drove off down in the gully some 20 steps away. They both testified to practically the same thing, and almost identically in the same manner: That they were driving along the road going to Chambers creek fishing, as was appellant. That they were in a road commonly used by the public in going to and from Chambers creek. About a mile from the creek they passed a negro cabin, in the front door of which stood the witness Mahala Drake. Appellant said to her: "Ain't you afraid your house will blow off the blocks?" The house was upon high blocks, and there had been recently a storm in the neighborhood. That Mahala Drake replied: "This is no public passway through here, and you can't go through here." Appellant replied: "We are already on our way, and will go through this time." Mahala Drake said: "White man, don't you start nothing here; I've got a gun here, and I will blow your brains out." And as she said this she turned back into the house. Appellant jumped out of the buggy, and grabbed up an ax, and ran hurriedly towards the door. At this juncture the two Tittle boys drove down in the ravine, which was about 6 or 8 feet deep, and some 15 or 20 steps from the house. They both denied emphatically that appellant cursed Mahala Drake, or used any profane language imputed to him by her. When Mahala Drake said, "This is not a public passway through here," appellant did not reply, "I don't give a damn." Nor did he reply to Mahala Drake when she said, "I've got a gun here, and I will blow your brains out." Appellant did not reply: "What in the hell and God damnation do I care for your gun? You damn black bitch, I'll cut your head open with this ax." He did not say this, or anything like this. They did not see what occurred after they drove away. Appellant took the stand in his own behalf, and stated he had lived in that neighborhood 25 years, and practically, as did the Tittle boys, that they were going fishing over

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a road through the Harbin farm, which had been used for 15 years by the public in going to and from the Chambers creek. When they came to the negro cabin referred to, Mahala Drake was standing in front of the door. He remarked to her: "Ain't you afraid your house will blow off of those high blocks?" She replied: "This ain't no public road through here, and you can't go through." Appellant replied: "Well, we've done started now, and we will go through this time." She said: "White man, don't you start anything here; I've got a gun, and I'll blow your brains out." When she said this, appellant says she turned around and started back in the house, and that he jumped out of the buggy, picked up an ax that was lying near, and said: "Do not get that gun; if you do, you will have to use it." Appellant says he ran hurriedly towards her. When she saw him coming she ran out of the back door of her house. He was then at the front door, but did not go into the house. He did not strike at her with the ax; was not close enough to her to hit her with it. He further says, when he saw her run out at the back, he turned and went back to the buggy, and they went away. He says: "I got the ax and ran towards the negro woman, Mahala Drake, solely for the purpose of preventing her from getting a gun and shooting me." He got in his buggy, and they went on their fishing excursion. He testified he did not use the language imputed to him by the woman, and that it was "entirely false and untrue"; that he used no vulgar or profane language of any kind towards her on this or any other occasion.

This is practically the case on the facts.

1. Among other things, appellant sought a new trial on the ground of newly discovered evidence. Without going into a detailed statement of these matters, the evidence is set forth in an affidavit of the witness Ferguson about as follows: He says he was summoned as a witness by the state in the above styled and numbered cause, and was attendant as a witness in the trial of said case, and that at the time of the trial of said case he lived near the village of Avalon, Tex., on a farm under the management of W. D. McClure, and that he still resided near said village of Avalon, and that he was personally acquainted with W. D. McClure since February, 1909, and also acquainted with Mahala Drake for the same length of time. "I further testify that I heard the following conversation between W. D. McClure and Mahala Drake, about 1 o'clock p. m., June 15, 1909, at the home of W. D. McClure, near Avalon, Tex., at his lot gate; these persons being present, W. D. McClure, Jordan Watson, Mahala Drake, Dave Aikens, and myself, and the conversation between the said McClure and Mahala Drake, being as follows: W. D. McClure called Mahala Drake off about 10 feet from me, and said to her: 'You must swear that Bob Piper picked up the ax, and

that he threw it at you, then picked it up and ran to the door, and went into the house and struck at you twice.' Mahala Drake replied to McClure: 'All right, I will swear it.' My business over there was to come to Waxahachie with McClure, as I was summoned as a witness by the state in this case against Bob Piper for striking at the negro woman, Mahala Drake, with an ax. I heard W. D. McClure say several times before the trial of this case that he was going to stick Bob Piper if he could, and was going to make it as hard for Bob Piper as he could. On the afternoon of June 15, 1909, myself, W. D. McClure, Mahala Drake, Dave Aikens, Millard Runnels, and Jordan Watson came to Waxahachie, Tex., and later in the evening of the same day, about dark, on the south side of the public square, about midway of the curb, and near same, which runs along the south side of the courthouse lawn, W. D. McClure called myself, Mahala Drake, Dave Aikens, Millard Runnels, and Jordan Watson, and said to us: 'We want to find out and agree on what we are going to swear, as we are going to have to work this thing close to stick Bob Piper.' McClure then said to Mahala Drake: 'You are going to swear what I told you to, are you?' and Mahala Drake replied: 'Yes.' I first told Bob Piper about this about four weeks ago, at Avalon, Ellis county, Tex."

This communication by Ferguson to appellant was subsequent to his trial, and was made a part of the amended motion for a new trial. The other matters connected with the motion for a new trial show that appellant was ignorant of the matters set out by Ferguson, as were his attorneys, until the communication by Ferguson to appellant. This testimony, in a certain sense, is impeaching; but it is more than that. It shows a conspiracy on the part of McClure and this woman to bring about an illegal conviction on manufactured or perjured testimony, if Ferguson's statement is correct. There is no controverting affidavit, nor any attempt at controverting this affidavit of Ferguson, and it stands in the record uncontroverted and unimpeached, although names of witnesses, the language used, and particularities of the transaction occurring between McClure and Mahala Drake, and the other things mentioned in the affidavit of Ferguson, were set out with great particularity in said affidavit. The state could have easily met this affidavit, and the facts set out in it, if they were not true, by the testimony of the parties named by Ferguson as being present at both conversations mentioned by him; but the state did not see proper to do so, nor was there any attempt on the part of the state to meet this affidavit. We, therefore, will presume that the matters are correctly stated in said affidavit. This evidence was of such nature, importance, and character as that the trial court should have granted the new trial under circumstances stated. These

matters were directly pertinent to the crucial point relied upon by the state for conviction, to wit, that appellant followed Mahala Drake in the house and struck at her twice with the ax; and because a new trial was not granted the judgment will here be reversed.

2. There is another matter that it is well enough to call the court's attention to in reference to the charges. The court charged the jury the statute with reference to the ability of a party making the assault to commit said assault by the use of the means with which he attempts it, and must be within distance, etc. He also charged that it would follow that one who is, at the time of making an attempt to commit a battery, under such restraint as to deprive him of the power to act, or who is at so great a distance from the person assailed, as that he cannot reach his person by the use of the means with which he makes the attempt, is not guilty of an assault; and also in reference to the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, etc. These general definitions were given, but not in applying the law to the facts. Appellant asked a special charge directly applying these matters to the facts of the case, which was refused. Upon another trial this special charge should be given. The issue is sharply raised by the testimony that appellant was not within the reach of the woman. While to some extent it is a controverted issue, yet the accused has the legal right to have his side presented fully and affirmatively to the jury.

The judgment is reversed, and the cause is remanded.

McCORD, J., not sitting.

### MAJORS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

#### 1. ASSAULT AND BATTERY (§ 83\*)—CRIMINAL PROSECUTION—EVIDENCE.

In a prosecution for aggravated assault, testimony that almost immediately after the quarrel began, but after the alleged assault, defendant's brother shot the father of the prosecuting witness; there being no evidence of a conspiracy between defendant and his brother as to the quarrel, and such act of shooting being that of a mere bystander.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 128-130; Dec. Dig. § 83.\*]

#### 2. WITNESSES (§ 345\*)—EVIDENCE AFFECTING CREDIBILITY—PENDENCY OF CRIMINAL PROSECUTION.

Where defendant's brother was a witness in his behalf in a prosecution for assault, as affecting his credibility it may be shown that a criminal prosecution is pending against him for shooting the father of prosecuting witness at the time of the alleged assault.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1126; Dec. Dig. § 345.\*]

Appeal from Hopkins County Court; T. J. Russell, Judge.

Dud Majors was convicted of aggravated assault, and he appeals. Reversed.

Leach & Allen, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged in the county court of Hopkins county by information with committing an aggravated assault upon the person of one Elmer Castle by striking him with a chair, which was alleged to be a deadly weapon. He was convicted on trial of simple assault, and his punishment assessed at a fine of \$5.

There are a great many questions presented on the appeal, some of which will not arise on another trial, and others of which are not serious or important. We have concluded that the case should be reversed on account of the admission of certain evidence with reference to Enos Majors shooting John Castle, father of the prosecuting witness. The parties lived in or near the village of Saltillo. John and Elmer Castle were engaged in the lumber business, and Enos and Dud Majors were engaged in and employed about a small store, in the rear of which was a restaurant. On the day of the difficulty some negotiations were had with appellant and his brother by the Castles with reference to the purchase of a lot on which to establish a lumber yard. During this conversation something was said about Enos Majors owing Castle a small bill. In the course of the conversation Enos claimed to have paid the amount, and stated that he had sent the money by appellant. The prosecuting witness, Elmer Castle, who seems to have been the active spokesman touching this part of the conversation, denied having received it. Appellant claimed to have paid the money to him in person. Elmer Castle left the store to get his books, to show by them that it had never been paid. Up to this time there was slight, if any, evidence of anger or unpleasantness. However, immediately on return of Elmer Castle, according to his testimony, on his again denying that the money had been paid, appellant picked up a chair and endeavored to strike him with it; that, seeing appellant approaching with a chair, he grabbed another chair, and the two chairs met somewhat in mid-air; that thereupon they each threw down their chairs and undertook to fight with their fists. Elmer Castle testified that he continued to ward off the blows of appellant, saying to him that he did not come there to fight; that appellant pressed on him, and finally got him down over some cross-ties, got a large stick, which the witness knocked out of his hand, and after this that appellant choked him very severely, notwithstanding his cries for help; and that after choking him some time he was interrupted by his

wife and a neighbor, and induced to cease assaulting him.

Appellant and his brother, Enos Majors, as well as his nephew, Burt Majors, gave a very different account of the matter, all of which is favorable to their side. They testified, omitting many matters of mere inducement, that after the prosecuting witness had returned with his books, and when appellant had again stated that he had paid Elmer Castle, he called him a liar, and that finally Dud Majors, appellant, said, "Let me see your books; I know I paid you;" that Elmer Castle said, "You are a damn liar," and picked up a chair, and struck at appellant, who caught it with his hand, and kept the chair between them, and finally got it out of his hands, and grabbed him, and put him between himself and John Castle, who was trying to get to appellant with a drawn knife in his hands. Appellant testifies to this same effect, and, further, that Elmer Castle was trying to get a knife out of his pocket, continually reaching his right hand towards his pants pocket, and that his following him up and striking his hand was to keep him from getting his knife. The testimony of appellant was restricted well within these lines.

On the trial the state was permitted to prove on cross-examination by Dud, Burt, and Enos Majors that almost immediately after the difficulty began, but after the assault with the chair must, under all the testimony, have been accomplished, if, in fact, such assault was made, Enos Majors, seeing the elder Castle undertaking to assault appellant with his knife, called out to him three times, "Stop! stop! stop!" right fast, and then shot John Castle with a pistol, which wound paralyzed his arm, and, as he stated, the bullet yet remained in his neck, inflicting a most serious wound upon him. To the admission of this testimony objection was made, for that same was immaterial, irrelevant, and highly prejudicial to the rights of appellant, there being no evidence of a conspiracy between Enos Majors and appellant pertaining to the fight then being engaged in with Elmer Castle; that the acts of Enos Majors were not binding on him, and could not affect his rights in his trial, and he was not responsible for same; that they were the acts of a bystander, without the knowledge or acquiescence of appellant; that same threw no light on the transaction, and tended to prove no material issue in the cause; that they were not *res gestæ* between the parties immediately concerned, but were events happening at the same time and place between other parties, all the testimony showing that the same were absolutely separable from and had no material connection with the facts of defendant's case, but that this was an independent and distinct transaction, occurring between other and different parties than himself and Elmer Castle. It

should be stated that the evidence further showed that Enos Majors was a cripple, who could not stand up, except supported by two crutches.

There is nothing in the evidence, as we read the statement of facts, to suggest any anticipation of any difficulty until at the immediate moment that same occurred. The act of firing was done after all the evidence shows that the use of the chairs had been abandoned. There is no evidence of acting together in the commission of the original offense, if such offense was committed; nor is there any evidence to show that appellant invited, or even knew of, the interposition of his brother in the difficulty. We think, in view of all the facts, that the details of this shooting should not have been admitted. In view of the fact that Enos Majors testified that a case against him was yet pending, it was, of course, proper to show, as affecting his credibility, the fact of a charge pending in the courts against him; but we think that the details of the shooting, and particularly the seriousness of the wound inflicted by him on Elmer Castle's father, ought not to have been admitted against this appellant. The following cases, while not directly in point, seem by fair analogy to sustain these views, which are undoubtedly on principle sound: *Ex parte Kennedy*, 57 S. W. 648, and *Baker v. State*, 45 Tex. Cr. R. 392, 77 S. W. 618.

For the error pointed out, the judgment is reversed, and the cause is remanded.

McCord, J., not sitting.

#### JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### 1. CRIMINAL LAW (§ 814\*)—APPEAL—PRESERVATION BELOW—BILL OF EXCEPTIONS—REFUSAL OF CHARGES.

Where, in a criminal case, there was no showing that any statements or confessions were made by accused, there was no error in refusing a requested charge that any statement made by him in another's presence, or any confession, was made while he was under arrest, and therefore not competent evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1864, 1865; Dec. Dig. § 814.\*]

#### 2. LARCENY (§ 63\*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for theft of a bay horse, which accused was shown to have exchanged for a sorrel, evidence held to show that accused was in exclusive possession of the bay when he swapped it for the sorrel.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 163; Dec. Dig. § 63.\*]

#### 3. CRIMINAL LAW (§ 814\*)—CHARGES—CONFORMITY TO EVIDENCE.

Where the evidence showed that accused had the exclusive possession of the bay horse, alleged to have been stolen, when he swapped it for a sorrel, a charge that unless the jury be-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lieved that accused was in the exclusive possession of the horse claimed to have been stolen, and further find that he stole it, they should acquit, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979-1985; Dec. Dig. § 814.\*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

Will Johnson was convicted of horse theft, and he appeals. Affirmed.

John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for horse theft; the punishment being assessed at four years' confinement in the penitentiary.

The alleged owner lost a bay horse, described by the witnesses as having a white spot in his face and three white feet. A witness for the state saw appellant in possession of this horse early one morning. He further saw him take the harness from the horse, and turn him over to another party whose name is given, and receive from the other party a sorrel horse, to which appellant transferred the harness he had taken from the bay horse. There are other facts and circumstances in the case sustaining the state's case. Appellant's theory was that he did not take the alleged stolen horse, and that at the time state's witness saw him with the horse he was simply getting the sorrel horse from the party referred to in order to train him to harness. These matters were in evidence before the jury, and we are of opinion the evidence is sufficient to sustain the state's contention that appellant was the party who took the horse.

1. Appellant asked first a peremptory instruction of acquittal, which was refused. Then he also requested the court to charge the jury that any evidence of any statement made by the defendant to or in the presence of the witness Cooper, if any such statement was made, was made while the defendant was under arrest, and, therefore, not competent evidence to be considered. A similar charge was asked in regard to the same matter or statements or confessions made to Britton, and the charge was put in another form by requested instruction not to consider the evidence of either or both of the witnesses Britton and Cooper as to any such statements. We are of opinion the court did not err in refusing these instructions. There was no bill of exceptions reserved showing that any statement or confessions were made, and the statement of facts does not incorporate any statement or confession of the appellant. There was no predicate, therefore, as we understand this record, for requesting such instructions.

2. Another charge was asked to the effect that unless the jury should believe beyond a reasonable doubt that defendant was in

exclusive possession of the horse alleged to have been stolen, and further find beyond a reasonable doubt that the defendant did steal said horse, they will acquit the defendant. This was refused. The court instructed the jury that unless they should find that appellant committed the theft they should acquit, and also gave a very clear charge in reference to circumstantial evidence. As we understand the facts, there was no question of the fact that appellant was in possession of a bay horse. He claimed that the horse did not belong to him at the time, but was in possession of another party. Under the circumstances stated above—that is, the state's witness testified that appellant had the possession of the horse, and took the harness off of the horse, and swapped it to another man for a sorrel horse; that appellant immediately took the harness off of the bay horse, and put it on the sorrel horse that he got from another party; that the other party transferred his harness to the bay horse—it was not error to refuse the charge. Each one of them seemed to have been driving in a separate buggy. Though appellant said the other man had possession of both horses, yet it is evident that appellant was driving the bay horse at the time, and took the bay horse from his buggy, and turned him over to the other party, and received in exchange the sorrel horse. Under the circumstances we are of opinion that the evidence shows that appellant was in the exclusive possession of the bay horse at the time of the exchange or swap, and therefore this charge was not called for. Appellant did not in any way undertake to account for the fact that his buggy was at the point in Dallas where he and the state's witness showed that it was, which was near the jail, upon any other theory than appellant had driven it there with the bay horse hitched to it. Appellant testified, and it is shown beyond dispute, that appellant lived in another and distant part of the city. This matter occurred early in the morning. We are of opinion there is no sufficient error in this matter, if any at all, which would require a reversal of the judgment.

The judgment is therefore affirmed.

#### SMITH v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### 1. INDICTMENT AND INFORMATION (§ 122\*)— VARIANCE BETWEEN COMPLAINT AND INFORMATION.

Where the complaint charges an assault with "a knife and with a chair," and the information charges that the assault was made with "fists and a chair," the variance is fatal.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 322; Dec. Dig. § 122.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. CRIMINAL LAW (§ 878\*)—GOOD AND BAD COUNTS—EFFECT OF GENERAL VERDICT.

Where there is a fatally defective count in an information, and the case is submitted on all counts, a general verdict of conviction cannot stand.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098, 2099; Dec. Dig. § 878.\*]

## 3. CRIMINAL LAW (§ 1189\*)—APPEAL—DISPOSITION OF CAUSE.

Where there is a good count in the information, on reversal of a general verdict of conviction for defects in one count, the cause will be remanded for a new trial, rather than dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3225-3227; Dec. Dig. § 1189.\*]

Appeal from Erath County Court; J. B. Keith, Judge.

John E. Smith was convicted of aggravated assault, and appeals. Reversed.

L. N. Frank and B. E. Cook, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged by information filed in the county court of Erath county with aggravated assault. There were two counts contained in the complaint and information, one charging that the assault was made while the justice court of precinct No. 1 of said county was in session, and the other charging that the assault was made with a deadly weapon. In the first count it is charged that appellant "did then and there unlawfully commit an aggravated assault in and upon A. P. Young by then and there striking him with a knife and with a chair." In the information filed on this complaint, corresponding with the count in same, it is alleged the assault was made upon Young by then and there striking him with his fist and a chair. The statement of facts is somewhat voluminous, and the record for a misdemeanor case quite a large one.

While the court, in its charge to the jury, instructed them, in the event they found appellant guilty, to state in their verdict on which count they so found him guilty, the jury returned a general verdict of guilty, without anything to indicate on what count their verdict was based. Complaint was made, and the matter saved by exception, that there was a fatal variance between the first count in the complaint and the corresponding count in the information, and as both counts were submitted to the jury, and there was a general verdict, that the conviction cannot stand. We think this position must be sustained. It is well settled that the material allegations of every information must conform to those in the complaint upon which it is founded. The affidavit alleges that the assault was made by appellant by striking Young with a knife and a chair. The information alleges that the assault was committed by striking Young with his fist

and with a chair. We think the variance fatal. *Davis v. State*, 2 Tex. App. 184; *Hoerr v. State*, 4 Tex. App. 75; *Ferguson v. State*, 4 Tex. App. 156; *Johnson v. State*, 4 Tex. App. 594; *Stinson v. State*, 5 Tex. App. 31; *Williamson v. State*, 5 Tex. App. 487; *Hawthorne v. State*, 6 Tex. App. 562; *Cole v. State*, 11 Tex. App. 68.

Since there is one good count in the information, we are not authorized to reverse and dismiss the case, but for the error pointed out it will be reversed and remanded.

There are many other matters raised on the appeal, which we do not deem necessary, under the circumstances, to discuss. Some of them will not arise on another trial, and in the light of the objections and criticisms made the trial court will doubtless be able to meet any objection or just criticism contained in the motion.

The judgment is reversed, and the cause is remanded.

McCord, J., not sitting.

## BLACKBURN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

## 1. WEAPONS (§ 17\*)—PROSECUTIONS—ISSUES—NATURE OF WEAPON—QUESTION FOR JURY.

In a prosecution for carrying arms, the state's witnesses testified that accused dropped something in the street which looked like a pistol; but they did not examine it, or look at it carefully, and accused claimed that it was a cylinder or wooden pistol, which would not revolve, and could not be fired, and gave a reason for carrying such a pistol which had some probability. *Held*, that the evidence raised the issue whether the thing carried was a weapon prohibited by statute.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 30; Dec. Dig. § 17.\*]

## 2. WEAPONS (§ 17\*)—INSTRUCTIONS—REQUESTS—CONFORMITY TO ISSUES.

The evidence made it an issue whether the weapon accused was charged with unlawfully carrying was not a wooden pistol which would not shoot, and the cylinder of which would not revolve, and the court charged, over objection, that it would not be unlawful to carry a pistol without a cylinder, but it was not necessary to a conviction that the pistol was in shooting condition at the time, whereupon accused requested a charge that the state must show that accused carried a pistol on his person, and if the pistol carried by accused had a wooden cylinder, and could not be fired and used for the purpose for which pistols are sold, the jury should acquit. *Held*, that the court's charge was improper, and the charge requested should have been given.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 31; Dec. Dig. § 17.\*]

Appeal from Hamilton County Court; J. W. Warren, Judge.

W. D. Blackburn was convicted of carrying weapons in violation of law, and appeals. Reversed and remanded.

Eldson & Eldson, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

**RAMSEY, J.** Appellant was convicted in the county court of Hamilton county on a charge of carrying arms in violation of law.

The evidence shows that he had in the town of Hamilton, about the time charged, what, at least from a casual observation, seemed to be a pistol. This he dropped in the street. He was on horseback. His attention being called to it, he dismounted, and recovered the instrument, and rode on. None of the witnesses for the state examined it, or gave more than ordinary casual attention to it. Appellant claimed that it was not a pistol; that what is known as a cylinder was in fact a wooden substitute therefor, painted a similar color to the other portion of the pistol; and that it would neither revolve nor could same be fired. His evidence, under the case of *Cook v. State*, 11 Tex. App. 20, and many other cases, clearly raised the issue that what was thought to be a pistol was not in fact such a weapon as under the law would come within the denunciation of the statute. He gives also in the record a reason why he had this particular weapon that lent some probability to his story, the details of which we deem unnecessary to set out.

On the trial the court gave the following charge: "In this connection I charge you that it would be no violation of law to carry a pistol without a cylinder, but it is not necessary for the state to show that the pistol was in a shooting condition." This charge was objected to, and it is urged that same was erroneous, and was in effect an instruction to convict the defendant. To cure this error appellant requested the following special charge: "The state, having charged the defendant with carrying on and about his person a pistol, must show by the evidence beyond a reasonable doubt that the defendant, on or about the date alleged, carried on or about his person a pistol; and in this connection I charge you that if the pistol or instrument had by the defendant, if any, had a wooden cylinder in it, but that said instrument could not be fired or discharged, and could not be used for the purposes which pistols are manufactured and sold for, or in case you have a reasonable doubt hereof, you will find the defendant not guilty."

However improbable appellant's story may be, his testimony directly raised the issue attempted to be covered by the court in his general charge, in reference to which this special instruction was requested. We think the limitation in the court's charge in the connection in which same appears was improper, and that, in substance at least, the special charge should have been given.

The other questions raised in the case are

not such as will likely arise on another trial, and need not be discussed.

For the error pointed out, the judgment is reversed, and the cause is remanded.

### ELLIS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### 1. BURGLARY (§ 24\*)—INDICTMENT—ALLEGATIONS—BURGLARY OF RESIDENCE AT NIGHT.

Allegations in an indictment that accused by force, threats, and fraud broke and entered a house occupied by another sufficiently alleged an ordinary night or day breaking, but did not allege burglary of a private residence at night.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. § 84; Dec. Dig. § 24.\*]

#### 2. BURGLARY (§ 46\*)—INSTRUCTIONS—SUFFICIENCY.

An indictment alleged the day or night breaking and entering of a house, but did not sufficiently allege burglary of a private residence at night. The court limited the consideration of the evidence to a daytime breaking, and instructed that if the breaking occurred in the daytime they could find accused guilty of burglary, but unless they found that the entry was made by actual force and breaking in the daytime they should acquit, and further instructed that if accused did not break and enter the house, but his uncle or some one else did so, he would not be guilty, and that if the house was broken and entered by accused, but not in the daytime, or if the jury had a reasonable doubt whether it was broken and entered in the daytime, as defined, they should acquit. The court also charged on circumstantial evidence, and on accused's theory that he obtained the goods claimed to have been stolen from his uncle for the purpose of pawning them. *Held*, that accused's rights were sufficiently guarded by the charges, and a peremptory instruction to acquit was properly refused.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 111-120; Dec. Dig. § 46.\*]

#### 3. CRIMINAL LAW (§ 1090\*)—APPEAL—NECESSITY OF BILL OF EXCEPTIONS—ADMISSION OF EVIDENCE.

Error in the admission of testimony need not be considered on appeal, where no bill of exception was reserved thereto.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2816; Dec. Dig. § 1090.\*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

Sam Ellis was convicted of burglary, and he appeals. Affirmed.

John A. Mobley, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** This conviction was for burglary of the house of one Matt Roach; the punishment being assessed at two years' confinement in the penitentiary.

The indictment charged appellant did by force, threats, and fraud break and enter a house occupied by Matt Roach. Matt Roach and his wife testified in the case, and the effect of their testimony is that Matt Roach himself was away, performing his duty on a railroad train, at the time the burglary

occurred. His wife testified that about 4 or 5 o'clock in the evening she dressed, locked the house, went away, and did not return until about 9 or 10 o'clock that night; that before returning to her house she went by the depot and accompanied her husband home from that point. Upon reaching home they discovered their house had been entered, and property taken. Appellant was arrested that night, about 9 o'clock, offering to pawn some of the goods taken from the house.

1. A bill of exceptions recites that when the state had introduced all of its testimony it was discovered that the house was a private residence, and that inasmuch as the indictment failed to state whether it was a daytime or night burglary, and did not state whether it was a residence or other house, and inasmuch as it failed to state that it was occupied by a family, the court should have given a peremptory instruction to the jury to return a verdict of not guilty. We are of opinion that this position is not correct. The allegation in the indictment was sufficient to cover an ordinary night or day breaking, but was not sufficient to charge the burglary of a private residence at night. The court limited the consideration of the evidence under the indictment to a daytime breaking, and instructed the jury to the effect that if the breaking occurred in the daytime they might find him guilty of the burglary, but unless they should find beyond a reasonable doubt that the entry, if one was made, was made by actual force and breaking, and in the daytime, they should acquit. They were further instructed that if from the evidence appellant did not break and enter the house, but that his uncle or some other person did so, he would not be guilty. The court further charged, if they should find that the house was broken by the defendant and entered as charged, but was not broken in the daytime, or if they had a reasonable doubt as to whether the same was broken and entered in the daytime, as that term was defined in a previous portion of the charge, they would acquit. The court also charged on circumstantial evidence, and appellant's theory that he obtained the goods from his uncle for the purpose of pawning them. We are of opinion, therefore, there is no merit in the contention that the court should have submitted a peremptory instruction to acquit. If the house was broken in the daytime, then it was not, under the terms of the statute, the breaking of a private residence. In order to make it a separate and distinct offense for burglarizing a private residence, the statute requires that the burglary shall be done at night. Appellant's side of the case was properly guarded by the court's instructions.

2. One ground of the motion for a new trial is to the effect that the court erred in

admitting the testimony of Officer Cornwell, in which he stated the defendant made a confession to him, because he was not warned according to the law regulating confessions, being under arrest at the time. It is unnecessary to consider or discuss this question, because a bill of exception was not reserved to the introduction of the testimony. In fact, looking to the statement of facts, we are of opinion appellant was not under arrest at the time the conversation occurred between the officer and the defendant.

The judgment is affirmed.

## ROWAN v. STATE

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

### 1. CRIMINAL LAW (§ 398\*)—EVIDENCE—PEDIGREE—HEARSAY.

Where, in a prosecution for rape, prosecutrix's mother testified as to prosecutrix's age, evidence of a Bible entry of the date of prosecutrix's birth made by the mother was inadmissible as secondary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 880; Dec. Dig. § 398.\*]

### 2. CRIMINAL LAW (§ 417\*)—DECLARATIONS—"PEDIGREE."

The term "pedigree" includes the facts of birth, marriage, and death and the times when such events happened.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 950; Dec. Dig. § 417.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5267-5268.]

### 3. CRIMINAL LAW (§ 1163\*)—APPEAL—RULINGS ON EVIDENCE—PREJUDICE.

Where, in a prosecution for rape, the only issue was prosecutrix's age, the court's error in admitting a Bible entry made by prosecutrix's mother as to the date of prosecutrix's birth in corroboration of the mother's testimony, showing that the prosecutrix was under the age of consent at the time the offense was committed, was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. § 1163.\*]

### 4. CRIMINAL LAW (§ 448\*)—EVIDENCE—CONCLUSIONS.

In a prosecution for rape, evidence of prosecutrix's mother that she discovered nothing while defendant boarded at her house that aroused her suspicions of intimacy between prosecutrix and accused except that after accused left the house witness found two letters addressed to the prosecutrix in defendant's handwriting which aroused her suspicions, which letters were not introduced in evidence, was objectionable as a conclusion of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1037-1039; Dec. Dig. § 448.\*]

### 5. RAPE (§ 44\*)—EVIDENCE—RELATIONSHIP.

In a prosecution for rape on a female under the age of consent, evidence that defendant made her presents of candies and a ring, in answer to a question whether prior to the intercourse defendant had made her presents, was admissible as showing intimate relations between prosecutrix and accused, it appearing that the intercourse was had with her consent, and to show willingness on her part.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 63; Dec. Dig. § 44.\*]

# 6. CRIMINAL LAW (§ 783\*)—IMPEACHING TESTIMONY—INSTRUCTIONS.

Where impeaching testimony in a prosecution for rape could have been considered by the jury as bearing on the issue of prosecutrix's age, which was the only material issue, the court erred in omitting to charge that such testimony could only be considered as affecting the credibility of the witness whom it was introduced to impeach.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1875; Dec. Dig. § 783.\*]

# 7. CRIMINAL LAW (§ 1063\*)—APPEAL—INSTRUCTIONS—MOTION FOR NEW TRIAL.

An instruction not objected to in the motion for new trial will not be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2638; Dec. Dig. § 1063.\*]

# 8. CRIMINAL LAW (§ 448\*)—EVIDENCE—ADMISSIONS—CONCLUSIONS OF WITNESS.

In a prosecution for rape on a female alleged to have been under the age of consent, defendant's statement to a witness after he had obtained a new trial from his first conviction that he was "really guilty," but was out on bond, having gotten a new trial, and "would beat it the next time," was not objectionable as the witness' conclusion but was admissible as an admission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1035; Dec. Dig. § 448.\*]

# 9. RAPE (§ 35\*)—IDEM SONANS—INDICTMENT—VARIANCE.

Where prosecutrix testified that her name was "Benoni May Scurlock," and defendant's indictment for alleged rape on her described her as "Benani May Scurlock," there was no fatal variance, such names being idem sonans.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 45; Dec. Dig. § 35; \* Indictment and Information, Cent. Dig. §§ 552-555.]

Appeal from District Court, Shelby County; James I. Perkins, Judge.

J. G. Rowan was convicted of rape, and he appeals. Reversed and remanded.

D. M. Short & Sons, Brockman, Kahn & Williams, Fisher & Allison, Bryarly, Carter & Walker, Hamilton & Minton, and Goodrich & Synott, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

McCORD, J. This is an appeal from a conviction for rape on a female under the age of consent with a penalty of 17 years' confinement in the penitentiary.

There seems to be no issue made on the question that appellant had had intercourse with the prosecutrix. The contention of appellant in the court below was that the prosecutrix was over the age of consent. It was attempted on the part of the state to show that the prosecutrix was born in July, 1893. The alleged rape was committed in April, 1907. The appellant's contention in the court below was that the prosecutrix was born in the year 1890.

1. On the trial of the case in the court below the mother of the prosecutrix, Mrs. Jennie Scurlock, took the witness stand as a state's witness, and testified that the prosecutrix, Benoni May Scurlock, was born July 7, 1893, and that a short time thereafter she

made an entry in the family Bible of that fact, and that she had torn out the leaf of the Bible and brought it with her to court. The state, over the objections of appellant, offered in evidence this leaf of the Bible containing the entry of the birth of Benoni May Scurlock. This was objected to on the part of appellant because the same was secondary evidence, and that, the mother being present and testifying to the age, it was not admissible, and was immaterial, irrelevant, hearsay, and secondary, and that it was particularly hurtful to the defendant's case in that it bore directly upon the only controverted issue in the case, to wit, the age of the alleged injured party; and because it had not been shown that the same constituted a record made at the time contemporaneous with the occurring of the events mentioned in said superscription. This action of the court was properly reserved by bill of exceptions, and is now before this court for revision, and the question here presented is this: Will a party be permitted to introduce the record of a past event when the party who made that entry in the record is present in court to testify as to the fact recited in said entry? This precise question has not been before our court in the manner in which it is here presented. A question similar to this, however, came before the Supreme Court of Texas in the case of William Campbell v. M. P. Wilson, reported in 23 Tex. 253, in which Campbell sued Wilson on a promissory note for \$100. Wilson set up the defense of infancy, alleging that he was under the age of 21 years, and on the trial the defendant, in support of his defense, offered in evidence the family record of births, deaths, etc., of the members of his father's family contained in a Bible, which was produced. The Bible was sufficiently identified as a part of the family record. He also testified that the defendant's mother was still alive, and in Austin county. Under these circumstances the court refused to permit the entries in the family Bible to be read to the jury, and the Supreme Court, speaking through Chief Justice Wheeler, held that this action of the court below was correct, and that the court did not err in excluding said testimony upon the ground that there was better evidence accessible, his mother being alive, and within reach of the process of the court. Further on he says: "It has been considered that these entries stand on the ground of family acknowledgments, and that they are admissible on account of their publicity, without proof that the entries were made by a member of the family. But when better evidence is shown to be accessible, they are excluded, by the rule that excludes the secondary when primary evidence can be obtained. When admitted, it is, in general, as the declaration of the persons by whom they were made. But they cannot be received where the fa-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ther, mother, or other declarant is present in court, or within reach of process." The doctrine here announced was again reaffirmed in the case of *Smith v. Greer*, 10 Tex. Civ. App. 253, 30 S. W. 1108, and in this last-named case the court held that an entry in a Bible is inadmissible if parents have testified as to the age of the child. A case, however, in point, and similar to the case now before us, is the case of *People v. Mayne*, 118 Cal. 516, 50 Pac. 654, 62 Am. St. Rep. 256. Mayne in that case was indicted for rape upon a female child under the age of consent. There, the mother was in court as in this case, and testified to the age of the child. The state offered in addition thereto an entry made in the Bible by the mother giving the date of the girl's birth, and the court in that case held that the testimony was not admissible, citing a number of authorities, and as we think the reasoning of the court in that case is conclusive of the question here involved, we therefore quote with approval the following extract from said opinion:

"An entry in a family Bible is a written declaration of a fact made out of court, not under the sanction of an oath, or with any opportunity to test its correctness by means of cross-examination. It is but a declaration by the person who made the entry, and is of the same character as any other declaration, whether written or oral. Being made in a book where entries of this nature are often made, it is entitled to greater weight by reason of its formality than would be a similar verbal declaration, but the principles upon which it is received in evidence are the same as govern verbal declarations of the same fact. It is hearsay evidence, and, subject to the general rule by which that class of evidence is governed, that the fact sought to be established cannot be otherwise shown. This rule was formulated by Chief Justice Marshall in *Mima Queen v. Hepburn*, 7 Cranch, 290 [3 L. Ed. 348], in the following terms: 'Hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge.' Such evidence is admitted in matters of pedigree, but, as Mr. Greenleaf says (*Greenleaf on Evidence*, § 103): 'The rule of admission is restricted to the declarations of deceased persons who were related by blood or marriage to the person.' Taylor, in his treatise on Evidence, ninth edition, section 641, says: 'Where, however, the declarant is himself alive and capable of being examined, his declarations will be rejected;' and in the American notes to this edition it is said: 'A familiar form of record is the family Bible. Declarations in such form of facts of pedigree, made by deceased members of the family, are competent evidence of the facts therein stated.' See, also, *Dupoyster v. Gagan*, 84 Ky. 403 [1 S. W. 652]; *McCausland v. Fleming*, 63 Pa. 36; *Leggett v. Boyd*, 3 Wend. [N. Y.] 376; *Greenleaf v. Dubuque*, etc., R. R.

Co., 30 Iowa, 301; *Campbell v. Wilson*, 23 Tex. 252, 76 Am. Dec. 67; *Robinson v. Blakely*, 4 Rich. [S. C.] 586, 55 Am. Dec. 703; 1 *Phillips on Evidence*, §§ 248, 250.

"Although the term 'pedigree' includes the facts of birth, marriage, and death, and the times when these events happened (*Greenleaf on Evidence*, § 104), and evidence of these facts is pertinent for the purpose of establishing pedigree, the several facts, or either of them, do not themselves constitute pedigree, and a case in which the age of an individual is the issue to be determined is not a case of pedigree. 'A case is not necessarily a case of pedigree because it may involve questions of birth, parentage, age, or relationship. Where these questions are merely incidental and the judgment will simply establish a debt or a person's liability on a contract, or his proper settlement as a pauper, and things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death, or birth are incidentally inquired of.' *Eisenlord v. Clum*, 126 N. Y. 566 [27 N. E. 1024, 12 L. R. A. 836]. See, also, *Haines v. Guthrie*, L. R. 13 Q. B. Div. 818. In *Leggett v. Boyd*, supra, the defense of infancy was made to an action upon a promissory note, and in support of this defense the family Bible of the parents was offered in which the entry of his birth had been made by his mother; and its exclusion was upheld upon the ground that the person by whom it was made was in court and could have been examined. *Campbell v. Wilson*, supra, was of the same character, and the evidence was excluded because it was shown that the mother was within reach of the process of the court. *Greenleaf v. Dubuque*, etc., R. R. Co., supra, was an action to recover damages for negligence in causing the death of a person, and, for the purpose of establishing his age as an element in determining the amount of damages, the plaintiff was allowed to show the date of his birth from an entry in the family Bible. This was held to be error, on the ground that it was not shown that the person who made the entry was dead. In *Robinson v. Blakely*, 4 Rich. [S. C.] 586, 55 Am. Dec. 703, the family register of births and deaths was held inadmissible to show the age of the plaintiff for the purpose of determining whether the action was barred by the statute of limitations, upon the ground that the father who made the entry was still alive, the court saying: 'These entries stand on no higher footing than other declarations, and are entitled to no higher consideration, except that if made at the time the fact occurred they are more reliable.' The admissibility in evidence of these facts is limited by Mr. Greenleaf in the section above referred to, to cases where they arise incidentally and in relation to pedigree as follows: 'Thus an entry by a deceased parent, or other relative, made in a Bible, family missal, or any other book, or in any document or paper, stating

the fact or date of the birth, marriage, or death of a child or other relative, is regarded as the declaration of such parent or relative in a matter of pedigree.' Taylor says (Taylor on Evidence, 650): 'Entries made by a parent or relation in Bibles, prayer books, missals, almanacs, or, indeed, in any other book, or in any document or paper, stating the fact and date of the birth, marriage, or death of a child or other relation, are also evidence in pedigree cases as being written declarations of the deceased persons who respectively made them.'

"The entry in the Bible in the present case was shown to have been made by Mrs. Ship-ton, and, as she was present in court and had testified to the date of the child's birth, it was not competent for the prosecution to introduce as a piece of substantive evidence in support of this issue her written declaration made several years previously. Nor can it be said that the error was harmless. The evidence was not cumulative, but was of an entirely different character from any other evidence in reference to the child's age, and the jury may well have given it a credit by reason of its formality and apparent authenticity which would not grant to the living witness who testified respecting the age."

Believing, therefore, that the action of the court below in admitting this leaf of the family Bible was error, and that said error was hurtful to the appellant, and that the jury were probably influenced by this testimony, as strengthening the testimony of the mother as to the age of the child, in a case where the issue of age was sharply drawn as in this case, it was of such a harmful character as to require a reversal of the case. However, there are several other questions in the record that we deem it proper should be noticed.

2. On the trial of the case when Mrs. Jennie Scurlock, the mother of the prosecutrix, was upon the witness stand testifying, the state asked this witness whether she saw anything during the time the appellant boarded at her house that would arouse suspicion in her mind of the existence of an intimacy between defendant and her daughter, Benoni May Scurlock, and if so state what it was. This question was objected to by appellant, which objection was overruled, and the witness answered, over the objection of appellant, to the effect that she did not see anything while he was boarding there that showed intimacy, but that after appellant left her house she found something that did arouse her suspicions; that she saw some letters addressed to Benoni May Scurlock in defendant's handwriting; that she found some of them in Benoni May Scurlock's trunk, and one in a tomato can in the garden. This testimony was objected to on the ground that it was irrelevant and immaterial in that the question called for the conclusion of the witness, and the testimony itself was too indefinite in its nature to throw any light up-

on any issue in the case, and, the contents of the letters not being disclosed, the inference that they showed an intimacy between defendant and Benoni May Scurlock arose out of the nature of the question, and was calculated to impress the jury that the contents of the letters were of a nature that demonstrated an improper intimacy to have existed between defendant and the prosecutrix. This action of the court was reserved by bill of exceptions, and in permitting this testimony we think the court below erred. The letters were not before the jury. What the contents of the letters were no one knew, and it is elementary that a witness will not be permitted to give the conclusion reached in his mind as to what a writing contained, or the meaning of a writing, but if the letters were properly proved up, they might be admissible in a proper case, and it would be the province of the jury to draw the inference from the letters or conclusion from the letters, but it is not the province of the witness so to do. We, therefore, hold that the court erred in allowing Mrs. Scurlock to testify as to the inference or conclusion that she came to from reading the letters. An inspection of the record in this case shows that appellant was boarding at the home of Mr. and Mrs. Scurlock, the father and mother of the prosecutrix, and the prosecutrix testified that in April, 1907, she and appellant took a stroll in the woods from the little village of Bronson, and went about a mile and a half from home, they taking a target rifle along with them, and were shooting at birds and gathering violets, and while on this trip appellant had intercourse with her. This was all the testimony that was offered in the case, and in view of the case as made by the state, we think that this testimony of the conclusion-drawn by the mother of prosecutrix was hurtful and prejudicial.

3. Appellant also excepted to the action of the court in permitting the state to prove by the prosecutrix, Benoni May Scurlock, while on the witness stand, that appellant had made her a present of some candies and a ring. The bill of exception fails to disclose whether these presents were made before or after the act of intercourse. However, the question that was asked was whether the defendant while boarding at her father's house, and prior to the time of the intercourse, had made her any presents or not. The witness answered that he had, but did not say whether before or after the act of intercourse. However, we are inclined to hold that this testimony was admissible. We think it is always admissible in a case of rape of a female under the age of consent to show any intimate relationship that might exist between the appellant and the prosecutrix, especially in a case of this sort, where the testimony shows that the intercourse was had with the full consent of the prosecutrix, as a circumstance to show the willingness on the part of the prosecutrix to enter into the act

of intercourse. While it is true want of consent is wholly immaterial in a case of this sort, however it might be that a story would sound unreasonable that a girl would willingly enter into this act of intercourse with a party in the absence of any circumstance showing familiarity or allurements preceding the act. We think this testimony was admissible as a circumstance to throw light upon the act of intercourse. *Battles v. State*, 53 Tex. Cr. R. 202, 109 S. W. 195.

4. On the trial of the case the appellant offered the witness Bertie Gray, who testified that she was a cousin of the prosecutrix, Benoni May Scurlock, and that they had lived close to each other, and had been boon companions all their lives, and that she, Bertie Gray, was born December 5, 1888, and that Benoni May Scurlock, her cousin, was born July 7, 1890. She further testified that they were both about the same age, wore one another's clothes, and that she had always been told previous to this as a part of the family history that she, the witness, was a year and seven months older than prosecutrix, Benoni May Scurlock. They both weighed about the same, and were about the same height. Now, then, the state placed upon the stand the witness R. S. Noble, in rebuttal, who testified that on a former trial of the case the witness Bertie Gray testified that she was born in December, 1889, and that she was a year, seven months, and two days older than the prosecutrix, Benoni May Scurlock. Now, the appellant in his motion for a new trial complains that the court erred in not charging the jury for what purpose the testimony of the witness Noble was introduced; that is, that said testimony could not be used towards establishing the age of the prosecutrix, Benoni May Scurlock, but that same could only be considered by the jury as affecting the credibility of Miss Bertie Gray. It has been repeatedly held by this court that where impeaching testimony is introduced, if the same could be used for the purpose of establishing any fact in the case other than as affecting the credibility of the witness, that it is the duty of the court to limit such testimony. We, therefore, hold that upon another trial of this case if the testimony should be offered by the state to impeach the witness Miss Bertie Gray as to her statement of her age, and as contradictory thereof, that the court in its charge to the jury should limit the effect of such testimony, and to substantially direct the jury that the same could only be considered as affecting the credibility of the witness, and for no other purpose.

5. In the brief of counsel for appellant complaint is made to the following paragraph of the court's charge: "It having been developed in this trial, without objection, that there had been one or more former trials of this case, and that defendant had once been convicted and obtained a new trial, it becomes proper, and I now instruct you, that

none of these former proceedings should in any degree influence your action in determining the issue of guilt on this trial, nor should the same be referred to or discussed by you with any such view or purpose or with the view or purpose of influencing the action or opinion of any other jurymen." There is no complaint of this charge in the motion for new trial, and therefore the same is not before this court in such shape as it can be considered.

6. Appellant's bill of exceptions No. 4 complains that the court below erred in permitting the witness Byerly to testify that the appellant, Rowan, came to him some time between the month of September and Christmas of the year 1907, and told him that he had had a trial, and had been convicted, and got a new trial. Witness told him he was glad of it, and then said to appellant: "Rowan, that was a kind of a hatched-up matter anyhow against you, was it not?" Appellant replied, "Well, no, I was really guilty; but I am out on bond now, have got a new trial, and I will damn sure beat it next time." This testimony was objected to on the trial of the case upon the following grounds: That same was in the nature of a legal conclusion, and was not the statement of a fact, and that said statement of the defendant as testified to by the witness was not the admission or confession on his part that he had done any act constituting a violation of law, and because said purported statement of the defendant to the effect that he was really guilty was calculated to be taken by the jury as a plea of guilty to the charge preferred, and to have embraced within its meaning all the elements of the offense with which he stands charged, and because said testimony, in view of the fact that the only issue made on the trial was as to the age of the injured party in the spring of 1907, and as to whether she was under 15 years old at that time, was specially hurtful on this particular issue, to wit, the age of the girl. Now, the first part of the witness' testimony, that the appellant told him that he had been convicted and obtained a new trial, while inadmissible, is not objected to, but the bill of exceptions is to that portion of the witness' testimony that appellant told him he was really guilty, the counsel contending that this was but a conclusion of the witness, and that the same may have been meant by the appellant to mean that he had intercourse with the girl, but was not an admission that the girl was under 15 years of age, and that the testimony was hurtful because of that fact, and, if the court admitted it, it should have gone further, and have given a meaning to the language used. Counsel for appellant have cited us to no authority sustaining their position, and we are constrained to hold that the testimony that he was guilty was admissible, and, as to its meaning, it must have been left to the jury to be construed in the light of the surrounding circumstances.

7. The ninth ground of the motion for a new trial claims that there is a variance between the bill of indictment and the proof; that the bill of indictment alleges the name of the prosecutrix to be Benoni May Scurlock while the proof showed that the name of the prosecutrix was Benoni May Scurlock. When the prosecutrix took the stand she testified that her name was Benoni Bird May Scurlock, but that the name she usually went by was Benoni May Scurlock, and there is no testimony in the case that she was ever called Benoni May Scurlock, and that this was such a variance as entitled appellant to an acquittal. The record discloses that after the witness Benoni May Scurlock had testified appellant moved the court to instruct a verdict because of the variance, and the question before this court is, was there such a variance as would defeat this prosecution under the indictment? If we should hold that there is a variance in this case, it must be upon the grounds that the two names are not idem sonans. Mr. Abbott, in his Trial Brief, § 680, lays down the following rule: "A variance is not now regarded as material unless it is such as might mislead the defense, or might expose the accused to the danger of being put twice in jeopardy for the same offense." And Mr. Rice, in his valuable work on Evidence, lays down the following rule: "There is a rule of growing importance by which courts, for many years, have evinced, by their decisions, a disposition to recede from the fading adherence to common-law technicalities, and hold rather to substance than mere form. Modern decisions conform to the rule that a variance, to be material, must be such as to mislead the opposite party to his prejudice, and hence the doctrine of idem sonans has been much enlarged by modern decisions, to conform to the above salutary rule. The law does not treat every slight variance, if trivial, such as the omission of a letter in the name, as fatal. The variance should be a substantial and material one to be fatal." See section 123, vol. 3. It may be said to be wholly immaterial as to how the word is spelled. If practically they have the same sound they will be regarded as idem sonans, and if the words have the same sound then there is no fatal variance, although the two names may have been spelled slightly different. See *Parchman v. State*, 2 Tex. App. 228, 27 Am. Rep. 435. And if the words can be sounded alike, without disturbing the power of the letters that is found in the variant orthography, the variance will be immaterial. See *Adams v. State*, 67 Ala. 89. Also see the cases of *Henry v. State*, 7 Tex. App. 388, and *Spoonemore v. State*, 25 Tex. App. 358, 8 S. W. 280. Identity of sound may be regarded as a surer method of designating the names of persons than that of depending upon mere identity in the orthography. The rule seems to be

that the doctrine of idem sonans should not be too rigidly enforced, and the principal question in all cases should be as to the materiality of the variance, which becomes a fact to be determined by a jury. In an early case the Supreme Court of Illinois has held, where material variance was claimed in the names of a conveyance, that, Michael Allen, named in the deed as grantor, was, presumptively, Michael Allaine, grantee of the same property, as, also, that Otoine Allaine was, presumptively, Antoine Allaine. See *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 148; and see cases cited in *Rapalje's Criminal Procedure*, § 83, in which a great number of cases are tabulated. It may be said that the decisions of the different courts are not uniform upon this subject, and that we can find authorities both ways upon the subject, one line of authorities holding that if a vowel is substituted that gives to the instrument a different sound, then it is a variance, and others holding that the mere fact of the change of the vowel giving it a different sound would not be a variance. However, "o" sometimes is given the sound of "a," and "a" sometimes the sound of "o." We therefore hold in this case that "Benoni" and "Benani" are practically idem sonans, and that the variance is not of sufficient materiality as could mislead the defense, and a conviction for rape upon a girl by the name of "Benoni" where the indictment charged "Benani" would be a complete protection, and in view of her testimony there could be no danger of appellant being put in jeopardy for the same offense.

We therefore overrule appellant's contention that there is a variance; but, for the errors indicated, the judgment is reversed and the cause is remanded.

#### DECKARD v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

#### 1. CRIMINAL LAW (§ 586\*)—CONTINUANCE—DISCRETION OF COURT.

The granting or refusing of a continuance is largely a matter of discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1311; Dec. Dig. § 586.\*]

#### 2. CRIMINAL LAW (§ 608\*)—CONTINUANCE—SECOND APPLICATION.

Nothing will be presumed to aid a second application for a continuance in a criminal case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1368; Dec. Dig. § 608.\*]

#### 3. CRIMINAL LAW (§ 594\*)—CONTINUANCE—ABSENT WITNESS—FUGITIVE FROM JUSTICE.

A continuance will not be granted in a criminal case to procure the testimony of a fugitive from justice, whose whereabouts is unknown.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1321, 1332; Dec. Dig. § 594.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

#### 4. CRIMINAL LAW (§ 598\*)—CONTINUANCE—DISCRETION OF TRIAL COURT—LACK OF DILIGENCE.

A criminal case had been pending for about two years, and a formal application by accused for a continuance was allowed at one term because of the absence of a witness, and at other terms the case was either not set for trial, or, if set, was continued upon consent based upon statements of accused's counsel that he hoped to procure the absent witness at the next term, and that the same facts could not be proved by other witnesses, during all of which time it was not claimed that the facts could be proved by P. until accused applied for a continuance to procure his testimony. The application, refusal of which is complained of, showed that the witness lived at a town in the venue county, but was temporarily absent in an adjoining county. All parts of such county were accessible by railroad from the place of trial. The only showing of diligence was a request during the trial for an attachment for the witness to such adjoining county, but it did not appear whether it was issued, or, if so, what disposition was made of it, and no motion was made to suspend trial until the witness arrived. *Held*, that there was no abuse of discretion in denying the continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.\*]

Appeal from District Court, Nacogdoches County; James I. Perkins, Judge.

Laura Deckard was convicted of manslaughter, and she appeals. Affirmed.

King & King, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. On an indictment charging her with the murder of her husband, Kit Deckard, filed in the district court of Nacogdoches county on the 20th day of March, 1907, appellant was at a trial held on April 12, 1909, convicted of the offense of manslaughter, and her punishment assessed at confinement in the penitentiary for two years.

That the appellant shot and killed her husband is not denied in the testimony. She interposed a plea of self-defense. The testimony of the state distinctly negatives any self-defense, but accounts for the killing on the ground of jealousy entertained by appellant on account of the attentions to and improper conduct of her husband with another woman. The only eyewitness produced was Joe Windham, a negro, whose testimony is vigorously assailed, and it was shown by a number of witnesses who heard his evidence on the examining trial that he had given an account of the circumstances at the time so far as observed by him in harmony with appellant's plea of self-defense, and had also stated that at the immediate time the gun was fired he was behind a tree, and did not see it. However, several witnesses for the state testified denying that he had so testified on the examining trial.

As stated by counsel for appellant, the only question of any importance relates to the action of the court in overruling the application for continuance. This application was based upon the absence and want of the testimony

of two witnesses, J. Will Harrison and Fred Patrick. The diligence as to Patrick up to the time the case was called for trial was clearly sufficient, and the application also averred that he had been in attendance as a witness at all times theretofore in obedience to the process served on him, and had never disobeyed the process so served upon him until this term of the court. The facts expected to be proven are as follows: "That on the day of the alleged homicide they resided at Sacul, in Nacogdoches county, Tex., and were engaged in cutting, hauling, and delivering pine logs to a sawmill near said place; that Harrison had deceased, Kit Deckard, employed upon the day that he was killed, cutting stocks; that the deceased and the defendant had a very sick child with pneumonia during said time, and deceased had asked to be relieved from his employment the two days prior to the killing in order that he might go home and remain with his wife and assist her in the care of the said child, which was then very low, but that deceased did not go home during said two days and remain with said child and wife, but was near where he was at work with another negro woman, the last fact being stated to the witnesses by the deceased; that they were present on the morning deceased was killed, and saw the entire transaction, and that they were nearer to the trouble than any other witness except Joe Windham, a negro man, who had gotten behind a tree when the trouble came up and could not see the parties; that, when the defendant came to where they were at work, they heard her ask the deceased why he had not come home, and assisted with the sick child the two days before, and heard her further ask him where that woman was that he had stayed with during said two days; that deceased began cursing and abusing the defendant, and told her that she had better go on home, or he would give her a dam good whipping; that defendant replied that she was looking for that woman that he had stayed with the two days before, when deceased cursed defendant for a dam bitch, and said if she did not go home that he would make her go, and stated that it was none of her dam business where he had stayed the two days before, and told her that if she did not go home that he would whip hell out of her, and that at that time deceased reached to the ground and got hold of a handle of an ax, and started to raise up with same, telling the defendant that if she did not go home that he would knock hell out of her, and would beat her dam brains out, when defendant shot deceased, as he was straightening up with the ax in his hand, making the statement above referred to; that defendant remarked to the witness, Harrison, 'Oh! Mr. Harrison, I did not want any trouble with Kit (meaning deceased). I was looking for that woman'—that deceased was very angry

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and had picked up the ax as he made the statement, and turned towards defendant as if to start at her with the ax; that they were only about seven or eight feet apart at the time of the shooting, and that deceased was a negro man about 35 years of age, and defendant was his wife about 28 years of age; that deceased would weigh about 160 pounds; that there was no one else present except the state's witness, Joe Windham, and that he had gotten behind a large tree, and did not see the trouble."

In addition to the necessary statutory averments, the following additional matter is included in the application: "In connection with this application and as a part hereof, this defendant would show to the court that she is a negro woman about 28 years of age; that the deceased was her husband and was about 35 years of age; that the two witnesses J. Will Harrison and Fred Patrick are both white men, the one about 36 years of age, and the other about 24 years of age, and were the only eyewitnesses to the transaction and the only parties present, save and except Joe Windham, a negro man, who, as soon as deceased began to curse, abuse, and threaten defendant, got behind a large tree, and saw none of the transaction to which the two witnesses named now absent from this court would testify; that defendant is informed that the said witness Joe Windham, now in attendance upon this court, proposes to testify that he saw all of said difficulty, and that defendant herein without cause or provocation shot deceased; that said witness Joe Windham lives in the immediate community with all the relatives of the deceased, and has testified heretofore at the examining trial that he did not see all of the difficulty, but now proposes to change all of his testimony so as to show that he saw the entire transaction, and that defendant was in the wrong, and the testimony of said absent witnesses, each of whom could have no interest in this cause, will not only establish that the defendant acted in self-defense, but that said witness Windham did not see the transaction when the shot was fired, and would therefore impeach and contradict the testimony of the said witness upon whose testimony the state now relies for a conviction."

This bill of exception is allowed by the court with the following qualification: "The witness Harrison was not only shown to be a nonresident of the state, whose residence was unknown, but also was and had been for some two years a fugitive from justice, charged with crimes in Navarro county and perhaps other counties of this state, and that the officers having process for him had never been able to effect his arrest or to locate him. As to the witness Patrick, I acted in overruling the application upon the following circumstances: The case had been before me personally from the time the indictment was filed (some two years). It had been continued at one term upon the formal applica-

tion of the defendant (as shown by the record), this continuance being on account of the absence of the witness Harrison. At the other terms the case was either not set for trial, or, if set down for a particular day and a special venire ordered, it was, on each occasion, called up before such day had been reached and continued generally upon a sort of quasi consent based upon the accepted statement of defendant's counsel that the witness Harrison had not been found, that he had recent information of his whereabouts, and hoped to procure his attendance by the next term, and that he could not prove the same facts by other witnesses. Notice would then be given that the case had been continued and that the witnesses and special venire need not attend, etc. On this account, there was no call of the witnesses made and no means of knowing whether Patrick was present or not, and during all these proceedings nothing was ever said of Patrick being a material witness, or that the facts now claimed to be within his knowledge could be proved by him (note that as set out in the application they are the same as by Harrison), but, on the contrary, I was always given to understand that these facts could only be proven by Harrison and by no other witness. I respectfully call the court's attention, also, to the following facts in relation to this application in so far as based upon the absence of the witness Patrick. The application shows the residence of Patrick to be Sacul, a station in Nacogdoches county, on T. & N. O. R. R., only about one hour's run by railroad from the town of Nacogdoches. He is said to be temporarily in Cherokee county working at a sawmill. Cherokee county adjoins Nacogdoches county and all parts of it have immediate and direct connection with the town of Nacogdoches by T. & N. O., H. E. & W. T., and Cotton Belt Railroads, and practically all the sawmills in Cherokee county are located on or near one or the other of these roads; that is, T. & N. O. or Cotton Belt. Upon the overruling of the application, an attachment to Cherokee county returnable instantan was ordered in behalf of defendant for witness Patrick. The trial occupied some two days, and the motion for a new trial was not acted upon until some two weeks after the trial and conviction. During the trial no motion was made to suspend same to await the coming of the witness and after the conviction no affidavit of the witness supporting the statement of what he would testify was ever made or, if made, was ever called to the attention of the court. If such affidavit had been presented, I doubtless would have granted a new trial. From the foregoing circumstances I did not believe when overruling the application that Patrick (if there was, in fact, such person) would testify to such facts as claimed, and I have been confirmed fully in that behalf by the developments of the

evidence on the trial as well as by the failure of defendant during and after the trial to make any effort to procure the testimony during the trial (further than a formal application for an attachment) or to procure the supporting affidavit of the witness to present with the motion for new trial. I believed when acting on the application, and am convinced that as to the witness Patrick it was all a trick for delay, and it is for your honorable court to say whether, because of precedent, if there be such, the trial courts must submit to such imposition, and the due and just administration of the law be thus defeated."

In connection with the observations of the court as to the application being a mere trick for delay, it should be stated that in correspondence filed with us the trial court expressly and unequivocally exonerates appellant's counsel from any imputations of bad faith or unprofessional conduct, and states that: "If you desire me to do so and will return me the bill and its qualification, I will interline in the latter the specific statement that 'I do not impute any wrong to defendant's attorneys,' or words of the same import and meaning. You are also authorized to use this letter before the Court of Criminal Appeals in such manner as you may wish and as may be permissible." We have had some doubt in respect to the sufficiency of the application under all the circumstances. It has been quite uniformly held that the granting or refusal of such application for continuance has always been a matter discretionary with the court (*Krebs v. State*, 8 Tex. App. 1); and, further, that nothing will be presumed in aid of a second application for continuance. The explanation of the court as to the witness Harrison makes it clear that the continuance should not have been granted on account of his absence. The fact that he was a fugitive from justice, and could not be found, under all the authorities, clearly disposes of the matter as to him against appellant. *Anderson v. State*, 53 Tex. Cr. R. 341, 110 S. W. 54. We think as here presented, that, when the absence of Patrick was discovered, it was the duty of counsel, in view of his nearby residence, and the fact that his whereabouts was stated to be known, to have used the utmost diligence to have secured his attendance on the trial. The only statement of diligence, after the case was called, is a mere averment that counsel had "this day asked for an attachment for said witness to Cherokee county, Tex." Whether the attachment was issued, or, if so, what disposition was made of it, is not stated, and we are not justified in aiding the application by any inference. In view of the fact, as stated in the court's explanation, that during the trial no application was made to suspend same to await the coming of the witness, and the fact that the counties of Nacogdoches

and Cherokee and all parts of them have immediate and direct connection with the town of Nacogdoches by the three railroads named in the statement above quoted, would seem to have suggested and required the utmost diligence of counsel to have secured the attendance of this witness, even after the application for continuance had been overruled. In view of the court's explanation, and the long delay of more than two years during which the case has been pending, we feel that we ought not to reverse the conviction, unless in the light of the entire record there had been a clear and palpable abuse of the discretion which the law confides to trial courts.

Under the circumstances we have concluded we ought not to interfere, and, there being no error in the record, the judgment of conviction is affirmed.

MCCORD, J., not sitting.

#### GRAVES v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

##### 1. HOMICIDE (§ 300\*)—TRIAL—INSTRUCTIONS.

Under White's Ann. Pen. Code, art. 713, providing that a person charged with murder may show threats by decedent, but that they will not justify the offense, unless at the time of the homicide decedent by some act manifested an intention to execute the threats, a charge in a prosecution for assault with intent to murder that if the party assaulted had made threats against the life of defendant, and when they met made a movement with his right hand as if to draw a weapon and used threatening language toward the defendant, causing him to have reasonable apprehension of death or serious bodily injury at the hands of the party assaulted, defendant had a right to use all necessary force to defend himself, was erroneous, since the statute does not define what acts shall justify the threatened party in using force to defend himself, and the court is not authorized to do so.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 617; Dec. Dig. § 300.\*]

##### 2. HOMICIDE (§ 300\*)—TRIAL—INSTRUCTIONS.

The charge is also erroneous as being more burdensome than the law, in that it blends the law of self-defense with the law of threats, and requires, to justify the assault, an affirmative finding that the assaulted party made a movement with his hand as if to draw a weapon and used threatening language toward defendant, which would cause him to have a reasonable apprehension of serious bodily injury, or that the assaulted party was about to carry out the threats.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 617; Dec. Dig. § 300.\*]

##### 3. CRIMINAL LAW (§ 404\*)—EVIDENCE—ADMISSIBILITY—EXHIBITING WOUNDS.

In a prosecution for assault with intent to murder, it was error to allow the assaulted party to exhibit his scars to the jury, where his wounds had been operated upon and so changed and enlarged that the scars could throw no light upon the issue in the case as to the manner in which they were inflicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

#### 4. HOMICIDE (§ 338\*)—APPEAL AND ERROR—HARMLESS ERROR.

In a prosecution for assault with intent to murder, it was not prejudicial error to allow the physicians who dressed the wounds of the person assaulted to give their opinions as to the course of the bullet, although they might not have been qualified to give expert testimony on the matter, where it was apparent from all the testimony in the case that the bullet did take the course described by the physicians, and any one, though not skilled in surgery or anatomy, could have discovered these facts.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 709; Dec. Dig. § 338\*.]

#### 5. CRIMINAL LAW (§ 366\*)—EVIDENCE—RES GESTÆ.

In a prosecution for assault with intent to murder, where defendant, about 15 minutes after the shooting, told the brother of the party assaulted to get out of the way and let him finish him, and the brother told him not to shoot any more as the assaulted party would be dead in a few minutes, whereupon he rode away, a statement made about this time by the assaulted party that he did not mind dying, but he hated to be shot in the back when he was unarmed, was admissible as *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 819; Dec. Dig. § 366\*.]

Appeal from District Court, Jones County; Cullen C. Higgins, Judge.

S. L. Graves was convicted of assault with intent to murder, and he appeals. Reversed and remanded.

Cunningham & Oliver, Thomas & Chapman, and J. H. Glasgow, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

MCCORD, J. This is an appeal from a conviction for assault with intent to murder with a penalty of two years.

On the trial of the case in the court below, appellant established by two witnesses, to wit, Overfelt and Hart, that some days previous to the shooting of the prosecuting witness, Sayers, by appellant, said Sayers had used violent and abusive language to the witness Hart, and at the same time the prosecuting witness, Sayers, made very serious threats against the life of appellant, Sam Graves, and stated that he would see appellant; that one or the other of them had to bite the earth, and that he had just as soon die now as to die further up the creek. This statement was substantially proved, as before stated, by the witnesses Overfelt and Hart. At the time of the shooting, the state's witnesses contended, it was an uncalled for and an unnecessary shooting, and that at the time that appellant shot the prosecuting witness, Sayers, Sayers was doing nothing but driving away from the appellant, and was shot off of his horse, or shot and the horse went off some 50 or 60 yards, when the witness stopped him and got off. The appellant claimed that in the manner that the prosecuting witness and his brothers and friends approached him, and the hostile demonstrations made at the time, that he believed that

the prosecuting witness was going to kill him and that he shot in self-defense.

The case was submitted to the jury on assault to murder, aggravated assault, self-defense, and threats, and on the subject of threats the court charged the jury as follows: "If you believe from the evidence in this case that the defendant, S. L. Graves, did shoot Farley P. Sayers in King county, Texas, on or about the 5th day of September, 1907, and either with or without the specific intent to kill the said Farley P. Sayers, but that, prior to the time of so doing, the said Farley P. Sayers had cursed and used violent and abusive language concerning the defendant, and threatened the defendant with having to bite the dust when he met him, and that said threats, if any, in substance were communicated to the defendant prior to the time of said shooting, and that the defendant and said Farley P. Sayers met at the Pitchfork Round-up, and that at the time of said meeting the said Farley P. Sayers leaned forward as if to dismount and made a movement with his right hand as if to draw a weapon from his bosom, and used threatening language at the time to the defendant, all of which either considered alone or considered with the defendant's knowledge of the character and disposition of the said Farley P. Sayers, or for either of said causes or any other cause disclosed by the evidence, caused the defendant to have a reasonable apprehension of death at the hands of said Sayers, or that serious bodily injury was about to be inflicted upon him at the hands of said Sayers, and that said Sayers was about to carry out and put into execution such threats so made against him, if any, by said Sayers, as all the facts and circumstances in evidence were viewed from the standpoint of the defendant at the very time of the shooting, and that acting upon the appearance of danger as he saw it from his standpoint at the time the defendant shot the said Farley P. Sayers, then the defendant had the right to use all necessary force to repel such attack or threatened attack, if any, to protect his life or person from such serious bodily injury, even to the extent of killing his assailant, and if you so believe, or have a reasonable doubt thereof, you will acquit the defendant." This charge was complained of by appellant in his motion for a new trial, and its correctness vigorously assailed in the court below, and presented before this court with earnestness and energy. We are of opinion that this charge was erroneous in several respects. It is more onerous than the statute requires. It blends and confuses the defenses arising from real danger and apparent danger. It not only enlarges upon the statute on the subject of threats, but it is an attempt on the part of the court below to define what the threats shall consist of and what the party shall do in order to justify on the grounds of threats.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Article 713, White's Ann. Pen. Code, provides: "Where a defendant accused of murder seeks to justify himself on the ground of threats against his own life, he may be permitted to introduce evidence of the threats made, but the same shall not be regarded as affording a justification for the offense unless it be shown that at the time of the homicide the person killed by some act then done manifested an intention to execute the threat so made. In every instance where proof of threats has been made it shall be competent to introduce evidence of the general character of the deceased. Such evidence shall extend only to an inquiry as to whether the deceased was a man of violent or dangerous character, or a man of kind and inoffensive disposition, or whether he was such a person as might reasonably be expected to execute a threat made." It will be seen by this article that a party would be justified in killing his adversary if at the time of the homicide the person killed by some act then done manifested an intention to execute the threats so made. The statute does not attempt to define of what this act shall consist. It does not say that if the party shall throw his hand to his hip or that he shall draw his gun, or that he shall advance, or that he shall strike with his fist. It leaves it to the jury to determine from the conduct and manner of the party what the act is. And for the court to attempt to define what the act shall be would be an attempt on the part of the court to legislate into the statute terms not authorized. Said charge is erroneous and more burdensome than the law, in that it blends the law of self-defense, both real and apparent danger, with the law of threats, and requires that the jury shall find affirmatively that Farley P. Sayers leaned forward as if to dismount and made a movement with his right hand as if to draw a weapon from his bosom, and used threatening language at the time to that effect, which caused appellant to have a reasonable apprehension of the threats at the hands of Sayers or serious bodily injury, before he would have a right to shoot in his own self-defense, or to shoot in the belief that said Sayers was about to execute said threats. See *St. Clair v. State*, 40 Tex. Cr. R. 479, 92 S. W. 1097; *Swain v. State*, 48 Tex. Cr. R. 98, 86 S. W. 337; and *Lockhart v. State*, 53 Tex. Cr. R. 589, 111 S. W. 1024. Without reference to the decisions made by this court upon this subject it will be sufficient to simply read the statute upon the subject of threats which in itself shows that the charge given by the court below is erroneous, and is such error that the case will have to be reversed.

There are several other questions presented in the record that perhaps it would not be ill advised to notice. The first bill of exceptions relates to the action of the court in permitting the witness Sayers, over the objection of appellant, to exhibit the wounds and scars to the jury on the ground that these

scars were not in the condition that they were immediately after the shot had been fired because appellant had been operated upon by physicians and the wounds enlarged so as to treat the internal injuries, and that his shoulder had been cut open, and that this could throw no light upon the issue in the case as to whether witness was shot in the front or the back. The proof showed that the physicians had operated upon the witness, and had made incisions in front and back, and that the wounds were not in the condition they were immediately after the shooting, therefore we cannot see how an exhibition of the scars could throw any light upon the issue as to whether witness was shot in the front or back. It was error to allow witness to exhibit the wounds, and appellant's objection should have been sustained.

Objection was made by the appellant to the action of the court in permitting Dr. Graham and Dr. Blackwell to testify to the following: "The bullet entered Farley P. Sayers, the prosecuting witness, in the shoulder behind, and came out at the top of the shoulder near the collar bone in front." This evidence was objected to on the part of the appellant because the witness had not sufficiently qualified as an expert to testify to his opinion as to which way the ball passed through the body and had not shown himself to be present or to be in position personally to testify as to its course, and because said evidence was a conclusion and is a matter upon which even an expert could not testify, and was a conclusion that the jury had a right to draw from the evidence, and was calculated to injure the rights of appellant. The judge appends to the bill of exceptions, the following qualification: These two doctors dressed the wounds inflicted upon Sayers and operated upon Sayers for the bullet which they took out in pieces although they did not recover it all, and testified that the wound in the back was the only opening made upon Sayers by the bullet, which was large enough to admit the bullet, and that the only other opening made in the skin of Sayers was a three-cornered in shape wound, in which was lodged a small three-cornered piece of metal cover that encased the bullet before firing, and that the metal piece slightly protruded from the front wound and was taken out at the front by the doctors, and that the parts of bullet taken out were followed from the wound in the back even by two fingers of the doctor's hand, and that the front wound was cut open, and that with the eye they could see through the shoulder of Sayers, and that the largest portion of the bullet of all was taken out of Sayers' neck to the right and above the wound in the front, and could be traced from the back wound with the probe, but not from the front wound at all, all of which were physical facts and required no expert testimony, but could have been testified to by any one who knew the facts. An

inspection of the statement of facts and the testimony of these doctors shows that the wounds inflicted went in from the rear. As stated by the court below it did not require a man skilled in the knowledge of surgery or anatomy to have discovered these facts. There was a wound large enough to admit the ball in the rear. This ball, after it entered the body and struck the shoulder blade, split to pieces, and several of these pieces were taken out in front, and we cannot see that the opinion of the doctor that it was fired from the rear could either be hurtful or prejudicial in this case. Even the appellant and his witness Oldham testified that when he fired the prosecuting witness was attempting to alight from his horse, and threw rather the side and back of his body to the appellant. In some cases the opinion of experts, or the opinion of people who are non-experts, might become injurious, but in the light of the record in this case we cannot see how it was hurtful.

Bill of exceptions No. 4 relates to the action of the court in permitting the state, over the objections of appellant, to prove that the prosecuting witness, Sayers, in about 15 minutes after the shooting, said that he did not mind dying, but he hated to be shot in the back when he was unarmed. This testimony was objected to on the ground that it was too remote from the immediate transaction of the shooting to come within the rule of *res gestæ* evidence. The court, in qualifying this bill, states: That when defendant shot Sayers, Sayers' horse ran to a tree between 100 and 250 yards away. Defendant followed after within about 100 to 60 yards of Sayers, who was on the ground and lying with his head on his brother's knee, and holloed to the witness Sayers, brother of the injured party, to get out of the way, and let him finish the son of a bitch, when the brother stated not to shoot any more, as he would be dead in 15 minutes, and the defendant turned and rode off, and this was about 15 minutes after the shooting. We are of opinion that this testimony was admissible as *res gestæ*, and came clearly within the rule announced by this court in the case of *Bronson v. State*, recently decided by this court. This, we think, disposes of all the questions raised in this appeal, and, for the error of the court in its charge upon the subject of threats, the case will be reversed and the cause remanded, which is accordingly done.

#### SMITH v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### 1. HOMICIDE (§ 307\*)—TRIAL—INSTRUCTIONS—IGNORING ISSUES.

An instruction that if the jury believe beyond a reasonable doubt that defendant "shot and killed deceased, as charged in the indictment,

to find him guilty of murder in the second degree," is erroneous, as it does not require the homicide to have been unlawful, or with malice, and ignores the question of self-defense under a mistake of fact testified to by defendant, and the issue of manslaughter, also raised by the evidence.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 641; Dec. Dig. § 307.\*]

#### 2. CRIMINAL LAW (§ 811\*)—TRIAL—INSTRUCTIONS—UNDUE PROMINENCE TO CERTAIN FACTS.

Though the allegation that the shotgun used by defendant was a deadly weapon was not questioned, an instruction that the "instrument or means by which a homicide was committed are to be taken into consideration in judging the intent" of defendant is not subject to the objections of giving undue prominence to the presumption arising from the character of the weapon and the manner of the killing, or that it makes a presumption of criminal intent neutralize the presumption of innocence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1969-1972; Dec. Dig. § 811.\*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

John Smith was convicted of murder, and he appeals. Reversed.

A. S. Baskett, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This appeal results from a conviction had in the Criminal District Court of Dallas County on January 28, 1909, in which judgment appellant was found guilty of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a period of 50 years.

A number of the questions presented as grounds for reversal are of a character not at all likely to occur upon another trial, and we, therefore, pretermitt any discussion of them. It was shown beyond doubt, and in fact admitted, that along about 26th day of May, 1908, and during a period of high water and overflow in some portions of the city of Dallas, appellant shot and killed Will Overstreet at the residence of Lee Lambkin on or near Ross avenue. The killing occurred at night, and in consequence of high water the streets were not lighted, and it was quite dark. Just before this killing, appellant had, with the same weapon—a shotgun—literally shot off the arm of Mrs. Maggie Carter. The testimony showed that appellant had been staying at Lambkin's house only on the day of the homicide; that he had no ill will at all towards, and only the very slightest acquaintance with, Mrs. Carter. There is slight, if any, evidence of any ill will towards Overstreet, and the evidence shows that their acquaintance was limited. Appellant was a leather worker. He is not shown to have been drinking, at least for some few days before the killing. The evidence shows that across the street were a large number of Mexicans—men and women—and strongly raises the belief that appellant

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was under the impression that these Mexicans were seeking his life. The testimony shows that Mrs. Carter had been away from the house a little while, and on her return, in a spirit of banter, stated to her companions that she could beat them to the door, and approached the door running somewhat rapidly, and almost without warning appellant fired the gun, with the effect of almost entirely severing her arm from her body; that very soon thereafter a policeman, J. T. Murray, appeared, and some parties directed him to the Lambkin house as the place where the first shot had been fired; that Murray and Overstreet went in the house, and in the hall towards the rear, and as they went near the door of the room appellant said, "Don't open that door;" that the policeman thereupon said to Overstreet, "Open it, Will," and Overstreet opened the door, and just as he did so, the appellant fired; that the gun was fired just as Overstreet and Murray, the policeman, stepped in after the door was opened, appellant firing at once with the opening of the door; and that thereupon Murray arrested appellant. The appellant testified at length in his own behalf, and disclaimed any animosity whatever, or any ill will, towards either Mrs. Carter or Overstreet, and went into some details as to the basis of his alarm and apprehension of attack from the Mexicans, and in support claimed that he believed at the time he fired the shot that the Mexicans were seeking his life.

1. The court charged on murder in the first degree, murder in the second degree, manslaughter, self-defense, and also instructed with reference to the law of threats and mistake of fact. The charge of the court is criticised as to all these matters practically, but is, we think, sufficient, and not subject to serious attack, except that portion of same which instructs the jury with reference to the issue of murder in the second degree. This charge, we think, is fatally defective, and for the error therein the case must be reversed. After defining murder in the second degree, substantially in accordance with law, the court then gives this instruction, and this is the only instruction which the court does give applying the law of murder in the second degree directly to the case: "If you believe from the evidence, beyond a reasonable doubt, that the defendant, in the county of Dallas and state of Texas, on the 26th day of May, 1908, as alleged, with a deadly weapon, to wit, a gun, did shoot and thereby kill Will Overstreet, as charged in the indictment, you will find him guilty of murder in the second degree, and assess his punishment at confinement in the state penitentiary for any period that the jury may determine and state in their verdict, provided it be not less than 5 years." It is urged that this charge is objectionable in many respects; that it is not even required, under

this charge, that the killing should be unlawful; that the jury are not instructed therein as to whether such killing should be upon malice or upon sudden passion, and that under the terms of the same it would not be a defense that the killing was justifiable or excusable on any of the matters testified to by appellant; but that this charge absolutely nullifies the defense of mistake of fact, self-defense under a mistake of fact, and also denies to appellant the consideration of the issue of manslaughter. We think all these complaints are well taken. A charge very similar to this was condemned by this court in the case of *Clark v. State*, 51 Tex. Cr. R. 521, 102 S. W. 1136. The charge there condemned was as follows: "If you believe from the evidence beyond a reasonable doubt that the defendant, in the county of Falls and state of Texas, on the 18th day of December, 1906, as alleged, with a deadly weapon, did unlawfully shoot and thereby kill Alonzo Porter, as charged in the indictment, you will find him guilty of murder in the second degree, and assess his punishment," etc. This charge is practically a reproduction of the court's charge in the case at bar, except that under the charge here considered the jury are not even required to find that the killing was unlawful. Touching the charge given in the *Clark Case*, supra, the court say: "It will be seen from this charge that the court nowhere tells the jury that the killing must be upon malice aforethought, or upon implied malice aforethought as theretofore defined; but, as presented, it would, as contended for by appellant, authorize the jury to find appellant guilty of murder in the second degree, or it might be manslaughter." The charge in this case is clearly distinguishable from the one considered and held sufficient in *Puryear v. State*, 56 Tex. Cr. R. 231, 118 S. W. 1042.

2. Complaint is also made of the charge of the court which instructs the jury that the instrument or means by which a homicide is committed are to be taken into consideration in judging the intent of the party offending. It is urged that under the facts of this case this instruction was erroneous and uncalled for, that the instrument used was beyond question a deadly weapon, and such a charge gives undue prominence to the presumption arising from the character of the weapon and the manner of the killing, and that it makes the presumption of criminal intent neutralize the presumption of innocence. We are not prepared to agree with this contention. The charge undoubtedly announced a correct proposition of law, and under some of the evidence we think it was proper for the court to have given this charge.

There are many issues of the case, and the charge of the court covers a great many questions. This charge we have carefully examined, and, except in the respect noted

above, find no error in same. However, for the error pointed out, the judgment is reversed, and the cause is remanded.

### MARTIN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### 1. JURY (§ 72\*)—SELECTION—PICKED-UP JURY—ABSENCE OF REGULAR JURIES.

Where regular juries were drawn as provided by the wheel jury law for alternate weeks, and a felony case, not being reached on a week on which a jury had been ordered, was reset for the next week, there being no regular jury, the court could order the sheriff to procure talemens to serve as jurors during that week.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 333-335; Dec. Dig. § 72.\*]

#### 2. CRIMINAL LAW (§ 854\*)—SEPARATION OF JURY AFTER TESTING AS WHOLE AND BEFORE SELECTION.

The statute forbidding the separation of the jury applies to jurors who have been segregated and impaneled in the case, and does not require jurors to be locked up after they have been examined as a whole, and no challenges have been made, and they have not been selected or sworn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2044; Dec. Dig. § 854.\*]

#### 3. CRIMINAL LAW (§ 730\*)—TRIAL—ARGUMENT OF PROSECUTOR.

In a robbery case, accused's counsel called a prosecuting witness abusive names, and stated that he was in no shape, having taken at least two glasses of beer, to know what really happened, and that he was not entitled to consideration. The court said: "It makes no difference how prominent a lawyer is, he has no right to abuse a witness as defendant's counsel has abused Mr. Smith (prosecuting witness)." Subsequently accused's attorney objected that the prosecuting attorney was calling accused a vile wretch, and the prosecuting attorney declared that he was quoting from accused's counsel's statement that the prosecuting witness was entitled to no more credit "than this vile wretch here," referring to accused. Accused's counsel denied using such term, claiming he had spoken of accused as a poor unfortunate wretch. The court stated that if the prosecuting attorney did call accused a vile wretch, he had no right to do so, and that the jury should not consider it against accused, and cautioned counsel against further use of such language, and told him to discuss the facts of the case. The prosecuting attorney then remarked that accused's counsel was in the habit of abusing the state's witnesses when he was defending persons accused with crime, and that he had done so in this case in behalf of accused who, according to the record, was a self-confessed robber, where, upon objection, the court told the prosecuting attorney that he must not comment on any habit of accused's counsel, it not being a part of the case, admonished him to keep within the record, and told the jury not to consider any such statement for any purpose whatever. *Held* that, it appearing that the prosecuting attorney was answering the argument of accused's counsel, the matter was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1698; Dec. Dig. § 730.\*]

#### 4. CRIMINAL LAW (§ 534\*)—EVIDENCE—CONFESSIONS.

Under Code Cr. Proc. 1895, art. 790, as amended by Laws 30th Leg. c. 118, providing

that a confession shall not be used if, when made, accused is in the custody of an officer, unless he states facts in connection with the confession found to be true, which conduce to establish his guilt, such as the finding of stolen property, where one accused of robbery turned the stolen property over to an officer upon her arrest, her admission made to him at the time that she had the property was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1224; Dec. Dig. § 534.\*]

#### 5. CRIMINAL LAW (§ 1124\*)—APPEAL—RECORD—NEW TRIAL—SUFFICIENCY OF MOTION—FAILURE TO VERIFY.

A motion for a new trial averring that one jointly indicted with accused had been discharged subsequent to accused's trial, and that he would testify to alleged facts exonerating accused, was insufficient, where no affidavit of the proposed witness was incorporated in the record, and there was nothing to verify any statement to which he would testify, and the motion was not sworn to by accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2948; Dec. Dig. § 1124.\*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

Hattie Martin was convicted of robbery, and she appeals. Affirmed.

John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for robbery, the punishment assessed being five years' confinement in the penitentiary.

The evidence shows that appellant, with two other parties, committed robbery from the person of R. L. Smith. The state's evidence is to the effect that the assaulted party was in the city of Dallas, having come over from Oak Cliff, and was standing on the corner of Wood and Jefferson streets waiting for a street car to return home. While standing there a white man, who had been following him, came up and said: "Hello, pal, where are you going?" The witness told him he was going home when his car came. Witness says the white man grabbed him by the right arm, and the negro man took hold of the other arm, and appellant came up, and the white man handed her a bottle, which he took out of his pocket, and told her to hold it to witness' nose. She pulled the stopper, and held the bottle to his nose until he lost consciousness. When he regained consciousness he was back of an old rock house that stands on the corner, and was covered with a lot of sacks, papers, and old stuff. He says he was almost suffocated, and thought he was dead. He immediately made complaint, and appellant was arrested, being recognized by the fact that she only had one leg, or "limb," as the witness calls it. She at first denied knowing anything about the matter, but finally returned the purse taken from the witness. This purse was valued at 10 cents, and had \$1.10 inside. This witness said he was robbed by the one-legged negro woman, a negro man, and a white man, and so described the people

to the officer who made the arrest. Appellant took the stand, and denied any connection with it, and said that the alleged assaulted party come to her house, and offered her 50 cents for permission to go to bed with her; that he was drunk. She denied making the statement to the officer about which the officer testified, and told him that the purse that she had was given to her by the negro, Jim Cass.

1. The first bill of exceptions recites that when the case was called appellant objected to proceeding with her trial on the jury lists handed her. The bill recites her objections as follows: "This case was set for trial during a week when there was no drawn jury according to the wheel jury law passed by the Legislature for counties having a city of more than twenty thousand population or according to the statutory law providing for the selection of juries. The defendant objected to going to trial with a picked-up jury." These objections were overruled, and appellant's attorneys ordered to proceed with the selection of the jury from the list furnished. It seems from the recital in the bill that the case had been set down for trial the previous week, to wit, on the 17th day of February, but, owing to the fact that a number of cases were tried, this case was not reached or called, but was postponed and reset for the 22d of February. The bill further recites that the court had ordered regular juries drawn, and they had been drawn for alternate weeks, as has been the habit of the court; that is, one week for ordinary felony cases, and the next week for special venire cases. In the alternate weeks, special venire cases, a large number of which were on the docket, had been set for trial. The case of *State v. Kaufman* was set for the 22d, and the court having reason to believe that said cause would be continued when reached ordered a number of cases set during that week to be taken up in case the court should be idle, the court stating to counsel, and here states, that owing to the crowded condition of the docket and the county jail, he wanted to utilize every moment possible. When the *Kaufman* Case was continued upon application of the defendant, "the court ordered the sheriff to procure, and he did procure in a legal way, talesmen to serve as jurors during that week, and this was the list furnished the defendant. Therefore, because in a manner unexpected no jury has been drawn from the wheel, and the court could not run without a jury, the court overruled the defendant's objections to the panel of talesmen, and required a jury to be selected from said panel." As this bill presents the matter, we are of opinion there is no error shown. In the absence of jurors drawn under the terms of the statute, as here shown, we are of opinion that the court is not without power to secure jurors for the transaction of the business of the court. So, in this case, we are of opinion the court had the authority to have a jury summoned for

the disposition of such cases as were set down for trial.

2. Another bill recites that after the jury had been examined as a whole, but no challenge had been made, it was noticed that it was adjourning time, and the court announced that he would not lock the jury up for the noon hour, as they had not been selected, or sworn, and that the taking of evidence had not begun, but he would allow them to go at large unaccompanied by any officer during the noon hour. As this bill recites it, we see no error in this ruling of the court. The mere fact that all of the jurors summoned had been tested, but none of them selected to try the case, nor in any manner set apart or sworn, does not come within the inhibition of the statute preventing the separation of the jury. That statute refers to jurors who had been segregated and impaneled in the case. Here, no juror had been selected, they had simply been tested as a whole, which we suppose means their qualifications in a general way had been tested for excuses and matters of that sort. As the bill is incorporated in the record, we are of opinion there is no error shown.

3. There is quite a lengthy bill complaining of a speech of the assistant county attorney. When the court's attention was called to the statements of the county attorney, the court instructed the county attorney to stay within the facts of the case, and cautioned him against making the comments he had made, and instructed the jury that it was not legitimate argument, and that the county attorney should not have used the same, and the jury would not consider it for any purpose whatever. The language used was as follows: "It makes no difference how prominent a lawyer is, he had no right to abuse a witness as defendant's counsel has abused Mr. Smith," and, further, "If a lawyer were to abuse me in that way, I would hold him personally responsible for it." In this connection the bill shows that counsel for appellant had been severe on the witness Smith, had called him a "night invader of the South End Saloons," and said the witness was in no shape, having taken at least two glasses of beer, to know what really happened, and furthermore said in his argument that Smith was not entitled to any more respect or consideration, or to be believed by the jury, than—that is, the court so remembered—(referring to defendant), and many other like expressions. Then followed the above caution and instructions of the court. After this the court proceeded to write the charge, and was not noticing the argument closely when defendant's counsel again objected, stating that the state's counsel was calling his client a vile wretch. The prosecuting attorney stated to the court that he was not calling his client a vile wretch, but was quoting from appellant's counsel, wherein he said that Mr. Smith was entitled to no more credit than this vile wretch here, and that he was only

quoting the language of appellant's counsel used in regard to his own client. This appellant's counsel denied, and said he had only spoken of his client as a poor unfortunate wretch. Again the court instructed the jury that he did not hear the language used, but that, if prosecuting attorney did call the woman a vile wretch, he had no right to do so, and that the jury should not consider it against the defendant for any purpose, and again told counsel not to use that language any further, but to discuss the facts of the case. The prosecuting attorney then remarked to the jury that appellant's counsel was in the habit of abusing the state's witnesses, and further stated that appellant's counsel had a mania for abusing witnesses when he was defending people charged with crime, and that he had done so in this case in behalf of this woman, who, according to the record, was a self-confessed thief and robber. Again counsel objected, and the court told the prosecuting attorney he must not comment upon any mania or habit of appellant's counsel, as that was not a part of the case, and again admonished him to keep within the record and discuss his case, and the court again told the jury not to consider any such statement as that made by counsel for the state for any purpose whatever, and the court told the prosecuting attorney if he did not obey the orders of the court from this time forward that he would punish him, and subsequently said to counsel for state to argue the law and facts in a legitimate way. This is the bill of exception. We are of opinion, as this bill presents the matter, it is not of sufficient importance to require a reversal, and, as the bill presents the matter, it seems the county attorney was answering the argument of appellant's counsel, or at least the court so leaves the matter as claimed by the prosecuting attorney.

4. The policeman Brown who arrested appellant stated that he was told of the robbery, and given a description of the party that suited defendant, and he went with the purpose of going where she was to be found. Before getting to her house he met and stopped her; that is, he said "Hello, Hattie," and she stopped. He asked her where the man's purse and money was that she took from him. She denied taking the man's money or purse. The officer stated, "You did, and I have proof." She again denied it, and he informed her that she did, and that she had "better come across and tell the whole as it will be better for you." She then admitted having the purse, and gave it to the officer. He then told her he would have to lock her up, and turned her over to another officer who took her to the city jail. Objection was urged to this because this statement had been elicited from her while she was under arrest and had not been warned. The court overruled these objections, and admitted the testimony. Concede under the facts she was under arrest at the time, it would make no

difference under the circumstances stated, because the officer obtained from her part of the stolen property. Article 790, Code Cr. Proc. 1895, as amended by Acts 30th Leg. p. 219, c. 118, reads as follows: "The confession shall not be used if at the time it was made the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of the accused taken before an examining court in accordance with law, or be made in writing and signed by him, which written statement shall show that he had been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made, or unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed," etc. If it be conceded that the party was sufficiently under arrest to exclude the conversation occurring between the parties at the time, still we are of opinion this testimony would be admissible under the second clause of this law; that is, "that any statement may be used in evidence against him on his trial for the offense concerning which the confession is therein made, or unless, in connection with said confession, he makes statements of facts or circumstances that are found to be true which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed." There is no question under the facts from the state or the defendant's side that appellant had the stolen purse and turned it over to officer Brown. There is some difference in the statement of appellant and the officer in regard to the conversation. Appellant said when she turned it over she made the statement that she received it from Jim Cass, one of the parties supposed to be connected with the robbery. She had possession of the stolen purse. The officer does not agree with her in regard to that statement, but in any event the stolen property was found in her possession, and she delivered it to the officer. This makes the case come within the exception in the statute, and authorized the court to permit the introduction of her statements.

5. One of the grounds of the motion for new trial is to the effect that Cass, who had been jointly indicted with appellant, was discharged by the county attorney, and that Cass would now testify that he found the pocketbook that was supposed to have been in the possession of the defendant, and gave it to her, and it is stated in the motion that Cass' affidavit is attached to the motion for

new trial, and she alleges that this testimony is newly discovered by reason of the fact that the case against Cass had been dismissed by the county attorney subsequent to appellant's trial. A sufficient answer to this is found in the fact that there is no affidavit made by Cass incorporated in the record, and nothing to verify any statement to which Cass would testify. The motion for a new trial is not even sworn to by appellant. In other words, this ground of the motion is simply a statement unverified. As presented it cannot be reviewed.

Finding no reversible error in the record, the judgment is affirmed.

### BRITTON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### WEAPONS (§ 7\*)—CARRYING WEAPONS FOR REPAIRS.

It is lawful for a person to carry a pistol, which is out of repair and will not shoot, to a repairer to be fixed, and to carry it home therefrom.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 6; Dec. Dig. § 7.\*]

Appeal from Panola County Court; W. R. Anderson, Judge.

Will Britton was convicted of unlawfully carrying a pistol, and appeals. Reversed and remanded.

Brooke & Woolworth, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for carrying a pistol in violation of the law.

The evidence discloses that he carried the pistol to town, and was seen by the witness Sparks with the pistol in his hand on his return from town; that it was a blue Colt's 41 caliber; that there had been a little show in the town of Ragley, where he (witness) and appellant had been; that he (witness) left Ragley about an hour by sun, and appellant overtook him on the way home, and had the pistol in his hand. This occurred on the 1st of May. The state further proved by the witness Davis, that about three weeks afterwards he traded with appellant for a blue Colt's pistol, and that at that time it would shoot. The witnesses for appellant testified that at the time he was seen with the pistol going from Ragley the pistol would not shoot, and that he carried it to town to have it fixed; that it was out of repair, and the cylinder would not revolve. The witness Davis said he did not know whether appellant had had the pistol fixed or not. Murphy testified, in behalf of appellant, that on the 1st of May appellant brought the pistol to him in the town of Ragley to have it fixed; that he examined it, and found the pistol broken;

that he could not move the cylinder or cock the pistol. He told appellant he did not have time to fix it that day, and told him to take it home. Houston Weaver testified that he was a blacksmith, and lived in the town of Timpson, and that on the 3d of May appellant brought the pistol to his shop to get it repaired, and left the pistol with the witness, and went away; that the pistol could not shoot, because the cylinder would not turn; that subsequently appellant came to the shop, and, finding it would be a week or two before the pistol could be fixed, on account of the fact that witness had to send away to get some parts that he did not have to repair the pistol, appellant declined to leave the pistol, and took it away. The witness Amos testified that he was in the town of Ragley on the 1st of May with appellant; that appellant had the pistol described by the other witnesses, and carried it to the blacksmith shop in Ragley to have it fixed; that the blacksmith could not fix it that day, and appellant did not leave it with the blacksmith, and asked the witness what he was to do with the pistol; that he wanted to go to the show, and did not want to take it with him; after deliberating about the matter, the witness suggested or advised appellant to hide it until the show was over, and then take it back home; that appellant did hide it behind some barrels on Ragley's gallery, and after the show he got the pistol; that the pistol would not shoot, and he knew that was the only pistol appellant had that day.

We are of opinion that, under the facts stated, this was not a violation of the law. Appellant had the right to carry the pistol to the shop to have it repaired, and carry it home with him. It seems to be unquestioned that this was his purpose in carrying the pistol, and there is no contradiction of the fact that it was out of repair and would not shoot. The state's witness knew nothing of the pistol, further than the fact that he saw appellant with it in his hand as he overtook him on the road home.

The judgment is reversed, and the cause is remanded.

### EMERSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 19, 1910.)

#### CRIMINAL LAW (§ 1122\*)—APPEAL—RECORD—STATEMENT OF FACTS—ABSENCE.

A conviction will not be reversed, in the absence of a statement of facts, for an alleged erroneous charge, if it could be applicable to any state of facts that might be introduced under the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2041; Dec. Dig. § 1122.\*]

Appeal from District Court, Tarrant County; W. T. Simmons, Judge.

Morris Emerson was convicted of burglary, and he appeals. Affirmed.

See, also, 54 Tex. Cr. R. 628, 114 S. W. 834.

John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for burglary; the punishment being assessed at five years' confinement in the penitentiary.

The record is before us without a statement of facts or bill of exceptions. The questions mentioned in motion for new trial cannot be revised in the absence of the evidence. The charge given is applicable to a state of facts provable under the allegations in the indictment. This court will not reverse a case, where the statement of facts is not before us, if the charge given and criticised could be applicable to any state of facts that might be introduced under the allegations in the indictment. As the record is presented to us, we find no error.

The judgment therefore is affirmed.

### REAGAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910.)

#### 1. WITNESSES (§ 277\*)—CROSS-EXAMINATION OF ACCUSED.

Where, in a prosecution for homicide, accused in his examination in chief, after having testified to criminal intimacy between deceased and accused's wife, stated that when he shot deceased he did so because deceased was making a demonstration that threatened death to accused and not because of deceased's prior misconduct, the court properly permitted him, in answer to a question on cross-examination as to whether he would not have shot deceased for what he had said concerning and done to accused's wife, though deceased had not placed his hand behind him or made any demonstration, to state that he would not have killed deceased except for the demonstration.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 979, 980; Dec. Dig. § 277.\*]

#### 2. CRIMINAL LAW (§ 956\*)—NEW TRIAL—MISCONDUCT OF THE JURY—AFFIDAVIT.

Where affidavits in support of an application for new trial for alleged misconduct of the jury were not specific, and it was uncertain from the record whether the misconduct in fact occurred, the motion, in so far as it was based on such grounds, was properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2391; Dec. Dig. § 956.\*]

#### 3. CRIMINAL LAW (§ 857\*)—MISCONDUCT OF THE JURY.

In a prosecution for homicide, defendant, though claiming he shot deceased in self-defense, also testified that he sought deceased, who was the stepfather of defendant's wife, to remonstrate with him for his criminal intimacy with defendant's wife and to obtain a promise from him to cease such attentions. *Held*, that statements made by jurors while considering their verdict that it seemed that defendant's wife was as anxious "to do it or to cohabit" as deceased was, and "I do not think a man ought to be shot down about a damned whore like that woman is," were not objectionable as receiving additional testimony after submission of the

case, but were justifiable expressions of the jurors' conclusions on the proposition submitted to them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2055; Dec. Dig. § 857.\*]

#### 4. CRIMINAL LAW (§ 945\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Alleged newly discovered evidence of decedent's wife that whoever shot deceased was standing in the road when he shot, and was not attempting to conceal himself, that she was sitting on the gallery of the house 200 or 300 yards distant, and when she heard the firing looked up and saw the person who shot with a smoking gun in his hand stepping toward the fence toward deceased's dead body, was not probably true, and would not have probably produced an acquittal or a conviction of a lesser offense than manslaughter of which accused was found guilty on a new trial, the witness having testified at the examining trial that the gun fire attracted her attention, when she looked the way her husband was in the field, saw his mule coming up the cotton rows with the plow, and went near enough to see that her husband was killed when she went for help, without having stated who it was that fired at deceased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2336; Dec. Dig. § 945.\*]

#### 5. CRIMINAL LAW (§ 939\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Where deceased's wife testified at defendant's examining trial, defendant was negligent in failing to procure her testimony at the trial, which would preclude his obtaining a new trial for her alleged newly discovered evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318, 2319; Dec. Dig. § 939.\*]

#### 6. CRIMINAL LAW (§§ 941, 942\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE AND IMPEACHING EVIDENCE.

Alleged newly discovered evidence which is cumulative and impeaching is not ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328-2332; Dec. Dig. §§ 941, 942.\*]

Appeal from District Court, Robertson County; J. C. Scott, Judge.

Richard Reagan was convicted of manslaughter, and he appeals. Affirmed.

John A. Mobley, Asst. Atty. Gen., for the State.

MCCORD, J. Under an indictment for murder appellant was convicted of manslaughter with a penalty of five years, and from this judgment of conviction has appealed to this court and asks for a revision of the action of the court below.

Briefly stated, the facts show that on the 7th day of May, 1909, in the county of Robertson, the deceased, Knox Whitehead, while plowing in a field was shot down and killed. The facts also show that appellant was the man that killed him; that he lived in Madison county about nine miles from where Whitehead lived; and that on the morning of the killing the appellant left his home afoot with a gun and a couple of dogs following him, and went on down to the home of the deceased, found him plowing in the field, and shot him down, killing him instantly. But one shot was fired, and one of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

buckshot entered the deceased on the right side of his face and in the right temple and one entered at the point of the chin and others went through his hat. The scattered condition of the wounds on the body and the holes in the hat show that the man who fired the shot must have been some distance from the body of the deceased at the time the shot was fired. The rows ran north and south in the field where the deceased was plowing. The road passed east and west along the north side of the field. The deceased had reached the north end of the rows and from the position of his body deceased had about fixed to turn around when he was shot. His head lay towards the fence and about three feet from the fence. The fence was a wire fence; it was about three feet from the wire fence to the edge of the road. Across the road, and some 17 steps from the north side of the road, there was a hickory tree. Some small bushes lay between the hickory tree and the road, not enough, however, to conceal a person. Around this hickory tree there were some indications that a person had stood. South of the dead body some shot were found in a tree. Also the bushes between the hickory tree and the road had been clipped by shot. The spot where these bushes were clipped, the dead body, and the shot in the dead tree, which was south of the dead body, all were in an exact line from the hickory tree. It was 37 steps from this hickory tree to where the dead body was lying, and the physical facts surrounding the killing indicated that the party who fired the shot must have been some distance from the deceased when the shot was fired, and that the same was not fired at close range. The appellant admitted the killing. He was seen by several witnesses going to and from the place of the killing. On the morning of the killing, appellant borrowed a gun from one of his neighbors and told him he was going squirrel hunting with it. He returned the gun on the same evening of the killing to the man from whom he borrowed it, the witness from whom he borrowed it being named George Lawson, and when appellant brought the gun back he told said Lawson that he had killed the deceased. The appellant and his wife both testified in the case to acts of intimacy on the part of the deceased with appellant's wife, she testifying that she was the stepdaughter of deceased, and that the deceased had been criminally intimate with her both before and after her marriage with the appellant. The appellant claimed that he was informed of this only a day or two before the killing, and that on the morning he borrowed the gun and went down to where the deceased lived, found him plowing in the field, and that he went up and stopped in the road some eight or nine feet from the end of the rows on the outside of the fence, and that when the deceased came plowing to the end of the rows the deceased looked up and saw him (the appellant), threw his hand to his hip, and, appellant thinking

that he was going to shoot him, fired and killed deceased, and when he fell he (appellant) went up to the edge of the fence, looked at him, saw the blood running out of his forehead and went on back home; that when the deceased threw his hand to his hip pocket like he was going to draw a pistol, he (the appellant) stepped back two or three steps which threw him to the north edge of the road when he fired; that he did not kill the deceased for the intimacy and insults offered to his wife, but that he killed him in self-defense, and that he had gone down there to exact a promise from the deceased that he would desist in his conduct towards the appellant's wife. This is a sufficient statement of the facts of the case to explain the issues raised.

1. The case was submitted to the jury on murder, manslaughter, and self-defense. No complaint in the motion for new trial was made to the charge of the court, and the charge seems to have fairly presented the law applicable to the facts of the case.

2. We find in the record but one bill of exceptions. This bill is to the action of the court in permitting the state's counsel, over the objection of appellant, to ask the appellant while on the witness stand, "Would you not have shot the deceased for what deceased had said about your wife or what he had done to your wife, even though deceased had not placed his hand behind him or made any demonstration?" And to the answer of the appellant that he would not have killed the deceased on account of what he had said about his wife or done to his wife, but that he killed him on account of the demonstrations made. This was objected to because it was a hypothetical question, and because same called for an opinion of the witness and did not tend to establish a fact. We are of opinion that the court below did not err in permitting this question to be asked and answered. It has always been held that the intent with which an act is done or which may accompany the act can always be inquired into. The appellant in his examination in chief, while he had testified to the conduct of the deceased towards his wife, testified further that at the time he shot the deceased the deceased was making demonstrations that threatened death, and that he (appellant) immediately fired. We are of opinion that it was a proper question to propound to the appellant that the jury might know whether the killing was in self-defense or was from passion aroused by an adequate cause. We therefore hold the court below did not err in permitting the question to be asked and answered.

3. Appellant in his motion for a new trial complained that the jury, while deliberating upon the case, was guilty of misconduct in that the jury received testimony other than that which was produced upon the witness stand, the other testimony being as follows: After the jury had been charged by the court

and had retired to consider their verdict and before the verdict of the jury had been arrived at, the following language, or language of similar import, was indulged in by the jury, to wit: "That it seemed that the defendant's wife, Mrs. Richard Reagan, was as anxious to do it, or to cohabit, as Knox Whitehead was"—the contention being that this was new testimony, was an inference or conclusion drawn by the jury not authorized by the testimony; and, further, that while the jury were deliberating upon their verdict some member of the jury in the hearing of one Gilmore, who was a member of the jury, said: "I do not think a man ought to be shot down about a damn whore like that woman is." The motion for new trial is sworn to by W. W. Wilson, one of the attorneys for the appellant, and in the affidavit of said counsel it is stated that the names of the two jurors above mentioned are unknown to the witness; that J. R. Gilmore told counsel for the appellant that he heard the language imputed to the said jurors, but did not tell said counsel what said language was, and did not give him the name of the said two jurors. The juror Gilmore was not brought before the court, nor was any of the other jurors examined with reference to what transpired in the jury room. The affidavit in itself only speaks of information or rumors that seemed to be floating around. It is not specific, and fails to show that any such thing transpired in the jury room. In this uncertain condition of the record, and in the absence of any positive proof that such a thing transpired in the jury room, this court would not be authorized to disturb the verdict, but conceding that the thing transpired as stated in the motion for new trial, we are not prepared to say that this was misconduct, nor receiving additional testimony, but was simply the inference or conclusion drawn by the jury from the testimony elicited upon the trial. We do not understand that juries, in reaching their verdicts, are denied the right of reasoning out propositions that are submitted to them and drawing deductions and conclusions therefrom. They have a right to weigh testimony that comes before them. They have a right to discuss it in the jury room and give their reasons as well as to draw their conclusions and to express these conclusions to one another. This was not additional testimony, and we think was a legitimate remark on the part of the jury. See *Jack v. State*, 20 Tex. App. 661, in which this court held that it would be a dangerous and exceedingly pernicious practice for the courts to permit the sanctity of the jury room to be invaded and jurors be interrogated as to the arguments used in their deliberations, and the influence of such arguments upon their minds, and the reasons and considerations upon which their verdict was based.

4. The next ground of the motion for new trial insisted upon by appellant is that he should have been granted a new trial because of newly discovered testimony that had come to his knowledge since the trial of the case, and that by no kind of diligence could have been discovered before the trial, and that if he had had said testimony it might have probably changed the result, and in his motion for new trial he sets up that Mrs. Knox Whitehead, the wife of the deceased, will testify that if appellant shot the deceased, or whoever shot the deceased, he was standing in the road when he fired, and was not attempting to conceal himself at the time of the firing of the gun; that she was sitting on the gallery of the house some 200 or 300 yards distant, and that when she heard the firing of the shot she looked up and saw the appellant or the party who fired the shot with a smoking gun in his hand in the road, stepping up towards the fence and towards the dead body of the deceased. They attached to the motion for a new trial her affidavit, and the purpose and object of this testimony, appellant says, was to show that he did not attempt to conceal himself at the time he fired the shot, but that the same was done openly, and that said testimony tended to support the theory of the appellant that he shot in self-defense. The appellant further contends that he was denied the right of talking to this witness, and that said witness had been advised by the state not to talk to appellant and his counsel, and that they never could get to see and talk to her. The state denies this, and in its controverting motion attaches the affidavit of the witness Mrs. Knox Whitehead embodying her statement made at the inquest or examining trial in which affidavit she does not mention that she ever saw who it was that fired at her husband; that she heard a gun fire which attracted her attention, and that she walked out and looked the way her husband was in the field, and saw the mule coming up the cotton rows with the plow, and that she went near enough to see that her husband was killed and the next thing was to get help. In view of the fact that appellant was convicted of manslaughter, we are not prepared to hold that this testimony could have changed the result, and that the same is probably untrue; that there was a want of diligence on the part of appellant to procure the same; that the same was impeaching and merely cumulative; and for these reasons, we think the court below did not err in refusing a new trial. See *Fleming v. State*, 54 Tex. Cr. R. 339, 114 S. W. 383, and *Harrolson v. State*, 54 Tex. Cr. R. 452, 113 S. W. 544.

Finding no error in the record, and believing appellant has had a fair and an impartial trial, the judgment of the court below is in all things affirmed.

**SHAW et al. v. SCHUCH.†**

(Court of Civil Appeals of Texas. Dec. 15, 1909.  
On Motions for Rehearing and Certiorari, Jan. 19, 1910.)

**1. APPEAL AND ERROR (§ 671\*)—SUFFICIENCY OF RECORD—NECESSITY FOR STATEMENT OF FACTS OR BILL OF EXCEPTIONS.**

Where the record contains neither statement of facts, conclusions of fact and law filed by the court, nor bill of exceptions, and no fundamental error appears, there is nothing for the court to review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

On Motions for Rehearing and Certiorari.

**2. APPEAL AND ERROR (§ 619\*)—DEFECTS IN RECORD—DUTY OF COUNSEL.**

It is the duty of counsel for appellant to see that the record on appeal is properly made up, and failure of the clerk to send up a statement of facts is no excuse for a defect in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2721-2723; Dec. Dig. § 619.\*]

**3. APPEAL AND ERROR (§§ 659, 832\*)—REHEARING—GROUNDS—DEFECTS IN RECORD.**

The mere failure of the clerk to send up a statement of facts, which has not been discovered by counsel for appellant who briefed the case until after its submission and decision, is not sufficient reason on which to base a motion for certiorari to perfect the record, and for a rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2835, 2838, 3219, 3222; Dec. Dig. §§ 659, 832.\*]

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Action by W. H. Shaw and others against H. J. Schuch, for injunction. Defendant had judgment, and plaintiffs appeal. Affirmed.

Taylor & Frink, for appellants. Joseph Spence, Jr., and C. El. Dubois, for appellee.

**RICE, J.** On the 8th of November, 1909, W. H. Shaw and others, appellants herein, presented their petition in vacation for injunction to Hon. J. W. Timmins, district judge, for a mandatory writ of injunction, for the purpose of enjoining H. J. Schuch, appellee herein, or any other person acting for him, from in any way interfering with them in removing, hauling, and using gravel from the bed of the main Concho river, and further requiring and commanding the said Schuch to remove a fence from around the gravel bed in said river, to the end that they, in common with all others, might use and haul said gravel, and that on final hearing said injunction be made perpetual, alleging, amongst other things, that the said Schuch, to their detriment, had fenced in and inclosed a part of the bed of the main Concho river, at a point about one mile from Chadbourne street, in the city of San Angelo; that said point or portion thereof so fenced was a part of said river bed running along

by and being the south boundary line of a tract of land owned by Leon Mosbacher, just below the confluence of the Middle and North Concho rivers; that defendant had fenced and inclosed the bed of said river, to the end that he might have the exclusive use and benefit of the gravel and sand that had accumulated at said point in said river, and had appropriated the same to his exclusive use and benefit. It was further alleged in said petition that there was no other body of gravel and sand of as good quality as this within said distance from said city to which appellants might have free access without trespassing upon private land; that some of them obtained a livelihood by hauling said gravel and sand, and that others of plaintiffs were users and consumers of said gravel as builders and contractors for the erection of houses in said city; that said gravel and sand at said portion of the bed of said river was common property belonging to the general public, and that no one has an exclusive right thereto, but that plaintiffs, in common with others, have the right to take, haul, and use said gravel, and that the defendant had no legal right to fence or inclose the same; that the Concho river, from its mouth to a distance far above said gravel and sand bed, is of a uniform width of more than 30 feet, and is thereby made navigable by virtue of article 4147 of the Revised Civil Statutes of Texas. Upon the presentation of this petition to said judge it was set down for hearing on the 10th of November, and notice issued to appellee in accordance therewith. Upon hearing appellee answered by general and special exceptions, general denial, and by special answer that he had leased the tract of land from Mosbacher bordering upon said river, upon which the gravel was situated, but that said gravel and sand mentioned in the petition is not nor does the same form any part of the bed of said river, but, on the contrary, by reason of the change in the course of the stream, said gravel and sand had accumulated to the height of some six feet above and higher than the bed of said river, and against the tract of land that he had leased, and, being so formed, that the same was by accretion a part of said land; that defendant had not fenced or inclosed, nor was he exercising the exclusive use of any sand or gravel situated in, the bed of said river; that the tract of land leased and fenced by him is bounded on the south by said Concho river, and extends to the low-water mark thereof, and that defendant has inclosed and is using the same, as he has a right to do, no part of which is public land nor lies in the bed of said river. The court, after hearing the evidence, refused the injunction, and an order was entered in accordance therewith, from which this appeal is prosecuted. The assignments of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

error assail the judgment refusing the relief on the ground that appellee had no right to enclose the land.

There is no statement of facts nor conclusions of fact and law filed by the court, nor any bill of exceptions to the ruling of the court in the record. This being the state of the record, and no fundamental error appearing, there is nothing for this court to review. *Secrest v. Townsend*, 1 Tex. 414; *Ward v. Lattimore*, 2 Tex. 246; *Punderson v. Love*, 3 Tex. 61; *Anderson v. Walker*, 67 S. W. 432. See, also, title Appeal and Error, 1 Green's Tex. Dig. p. 467, § 582 et seq.

Therefore the judgment of the court below must be affirmed, and it is so ordered.

**Affirmed.**

#### On Motions for Rehearing and Certiorari.

On the 15th of December last judgment of the court below in this case was affirmed without reference to the merits; it being held by us that, in the absence of a statement of facts, the errors assigned were such as could not be considered. Since then, to wit, on December 30, 1909, a motion for rehearing was filed herein, and on January 11, 1910, appellant filed a motion suggesting diminution of the record, and for writ of certiorari to the district clerk to perfect the same by sending up the original statement of facts, to the end that the same might be filed as a part of the record on this appeal, which last motion is accompanied by an agreement of opposing counsel to the effect that said original statement of facts might be filed and used on motion for rehearing. As a basis for said motion it is alleged, among other things, that the clerk of the court, in sending up the transcript of the record in this case, inadvertently overlooked and failed to send up the original statement of facts agreed to by the respective attorneys and approved by the court, filed November 12, 1909. And it is further alleged that counsel for the appellant believed that the statement of facts was on file among the papers in this cause (that is, the counsel that were then in the case) until after the case was affirmed, when they were informed that no statement of facts appeared among the papers of the cause.

Both of these motions, after due consideration, we think should be overruled, because no sufficient reason is shown why the statement of facts did not accompany the record. The transcript of the record was filed in this court on the 17th of November, 1909, accompanied by briefs for appellant, which were filed on the same day. Briefs for appellee were filed on the 22d of said month, and the case was not submitted until the 8th of December. It is not a sufficient excuse that the clerk from inadvertence failed to send up the statement of facts. It has frequently been held that it is the duty of counsel to see that the record is properly made up for submission, and nothing is shown in the mo-

tion excusing the failure on the part of counsel in this case to ascertain the fact that the statement of facts had not been sent up. The only allegation is to the effect that counsel thought that it had been sent.

In *Ross v. McGowen*, 58 Tex. 603, where a statement of facts was disregarded because it was filed after close of the term at which the cause was tried, without the record showing that an order had previously been entered allowing this to be done, and where it was actually shown that the order had been entered in the court below, allowing the statement to be prepared and filed after adjournment, but by inadvertence of the clerk it was not incorporated in the record, and where it was asked that a certiorari be issued to have the same so incorporated that it might be considered in the case if the motion for rehearing should prevail, it was held, Chief Justice Willie delivering the opinion of the court, that: "No excuse is offered as to why this defect in the record was not discovered before the cause was submitted, and why the certiorari was not asked to perfect it before the court was compelled to undergo the labor of examining the case under the supposition that no such order has been made in the court below. Inadvertence or inattention of the clerk to his duties in making up the transcript does not excuse an appellant for failing to perform his duty in bringing the appeal properly before the court. Due scrutiny of the record will enable him to discern defects in it, and have them remedied in time; and, should the clerk refuse to make up the transcript properly, the appellant has his remedy to compel him to the performance of this duty." He further says that: "After a cause is once submitted upon a transcript supposed to be correct, as the parties have made no objection to it, and we have decided it upon such transcript, we cannot undertake to re-examine such cause because the counsel for either party discovers a defect in the transcript, which if supplied, might possibly lead us to a different conclusion. A mistake in the pleadings or facts of a single word might influence the decision. This discovered and remedied, a new opinion, framed to suit the altered record, might itself be set aside upon the discovery of some other error, and so on to numberless changes in the transcript and the decisions upon it. This practice cannot, of course, be allowed, and to prevent it the right to a certiorari must be limited to some point in the proceedings, which must not extend beyond the date of the submission of the cause to the court for decision. Indeed, this has been the rule of this court, announced in frequent opinions of our predecessors, which, having been orally delivered, may not have come to the knowledge of the profession generally." To the same effect is *Railway v. Scott*, 78 Tex. 360, 14 S. W. 791. See, also, *St. Louis & S. F. Ry. Co. v. Pettigrew* (Tex. Civ. App.) 97 S. W. 338, and *Bon-*

ner v. Legg & Tindall, 46 Tex. Civ. App. 176, 101 S. W. 839. See, also, Wallace & Reed v. Reed Bros. (Sup.) 116 S. W. 85, where the ruling in Ross v. McGowen, supra, is approved.

Believing that mere failure or inadvertence on the part of the clerk to send up a statement of facts, which has not been discovered by counsel for the appellant who has briefed the case until after its submission and decision, is not sufficient reason upon which to predicate a motion for certiorari to perfect the record, we, therefore, overrule the same, as well as the motion for rehearing.

Motions overruled.

#### COVINGTON v. SLOAN.

(Court of Civil Appeals of Texas. Jan. 12, 1910.)

##### 1. APPEAL AND ERROR (§ 742\*)—ASSIGNMENT OF ERROR—STATEMENT.

Where an assignment of error is not followed by a statement as required by the rules, it will be overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

##### 2. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Appellant cannot complain on appeal to the admission of testimony where on cross-examination he elicits the same testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.\*]

##### 3. FRAUD (§ 34\*)—ACTION—CONDITIONS PRECEDENT—RESTORATION OF CONSIDERATION.

It is not a condition precedent to a suit for damages for fraudulent representations as to the value of a horse traded to plaintiff that plaintiff should tender the horse to defendant; the action not being one for rescission.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 29; Dec. Dig. § 34.\*]

##### 4. PARTNERSHIP (§ 199\*)—ACTIONS—RIGHT OF ACTION BY PARTNER.

Where a partner trades for a horse in his own name, but for the partnership, he can sue for all the damages arising from the contract in his own name, as an agent for a partnership, who contracts in his own name without disclosing his principal, has full authority to sue in his own name.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 363; Dec. Dig. § 199.\*]

##### 5. APPEAL AND ERROR (§ 931\*)—ABSENCE OF BILL OF EXCEPTIONS—PRESUMPTIONS.

Where the record does not indicate that the motion for findings of fact and conclusions of law was ever brought to the attention of the court and acted upon by him, and that he refused to grant the motion, and that a bill of exceptions was filed on his refusal to act, it will be presumed, in the absence of such bill of exceptions, that the trial judge knew nothing about the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3770, 3771; Dec. Dig. § 931.\*]

Appeal from Bexar County Court; P. H. Shook, Judge.

Action by W. W. Sloan against J. H. Covington. Judgment for plaintiff, and defendant appeals. Affirmed.

Chambers, Hertzberg & Barrett, for appellant. Davis & Lipscomb, for appellee.

FLY, J. This is a suit instituted by appellee to recover damages from appellant alleged to have grown out of a certain trade in which appellee gave appellant a certain black horse alleged to be worth \$300 and \$10 for a certain bay horse, which appellee alleged was utterly worthless, and that appellee was overreached and misled by the willful, malicious, and fraudulent representations as to the condition and age of the bay horse. The bay horse was alleged to be lame in both front legs and his right hip. The court tried the cause, without a jury, and rendered judgment for appellee in the sum of \$150.

The first assignment of error is not followed by a statement, as required by the rules, and is overruled. Appellant is in no position, however, to object to testimony of the witnesses as to market value of the bay horse because on the cross-examination he elicited the same testimony.

This is a suit for damages, and not to rescind a contract, as is stated by appellant, in the second assignment of error. Appellee was under no obligation to tender to appellant the horse he got from appellant, and such tender cut no figure whatever in the case.

Sloan traded for the horse in his own name, but for the partnership of which he was a member, and he could sue for the damages arising from the contract in his own name. He was acting as an agent for the partnership, but contracted in his own name, not disclosing his principal, and he had full authority to sue in his own name. Tinsley v. Dowell, 87 Tex. 23, 26 S. W. 946; Cleveland v. Heldenheimer, 92 Tex. 108, 46 S. W. 30.

The evidence showed that a fraud was perpetrated on appellee, and that he was damaged in the sum found by the court. He had the authority to sue for and recover all the damages.

The record does not indicate that the motion for findings of fact and conclusions of law was ever brought to the attention of the court and acted upon by him, and that he refused to grant the motion, and that a bill of exceptions was filed to his refusal to act. In the absence of such bill of exceptions it will be presumed that the trial judge knew nothing about the motion. Supreme Commandery v. Rose, 62 Tex. 321; Hess v. Dean, 66 Tex. 663, 2 S. W. 727; Cleveland v. Sims, 69 Tex. 153, 6 S. W. 634; Cotulla v. Goggan, 77 Tex. 32, 13 S. W. 742; Landa v. Heermann, 85 Tex. 1, 19 S. W. 885; Maverick v. Burney, 30 S. W. 566; Maury v. Keller (Tex. Civ. App.) 53 S. W. 59.

We find no error in the record that would justify a reversal, and the judgment is affirmed.

**FANT v. D. SULLIVAN & CO. et al.†**

(Court of Civil Appeals of Texas. Jan. 5, 1910.  
Rehearing Denied Feb. 2, 1910.)

**JUDGMENT (§ 720\*)—CONCLUSIVENESS—MATTERS CONCLUDED.**

Where, in a prior action between parties to a suit in which an accounting was had, the court rendered judgment, which was affirmed on appeal, fixing their rights in respect to all transactions between them, this judgment was conclusive against any claim one might bring against the other in a subsequent suit, based on transactions involved in the first suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.\*]

Appeal from District Court, Bexar County; Edward Dwyer, Judge.

Action by F. Groos & Co. against Lucie A. Fant, as executrix, D. Sullivan and W. C. Sullivan, individually and as partners as D. Sullivan & Co., and others. From an adverse judgment Lucie A. Fant and the Sullivans appeal. Affirmed in part, and reversed in part.

R. L. Ball, for appellant Fant. Denman, Franklin & McGown and Webb & Goeth, for appellees.

FLY, J. F. Groos & Co., bankers, sued Lucie A. Fant individually, and as independent executrix of the estate of D. R. Fant, her deceased husband, J. M. Chittim and Archie Parr, individually and as a firm, Floyd McGown, as receiver of the estate of J. M. Chittim, and D. Sullivan and W. C. Sullivan, as individuals and as the banking firm of D. Sullivan & Co., alleging that about May 18, 1899, Chittim & Parr entered into a lease contract with D. R. Fant, deceased, whereby certain land was leased to them in Hidalgo county, known as the "Big Santa Rosa Pasture," containing about 89,360 acres, for a period of five years, beginning on May 1, 1899, and ending on April 30, 1904, at an annual rental of 17½ cents an acre, the sum of \$250 annually to be reserved out of the rent money for sinking wells and erecting windmills; that on or about November 30, 1901, D. R. Fant assigned the lease contract to F. Groos & Co., to secure said firm in amounts due, or to become due, them by the said Fant; that on May 1, 1903, D. R. Fant executed his promissory note for \$12,000 to F. Groos & Co. due one year after date, and on October 23, 1903, said Fant and H. Brendel executed their promissory note to said firm for \$4,182.64, which notes were not paid, and F. Groos & Co. claimed a first lien on the rent money, which was alleged to be \$15,388. It was further alleged that after the institution of this suit Floyd McGown had been appointed receiver of the estate of J. M. Chittim, and had, acting under judicial orders, sold certain live stock, to which the lien for the rent money had attached, and had been directed to retain in his possession

\$15,000 until it could be shown to whom the same belonged; that on or about May 1, 1904, D. Sullivan & Co. and D. Sullivan and W. C. Sullivan had entered into the possession of the Big Santa Rosa pasture as privies in the estate of D. R. Fant, but with notice of the prior and superior lien of F. Groos & Co., and that they were liable and bound to carry out and execute the contract of D. R. Fant, and that the plaintiffs were entitled to a foreclosure of their lien on the property for the satisfaction of the debt due them by D. R. Fant. It was further alleged that Chittim & Parr and D. R. Fant were insolvent at the time the notes and rents became due.

Sullivan & Co. denied any liability to Groos & Co. and sought to recover of Chittim & Parr the amount of the rent money, and from the receiver the money held by him, and also asked for judgment for the amount of the rent from Lucie A. Fant, individually and as executrix, in case the claim of the plaintiffs should be held superior to theirs. It was alleged by Sullivan & Co. that when the lease contract was entered into between Fant and Chittim & Parr, on May 18, 1899, Fant owed Sullivan & Co. large sums of money, and that when the assignment of the lease took place on November 30, 1901, he was still indebted to them, all of such indebtedness being secured by deeds of trust; that on February 9, 1903, all of said debts were put in one note for \$260,000, which was to become due on February 9, 1904, and was secured by a deed of trust dated February 24, 1903, which included the property which was the subject of the lease contract; that the amount of the note was not paid, and there was a foreclosure of the deed of trust, and the land in question, with other lands, was sold to D. Sullivan & Co. for \$100,000, which was credited on the debt of D. R. Fant, and that the sale was afterwards confirmed by Fant and wife to Sullivan & Co., and they thereby acquired the title to the Big Santa Rosa ranch and the reversion thereof under the lease contract and the rents thereafter due from Chittim & Parr, aggregating, as above stated, \$14,945.77, or in the alternative they have the right to foreclose their liens upon said rents, and have them applied to the discharge of the debts so secured, and now due from D. R. Fant. Sullivan & Co. also alleged a former suit between them and Lucie A. Fant, in which the latter had sought for an accounting; that in that suit Lucie A. Fant recovered of them certain "moneys and properties set out in said decree," and that no claim was set up in that suit by Mrs. Fant to the rents involved in this suit, "and their right to establish such claim and title, if any they had, is res adjudicata and barred by said judgment."

J. M. Chittim and Floyd McGown, his re-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
†Writ of error denied by Supreme Court.

ceiver, admitted that the sum of \$14,995.77 was due from Chittim on the lease contract on April 30, 1904, and that the receiver had in his hands, subject to the order of the court that appointed him receiver, more than enough to pay off the claim of plaintiffs, and they asked that the right to the money be determined by the court. Parr answered that Chittim had assumed the debt, and asked that it be paid out of money in the hands of the receiver, and for judgment over against Chittim for the amount of any judgment rendered against him.

Lucie A. Fant admitted the right of the plaintiffs to recover the amount of the lease money due on April 30, 1904, and in answer to the claims of Sullivan alleged that all indebtedness due by D. R. Fant to Sullivan & Co. had been fully paid, and that the latter had never held title in their own right to the lands leased to Chittim & Parr; that the purchase of the lands at the foreclosure sale, and the confirmatory deed thereof of Fant and wife, were made for the purpose of placing the lands of D. R. Fant and Lucie A. Fant in the hands of Sullivan & Co., to be held in trust for them to satisfy their indebtedness, attorney's fees, and expenses of executing the trust, and that what remained was to be the property of Lucie A. Fant; that an accounting was had between Sullivan & Co. and the Fants in cause No. 19,375, in the Fifty-Seventh district court, wherein the Fants were plaintiffs and Sullivan & Co. defendants, and that a decree was rendered therein on May 31, 1907, in which it was adjudged that the entire indebtedness of Fant to Sullivan & Co. had been fully paid off and discharged, and awarding to Mrs. Fant a judgment against Sullivan & Co. for \$65,841.01, and that she recover of Sullivan & Co. a large amount of land, which included practically all the lands leased to Chittim & Parr, a small portion thereof having been sold to pay debts to Sullivan & Co. and the Big Santa Rosa ranch was at the time this suit was filed held and owned by Lucie A. Fant, and that judgment was pleaded as *res adjudicata* of all matters between Sullivan & Co. and the Fants.

The cause was tried by a jury, and the court instructed a verdict in favor of Groos & Co. against Lucie A. Fant, executrix, for the sum of \$16,132.60, with interest and attorney's fees, and against Chittim and Parr, as a firm and individually, for \$14,945.77 and interest, and against the receiver for \$14,960.75, to be applied as a credit on the Fant indebtedness to plaintiffs. The court also instructed the jury that if Sullivan & Co. had notice of the assignment of the lease to Groos & Co., their verdict should be for the latter, and that if they did find for Groos & Co., they should find in favor of D. Sullivan & Co. against Lucie A. Fant, independent executrix of the estate of D. R. Fant, deceased, for the sum of \$14,945.77 with 6 per cent. interest from April 30, 1904, to Novem-

ber 28, 1904. The jury found in favor of Groos & Co. as against Mrs. Fant, Chittim & Parr, and Floyd McGown, receiver, and in favor of Sullivan & Co. against Lucie A. Fant, as independent executrix, the sum of \$15,463.80, and judgment was accordingly so rendered. The suit as between the plaintiffs and Sullivan & Co. was not in terms disposed of in the verdict or judgment, but was in effect disposed of. No dissatisfaction with the judgment is expressed by Chittim and Parr, and the receiver, and this appeal is perfected by Sullivan & Co. and Lucie A. Fant, independent executrix of the estate of D. R. Fant.

The facts show that Sullivan & Co. had full notice of the assignment of the lease contract by Fant to Groos & Co., and we find that the uncontroverted evidence shows that there had been a full settlement of all matters of indebtedness between the estate of D. R. Fant and Sullivan & Co. and the members composing that firm, and the settlement fully set forth and embodied in a judgment in the district court of the Fifty-Seventh judicial district, which was affirmed by this court (110 S. W. 507), and approved by the Supreme Court of Texas (114 S. W. xiii, denying a writ of error), in which judgment Sullivan & Co. were adjudged to pay Mrs. Fant \$65,841.01, and surrender to her valuable land, a part of which is the land concerning the lease of which this controversy arose. We find that the estate of D. R. Fant is not indebted to Sullivan & Co. in any sum.

In the former case of D. R. Fant and Lucie A. Fant v. D. Sullivan & Co., it was alleged by the plaintiffs that a note of date February 9, 1903, due February 9, 1904, for \$260,000 and some other debts were due to the defendants, and plaintiffs expressed a willingness to pay the same, and alleged that defendants had sold enough of the property of plaintiffs, held in trust by them, to discharge all the debts of D. R. Fant to Sullivan & Co. The defendants in that case made a full accounting of all the indebtedness of D. R. Fant, and no claim for the lease money herein involved was placed therein. The judgment in that case determined that the Sullivans did not own the land of the plaintiffs, but held it merely as trustees, and found from the statements and accounting made by defendants that they were indebted to Lucie A. Fant in the sum of \$65,841.01. That amount of money was paid by Sullivan & Co. to Mrs. Fant. That judgment, whether it was *res adjudicata* in a strict sense or not of the claim of Sullivan & Co. in this case, is evidence of the strongest character of a full and complete settlement of all matters between the parties, and we cannot conceive of D. R. Fant being indebted to Sullivan & Co. in the sum of about \$15,000, and yet that large sum being ignored in an accounting made by them, and no effort being made to offset it against the large judgment for money recovered by Mrs. Fant. But one

conclusion can be reached from the testimony, and that is that every debt of every character held by Sullivan & Co. against D. R. Fant was brought forward and formed a part of the judicial settlement between the parties in the suit to which reference has been made. The presumption would prevail, even if there were not positive testimony to the fact, that all accounts were included in the settlement between the parties, and this rule should be applied with greater vigor where the accounts have been presented by a party endeavoring to go back of the settlement. *Barkley v. Tarrant Co.*, 53 Tex. 251.

It was determined in the suit between the Fants and Sullivan & Co. that the "Big Santa Rosa ranch," the land that was leased to Chittim & Parr, and whose lease contract was assigned to Groos & Co., was not the property of Sullivan & Co., but was held in trust by them for Lucie A. Fant, and the title to the same was divested out of them and invested in Mrs. Fant. There is no conceivable reasonable ground upon which they could, under the state of facts contained in this record, lay claim to \$15,000 of Fant's money. The question of the trusteeship of D. Sullivan & Co. was fully investigated in the former suit, and the courts should not be called upon to reinvestigate that question in matters involving the rights of the same parties. The vital issue in that former suit was whether or not Sullivan & Co. held title to the very land, the lease money from which is involved in this suit, as their own, or in trust for Mrs. Fant, and it was fully and finally settled, by the judgment of the district court and the decision of this court, that they held the land as trustees, and that should settle the matter between the parties. It does not matter that the interests of other parties are involved in this suit that were not in the former suit, as between the Fants and Sullivan & Co. the issues determined in a former suit between them are conclusive against them wherever they confront them. *Russell v. Farquhar*, 53 Tex. 355.

In the former suit the right of the Fants to recover the land to which Sullivan & Co. had deeds depended on the question of whether the deeds vested the title in the latter as their own, or to be held in trust for Mrs. Fant, and it was determined by the judgment that the land was held in trust. The whole case revolved around that point. In this case the right of Sullivan & Co. must depend, if it have any basis whatever, upon the issue as to whether they had title to the same land for themselves or as trustees for Mrs. Fant, and they must be held to be estopped to set up that they held title to the land for themselves by the former judgment in any suit between the parties, no matter who else may be involved in the suit. The former judgment is conclusive as evidence

between the parties at all times. *Bigelow, Estoppel*, pp. 90-98; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202. At the time that this rent money became due, Sullivan & Co. had the authority, if the assignment to Groos & Co. was invalid, to collect the money as trustees for Mrs. Fant, and to apply it to the purposes of the trust, but they made no effort to collect it, and, after the trust relation was dissolved and set aside by the judgment of a court, they had no further connection with the lease money, and have established no more right to it than any person who never at any time had anything to do with the matter. Consequently they have no right to raise questions as to the validity of the assignment of the lease to Groos & Co. If the Fant estate is satisfied, no one else can complain.

The judgment of the lower court will be affirmed in every respect except in so far as it awards a recovery to D. Sullivan & Co. as against Lucie A. Fant, executrix, which part of the judgment is reversed, and judgment here rendered that D. Sullivan & Co. take nothing as against said executrix, and that she recover of D. Sullivan & Co. all costs in this behalf expended.

#### VARN v. ARNOLD HAT CO.

(Court of Civil Appeals of Texas. Dec. 22, 1909. Rehearing Denied Feb. 2, 1910.)

##### 1. JUDGMENT (§ 935\*)—FOREIGN JUDGMENT—ACTIONS—PARTIES.

A plaintiff being permitted, under the express provisions of Rev. St. 1895, art. 1256, to discontinue as to one or more of several defendants joined, but not cited, the same rule may be applied where persons who might have been made parties are not joined; and hence a suit could be brought on a foreign judgment against one of two persons against whom the judgment was rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1770; Dec. Dig. § 935.\*]

##### 2. PLEADING (§ 312\*) — VARIANCE BETWEEN PETITION AND EXHIBIT.

Where a copy of the original judgment sued on was attached as a part of the petition, there could be no variance between the allegations of the petition and the judgment itself, since, whatever might be alleged, the instrument would be bound to control, and defendant could not be misled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 943; Dec. Dig. § 312.\*]

##### 3. JUDGMENT (§ 942\*)—FOREIGN JUDGMENT—ACTIONS—PRESUMPTIONS—JURISDICTION.

Every presumption will be indulged in favor of the jurisdiction of a court in a sister state, rendering a judgment, in the absence of any plea or evidence attacking it; and an allegation that "the city court of Andalusia, Covington county, state of Alabama, is and was a court of general jurisdiction, having jurisdiction of the person of defendant W. W. Varn and of the subject of said suit," was sufficient in the absence of such attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1781; Dec. Dig. § 942.\*]

**4. EVIDENCE (§ 348\*)—FOREIGN JUDGMENT—CERTIFIED COPY—SUFFICIENCY OF CERTIFICATE.**

A certificate of the clerk of the court attached to a judgment, reciting that the judgment was "a full, complete, true, and exact copy of the proceedings in the cause of record in the office of said court in favor of \* \* \* [stating the style of the case], and attested by the seal of the court, was sufficient, though the certificate did not have the style of the case at its head.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1370; Dec. Dig. § 348.\*]

**Error from District Court, El Paso County; J. M. Goggin, Judge.**

Action by the Arnold Hat Company against W. W. Varn. Judgment for plaintiff, and defendant brings error. Affirmed.

M. W. Stanton, for plaintiff in error. Robt. T. Neill, for defendant in error.

**FLY, J.** This is a suit instituted by defendant in error against plaintiff in error, on a judgment recovered by it in the city court of Andalusia, Covington county, Ala., of March 5, 1908, for the sum of \$842.25; the same being a joint judgment against plaintiff in error and A. T. Woodham. Judgment was asked on the Alabama judgment only against W. W. Varn, who lived in El Paso at the time this suit was instituted. Plaintiff in error answered by general and special demurrers and general denial. The cause was tried without a jury, and judgment rendered for the Arnold Hat Company in the sum of \$880.18, being the principal, with 6 per cent. interest per annum from March 5, 1908, and all costs of suit.

The first and second assignments of error question the action of the court in overruling exceptions to the petition involving the right and power of defendant in error to institute suit against one party on a judgment of another state, in which judgment was rendered against the party sued jointly with another, who is not joined in the suit in this state, unless it is alleged that the joint debtor is beyond the jurisdiction of the court, is dead, or insolvent. We do not think the assignments should be sustained. The authorities cited by plaintiff are not applicable to the case under consideration. The Texas authorities hold a contrary doctrine to that asserted by plaintiff in error. *Cook v. Phillips*, 18 Tex. 31; *Forbes v. Davis*, 18 Tex. 268; *Shipman v. Allee*, 29 Tex. 17. The plaintiff in a suit is permitted, by statute, to discontinue as to one or more of several defendants (articles 1256-1259, Rev. St. 1895), and it is held in *Wooters v. Smith*, 56 Tex. 198: "Such being the rule in cases in which defendants have been joined in the suit and not cited, the same must be applied in a case in which some parties, who might have been made parties, are not joined. The object of the statute was to abolish the common-law

rule, and such parties as are only liable as indorsers, guarantors, sureties, or drawers of accepted bills are protected from the operation of the rule thus established by articles 1257, 1258, 1259, Rev. St." That decision is cited with approval in *Miller v. Sullivan*, 89 Tex. 490, 35 S. W. 362, and *Bute v. Brainerd*, 93 Tex. 137, 53 S. W. 1017. The rule announced would apply to a suit on the judgment of another state, as well as to suits on contracts. No distinction can be drawn that would apply the rule as to joint and several obligations in contracts, and would not apply it to a judgment obtained on a contract which is made a basis of the suit. The basis of the suit in Alabama was an account against A. T. Woodham and W. W. Varn. On that account a judgment was rendered against the defendants for \$842.25. At the time this suit was instituted Varn lived in El Paso county, and defendant in error was authorized to sue him alone on the judgment rendered against him and another in Alabama. Plaintiff in error made no effort to show that his rights were prejudiced by the failure to sue Woodham, and this court cannot indulge in speculations as to the possibility of the Alabama judgment having been paid off by the latter. *Keesey v. Old*, 82 Tex. 22, 17 S. W. 928.

A copy of the original judgment was attached to and made a part of the petition, and there is no merit in the contention as to there being a conflict in the allegations of the petition and the exhibit of the judgment attached thereto; and the reason for so holding is apparent. There could be no variance between the allegation and the instrument, itself made a part of the petition, because whatever might be alleged the instrument would be bound to control, and the party sued could not therefore be misled. The instrument itself would cure any misdescription of it in the petition to which it is attached as an exhibit. *Peters v. Crittenden*, 8 Tex. 131; *Pyron v. Grinder*, 25 Tex. Supp. 160; *Spencer v. McCarty*, 46 Tex. 213; *Longley v. Caruthers*, 64 Tex. 287; *Beham v. Ghio*, 75 Tex. 87, 12 S. W. 996; *Mast v. Nacogdoches County*, 71 Tex. 386, 9 S. W. 287; *Insurance Co. v. Boren*, 83 Tex. 97, 18 S. W. 484. The allegation that "the city court of Andalusia, Covington county, state of Alabama, is and was a court of general jurisdiction, having jurisdiction of the person of defendant W. W. Varn and of the subject of said suit," was sufficient, especially in the absence of any plea attacking the jurisdiction of the Alabama court. Every presumption will be indulged in favor of the jurisdiction of the court which rendered the judgment, in the absence of pleading or evidence attacking it. When a judgment of a sister state is produced, the presumption is that the court in which it was rendered had

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

jurisdiction and authority. *Reid v. Boyd*, 13 Tex. 241, 65 Am. Dec. 61; *Houston v. Dunn*, 13 Tex. 476; *Henry v. Allen*, 82 Tex. 35, 17 S. W. 515. The judgment was properly admitted in evidence. If plaintiff in error wished to attack the validity of the judgment, he should have filed proper pleadings to justify such attack. Defendant in error did all that the law required of it. The certificate attached to the judgment was sufficient. The clerk certified that instrument contained "a full, complete, true, and exact copy of the proceedings in the cause of record in the office of said court in favor of Arnold Hat Company against A. T. Woodham and W. W. Varn, defendants," and attested it by the seal of the court. The judgment was sufficiently identified, even though it did not have the style of the case at its head.

There is no error in the judgment, and it is affirmed.

NEILL, J., did not sit in this case.

# ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. KEITH.†

(Court of Civil Appeals of Texas. Dec. 23, 1909. Rehearing Denied Jan. 27, 1910.)

## 1. MASTER AND SERVANT (§ 124\*)—DUTY OF INSPECTION—BRAKE BEAMS OF CARS.

Where brakemen in the employ of defendant, when switching, commonly and necessarily rode the cars by catching the handles on the sides of the cars, and standing on the ends of the brake beams, with the knowledge and acquiescence of defendant, it was its duty to use ordinary care to ascertain whether the brake beam of a car, which was to be switched, was in reasonably safe condition to be used by a brakeman, falling in which it was negligent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

## 2. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—DEFECTIVE BRAKE BEAMS OF CARS—EVIDENCE.

Evidence, in an action by a brakeman for injury from the giving way of a brake beam of a car when he stepped on it, in the course of the switching of the car, held sufficient to authorize a finding that the brake beam and its appliances were in a defective and dangerous condition, causing the injury, which condition could have been discovered by a reasonable inspection, had defendant made one.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954-972; Dec. Dig. § 278.\*]

## 3. ABATEMENT AND REVIVAL (§ 77\*)—APPEARANCE OF ADMINISTRATRIX—ADOPTION OF PLEADINGS.

The written appearance of the deceased plaintiff's administratrix, suggesting his death and her authority to prosecute the pending suit, and expressly adopting, reaffirming, and making her own in all respects the allegations in his petition then already filed, retains and constitutes in legal force and effect such pleading a

part of her pleading in the case, so as to authorize judgment in her favor.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 488-494; Dec. Dig. § 77.\*]

## 4. TRIAL (§ 260\*)—INSTRUCTIONS—OTHER INSTRUCTIONS.

Refusal of the defendant's requested instruction, in an action for personal injuries, begun by deceased, and continued by his administratrix, that there could be no recovery if deceased died of clot on the brain, could not be complained of, the main charge—affirmatively directing that plaintiff could not recover if the efficient predominant cause of the death was the injury in suit received by deceased, or if he after his injury became affected with some disease, and such disease was directly and proximately caused by the injury, or arose as the direct and proximate result of such injury, and his death would not have resulted had it not been for such injury—sufficiently and affirmatively presenting the issue as to the cause of his death.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

## 5. TRIAL (§ 252\*)—INSTRUCTIONS—EVIDENCE WARRANTING INSTRUCTION.

Evidence from which it was inferable that a brake beam was worn and would swing back and forth across the car warranted an instruction submitting such issues.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Action by Lidle Keith, administratrix, against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

S. R. Keith, while in the performance of his duties as a brakeman, received a personal injury through the alleged negligence of appellant, and brought the suit for damages. He died while the suit was pending, leaving neither wife, child, nor parents. His sister, Miss Lidle Keith, having been appointed temporary administratrix of his estate with express authority to do so, seasonably suggested his death and made herself a party plaintiff, claiming that Keith's death did not result from his injury. By the petition it is claimed that it was the general and universal practice known to appellant, of brakemen in its service to make use of the ends of brake beams in catching upon and riding short distances on cars that were being switched, and they properly so used them in performing such work; that it became necessary for Keith, at the time of his injury, to catch onto a certain car then being set out of his train to a siding, and be upon it while it was being backed to the side track in order to operate the coupling lever and to uncouple the car and set the brake, and in the performance of such duties, while in the exercise of proper care, first catching and holding with his hands the handhold or ladder on the side of the car, he placed his foot, as was proper and usual, on the end of the brake beam of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

car, and as he placed his foot and weight on the brake beam it suddenly gave way and moved, causing his foot to slip under the moving wheels of the car which was next, crushing it. It was alleged that the brake beam and its appliances, though not known at the time to Keith, were worn, dilapidated, loose, and insecure, and defectively and insecurely arranged, adjusted, and guarded, and had an excessive motion, or slack. The appellant answered by general denial, plea of contributory negligence, and assumed risk. In accordance with the verdict of a jury, judgment was entered for appellee.

The evidence substantially shows that on the morning of the day that the injury occurred appellant's freight train, of which Keith was head brakeman, comprising eight or nine cars, one of which was an International & Great Northern car, which had been made up at Lufkin, a terminal point, left Lufkin en route to Tyler. When the train reached Wells, a station about 16 miles north of Lufkin, the conductor directed that the International & Great Northern car be shifted from its then position in the train near the caboose next to the locomotive, so that it might be set out and left at Alto, a station further on, without delay; and in executing this order Keith was injured. Keith cut or uncoupled the train at the rear end of the International & Great Northern car, and the front portion was moved forward north to a point beyond a switch which led to a siding, it being the intention to put the International & Great Northern car on the siding, and when the other cars had again been put on the main track to pick up the International & Great Northern car with the locomotive, push it down on the main track, and couple it to the other cars. After the string of cars had passed north of the switch, Keith disconnected the air hose at the front end of the International & Great Northern car and set the switch for the siding, when, upon his signal, the engineer pushed the train upon the side track south, the International & Great Northern car leading. Keith ran beside that car, as he said, leaped and caught with his hand the handhold at or near the rear end of it as it was then moving, and at the same time put his foot and weight on the end of the brake beam, as he said; his purpose being to uncouple the car by operating the coupling lever, mount it, and stop it by means of the brake when it had gone far enough to clear the main track. When his weight was placed against the end of the brake beam, it, as he said, at once gave way laterally and slipped by the car wheel, causing his foot to drop across the rail of the track, when the wheel of the next car ran over and crushed it, causing amputation to be necessary. No other witness but Keith saw the way that he was injured. The other witnesses testified to facts that make a conflict in the evidence as to whether

Keith at the time of his injury was riding between the cars or on the side of the car. On this conflict we are bound by the jury's finding, and assume the truth thereof as testified to by Keith. It was proved that brakemen invariably and necessarily rode the ends of the brake beams in similar circumstances, and that Keith's conduct and manner of operating the cars on that occasion were customary among trainmen, and that Keith had no occasion to operate the car or ascertain the condition of its brake beam before the time of the injury. The amount of the verdict is sustained by the proof.

E. B. Perkins, Daniel Upthegrove, and Marsh & McIlwaine, for appellant. Johnson & Edwards, for appellee.

LEVY, J. (after stating the facts as above). By the first and second assignments it is contended that there is no sufficient evidence to support the finding of the jury that the braking appliances of the car in question were defective, or that if defective the appellant by ordinary care could have ascertained the condition before injury, or that the injuries received by Keith were the result of any negligence on the part of the appellant.

It being established, and not questioned, that brakemen in the service of appellant, when switching, commonly and necessarily rode the cars by catching the handles and standing on the ends of the brake beams, and this with the knowledge and acquiescence of appellant, and that this particular car in question was to be switched to the siding at Alto, then, it is not doubted, the legal duty existed on the part of the appellant to use ordinary care to ascertain whether the brake beam of the car in question was in reasonably safe condition to be used by Keith, and failing in this duty would be negligence. *Railway Co. v. Harris*, 45 Tex. Civ. App. 542, 101 S. W. 506; *Railway Co. v. Conway*, 44 Tex. Civ. App. 68, 98 S. W. 1073; *Railway Co. v. Templeton*, 87 Tex. 42, 26 S. W. 1066.

Bearing in mind the rule that the burden was upon appellee to prove the facts entitling her to recover, is there substantive proof by appellee of negligence of appellant in its duty owing Keith? If so, and we think so, the appellee was entitled to have the jury pass on the question of negligence vel non of appellant, and having been determined by the jury, upon a consideration of all the facts, adverse to appellant, their finding as is their function, is conclusive in the case. The salient features of the testimony, and the effect and tendency of which, will be considered. It is affirmatively shown that the particular car in question was a box car equipped with a brake beam and rigging as other cars, which was operated in the same mode as all other brakes. It must be taken as a fact proved, Keith affirmatively so testifying,

that this brake beam, when he placed his weight on the end, at once gave way and slipped by the flange of the car wheel. There is evidence that the weight of a person, as in this case, would not cause the brake to slip by or pass the flange of the car wheel, unless because of either the want of a guard pin, or a defective or worn one, or because of improper slack, or loose motion from the brake rigging; and that either condition existing would cause the injury. Was either condition as to this car shown? The make-up and construction of brakes and their rigging was shown. It does appear that the brake in question was of the usual pattern of brakes. It was shown that the brake shoe in a properly constructed and connected up brake beam fits against the face of the car wheel, normally having the distance, or play, from the face of the wheel of from one-fourth to one-half an inch. The flange of the car wheel extends about  $1\frac{1}{2}$  inches deep. To keep the brake shoe in position, and to arrest lateral movement, and to prevent its slipping past the flange of the car wheel, guard pins are used. To prevent the beam, having a guard pin, from passing by the flange of the wheel, it is required further that the brake rigging, or rods, be level and properly and sufficiently adjusted or connected up. The rods operate the brake beam. The guard pins are iron bolts put on through the brake beams and secured by a nut on the bottom side to hold them. No witness says or denies that the particular brake beam was constructed with a guard pin. A witness for appellee testified, and it is not denied, that "all outside brakes have guard pins." It was affirmatively shown that this particular brake "was an outside brake." It was shown by appellant, by witness, "I have seen some brakes without guard pins." The two statements are not inconsistent, but consistent and a question for the jury. If "all outside brakes" have guard pins, it appearing that the instant beam was of the usual pattern of brakes, then the "some brakes" without guard pins could be referable only to inside brake beams. If the statement be true that all outside brakes have guard pins, and the instant brake being of usual pattern and an outside brake, the jury were warranted in finding from such testimony that the brake in question was constructed with a guard pin.

There is testimony tending to show, and sufficiently support the finding of the jury, that the braking appliances of this particular car were defective at the time of the injury. There was evidence, as to guard pins, that: "When they are put on there is no way for them to come out, unless they break or wear out. They can be broken by a wreck, or by the brake beam coming down, and there may be other reasons for it. I do not think they ever work loose and come out." It is evident from the record that

there was no wreck, and that the brake beam did not come down, and these facts, coupled with the affirmative proof of careful operation of the train and braking appliances, authorized the jury to find that the guard pin, which is made to appear as a necessary part of the proper construction of the brake, must have been defective. This also was affirmative evidence sufficient at least to negative any recent or sudden happening of its defective condition, and to lead reasonably to the conclusion that it was defective and open to observation at the time of and before the leaving of the train from Lufkin, a terminal point, one hour before, and at which point it was shown appellant had a regular car inspector charged with the duty of inspecting all cars. Besides, it is shown that the train was made up at Lufkin. As to the condition of the brake rigging of the car at the time of the injury there is affirmative evidence; the weight and consideration to be given to which is at least for the jury. The conductor and engineer each observed the brake beam in a very short time after the injury. The engineer testified: "I noticed if the brake shoe was connected up and if the air was working. I saw that it was connected up. There seemed to be a little slack in the brake shoe. I could not say that there was more than usual, but there was enough that I noticed it." The conductor testified: "I did not notice whether the brake beam had guard pins. The brake beam was hanging loose on the ball of the wheel. It was probably an inch and a half from it; I cannot say how much." Considering that it was affirmatively shown that the normal play of a brake shoe in a brake beam properly connected up would be from one-fourth to one-half an inch, and the flange of the car wheel was  $1\frac{1}{2}$  inches deep, and that the brake beam did in this case slip by the car wheel, then, if it be true that the particular brake shoe was hanging from its normal position "enough that I noticed it," and "probably an inch and a half," there was evidence pointing directly to the chief cause of the injury as being the fact of improper slack in the brake rigging. It was affirmatively shown that to hang that distance from the car wheel was because of defective rigging. As circumstances negating a recent occurrence of the defective condition, it was affirmatively shown that there was a careful operation of the train and car for the distance of 18 miles that it had come, and in being switched to the siding. By these facts, the brake appliances if out of order being easily seen by inspection, then, in the absence of proof of an inspection by appellant, the jury on these facts were warranted to infer negligence. Such facts strongly negated a sudden happening. If it could be said that, from the circumstances offered, the jury, acting as reasonable men, would

be persuaded to render a verdict on the issues involved for appellee, then appellee would be entitled to have such evidence go to the jury for their decision. It is laid down as an elementary rule by Greenleaf that a party having the burden of proving an issue has made out a prima facie case, to get to the jury, when he either by means of a presumption or by a general mass of strong evidence has entitled himself to a ruling that his opponent should fail if he does nothing more in the way of producing evidence.

The evidence, we think, fully authorized the finding of the jury that the brake beam and its appliances were in a defective and dangerous condition at the time of the injury, and that such condition was discoverable by appellant by reasonable inspection, which does not appear to have been made, and that appellant's negligence proximately caused the injury. *Railway Co. v. Lindsay*, 27 Tex. Civ. App. 316, 65 S. W. 668; *Railway Co. v. Wood*, 63 S. W. 164; *Railway Co. v. Lynch*, 40 Tex. Civ. App. 543, 90 S. W. 513; *Railway Co. v. Johnson*, 83 Tex. 628, 19 S. W. 151; *Railway Co. v. Chambers*, 17 Tex. Civ. App. 487, 43 S. W. 1091; *Railway Co. v. Winton*, 27 Tex. Civ. App. 503, 66 S. W. 477; *Machine Co. v. De Guereque*, 46 Tex. Civ. App. 86, 101 S. W. 814.

Appellee in her written appearance suggesting the death of Keith, and her authority to prosecute the pending suit, specially alleges that she "does hereby adopt and reaffirm and make her own in all respects the allegations contained in plaintiff's first amended original petition which was filed in this court in this case on September 8, 1908, by the said S. R. Keith, as plaintiff in this cause, in his lifetime." Appellee's appearance being as a legal representative to continue the suit, and a form of law for the substitution of a plaintiff, her declaration in writing, as she made, expressly adopting, reaffirming, and making her own in all respects the allegations in the petition then already filed, would, we think, retain and constitute in legal force and effect the pleading referred to a part of her pleading in the case. We would not be warranted, therefore, we think, in ruling that there was no pleading in the case on the part of appellee authorizing the court to enter judgment in favor of appellee against appellant. The third assignment is overruled.

The appellant by special charge, complained of in the fourth assignment, asked an instruction that, if "Keith died from rhombus or clot on the brain," a verdict should be returned in its favor. Walving as unimportant the question of the inaccurate technical designation of the disease as "rhombus," we think the court's main charge sufficiently and affirmatively presented to the jury the issue as to the cause of Keith's death. The jury were affirmatively directed that appellee could not recover if the efficient pre-

dominant cause of the death of Keith was the injury in suit received by him, or if Keith after his injury "became affected with some disease, and that such disease was directly and proximately caused by the injuries received on February 8, 1907, or arose as the direct and proximate result of such injuries, and that the death of said Keith would not have resulted had it not been for such injuries." *Roth v. Protective Ass'n* (Sup.) 115 S. W. 81.

By the fifth assignment it is contended that, there being no evidence that the brake beam was "worn," or "that it would swing back and forth across the car," it was error for the court to submit such a condition of the brake beam as an issue. The charge of the court was: "If you find that the brake beam of the car was worn, defective, and out of repair to the extent that it would swing back and forth across the car when used by a brakeman to put his foot upon in riding and mounting the car," etc. There is evidence, we think, tending to show such condition of the brake beam; and, as the phrases used by the court are appropriate to the evidence, the assignment, we think, should be overruled, as the charge was not misleading to the jury. It was the duty of the court to evolve the issues in the case; and in so doing the court is authorized, in defining the proper issues, to pay regard to inferences appropriate to the evidence which the jury may be authorized to draw from such inferences. To that effect, *Maes v. Railway Co.*, 23 S. W. at page 727; *Railway Co. v. Parvin*, 27 Tex. Civ. App. 60, 64 S. W. 1008.

The court in his charge sufficiently and substantially, we think, gave the requested instruction; and the sixth and seventh assignments are overruled.

If, as the evidence shows, Keith's injury was not caused merely by his attempting to uncouple the cars while in motion, but was caused by his attempting to stand on the brake beam, as was customary, while the cars were moving, and if he would not have been injured, as is shown, but for the intervention of appellant's negligence in furnishing him, to use in a way that was customary, a defective brake beam, then to have given the requested instruction complained of in the eighth assignment, requiring a verdict for appellant on the grounds therein stated, without requiring a finding that the acts of Keith therein described proximately contributed to the injury, would, we think, have been error. *Railway Co. v. Cleland*, 110 S. W. 122.

We would not be authorized, we think, in the case to rule that the jury were not warranted in finding for appellee the amount of the verdict, and the ninth assignment, complaining of its being excessive, is overruled.

The case was ordered affirmed.

TOEPPERWEIN v. CITY OF SAN ANTONIO.†

(Court of Civil Appeals of Texas. Jan. 12, 1910. Rehearing Denied Feb. 2, 1910.)

1. TAXATION (§ 573½\*)—JUDGMENT FOR TAXES—ASSUMPTION OF PAYMENT—RIGHTS OF CITY.

The assumption by the purchaser of a lot of the payment of a judgment for taxes in favor of a city gave it the right to sue him personally for the debt evidenced by it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1145; Dec. Dig. § 573½.\*]

2. TAXATION (§ 641\*)—ASSUMPTION OF TAXES—ENFORCEMENT OF LIEN—PARTIES.

The lien on a lot securing subsequently accruing taxes which a purchaser assumed could not be enforced, except by a suit against him.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1304; Dec. Dig. § 641.\*]

3. ACTION (§ 45\*)—JOINDER OF CAUSES OF ACTION—ASSUMPTION OF TAXES—ENFORCEMENT OF LIEN.

A city, desiring to avail itself of the assumption by a purchaser of a lot of a judgment in its favor for taxes, and also of subsequently accruing taxes thereon, and having the right to personal recovery against him for both debts, could litigate his liability in one suit, and could properly include therein a prayer for foreclosure of the lien on the lot common to all the taxes.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 400, 430; Dec. Dig. § 45.\*]

4. TAXATION (§ 634\*)—LIEN—PROCEEDINGS TO ENFORCE.

A wife and her husband having parted with all their interest in a lot, it was not subject to be administered as a part of her estate, and a tax lien on it could not be enforced through such proceeding.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1291-1297; Dec. Dig. § 634.\*]

5. JUDGMENT (§ 903\*)—VEXATIOUS ACTION—PROCEEDINGS TO ENFORCE TAX LIEN.

Where a judgment of foreclosure of a tax lien against a lot was rendered against a husband and wife, and she died without a sale of it, a sale made after her death would be of doubtful effect, depending on whether it was community or her separate property, and all questions as to its effect would be removed by a proceeding against a subsequent purchaser, who assumed payment of such judgment, by a judgment establishing a lien and a clear right to issue foreclosure process, and the inclusion of such prior judgment in a suit to enforce a lien for all unpaid taxes was not for an idle and vexatious purpose.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 903.\*]

6. TAXATION (§ 573½\*)—PURCHASER OF PROPERTY—PERSONAL LIABILITY.

A purchase of realty subject to a tax lien does not impose personal liability on the purchaser.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1145; Dec. Dig. § 573½.\*]

7. TAXATION (§ 511\*)—INNOCENT PURCHASER—LIABILITY FOR TAXES.

That the owner of a lot, who bought it subject to taxes, was an innocent purchaser, could not be set up as a defense against a suit to enforce the tax lien, as every one is charged with knowledge of taxes and of the existence of the lien, and especially a person undertaking to pay all taxes and taking subject thereto.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 947; Dec. Dig. § 511.\*]

8. HOMESTEAD (§ 105\*)—TAXES—PENALTY FOR NONPAYMENT.

A penalty cannot, under the Constitution, be imposed on a homestead in addition to "taxes due thereon."

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 162-164; Dec. Dig. § 105.\*]

On Rehearing.

9. EVIDENCE (§ 450\*)—PAROL EVIDENCE AFFECTING WRITING.

A clear and unambiguous written agreement to take property "subject to all taxes due thereon" is not subject to construction or explanatory testimony to show an agreement to assume the same.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2073; Dec. Dig. § 450.\*]

10. VENDOR AND PURCHASER (§ 80\*)—ASSUMPTION OF TAXES—EVIDENCE.

Evidence held not to show that the purchaser of a lot assumed personally to pay taxes due thereon, but to show that he took it subject thereto.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 135; Dec. Dig. § 80.\*]

Appeal from District Court, Bexar County; Arthur W. Seeligson, Judge.

Suit by the City of San Antonio against Udo Toepperwein. From a judgment for plaintiff, defendant appeals. Reformed and affirmed.

Camp & Camp and Solon Sewart, for appellant. Joseph Ryan, for appellee.

JAMES, C. J. The petition of the city contained allegations that on October 3, 1904, the city recovered a judgment against Maria de los Santos Gonzales and her husband, Florentio Gonzales, in the sum of \$3,203.09, with interest at 6 per cent. per annum from that date and costs of suit with a foreclosure of a tax lien on a lot in the city of San Antonio, which judgment was unsatisfied in whole or in part; that said Maria Gonzales died about August 2, 1906; that by deed dated December 1, 1904, she and her husband conveyed the property to Hortense Nicklis; that on or about July 15, 1907, Hortense Nicklis and her husband conveyed it to defendant Toepperwein, who, as a part of the consideration therefor, assumed the payment of said judgment and all the accrued taxes on the property, and that he is now justly indebted to the city in the full amount of said judgment, and also the taxes due the city on said property for the fiscal years 1903, 1904, 1905, and 1906 with 6 per cent. interest from the 1st day of June of each of said years, also 10 per cent. of same as penalty for delinquency, the total of the taxes for said years being \$506.54, for all of which plaintiff has a lien on the property. The petition prayed for a personal judgment for the full amount of the judgment sued on, and for a foreclosure of the lien given in the judgment, also for the taxes, interest, penalty, and costs which have accrued since the said judgment, being for the fiscal years 1903, 1904, 1905, and 1906, and that the city's tax lien on the property

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error granted by Supreme Court.

be foreclosed and for general relief. Defendant answered by general demurrer and by special exception to so much of the petition as sought a recovery and foreclosure and enforcement against the defendant of the judgment of 1904, "because it appears from the petition that executions have been duly issued on said judgment, and the said judgment is not dormant, but is a valid and existing judgment against the defendants in said cause No. 15,398, from and under whom said petition alleges this defendant acquired his claim and title to the premises as described in the petition subsequent to the date of the rendition of said judgment, and while, as it appears from the allegations of said petition, said judgment was in full force and existence, and because it does not appear from the allegations of said petition that there is any necessity for another judgment on said judgment." There was also a general denial. Plaintiff filed a trial amendment, which alleged that Hortense Nicklis, when she bought, and her husband assumed to pay the judgment and the accrued taxes on the property; that plaintiff cannot now rely on said judgment because Mrs. Gonzales is dead, and no administration was ever had on her estate, and that neither she nor her husband has any title, claim, or interest in said property because same was sold and conveyed by them to Hortense Nicklis, as alleged in the petition, and was by said Hortense Nicklis and her husband afterwards sold and conveyed to this defendant. The court rendered judgment for plaintiff against defendant for the full amount of the judgment and interest to date, and also for the taxes for 1903, 1904, 1905, and 1906, with interest, penalties, and costs, except penalties for the years 1903 and 1904, which the court held the city was not entitled to for the reason, as found by the court, that during those years the property was homesteaded of Gonzales and wife. The judgment awarded a foreclosure of lien.

The first assignment of error complains of the overruling of said special demurrer. The petition showed that the payment of the judgment had been assumed by Toepperwein, which, if true, gave the city the right to prosecute against him personally an action for the debt evidenced by it. It alleged also that he assumed subsequently accruing taxes on the property, which were a lien, and for these there was no judgment, and the lien securing them could not be enforced, except by a suit against Toepperwein, to whom the property had been conveyed. It seems to us that, the city desiring to avail itself of the assumption by him, and having the right to obtain personal recovery against him for the judgment debt, as well as for the later taxes, it could litigate his entire liability in one suit, and could properly include in such suit a prayer for a foreclosure of the lien that was common to all of the taxes. Mrs. Gonzales and her husband having parted with their interest in the property, it was not sub-

ject to be administered on as a part of her estate, and the lien on the property could not have been enforced through such proceeding. Mrs. Gonzales, one of the parties against whom the judgment for foreclosure was rendered, having died without a sale of the property, through process under it having been made, a sale made afterwards through such process would have been of doubtful effect, depending upon whether or not the property was community property or the separate property of Mrs. Gonzales. If community, such a sale after the death of Mrs. Gonzales would probably have passed title, as the husband, a judgment defendant, was living. But this question, as well as others, would be removed by a proceeding against the defendant, establishing the lien and a clear right to issue process of foreclosure. The inclusion of the tax judgment in this suit was not for an idle and vexatious purpose. We think that the special demurrer was properly overruled. *Stevens v. Stone*, 94 Tex. 415, 60 S. W. 959, 86 Am. St. Rep. 861.

The third assignment of error, and what is called a proposition under it, both fail to specify any point intended to be made. In the argument, however, the point indicated appears to be substantially the same as that embodied in the fourth assignment, which states that there was no proof of plaintiff's allegation that Hortense Nicklis and husband, defendant's immediate grantors, assumed the judgment, and therefore the court's first conclusion of law that plaintiff should have judgment for the amount of the judgment, with 6 per cent. per annum interest thereon from its date, all costs of that suit and the taxes, interest, penalty, and costs for the subsequent years, etc., was wrong. The sixth assignment is to the same effect, and the point is that, unless plaintiff proved that Mr. and Mrs. Nicklis were obligated to pay said judgment, this defendant was not liable to the city on his assumption of it. There was no effort on the part of the city to prove that Mrs. and Mr. Nicklis had assumed to pay the judgment or the tax indebtedness represented by it. It did not accrue while they held the title. This question is the subject of conflicting decisions, and so far as we are informed, it has not been decided in this state. In the case of *Fant v. Wright*, 61 S. W. 516, it is referred to, but not determined. And we find it unnecessary to pass upon the question in this case, because the written evidence of the terms of the purchase, signed by the parties, shows that Toepperwein did not assume the payment of the taxes, but that he bought the property subject to the taxes, and the decisions are uniform in holding that this does not impose personal liability on the purchaser. *Garza v. Hammond*, 39 S. W. 610.

The third conclusion of the court, to wit, "That plaintiff has a tax lien on said property for all the taxes, including said judgment against Gonzales and wife, and that said

lien should be foreclosed according to law," is attacked by the seventh, eighth, and ninth assignments. Appellant's point is expressed as follows: "Where a plaintiff seeks to foreclose a lien or equitable claim against one having the legal title to the property, the burden of proof is upon the plaintiff to show that the one having the legal title to said property purchased it with notice of such lien or equitable claim, or that he did not pay a valuable consideration therefor." There was no evidence that defendant knew of the judgment, and he testified that he did not know anything about it when he bought. The proposition makes no question that the judgment, in connection with the petition in that case, which was also introduced, was not what it purports to be, solely an adjudication of what was due the city on this property in respect to the taxes, for the years 1887 to 1902, inclusive. The point made by the proposition is that, without proof that defendant was informed of this judgment when he purchased, he is protected from any recovery by what it evidences, on the ground of innocent purchaser. Defendant could not set up such a defense against taxes. Every one is charged with knowledge of taxes, and of the existence of the lien they carry, and especially so a person who undertakes to pay all taxes, or takes subject to all taxes.

Appellee has cross-assignments of error, asserting that the court erred in refusing to render judgment in favor of the city for the penalties in respect to the taxes for the fiscal years 1903 and 1904. We concur with the ruling made in *City of Marlin v. Green*, 34 Tex. Civ. App. 421, 78 S. W. 704, 79 S. W. 40, that a penalty cannot, under the Constitution, be imposed upon a homestead in addition to the "taxes due thereon."

The judgment will be reformed so as to deny execution against appellant for any deficiency, and, as thus modified, it is affirmed. Reformed and affirmed.

#### On Motion for Rehearing.

Appellee contends that the court's finding of fact No. 11, viz., "that when Toepperwein purchased said title from Mrs. Nicklis and husband, he agreed, as part of the purchase price therefor, to pay all taxes legally owing to the city of San Antonio," is conclusive that Toepperwein assumed personally to pay these taxes; the finding being in accordance with the evidence. Appellee states that the finding is based on the testimony of Toepperwein himself that he agreed to pay taxes due on said property, also that "he agreed to pay whatever was due as legal taxes, and that was part of the consideration for the property;" also "as a consideration he assumed to pay the taxes that were due on it." Taking appellant's said language literally, it would support the finding. But taking it in connection with the written evidence of the terms of the purchase, we regard the testimony above cited as having a different

meaning than that Toepperwein assumed personal responsibility for the taxes.

The following is the writing:

"San Antonio, Texas, July 19, 1907. Mrs. Hortense M. Nicklis, Niagara Falls, N. Y. Dear Madam: I have purchased from E. E. Nicklis and his wife, Hortense M. Nicklis, lot No. 8, city block No. 916 on South Flores street in the city of San Antonio, Texas. In purchasing said lot it is understood that I take the same subject to all taxes due thereon. I have paid to Mr. A. W. Bitter the sum of \$1,000.00 cash; of this sum he is to send you \$666.66 $\frac{2}{3}$  and he is to retain of said amount \$333.33 $\frac{1}{3}$  to pay the pretended claim of Florencio Gonzales, should it become necessary to pay him anything, and if it turns out that he is entitled to receive more than that sum, then I assume the settlement with him of all over and above said sum of \$333.33 $\frac{1}{3}$ . And if the said Gonzales is settled with for a less sum than \$333.33 $\frac{1}{3}$ , then the balance of said sum of \$333.33 $\frac{1}{3}$  so retained by Mr. A. W. Bitter is to be paid over to you. I also assume the payment of the commission of A. W. Bitter, and it is further understood that I will also satisfy Mr. Joseph Ryan for his services in representing said Nicklis and wife in one certain suit between them and said Gonzales involving the right to the possession of said lot pending in the district court of Bexar county. Yours truly, [Signed] Udo Toepperwein.

"Accepted. [Signed] A. W. Bitter, Agent."

This agreement is clear and unambiguous on the subject of taxes, and that he took the property subject to the taxes. It was not on this feature subject to construction, or explanatory testimony. The subsequent portions of the same agreement, in which Toepperwein was made to assume in terms to pay certain sums, emphasizes the fact, if it admitted of any emphasis, that it was not intended that he should assume the taxes. The testimony of appellant cited above is not necessarily inconsistent with the idea that he merely took the property subject to the taxes, as the wording expressly states. In a sense he was to pay the taxes, or agreed to pay the taxes, if the same were to come out of this property, which after the sale became his.

In reference to this agreement or writing, the motion states that it was made four days after the deed was dated. This is a fact, as the deed bore date July 15, 1907. This deed, as it appears in the record, simply shows that it was a deed from E. E. Nicklis and wife, Hortense Nicklis, properly acknowledged by the grantors before a notary public, and duly recorded. That deed was not necessarily delivered on its date, and the evidence would clearly indicate that it was not. The writing in question was made four days after the date of the deed, and it was in the form of a letter addressed to Mrs. Hortense Nicklis, Niagara Falls, N. Y., and agreed to by her agent, Mr. Bitter. Evident-

ly the deed was executed there and sent to San Antonio for delivery. It is not in accordance with the ordinary course of business for such a writing to be executed days after the final consummation of the sale, but, regularly, it would be made, at the time of the sale. It is a matter of common knowledge that it would take about that time for the deed to come from Niagara Falls. Furthermore, A. W. Bitter, who was Mrs. Nicklis' agent at San Antonio, and acted for her in selling the property to Toepperwein, testified in reference to the agreement: "This is the agreement with reference to the property located on South Flores street. \* \* \* As to whether Mr. Toepperwein agreed to pay the taxes, whatever was due on it, I will say it reads there; there it is; it reads for itself." For these reasons we saw proper to give controlling weight to the written evidence of what the parties agreed to as to taxes, and to consider that it was evident that this agreement was made at the time the sale was concluded, and as a part of it, and embodied, as it was intended to do, the agreements of Toepperwein in respect to the sale to him. We likewise considered that where Toepperwein and Bitter stated that the former agreed to pay the taxes, they had in mind what was in this agreement on the subject, misconstruing it, of course, if they supposed that it made Toepperwein personally responsible for the same. But as already stated, their testimony on this subject was correct in one sense, because, after all, Toepperwein agreed to and had to pay these taxes out of this property.

With this explanation, we overrule the motion.

# MELLODY v. MISSOURI, K. & T. RY. CO. OF TEXAS.†

(Court of Civil Appeals of Texas. Jan. 8, 1910.  
Rehearing Denied Jan. 29, 1910.)

## 1. NEGLIGENCE (§ 134\*)—COMMUNICATION OF CONTAGIOUS DISEASE—EVIDENCE—SUFFICIENCY.

In an action against a railroad company for injuries sustained through its negligence in permitting a section house, in which plaintiff's father resided in the performance of his duties as defendant's section foreman, to become infected with smallpox, which was communicated to plaintiff, rendering him totally blind, evidence held insufficient to show negligence on the part of defendant in placing an infected child in the section house and allowing it to remain there.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 267; Dec. Dig. § 134.\*]

## 2. NEGLIGENCE (§ 1\*) — COMMUNICATION OF CONTAGIOUS DISEASE.

A railroad company is liable for the spread of a contagious disease through the negligence of its servants acting within the scope of their authority, whereby another is injured as the proximate result of such negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 3. RAILROADS (§ 281\*)—INJURIES TO LICENSEE —ACTS OF EMPLOYEES.

The mere act of a section foreman in bringing his child to a section house after it had been in the presence of another child afflicted with smallpox was not within the scope of his employment, and where the child later contracted the disease and communicated it to plaintiff, a child of another section foreman residing with its father in the section house, the railroad company was not liable unless it or its servants were negligent in permitting the affected child to remain in the house.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 902; Dec. Dig. § 281.\*]

## 4. NEGLIGENCE (§ 136\*)—COMMUNICATION OF CONTAGIOUS DISEASE—QUESTION FOR JURY.

In an action against a railroad company for injuries sustained through its negligence in permitting a section house in which plaintiff's father resided in the performance of his duties as a section foreman, to become infected with smallpox, which was communicated to plaintiff, rendering him totally blind, evidence held, as a matter of law, not to raise an issue of negligence on the part of defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 324; Dec. Dig. § 136.\*]

## 5. NEGLIGENCE (§ 136\*)—DIRECTION OF VER- DICT.

Though where there is any substantial evidence tending to show negligence on the part of defendant in a personal injury action, the issue must be submitted to the jury, where there was no issue of fact upon which liability of the defendant could have been predicated, the trial court properly instructed the jury to return a verdict for defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 283; Dec. Dig. § 136.\*]

Appeal from District Court, Rockwall County; F. L. Hawkins, Judge.

Action by James Melody against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Allen and Wallace & Mount, for appellant. Coke, Miller & Coke, W. C. Jones, and Ridgell & Stroud, for appellee.

TALBOT, J. This suit was instituted by the appellant against the appellee to recover damages sustained by him through the alleged negligence of appellee in permitting its section house in Rockwall county to become infected with smallpox, which was communicated to appellant, destroying his eyesight and rendering him totally blind. The petition alleges, in substance, that in March, 1891, the defendant made a contract of employment with plaintiff's father as a section foreman, and that by virtue of such contract plaintiff's father was required to reside with his family, including plaintiff, in defendant's section house at or near the town of Rockwall, which the defendant maintained as a boarding and lodging house for its two section gangs with their respective foremen, one of whom was plaintiff's father, the other one Fred Bryers; that on or about said date said Bryers, under and by virtue of his employment, un-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

† Writ of error denied by Supreme Court.

dertook to occupy said section house with his family, which then consisted of himself and his infant son; that the said child of the said Bryers had been exposed to smallpox at Palestine, Tex., before being brought to said section house, which was or ought to have been known to Bryers; that in a few days after said child was placed in the section house by its father it became sick of smallpox, and that in this way the defendant negligently permitted such section house to become infected with a dangerous contagious disease, thereby negligently communicating such disease to plaintiff, then an infant four years of age, which resulted in rendering plaintiff totally and hopelessly blind, and causing him to then suffer great physical pain and mental anguish, which pain and anguish plaintiff has continuously suffered from the date of his sickness and will in the future continue to suffer.

The defendant answered by general demurrer, general denial, and specially pleaded, in substance, that, if its section foreman brought his child to the section house near Rockwall after it had been exposed to smallpox, the fact that the child had been so exposed was unknown to the said section foreman or to the defendant; that the section foreman, in bringing the child from Palestine to Rockwall, if he did bring it as alleged by plaintiff, was not, in so doing, acting in the discharge of any duty incident to or connected with his employment, but was acting solely in his individual capacity, and at the time was not actively engaged in the service of defendant; that the defendant had no knowledge whatever that the said section foreman had gone to Palestine for his child; that the room in the section house occupied by its foreman was under his exclusive control and management; and that if the child was brought to the section house it was brought there under an agreement with plaintiff's father and mother, who had control of the house, about which private contract or agreement defendant had no knowledge and with which it had nothing to do.

After the introduction of the evidence the trial court instructed the jury to return a verdict in favor of the defendant-railway company. This instruction was obeyed, and judgment entered in accordance therewith. From the judgment thus rendered, the plaintiff has appealed, and assigns as error the court's action in directing the jury to return a verdict for the defendant. The facts upon which a decision of the question turns are practically undisputed, and are substantially as follows: In February, March, and April, 1891, the defendant had two sections on its road, the division line between them being near Rockwall, Tex. James Melody, foreman of one of said sections, with his family, resided in the section house and boarded the employes of the two sections.

F. C. Bryers, who had charge of the other section, occupied a room in the section house and boarded with Mr. Melody. The section men roomed in what is termed the "bunk house," which was near the section house. The foremen and men were required to reside in or near the section house. The foremen had the same jurisdiction over the section house as they did over the railroad track, and it was their duty to keep the house clean, and such work of this character as was not done by the wife of Mr. Melody was done by section men, an equal number being assigned for this purpose from each of the two sections. F. C. Bryers was living apart from his wife in February, 1891. Soon thereafter he instituted a suit for divorce against her at Palestine, Tex., and about March 21st or 22d he returned to Palestine to look after said suit. He had no leave of absence for this purpose, but wired the roadmaster that he was going on the day he left. While in Palestine he learned that there was an epidemic of what was called "black measles" in the city. His wife was at the time quarantined, said to be sick, with a guard about the house in which she was kept, and he was not permitted to see her except at a distance. He talked to her, however, at a distance of some 50 feet through an open window. In the course of the conversation she agreed that he might take their child, who was some four years old, back with him, if he would send it to her mother. This he agreed to do. He consulted his attorneys and made the necessary arrangements for taking the child back with him. He was advised that it would be necessary for him to get a health certificate, as other places had quarantined against Palestine. He consulted the city health officer, who went with him to the place where the child was staying, the house being some 50 feet from the house in which his wife was quarantined. After consulting the guard and others, who informed him the child had not been exposed to the disease, the city health officer consented that the child might be removed, and gave him and his father, Bryers, each a health certificate. The child was not permitted to go into the presence of his mother, but bade her good-bye from the place where Mr. Bryers had stood when talking with her. After getting the health certificates Bryers left with the boy for Rockwall. While on the train his child went near another child, whose mother said it had fever, and, as she had but recently lost her husband as a result of black measles, she feared the little one was afflicted in the same way. After being advised of this, Bryers did not permit his boy to go near the sick child any more. Bryers took his child to the section house at Rockwall, and requested Mrs. Melody, wife of the other

section foreman, to permit him to stay there a week or two until he could make arrangements to take him to his grandmother. M. J. Murray, appellee's roadmaster, also requested Mrs. Melody to permit the child to remain there a short time, which she consented to do. Some 15 days after the Bryers child was brought to the section house he was taken sick while his father was out on his section at work. As soon as the father came in and was told of the boy's illness he went for a physician, securing Dr. J. E. Selby, who was not in any wise connected with the defendant. Dr. Selby was then a young physician. He was a graduate of the medical department of Vanderbilt University, and was at the time in the active practice of medicine. Bryers asked a number of people about Dr. Selby, and they recommended the doctor to him. That is the reason he was called in. Bryers heard that there was an epidemic of black measles at Palestine when he was there, but he did not hear that any one there was afflicted with smallpox. Up to the time the child got sick Bryers did not tell Mrs. Melody anything about it having been exposed to any contagious disease. While the Bryers child was ill his father received a letter from a party at Palestine, who was in no way connected with the defendant, stating that the child's mother had died of smallpox. Bryers read the letter to Dr. Selby, and stated to him that he brought the child from Palestine, and explained the circumstances connected with his being brought away, putting him in possession of all the facts he had in the matter. M. J. Murray, the roadmaster of appellee, who was the immediate superior of its foremen Bryers and Melody, was at the section house two or three days after the child took sick, and Bryers explained to him fully the circumstances under which he got the boy at Palestine, the prevalence of black measles there, etc. Murray was again at the section house on the day the disease was pronounced smallpox. At first Dr. Selby said the child had measles. He pronounced the case one of smallpox, according to his testimony, on the fifth or sixth day after his first visit, which was between the 2d and 4th of April. According to the testimony of Mrs. Melody, mother of appellant, he pronounced it a case of smallpox 9 or 10 days after the child was taken sick, and according to the testimony of Bryers about 12 days after the child became sick. The child died the thirteenth day after it was taken ill. When the disease was pronounced smallpox, Dr. Selby advised that the boy and his father be quarantined and that the other inmates of the section house move therefrom, which was done. As a result of the exposure to the disease while the Bryers boy was in the section house the plaintiff, among others, took the

smallpox, and he was, as a result thereof, made totally blind. He has not been able to see since that time, and his case is pronounced hopeless. He was, at the time, about four years old. Smallpox is considered a highly contagious and deadly disease. Black measles is a virulent form of common measles, and is a highly contagious, dangerous, and often fatal disease.

The principal propositions contended for by appellant, as we understand it, are, in substance: (1) That appellee, in the operation of its railroad, having placed its section foreman Bryers in control of a part of its section house at Rockwall and its section foreman James Melody, father of appellant, who was then an infant, in another portion of said house, requiring said house to be maintained as a boarding house for the section gangs and said foremen to reside therein with their respective families, it was the duty of Bryers to exercise ordinary care to keep his portion of the premises in a reasonably safe sanitary condition, and that if he negligently permitted the same to become infected with smallpox, he, in doing so, was acting within the scope of his employment, and if said disease was thereby communicated to the appellant, and was the proximate cause of his injuries, appellee was liable for such negligence and the damages suffered by appellant as a result thereof; (2) that if Bryers had such knowledge of his child's exposure to a dangerous contagion as would cause an ordinarily prudent person to believe that his child would probably take such contagious disease, defendant, under the circumstances, was guilty of negligence in permitting it to become and remain an inmate of the section house, and that whether or not Bryers had such knowledge was a question for the determination of the jury; (3) that if appellee had notice or knowledge that Bryers' child had been exposed to a deadly, dangerous, and contagious disease, the fact that such disease was misnamed, medically, would not relieve appellee of the duty of guarding appellant against such disease; (4) that notice or knowledge on the part of appellee's roadmaster Murray, under the facts of this case, was notice to and knowledge on the part of the appellee, and whether Murray became possessed of information which by the use of ordinary care, if acted upon by him, would have prevented appellant's injury, and he failed to so act, and appellant was injured thereby, appellee is liable for the damages so sustained by him; (5) that whether Murray, under the circumstances, was negligent in not isolating Bryers' child from appellant to prevent appellant from becoming afflicted with the disease with which said child was afflicted was a question for the jury.

It is not pretended that any agent or servant of appellee, other than Bryers, its section foreman, and Murray, its roadmaster, knew or had any reason to suspect that Bry-

ers' child when brought to the section house had been exposed to the contagious disease of smallpox or any other contagious or infectious disease, and whether knowledge on the part of said employes, or either of them, would constitute knowledge on the part of appellee is a question about which we have grave doubts. In the view we take of the case, however, it does not become necessary to determine that question, and hence we express no definite or authoritative opinion upon it. We are of opinion that the practically uncontroverted testimony conclusively shows that neither Bryers nor Murray had any such knowledge that Bryers' child, before being placed in appellee's section house, had been so exposed to the disease of smallpox or "black measles," as would have authorized a finding by the jury that either was guilty of actionable negligence in placing said child in the section house or in allowing it to remain therein. It is true, the evidence shows that a disease known as "black measles" was prevalent in the city of Palestine; that Bryers' wife was sick and quarantined in that city; that Bryers found his child in Palestine and carried it from that place and put it in the appellee's section house, but that said child had been so exposed to the epidemic of smallpox or black measles then prevailing in Palestine as to render it probable that the child would contract the disease, or that if it had, appellant knew, or had good reason to believe, that it had been so exposed, and was therefore guilty of negligence in placing the child in the section house, is not warranted by the testimony. It appears without contradiction or dispute that the child had been isolated from those persons afflicted with the disease, and that Bryers had been informed that it had not been exposed to the contagion. He consulted the city health officer at Palestine, who went with him to the place where the child was staying, and instituted an inquiry as to the exposure of the child to the disease in question, and, after a satisfactory investigation, gave Bryers and his said child each a health certificate evidencing their freedom from exposure to any contagious disease that may have existed in Palestine at the time. In regard to the meeting of Bryers' child with the sick child on the train, the evidence shows that Bryers acted as a prudent and cautious person would have done under the circumstances. When informed that this child was sick with a fever and that its mother entertained some fear that it had black measles, he promptly separated the children, who had been together but a moment, and thereafter kept them apart. There was nothing in this incident, in our opinion, that would warrant the conclusion that Bryers might have reasonably foreseen or anticipated that his child would contract some contagious and dangerous disease by reason

of the momentary contact with the sick child, and therefore, in putting his child in the section house, failed to exercise ordinary care to prevent the infection of said house. A careful examination of all the testimony upon the whole case has convinced us that it utterly fails to show actionable negligence on the part of either Bryers or Murray in respect to placing or allowing Bryers' child to remain in appellee's section house until its death, and therefore appellee cannot be required to respond in damages for the injuries sustained by appellant on account of its said house becoming infected with smallpox by the presence of Bryers' afflicted child, or because said disease may have been communicated to appellant by actual contact with said child. That the railway company would be liable for the spread of a contagious disease through the negligence of its servants acting within the scope of their authority, whereby another was injured as the proximate result of such negligence, is not at all questioned. *Railway Co. v. Wood*, 95 Tex. 223, 66 S. W. 449; *Railway Co. v. Raney*, 44 Tex. Civ. App. 517, 99 S. W. 589. Clearly, Bryers was not acting within the scope of his authority so as to bind appellee up to the time of placing his child in the section house and in permitting the child to remain therein the short time which elapsed from the time he discovered the child was probably afflicted with smallpox and the time of its death, he cannot fairly be charged with a failure to do what an ordinarily prudent person would have done under the circumstances of the situation. Nor is the proposition that, where there is any substantial evidence tending to show such negligence, the issue must be submitted to the jury denied. We hold that, under the undisputed facts and circumstances of this case, as a matter of law no issue of negligence on the part of appellee, through its employes Bryers and Murray, or either of them, or through any agent or servant, whereby appellant suffered the injuries complained of by him, was raised; that, there being no issue of fact upon which liability of the appellee could have been predicated, the trial court properly instructed the jury to return a verdict for the appellee. If we are correct in the views expressed, the questions presented by the other assignments become immaterial.

The judgment of the court below is affirmed.

ELY-WALKER DRY GOODS CO. v.  
COLBERT.

(Court of Civil Appeals of Texas. Jan. 19,  
1910.)

1. PLEDGES (§ 27\*)—RIGHTS AND LIABILITIES  
OF PLEDGEE—AGREEMENTS—EFFECT.

The fact that the pledgee of a note and mortgage on property in a sister state, agreed

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to keep the collateral note and mortgage at his place of business in another state did not prevent him from taking under proper circumstances steps looking to the preservation and collection of the collateral note, and as a collection by attorneys in the sister state could not be made unless they had in their possession the collateral note and mortgage, the payee might, under proper circumstances, incur expenses in preserving the collateral note and mortgage and charge the same against his debtor.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 67, 68; Dec. Dig. § 27.\*]

**2. TRIAL (§ 296\*)—INSTRUCTIONS—ERRORS IN ONE INSTRUCTION CURED BY OTHER INSTRUCTIONS.**

The error in an instruction denying to the pledgee of a note and mortgage made on property in a sister state any compensation from the pledgor for expenses incurred in preserving and collecting the collateral note was not cured by a charge that the pledgee could take such steps as a person of ordinary prudence would do under similar circumstances for the preservation and protection of the collateral.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-718; Dec. Dig. § 296.\*]

**3. PLEDGES (§ 33\*) — AGREEMENTS — EFFECT — QUESTION FOR JURY.**

The effect of an agreement by the pledgee of a note and mortgage of a third person on property in a sister state, to keep the collateral note and mortgage at his place of business in another state, is for the jury, and they may find that it was the intention of the parties that nothing should be done by the pledgee with reference to the collateral except retaining it in his possession at his office.

[Ed. Note.—For other cases, see Pledges, Dec. Dig. § 33.\*]

**4. TRIAL (§ 253\*) — INSTRUCTIONS — IGNORING FACTS.**

A requested charge which ignored a contract between the parties, and the effect the jury might give to it, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

**5. PLEDGES (§ 27\*)—EXPENSES INCURRED BY PLEDGEE—LIABILITY OF PLEDGOR.**

The attorney employed by the pledgee of a note to preserve and collect it is the attorney of the latter, and he may not make an unauthorized charge and hold the pledgor responsible therefor.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 67, 68; Dec. Dig. § 27.\*]

**6. PLEDGES (§ 27\*)—RIGHT OF PLEDGEE.**

The pledgee of a note and mortgage of a third person may incur reasonable expenses for the protection and collection of the note, provided an ordinarily prudent person would have done so under the circumstances, unless the agreement with the pledgor denied him the authority to do anything with reference thereto.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 68; Dec. Dig. § 27.\*]

Appeal from Hays County Court; Ed R. Kone, Judge.

Action by W. B. Colbert against the Ely-Walker Dry Goods Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

R. E. McKie, for appellant. Will G. Barber, for appellee.

FISHER, C. J. This is a suit by appellee, Colbert, to recover from the appellant the

sum of \$297, the balance claimed by appellee to be due on a note collected by appellant, which was left in the keeping of appellant as collateral to secure a \$2,500 note executed by Colbert and his partner Ivey. The collateral note was for \$3,500, executed by appellee's brother, and payable at Jackson, Miss., secured by a mortgage lien on certain properties there situated. The appellant, through its attorneys at Jackson, Miss., collected the full amount of the note with interest, which was remitted to them by the attorneys less \$297, \$6.50 of which was charged as exchange and \$6.30 as court costs, and the balance retained by the Jackson attorneys under the claim that it was a reasonable compensation for their services in and about the investigation of the solvency of the maker, the title of the property that stood as security for the note, and an effort to get the maker to pay the same, etc., and in the actual collection of the note from the maker. The amount so received by appellant from the Jackson attorneys was promptly remitted to the appellee at San Marcos, Tex., which was received by him. Before the Jackson note was collected, the appellee paid off and discharged his debt to the appellant.

Appellee's suit is based upon the proposition that he was entitled to the full sum of the note that was collected from the maker at Jackson; that he did not authorize the appellant or the attorneys at Jackson to make any effort to protect this note, or to collect the same, or to inquire into the solvency of the maker, or to bring any suit, or to incur any court costs, or to examine the status and title of the property that stood as security for the note. Further, that there was an agreement between him and appellant, when the note was deposited with them as collateral, that the same should be attached to his note and should be kept by them at their place of business in St. Louis. The appellant pleaded that all the charges made by the attorneys at Jackson, Miss., were proper, legal, and reasonable, and that they were justified in order to protect the security to pursue the course they did in forwarding the note to the attorneys at Jackson for investigation and for collection. There was evidence upon these questions, and there was also evidence to the effect coming from appellant that there was an agreement between them and the appellee that they could have the title of the property and the solvency of the maker, etc., investigated, but upon this last issue, although proven, there was no pleading. The case was tried before a jury, and verdict and judgment were in appellee's favor for the full amount sued for.

Appellant's first assignment of error complains of the following charge of the court: "If you believe from the evidence that at the time the plaintiff W. B. Colbert delivered to Ely-Walker Dry Goods Co. said note and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

trust deed, it was expressly agreed between them that said note and trust deed should be kept by said defendants at St. Louis, Mo., and that the plaintiff never agreed and consented that said note and trust deed should be turned over to attorneys for protection or collection, and that defendant turned said note and trust deed over to Brame & Brame, of Jackson, Mississippi, without the consent of plaintiff, then plaintiff is entitled to recover from the defendant said \$297, with 6% interest per annum from the date Brame & Brame received the money, and, if you so find from the evidence, you will return a verdict in favor of plaintiff W. B. Colbert for said amount." It is contended that this charge is erroneous because, notwithstanding the fact that there might have been an agreement that the note and the trust deed should be kept by the defendant at St. Louis, and that the plaintiff never consented or authorized them to use efforts looking to the protection or collection of the note, they would, nevertheless, be entitled to take such steps as a person of ordinary prudence would do, looking towards the necessary protection of the collateral and for the collection of the same. We are inclined to the opinion that, for the reasons stated, the charge is erroneous. Notwithstanding the existence of the state of facts presented in this charge, the holder of the collateral might, under certain circumstances, be justified in taking steps looking towards the protection of the paper and for its collection; and there is evidence in the record that would justify the submission of this question to the jury. In fact the trial court did, in a subsequent portion of its charge, instruct the jury that, if there was no express agreement to the contrary, the holder of the collateral could take such steps as a person of ordinary prudence would be expected to do, looking towards preserving and protecting the security. There may have been an express agreement for the appellant to retain the note and the deed of trust at St. Louis, but it was not absolutely essential for the Jackson attorneys to have actual possession of the paper for at least a part of the services that they rendered; and it would be a question of fact as to whether these services were reasonable and could be charged to the appellant or the owner of the note. It may be true that a successful collection by the Jackson attorneys could not have been made unless they had in their possession the paper, as the payor would not be required to pay except upon surrender of the note and the cancellation of the lien; but the charge is so framed that it excludes all of the items set up by the appellant based upon the services rendered by the Jackson attorneys, if there was an agreement that the note and deed of trust should remain in appellant's possession at St. Louis. We think this charge is erroneous. It is not corrected, as claimed by appellee, by the charge which immediately follows it. While it is true that

it permits the appellant to take such steps as a person of ordinary prudence would do under similar circumstances for the preservation and protection of the collateral, still it conflicts with the charge above quoted in the way just pointed out.

There was no error in the court's refusing appellant's charge set out under its second assignment of error. That is to the effect that in determining the merits of the case the jury should not consider the question whether or not Ely-Walker Dry Goods Company agreed with Colbert to keep the note and mortgage in the vaults at St. Louis, because such agreement would not affect the controversy between the parties to this suit; that is, in substance, the charge which was requested and refused. It was for the jury to say what effect should be given to that agreement. The scope and effect of the agreement is not altogether plain. It may be that a jury might justly reach the conclusion, under the circumstances, that the intention was that nothing should be done by the appellant with reference to the collateral paper except retaining it in their possession at St. Louis. That was a question for the jury, and it was for them to say what was meant and what was intended to be accomplished by the agreement.

In subdivision 2 of the court's charge is practically given the rule contended for by the appellant in the charge set out under the third assignment of error, which was refused, except the charge given has embodied in it the expression "if there was no express agreement to the contrary." We think the charge as framed was properly given, and it would have been error to give the one requested, because it ignored the contract made between the appellant and the appellee and the effect that a jury might give to it.

What we have just said also disposes of the appellant's fourth assignment. The charge set out under that assignment is practically the same as the one just discussed.

We cannot agree with appellant's contention, urged under the fifth and sixth assignments of error. The first charge quoted under these assignments, which was refused, is on the weight of evidence; and as to charge No. 8, set out and refused, we are of the opinion that under the testimony appellant would be responsible to the appellee for any improper items charged by the attorneys at Jackson. They were the attorneys of the appellant, and while it may be conceded that the appellant might have been justified in taking steps looking to the preservation, protection, and collection of the note, still, in doing that, the attorneys they employed could not legally make a charge which was unauthorized and hold the appellee responsible therefor.

We think a charge substantially as set out under the appellant's seventh assignment of error would be proper to be given on another

er trial, if the facts are similar. Unless the effect of the agreement pleaded by appellee was to deny the appellant the authority to do anything with reference to protecting and collecting the note, they would have the right to incur reasonable expenses, looking to that end, provided an ordinarily prudent person would have done so under the circumstances.

The other questions raised are on the facts.

We have not overlooked the suggestion of the appellee to the effect that, notwithstanding the error pointed out, the judgment should be affirmed under the facts. We deem it unnecessary to go into a discussion of this question, but we have properly considered it, and think that appellee's suggestion is not an answer to the error pointed out.

For the reasons stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

#### PORTER v. EL PASO & S. W. RY. CO.

(Court of Civil Appeals of Texas. Dec. 8, 1909.  
Rehearing Denied Feb. 2, 1910.)

##### 1. RAILROADS (§ 441\*)—INJURIES TO ANIMALS —FAILURE TO FENCE TRACK—EFFECT OF STOCK LAW.

Comp. Laws N. M. 1897, §§ 241, 242, make it the duty of a railroad company, within six months after its line is open for use, to erect and maintain fences sufficient to keep cattle off the track, and provide that whenever cattle are killed by a train where such railroad is required to be fenced, and the owner makes and files an affidavit of his ownership and of the injury to or destruction of his property and its value, and gives 90 days' written notice to any station agent, such killing or destruction is made prima facie evidence of negligence on the part of the railway company. Section 98 provides that it shall not be lawful for any person in the territory to allow his cattle to run at large from March until October, inclusive. *Held* that, where an animal, at large in violation of section 98, was killed by a railroad train, the owner could not recover its value without proof of the railroad company's negligence, independent of section 242, although the land upon which the animal was allowed to run at large was not agricultural land, and section 98 was taken from "An act for the protection of agricultural lands in this territory."

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1573, 1579; Dec. Dig. § 441.\*]

##### 2. NEW TRIAL (§ 102\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

In an action against a railroad company for killing an animal on its track, the court directed a verdict for defendant on the ground that Comp. Laws N. M. 1897 (where the animal was killed) § 98, forbids any owner to allow his stock to run at large during certain months of the year; plaintiff's animal being killed while at large in violation of that statute. *Held*, that it was not error to refuse a new trial, which was requested on the ground that plaintiff had discovered that the act of the New Mexico Legislature (Laws N. M. 1880, c. 27), of which section 98 was a part, was entitled "An act for the protection of agricultural lands in this ter-

ritory," and that the act was therefore not passed for the protection of railroad companies, and that the failure to discover this in time for the original trial was due to inability to find a copy of such act; it being inconceivable that the act could not have been found in the time which elapsed between the filing of the answer and the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 210; Dec. Dig. § 102.\*]

Appeal from El Paso County Court; Albert S. Eylar, Judge.

Action by James L. Porter against the El Paso & Southwestern Railway Company. A verdict was directed for defendant, and plaintiff appeals. Affirmed.

Sam B. Gillett, for appellant. Patterson, Buckler & Woodson, for appellee.

JAMES, C. J. This case, brought by appellant to recover the value of a Hereford bull, of the value of \$500 as alleged, killed by appellee's train in Dona Ana county, N. M., on or about April 27, 1905, was before this court on appeal on a previous occasion, and remanded. 107 S. W. 927. At the late trial the county judge directed a verdict for the railway company.

The plaintiff testified to what was sufficient to show that the animal was killed by defendant's engine on April 27, 1905; that he caused to be served on defendant's agent a notice, dated September 27, 1905, concerning the killing, which is conceded to have been a sufficient notice under the following portions of the statutory law of New Mexico:

"Within six months after its line of railroad or any part thereof which is open for use to erect and thereafter maintain fences on the side of their railroad, or the part thereof open to use, suitable and amply sufficient to prevent cattle, horses (etc.) from getting on said railroad, except at crossings of public roads and highways and within the limits of towns, cities and villages." Comp. Laws 1897, § 241.

"Whenever any cattle, horses (etc.) shall be killed, injured or destroyed by any railroad company operating a railroad in the territory, or by its trains, cars or locomotives at any point on the line of its road where by law such railroad is required to be fenced and the owner of such animal \* \* \* shall make affidavit of his ownership and of the injury or destruction of such property and the value of the same, or the amount of the injury done thereto, and file the same with and give ninety days' notice in writing to any station agent in the management of the business of such railroad company in the county where the killing, injury or destruction complained of shall have been committed, such killing or destruction is hereby made prima facie evidence of negligence on the part of the railway company." Comp. Laws 1897, § 242.

Then this statute goes on to provide that

if the railway company has not paid the fair market value of the animal, or the actual amount of the injury inflicted, within said 90 days, upon suit brought therefor judgment shall be rendered against the railway company for the actual value of the animal or the damage inflicted, unless the railway company shall overcome the presumption of negligence as herein provided, and establish that such killing, injury, or destruction was not the result of negligence on the part of the railroad company, or its agent, in the management of its trains, cars, or locomotives.

Plaintiff showed that this railroad had been in operation more than six months; that the track where the bull was killed was straight and in open country; that the killing occurred some time during the night; that plaintiff's place consisted of 160 acres, which did not extend to the track; that the bull was not upon his land when killed, and was at least two miles from his land; that they had been grazing out there on government land, permitted to graze around in the open country; that plaintiff's animals would come up, and he would feed them in a corral a while, and then turn them out. Plaintiff testified that there were no bulls of that character being sold in the vicinity, and another witness testified that this bull was worth between \$300 and \$400 at Deming at the time. With this testimony the plaintiff rested his case and defendant introduced the following statute of New Mexico: "Sec. 98. From and after the passage of this act, it shall not be lawful for any person or persons in this territory or for any owner or owners of large stock, to allow the same to run at large during the months of March, April, May, June, July, August, September and October, nor under any pretext whatever to have them at large on their ranches, or herding ranges, unless they shall have them under custody, during the months above specified. And every person or persons who shall violate the provisions of this act shall suffer a fine and costs as provided in the laws in force in this territory." Defendant also showed by plaintiff that he bought the bull at Adan, N. M., which was about 25 miles from his place and nearer than Deming; that he bought six bulls, and paid \$900 for the six. Plaintiff in this connection stated that out of the six there was one dwarf, and one yearling, and the other four were big bulls. These six bulls were plaintiff's part of a car load bought in September, 1904. In the division, in which he obtained six, they were averaged and valued at \$150 apiece around, scrubs and everything. Upon this state of evidence the peremptory charge was given for the defendant.

Plaintiff is here contending, through various propositions, that he had made a prima facie case, by reason of the statutes he pleaded and proved, and was therefore entitled to recover unless the presumption of negligence was removed by defendant, which he con-

tends was not done. In determining the merits of this position the effect of the statute introduced by defendant is to be considered. It forbade, under a penalty, the allowing by plaintiff of his cattle to run at large. In this state, under a statute making a railway company liable absolutely for the killing of an animal by its locomotive or cars where it has failed to comply with its duty to fence, it has been held that such statute has no application to places where there is in force a law which makes the running at large of animals unlawful in a certain district (*Railway v. Cocke*, 64 Tex. 157; *Railway v. Dunham*, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484; *Railway v. Tolbert*, 100 Tex. 485, 101 S. W. 206); and the same cases hold, and particularly the two last named, that under such circumstances the railway company is liable only where negligence on its part is shown in failing to use proper care after the animal is found to be in danger. The burden to show this would clearly be upon the plaintiff. So much for the rule as it is understood and applied in this state.

The killing in question occurred in another jurisdiction, where, as the testimony shows, the two sections of the Statutes of New Mexico, which plaintiff invokes (sections 241-242, above shown) and section 98, also above shown, appear to have been in force. At least there is no suggestion otherwise. Assuming, therefore, that they were in force at the time of this killing, and applying the rule as adopted in this state for the construction of the former, in view of the latter, the conclusion must be that section 242 is not to be given effect in cases where animals are killed or injured at places where by law they are prohibited from being at large. We find no construction of said sections 241-242 by the Supreme Court of New Mexico, except in *Ry. Co. v. Cazier*, 13 N. M. 131, 79 Pac. 714, which goes no further than to declare the same as merely effecting a change in a rule of evidence. The effect to be given said sections in connection with section 98 has not been declared in that territory, and we see no reason why the decisions of our own state in regard to a like situation should not be our guide. We have given due consideration to the fact that this section of the territory was sparsely settled, and the country thereabout grazing lands, and plaintiff's nearest neighbor was 12 miles away. But section 98 clearly has application to the entire territory.

It would appear to have been the policy of the Legislature for some reason (probably from what would appear in the motion for new trial), viz., the protection of agricultural lands in the territory, to prohibit "any and all owners" of cattle, etc., from allowing same to run at large during certain months of the year on their ranches or herding ranges in any part of the territory. The fact that the land in this particular vicinity

was not agricultural did not exempt the locality from the operation of the statute. At the place where this animal was killed, there was no inclosure; it was open land, just such part of the lands of the territory over which the statute (section 98) made it unlawful for stock to be permitted to go at large. Such open and uninclosed portions of the territory, through which railways run, may be small, or they may be extensive in areas, but, small or extensive, they fall within the language and evident operation of said statute. We, therefore, conclude that it was necessary for plaintiff to make proof of defendant's negligence, independently of the provisions of section 242; and, as this was not done, it was proper for the court to direct the verdict. Upon this view of the case, all questions which concern only the question of value of the animal are immaterial.

One of the grounds for a new trial was for newly discovered evidence, which was alleged to consist "in finding and procuring the Session Acts of the New Mexico Legislature of the year 1880, from which said section 98 of the Compiled Laws of New Mexico (1897 Compilation) was taken, which act is entitled and is in words and figures as follows:

**"Chapter XXVII.**

**"An Act for the Protection of Agricultural Lands in this Territory.**

**"Contents.**

**"Sec. 1. Stock running at large from March to October inclusive prohibited, except in custody."**

Then follows section 1, it being the same in language as section 98 above.

The motion claimed that it thus appears from the title of the act that it was passed for the benefit of farmers, and not railroads, and in the motion gives as a reason for not having introduced this act at the trial that, soon after defendant's answer was filed setting up section 98, plaintiff was advised of the necessity of getting the Session Acts of 1880 when this statute was originally enacted, and thereupon he and his attorneys went to work to find same, and that one of his attorneys made especial effort to find same; that such attorney frequently reported to plaintiff that he had visited offices of attorneys in New Mexico, and had searched for said acts, and had inquired of such lawyers for same, but was unable to find them, or find any one who knew the caption and contents of same; that plaintiff himself had inquired of cattle inspectors of New Mexico where said Acts of 1880 might be found, also as to the caption and contents thereof, but that none of them knew anything about same other than that it once existed, and that he had made inquiry of said inspectors because it was their duty, under the law and Cattle Sanitary Board of New Mexico, to familiarize themselves with

the stock laws of the territory, and that neither plaintiff nor his attorneys were able to find said act of 1880 until after the trial of this case, although each had made diligent search to find the same.

The answer of defendant bears an original file mark September 25, 1906, and a later one as "Refiled this 27th day of January, 1909." The trial occurred February 27, 1909. The trial judge did not err in refusing to grant a new trial for this reason. It is inconceivable that there could be such a difficulty in obtaining evidence of a public statute of a territory as to excuse the failure to procure same in the time that elapsed between even the more recent filing of the answer and the trial. Moreover, the fact that in passing the act the Legislature did so in the interest of farmers does not get away from what the act saw fit to prohibit to that end.

Judgment affirmed.

**LOWRY v. McDANIEL et al.**

(Court of Civil Appeals of Texas. Jan. 7, 1910.)

**1. TRESPASS TO TRY TITLE (§ 10\*)—TITLE TO SUPPORT.**

Title acquired under a parol contract of sale, the price being paid, and the purchaser being placed in possession and making valuable improvements on the land, with the knowledge and consent of the vendor, is sufficient to sustain an action of trespass to try title.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 13; Dec. Dig. § 10.\*]

**2. TRESPASS TO TRY TITLE (§ 25\*)—DEFENSE OF STATE DEMAND.**

The defense of state demand is not available in trespass to try title, though the action is based on an equitable title.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 30, 31; Dec. Dig. § 25.\*]

**3. ADVERSE POSSESSION (§ 100\*)—CONSTRUCTIVE POSSESSION.**

Defendant, having received a deed of 5 acres, 2 of which had previously been sold to plaintiff and segregated from the balance of the 5 acres long prior to defendant's deed, did not acquire title by adverse possession to the 2 acres; his actual possession extending only to the 3 acres, and such possession not being extended by construction to the 2 acres.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. § 100.\*]

**4. VENDOR AND PURCHASER (§ 229\*)—INNOCENT PURCHASER—NOTICE.**

Defendant, when purchasing from C.'s heir a 5-acre tract, including 2 acres which C. had orally sold to M., had notice, putting him on inquiry from his knowledge of the contents of a deed from C. to B., describing the land conveyed to B. as beginning "at the N. E. corner of a survey of two acres sold by me in a square out of the northwest corner of my tract to M."

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477-494; Dec. Dig. § 229.\*]

Appeal from District Court, Jefferson County; L. B. Hightower, Jr., Judge.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by Ella McDaniel and another against M. W. Lowry. Judgment for plaintiffs. Defendant appeals. Affirmed.

J. D. Martin, for appellant. Blain & Howth, for appellees.

PLEASANTS, C. J. This is an action of trespass to try title brought by appellees Ella McDaniel, and Jonas McDaniel against the appellant to recover the title and possession of a tract of 2 acres of land, a part of the A. Williams survey in Jefferson county. The defendant answered by general demurrer, plea of not guilty, and pleas of limitation of 3, 5, and 10 years. The trial in the court below without a jury resulted in a judgment in favor of plaintiffs for the tract of land claimed by them.

The facts disclosed by the record are as follows: Plaintiff Ella McDaniel is the widow, and plaintiff Jonas McDaniel is the son and sole heir, of Doy McDaniel, deceased, who died in January, 1908. The land in controversy is a part of a tract of 100 acres formerly owned by Spencer Cole, deceased. In 1887 Doy McDaniel, who was then the husband of the plaintiff Ella McDaniel, purchased from Spencer Cole the 2 acres of land in controversy. This sale was verbal, but McDaniel paid for the land, and was placed in possession thereof by Cole, and made valuable improvements thereon with the knowledge and consent of Cole, and the title to the land thereby became vested in said McDaniel. After his purchase McDaniel resided on the land with his wife until 1892, when he moved to an adjoining county, where he resided for a number of years. He returned to the neighborhood of this land several years before this suit was brought, but he did not reside on the land after 1892, except for a brief period, the exact date of which is not shown. The 2 acres purchased from Cole by McDaniel was segregated and described at the time of the purchase, and in a subsequent deed, executed by Spencer Cole to Reuben Benn, the land conveyed to Benn is described as beginning "at the N. E. corner of a survey of two acres sold by me in a square out of the northwest corner of my tract to Doy McDaniel." On January 18, 1902, appellant purchased from Jim Cole, the sole heir of Spencer Cole, who died prior to said date, a tract of 5 acres of land, which includes the 2 acres in controversy. This deed gives the outside boundaries of the 5 acres thereby conveyed, but does not refer to the 2-acre subdivision thereof claimed by appellees. The deed from Spencer Cole to Benn, before mentioned, was on record at the time appellant bought the 5 acres from Jim Cole, and he testified that he saw and read this deed before he bought the land. His testimony as to this is as follows: "I examined the records, and found no deed to that tract (the two acres in controversy). I read all the deeds on record from Spencer Cole. I read the deed to Reuben Benn. I mean

the deed to Reuben Benn that calls for the 2 acres of land." Upon his purchase, or a month or two thereafter, appellant went into possession of a portion of the 5 acres under his deed from Jim Cole, which was duly recorded, and had remained in continuous possession, paying all taxes thereon, up to the time of the trial. The suit was filed in February, 1908. The actual possession and occupancy of appellant under his deed from Jim Cole has at no time extended to any part of the 2-acre tract in controversy, but has been restricted to other portions of the 5 acres conveyed by said deed. The original Spencer Cole tract of land, of which the land in controversy is a part, is in shape of a parallelogram, and the description of the 2 acres sold to Doy McDaniel as "two acres in a square out of the northwest corner" of said tract accurately identifies and describes said 2 acres. Upon these facts, which are undisputed, no other judgment than one in favor of the plaintiffs could have been properly rendered, and it would serve no useful purpose to discuss the several assignments of error in detail.

There is no merit in the contention that plaintiffs' suit was a stale demand at the time the suit was filed. The title acquired by Doy McDaniel under the parol sale was a perfect and superior title to the land sufficient to sustain a claim of title in an action of trespass to try title, and it is well settled that against such a title, whether it should be technically regarded as an equitable or a legal title, the defense of stale demand is not available. *Land Co. v. Hyland*, 8 Tex. Civ. App. 601, 28 S. W. 211; *Lumber Co. v. Pinckhard*, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015; *Lochridge v. Corbett*, 31 Tex. Civ. App. 682, 73 S. W. 96; *Betzer v. Goff*, 35 Tex. Civ. App. 408, 80 S. W. 671; *Lyster v. Leighton*, 36 Tex. Civ. App. 62, 81 S. W. 1033.

The defense of limitation was not made out because the possession of the defendant did not extend to any part of the 2-acre tract in controversy, and said 2 acres having been segregated from the balance of the 5 acres claimed by defendant under his deed from Jim Cole, long prior to the execution of said deed, possession of the remainder of the 5-acre tract by the defendant could not be extended by construction to the 2 acres in controversy. *Turner v. Moore*, 81 Tex. 206, 16 S. W. 929; *Blaske v. Settegast* (recently decided by this court) 123 S. W. 220.

The contention that appellant was an innocent purchaser for value without notice of appellees' title is also without merit. Having been informed by the recitals in the deed from Spencer Cole to Benn, which he admits he read before he purchased the land from Jim Cole, that the land in controversy had been sold to McDaniel, he was put upon notice of appellees' title; or at all events he had notice of such facts as required a reasonably prudent person to make inquiry as to whether the land had been sold to Mc-

Daniel as recited in said deed, and it cannot be doubted from the evidence that any reasonable inquiry on his part would have resulted in full knowledge by him of appellees' claim.

The judgment of the court below is affirmed.

Affirmed.

### BROUSSARD et al. v. LAWSON.

(Court of Civil Appeals of Texas. Dec. 9, 1909. On Appellee's Motion for Rehearing, Jan. 6, 1910. Rehearing Denied Appellants Jan. 27, 1910.)

#### 1. INJUNCTION (§ 241\*)—BOND—ENFORCEMENT IN INJUNCTION SUIT.

Plaintiff sued to enjoin a sale under execution, and defendant filed an amended answer against plaintiff and the sureties on the injunction bond, alleging that the property levied on had been transferred to plaintiff by her husband, a judgment debtor, in fraud of his creditors and especially of defendant, and that the property had been turned over to the husband and the sureties, and had been disposed of by them for their mutual benefit, and prayed for dissolution of the injunction and for judgment against plaintiff and the sureties for the amount due on the judgment, and for damages and costs. Defendant filed a supplemental answer, alleging that since filing the amended answer plaintiff had died intestate and insolvent, that her husband had been adjudicated a bankrupt and discharged from all his debts, and prayed to dismiss his cross-bill as to said plaintiff and to prosecute the same against the sureties. *Held*, that there was no error in permitting defendant to dismiss as to plaintiff and prosecute his cross-bill against the sureties on the injunction bond.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 544; Dec. Dig. § 241.\*]

#### 2. INJUNCTION (§ 241\*)—BOND—ENFORCEMENT IN INJUNCTION SUIT—PARTIES.

Where a married woman sues to restrain the sale of property under an execution against her husband on the ground that the property belongs to her, and alleges that her husband refuses to join in the suit, and defendant subsequently files a cross-bill against her and her sureties on the injunction bond, it is proper to refuse her prayer that her husband be made a party defendant to the cross-bill.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 544; Dec. Dig. § 241.\*]

#### 3. INJUNCTION (§ 241\*)—BOND—ENFORCEMENT IN INJUNCTION SUIT—PARTIES.

Plaintiff having died insolvent, it was not necessary to bring in her heirs or other representatives, although the injunction bond binds the sureties to pay such damages as should be adjudged against her.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 544; Dec. Dig. § 241.\*]

#### 4. EXECUTION (§ 172\*)—ACTIONS TO RESTRAIN —BURDEN OF PROOF.

In a suit by a married woman to enjoin the sale of property on an execution against her husband, plaintiff claimed that the property had been transferred to her by her husband in satisfaction of a note for an indebtedness for property belonging to her separate estate, and that she held the property under a bill of sale. *Held*, that the burden was on plaintiff to show the indebtedness of her husband to her, the execution of the note and of the bill of sale, and that this burden was satisfied by the introduction of

the note and bill of sale, and those instruments were competent to establish an indebtedness and the sale of the property to her in satisfaction thereof, unless rebutted by competent evidence.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 532; Dec. Dig. § 172.\*]

#### 5. FRAUDULENT CONVEYANCES (§ 118\*)—CONVEYANCE BY HUSBAND TO WIFE—PREFERENCE.

The transfer of property by a debtor to his wife to pay an indebtedness to her is not fraudulent if no more property is transferred than is reasonably sufficient to satisfy the debt, as a failing debtor has the right to prefer one or more of his creditors to the exclusion of others.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 380; Dec. Dig. § 118.\*]

#### 6. EXECUTION (§ 172\*)—ACTIONS TO RESTRAIN —GROUNDS—BURDEN OF PROOF.

A wife is entitled to have the injunction against the sale of property on an execution against her husband perpetuated on a showing that she owned the property at the time of the levy, and that it had been transferred to her by her husband in satisfaction of an indebtedness, unless defendant shows that the transfer to her was in fraud of creditors, which he could do by showing that the debtor was not indebted to his wife, or that the property conveyed was greater in value than was reasonably necessary to satisfy the debt.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 532; Dec. Dig. § 172.\*]

#### 7. FRAUDULENT CONVEYANCES (§ 146\*) —TRANSFER BY HUSBAND TO WIFE—POSSESSION BY HUSBAND.

Under Rev. St. 1895, art. 2967, providing that a husband shall have the sole management of all of his wife's separate property, that a debtor, after transferring a growing crop of rice to his wife, remains in possession of and manages it, and that accounts with the owner of the land on which the crop transferred was raised was kept in the name of the husband as they had been kept previous to the transfer, does not indicate that the transfer was simulated and fraudulent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 456; Dec. Dig. § 146.\*]

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Action by Ottilie Womack against D. B. Lawson to enjoin the sale of property under an execution. Defendant filed a cross-bill against plaintiff and J. E. Broussard and A. F. Goodhue, sureties on plaintiff's injunction bond, and later dismissed his cross-bill as to plaintiff. Decree for cross-plaintiff, and the sureties appeal. Reversed and remanded.

A. D. Lipscomb, for appellants. J. Earl Preston, for appellee.

REESE, J. D. B. Lawson, appellee, having a judgment of the county court of Grimes county against C. M. Womack, on July 24, 1903, had an execution thereon levied by the sheriff of Jefferson county on a crop of rice planted and growing upon 300 acres of land, which the said C. M. Womack had rented from the Beaumont Irrigation Company. The execution was returned for want of time to make the sale, and a venditioni exponas is-

sued under which the sheriff was ordered to make sale, and to deliver possession to the purchaser. This suit was then instituted against Lawson and the sheriff by Otille Womack, wife of C. M. Womack, to enjoin the sale of the property under the execution. It was alleged that the husband of plaintiff refused to join her in the suit, and she asked to be allowed to prosecute the same alone. The rice crop was alleged to be of the value of \$5,000 and to be separate property of plaintiff, who further alleged that she was unable to give a claimant's bond for trial of the right of property. On October 6, 1903, a temporary injunction was granted, the plaintiff executing an injunction bond in the sum of \$1,000, with J. E. Broussard and A. F. Goodhue as sureties. The sheriff answered by general denial November 4, 1904. On January 5, 1906, Lawson filed an amended answer, containing a general demurrer and special exception to the jurisdiction of the court, on the ground that the writ of injunction should have been returned to the county court of Grimes county. The answer also contained general denial and special denial of plaintiff's ownership of the property, with the allegations that the conveyance of the same to her by C. M. Womack, if any such was ever made, was in fraud of his creditors and especially of defendant; that, upon the issuance and service of the injunction, the rice crop had been turned over to the said C. M. Womack and the sureties on his bond, and had been disposed of by them for their mutual benefit. With much fullness of averment it is charged that plaintiff's claim, the injunction, and subsequent proceedings was the result of a fraudulent conspiracy between plaintiff and her said husband to defeat the just and lawful attempt of defendant to subject the same to his said debt. There is a prayer for the dissolution of the injunction and for judgment against plaintiff and the said sureties for the amount shown to be due upon his said judgment, and for his damages and costs and general relief.

On November 15, 1907, Lawson filed a further supplemental answer, alleging that since the filing of the amended answer Otille Womack had died intestate and wholly and totally insolvent, leaving no estate whatever, separate or community, and that there had been no administration on her estate; that since filing the suit the said C. M. Womack had been adjudicated a bankrupt, and had been regularly discharged from all his debts. Upon these facts, he prayed the court to permit him to dismiss his cross-bill as to the said plaintiff and to prosecute the same against the said sureties on her injunction bond, and that he have judgment against them for the amount of his original debt. To the amended answer and cross-bill of Lawson filed January 5, 1906, Broussard and Goodhue on March 8, 1906, filed their answer containing general

demurrer and general denial, and, further answering, they denied specially the charge of collusion and fraud on their part, alleging that they became sureties on Mrs. Womack's injunction bond under the belief in good faith that she was the owner of the crop of rice in question by a bona fide assignment and transfer of the same by her said husband; that the said Otille Womack is now out of Jefferson county, and they do not know where either she or her said husband are to be found, and that both of them are wholly insolvent and unable to respond in damages in any sum whatever in this suit; and that it is necessary for the said sureties to defend the said cross-bill for their own protection. It is further alleged that the said rice crop was grown on land leased from the Beaumont Irrigation Company, and that, even if the said C. M. Womack had been the owner of the same, yet the same would have been wholly valueless to any one who should have purchased the same at execution sale against him, because wholly immature and requiring constant care, and a stranger to the rental contract would not have been admitted to the possession of the land. It is further alleged that the beneficial interest of the tenant, whether C. M. Womack or the said Otille Womack, had been entirely absorbed in payment of claims of the landlord for land rent, water rate, and for advances to be used in making the crop, which amounted to more than the value of the interest of the tenant. On March 8, 1906, the plaintiff, Otille Womack, filed a supplemental petition, answering the original cross-bill of defendant, Lawson, alleging that she is a married woman, living with her husband, and pleading in abatement of said cross-bill the failure to make her said husband a party thereto. The case came on for trial December 5, 1908, without a jury, and resulted in a judgment for defendant, Lawson, on his cross-bill against Broussard and Goodhue for the amount of his original judgment against C. M. Womack, with interest and costs. All demurrers and exceptions were overruled. Preliminary to the judgment proper and a part thereof is the following recital and order: "Thereupon the plaintiff's attorney suggested the death of the plaintiff, and that her legal representatives had not been made parties. And it further being made to appear to the court that the death of plaintiff had been suggested to the court more than a year ago, and the cause continued to make parties, the defendant, Lawson, dismissed his cross-bill against the plaintiff, alleging the insolvency of the plaintiff's estate, and asked leave to proceed on his cross-bill against A. F. Goodhue and J. E. Broussard, the sureties on the injunction bond of the plaintiff Otille Womack. It was therefore ordered by the court that the case of Otille Womack against B. D. Lawson and Ras Landry be dismissed, and that the cross-bill of the de-

fendant, Lawson, against the plaintiff, Ottillie Womack, be dismissed and the case proceed to trial on the cross-bill of the said D. B. Lawson against the sureties on said injunction bond, A. F. Goodhue and J. E. Broussard, to all of which the said A. F. Goodhue and J. E. Broussard excepted."

There are no conclusions of fact in the record, but from the statement of facts we make the following findings: The recovery of judgment by appellee against C. M. Womack and the issuance and levy of execution and issuance of order of sale were established as alleged. The crop of rice levied upon was growing upon land rented by Womack from the Beaumont Irrigation Company, of which Broussard was general manager and Goodhue president. Upon the granting of the injunction Ottillie Womack executed a bond in statutory form payable to appellee in the sum of \$1,000. By the terms of the rental contract the landlord was to have one-half of the crop as compensation for water furnished and rent of land. They also made advances to the tenant in money and supplies for the purpose of enabling him to plant, cultivate, and gather the crop. The evidence shows that after setting aside to the landlord his half of the crop the one-half left for the tenant was not sufficient to pay his indebtedness to the landlord, but it is not shown that all of this indebtedness was for advances such as were covered by the statutory lien. On the contrary, the evidence would support the conclusion, which we make, in deference to the judgment, that there was a sufficient amount of the tenant's half, after paying to the landlord all such indebtedness as is shown to have been made to enable the tenant to plant, cultivate, and harvest the crop, to cover the amount of the judgment rendered.

On January 1, 1903, C. M. Womack executed to his wife, Mrs. Ottillie Womack, his promissory note for \$6,500, reciting therein that he was indebted to her in that amount for certain items of property, her separate estate, inherited from her mother, giving the amount of each item of said property which had been appropriated and used by him. On May 1, 1903, the said Womack executed to the said Ottillie a bill of sale of certain personal property including said crop of growing rice, and reciting therein that it was in satisfaction of the note aforesaid. The rice crop referred to in this instrument is the same now in controversy. After the execution of this bill of sale, C. M. Womack remained in possession of the crop of rice, attending to the cultivation and harvesting of the same. Prior to the execution of the bill of sale, C. M. Womack had an account with his landlord for supplies, and after its execution this account was kept in his name; supplies being charged to him. There was no evidence offered to impeach the note or bill of sale, or to show fraud in the same,

unless the facts of Womack's remaining in possession, and the keeping of the accounts in his name, are sufficient for that purpose. Nor was there evidence outside of the papers themselves to show the indebtedness from Womack to his wife.

Under the case as thus presented, we do not think the court erred in permitting appellee to dismiss as to Ottillie Womack and to prosecute his cross-bill against the sureties on the injunction bond. Mrs. Womack having sued, without joinder of her husband, upon the express allegation that he refused to join, it was proper to refuse her prayer that he be made a party defendant to appellee's cross-bill.

It was alleged by both appellants and appellee that Mrs. Womack was entirely insolvent. Her death had been suggested more than a year before the trial and leave granted to make her representatives parties, but no steps had been taken to have this done. In these circumstances there could have been no useful purpose served by bringing in her heirs or other representatives. Nor is this conclusion affected by the terms of the injunction bond binding the sureties to pay such damages as should be adjudged against her. The first and second assignments of error, presenting these questions, are overruled.

The third and fifth assignments present error for which the judgment must be reversed. The burden was upon Mrs. Womack to establish the allegations of her petition with regard to the indebtedness of her husband to her, the execution of the note, and of the bill of sale. This burden was satisfied by the introduction of these instruments; and they sufficed, unless rebutted by evidence, competent and sufficient for that purpose to establish the indebtedness and the sale of the crop of rice in satisfaction thereof. The fact that Womack was indebted to appellee, and that the effect and the purpose of the transfer of the property to his wife was to pay his debt to her, and thereby defeat its appropriation to the payment of other debts, does not render such transfer fraudulent. A failing debtor has an undoubted right to prefer one or more of his creditors, to the exclusion of others, and upon the face of the papers this is what Womack did. Of course, it would be necessary to the validity of such transfer that he really owed his wife the debt set out in the papers, and that he transferred to her no more property than was reasonably sufficient in value to satisfy the debt. Having thus, by the introduction of the note and bill of sale, made a prima facie case of ownership in herself of the crop of rice at the time of the levy, she was entitled to have the injunction perpetuated unless defendant rebutted this prima facie case by showing that the transfer was in fraud of creditors. This he could do by showing that Womack was not indebted to his wife, or that the property conveyed was greater in value than was reason-

ably necessary to satisfy the debt. No evidence was introduced to establish either fact. Appellee seems to rely solely upon the fact that Womack was in possession of the crop, managing the business, after the execution of the bill of sale, and so remained, and that the accounts were continued in his name. If the case were other than a sale by the husband to the wife, these facts would be considered badges of fraud, which, unless explained satisfactorily, would authorize the conclusion that the transfer was simulated and fraudulent. But not so in this case. By statute it is provided that during the marriage the husband shall have the sole management of all of the wife's separate property. Rev. St. 1895, art. 2967; *Brown v. Brown*, 61 Tex. 56; *Clay v. Power*, 24 Tex. 304. His possession is in no wise inconsistent with her ownership, but, on the contrary, is exactly what would be expected if the transfer to her were with the utmost good faith. It was both his right and duty to continue to manage the business of cultivating and harvesting the crop. Nor was it, we think, an indication of fraud that the accounts between the tenant and the landlord continued to be kept, as they had been previous to the transfer, in the name of C. M. Womack. The entire indebtedness was secured by the crop, and C. M. Womack continued to be the manager.

Our conclusion is that from the undisputed evidence Mrs. Womack must be held to have been the owner of the property levied upon. In such case it was not subject to the execution, and the appellee was not entitled to recover on his cross-bill, having suffered no damage. The question of the right of Mrs. Womack to resort to the writ of injunction upon the grounds alleged is not presented by the record. The trial court overruled all demurrers and exceptions, and no objection is made to his ruling.

For the errors indicated, the judgment will be reversed. The evidence appears to have been fully developed. The judgment should have been for appellants, which judgment is here rendered.

Reversed and rendered.

#### On Appellee's Motion for Rehearing.

The motion for rehearing filed by appellee is overruled. Upon further consideration of the record, however, we have concluded that the cause should be remanded for a new trial in accordance with the opinion herein rendered. We are inclined to think that we were in error in rendering judgment for appellants on the ground that the evidence upon the contested issues had been fully developed.

The judgment of the trial court is therefore reversed, and the cause remanded.

#### FORD v. HOUSTON & T. O. R. CO.

(Court of Civil Appeals of Texas. Jan. 15, 1910.)

#### 1. APPEAL AND ERROR (§ 154\*)—RIGHT OF REVIEW—EFFECT OF TAKING NONSUIT.

Where plaintiff takes a nonsuit because of a ruling which prevents recovery, he may have such ruling reviewed by an appeal from the judgment refusing to set aside the nonsuit, and reinstate the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 966; Dec. Dig. § 154.\*]

#### 2. RAILROADS (§ 398\*)—INJURY FROM FRIGHTENING ANIMALS NEAR TRACK—EVIDENCE OF NEGLIGENCE.

Evidence held to show that the noise from escaping steam which frightened plaintiff's team causing it to run away and injure him was the ordinary and usual noise made by steam escaping from the safety valve of a steam engine.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1356; Dec. Dig. § 398.\*]

#### 3. RAILROADS (§ 360\*)—LIABILITY FOR INJURY FROM FRIGHTENED ANIMALS NEAR TRACK.

A railroad company is not liable for personal injuries resulting from plaintiff's team running away on taking fright at the ordinary noise of escaping steam from a locomotive as plaintiff was passing on a traveled way near the company's yards.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1242; Dec. Dig. § 360.\*]

#### 4. RAILROADS (§ 381\*)—LIABILITY FOR INJURY FROM FRIGHTENED ANIMALS NEAR TRACK—CONTRIBUTORY NEGLIGENCE.

One who voluntarily undertakes to drive near railroad yards for his own convenience, rather than to drive further around, assumes the risk of his team becoming frightened at steam suddenly escaping from a locomotive.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1291½; Dec. Dig. § 381.\*]

Appeal from District Court, Limestone County; H. B. Daviss, Judge.

Action by J. M. Ford against the Houston & Texas Central Railroad Company. Defendant had judgment, and plaintiff appeals. Affirmed.

A. B. Rennolds, for appellant. Baker, Botts, Parker & Garwood, Williams & Bradley, and O. L. Stribling, for appellee.

TALBOT, J. Appellant, Ford, sued the appellee to recover damages for personal injuries alleged to have been received by him through the negligence of appellee in permitting steam to escape from one of its engines left standing unattended on a side track in its yards at the town of Mexia near "a public way of travel on defendant's right of way," which frightened appellant's mules drawing a wagon in which he was riding, causing said mules to run away and throw appellant from the wagon and injure him. The defendant pleaded general and special demurrers, which were by the court overruled, a general denial, and contributory negligence. A jury was impaneled, the evidence introduced, and the attorney for the plaintiff made the opening argument, whereupon the court announced, in the presence

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and hearing of the jury, "that he did not believe that under the pleadings and proof there was liability in damages to plaintiff shown against defendant railroad company, and that the court would peremptorily instruct the jury to find for the defendant," and this the court would have done, as shown by bill of exceptions, but for the fact that counsel for plaintiff upon the court's announcement, as stated, made a motion that plaintiff be permitted to take a nonsuit, which motion was granted and the cause dismissed. The plaintiff excepted to the court's action in announcing that he would instruct a verdict for the defendant and in refusing to submit the issues of fact, as insisted upon by him, for the determination of the jury, and in due time filed a motion to reinstate his case. This motion was overruled, and from the ruling of the court the plaintiff appealed.

Appellee moves this court to dismiss the appellant's appeal and strike the case from the docket of the court, because, as claimed, this court is without jurisdiction to try and determine the appeal for the reason that the nonsuit taken by appellant in the district court was voluntary and not taken under such coercion as entitles him to an appeal from such judgment.

We think the action of the court in announcing that appellant had failed to show any liability on the part of appellee for the alleged injuries sustained by him, and that he would instruct a verdict for the appellee, was practically the same as if such direction had been given before appellant took a nonsuit; and, after such action of the court, it was not obligatory upon appellant, in order to avail himself of the right of appeal, to permit a verdict to go against him. We understand the rule to be in this state that when the plaintiff is surprised by a ruling of the court, which practically prevents a recovery by him, he is not compelled to proceed with the trial, but may take a nonsuit, and may then move to set aside the nonsuit and reinstate the case; and, if the action of the court necessitating such course be erroneous and the motion to reinstate is overruled, its judgment may be revised on appeal. If the ruling of the court is not erroneous, the motion to reinstate is addressed to the discretion of the court, and its refusal is not error. *Huston v. Berry*, 3 Tex. 235; *Easterling v. Blythe*, 7 Tex. 210, 56 Am. Dec. 45; *Osborne v. Scott*, 13 Tex. 59; *Lockett v. Railway Co.*, 78 Tex. 211, 14 S. W. 564. We are of the opinion the court did not err in refusing to reinstate appellant's cause for the reason that the evidence was insufficient to authorize a finding by the jury that appellee was responsible for the accident resulting in the injuries of which appellant complains. The petition stated a good cause of action, and appellee's demurrers were therefore properly overruled, but

the evidence fails to raise an issue of fact upon the ground of negligence alleged upon which a recovery is sought to be had. It is not claimed that an unusual quantity of steam escaped from the engine and caused the team to become frightened, but that the team became frightened at the noise made thereby. It appears that appellee's locomotive engine from which it is alleged the steam escaped, causing appellant's mules to take fright, was standing on one of its tracks in the railroad yards in the town of Mexia, not very far from a traveled way, which had been used by the people for many years, along the railroad right of way, but not near a public street or street crossing of said city; that the noise made by the escape of steam from said engine at the time appellant's mules became frightened and ran away was about as loud as is usually made by the escape of steam from an engine.

Appellant testified: "On the right-hand side of the road that I went down was a small building that was used for a hotel. Right south of that was the Rotan Grocery house. \* \* \* As I was coming down that road, when I got about even with the Rotan Grocery house, the engine that was standing on the track there popped off steam. The engine made about the usual noise that engines make when they pop off steam. The engine that I was looking at was the one that popped off steam. I was not quite opposite the engine when it popped off steam. I do not know exactly how far this road that I traveled down was from the engine. It was about 60 or 80 feet. I have been going to Mexia for the last 20 years. I have been across the depot grounds frequently. When the steam popped off in that engine standing there, my team began to run. I could not tell you exactly the kind of noise that engine made. It was a loud noise, just about the usual noise an engine generally makes when the steam escapes and pops off. I could not describe the kind of racket that it made, except that it popped off steam. I could not tell you exactly the kind of noise the engine made when it popped off steam. It was pretty loud; about as loud as an engine generally makes when the steam escapes through automatic pop valves. Everybody in this country has heard them, but I could not just describe the noise they make. Nearly every one in this country has heard the racket they always make." Then he was asked: "Did the engine make that noise when it was standing there? Was it unusually loud in that respect?" To which he answered, "Yes, sir." On cross-examination plaintiff testified: "I suppose I was somewhere between 60 and 80 feet from it when it first popped off steam. I stated on direct examination this morning that the noise this engine was making was the usual noise engines make in popping off steam."

That is as near as I can describe it. It certainly was the ordinary and usual noise that everybody has heard engines make when popping off steam. There was nothing unusual about that." This is all the testimony in the record relative to the character of noise made by the engine when it popped off steam; and the answer, "Yes," made by the plaintiff to the two questions: "Did the engine make that noise when it was standing there?" "Was it unusually loud in that respect?" was evidently intended as an affirmative answer to the first of said questions. This is made certain by the subsequent positive statement of the witness, in which he declares: "It certainly was the ordinary and usual noise that everybody has heard engines make when popping off steam. There was nothing unusual about that."

The grounds of appellant's motion to reinstate are, in substance, simply that the evidence was sufficient to require the submission of his case to the jury, and therefore the trial court erred in failing to so submit it upon proper instruction, applying the law to the facts. No claim or showing was made that his case could be strengthened on another trial, and from the testimony adduced we think it conclusively appears that the noise created by the escape of steam from appellee's engine at which appellant's mules took fright was no more than the usual and ordinary noise that an engine makes when steam escapes therefrom, and such only as is reasonably incident to its safe and proper management. This being true, liability cannot be predicated upon the fright taken by appellant's mules at such noise, and appellant having failed to show that testimony existed which he could probably procure upon another trial, and which would authorize a verdict against appellee in his favor, his motion to reinstate was properly refused. It is well settled that railway companies may without subjecting themselves to the charge of negligence for so doing make such noises with their engines as are necessarily incident to their safe operation, and that one who approaches in close proximity thereto has no right to assume that it will remain quiet, and, if such assumption is indulged and the team driven becomes frightened at such noise, the person injured thereby will not be heard to complain. In such case it is said that "liability would no more grow out of fright created by such a cause than could liability be predicated upon fright proceeding from the ordinary appearance of a locomotive in the absence of noise." *Railway Co. v. Belt*, 24 Tex. Civ. App. 281, 59 S. W. 607. In support of his contention that the facts shown were sufficient to warrant a finding of negligence and consequent liability on appellee's part, appellant has cited the cases of *Railway Co. v. Traub*, 19 Tex. Civ. App. 125, 47 S. W. 282, and *Railway Co. v. Cardwell*, 67 S. W. 157, decided by this court;

but the case at bar is easily distinguished from those cases, in that in each of them the engine was at or near a street or public road crossing and the noise made by the escape of the steam was unusual. In this case the engine was not at or near such a crossing, and the undisputed evidence shows that the noise made by it was the usual noise and necessarily incident to its safe management. At most, the engine was left near a passway on appellee's right of way commonly used by the public with its acquiescence or consent, and appellant in driving along this way was a mere licensee.

There is another reason, we think, why the court was authorized to instruct a verdict for the defendant in this case, and therefore did not err in refusing to reinstate the same on the showing made by appellant therefor. It is manifest from appellant's testimony that he knew the way traveled by him along appellee's right of way was dangerous, and it is fairly inferable therefrom that there was another or other ways by which the cotton yard in the town of Mexia, and to which he was going, could have been reached without incurring the risk of having his team frightened by noises made by appellee's engines or trains. In speaking of driving along appellee's right of way he says: "I did take chances on getting through there. I thought I could get through all right. I did not know of any other street and crossing, and, of course, I had to risk some chances in going through there. I could have gone clear around, but I went through there because it was a little nearer. I had gone through there before." Appellant did not have an absolute right, as one passing over a street or public road crossing, to drive along appellee's right of way, but simply a permission or license to do so. In *Railway Co. v. Matthews*, 100 Tex. 63, 93 S. W. 1068, our Supreme Court, in speaking of the principle as applied to persons walking along a railroad track, when the same was so generally used that it might be deemed that they had a license to use the track for the purpose of a foot passage, said: "An implied permission, such as is claimed, to use a railroad track as a foot path, may relieve the person enjoying it of the imputation of being a trespasser, but it does not relieve the place of its inherent dangers, nor exempt the traveler from the duty to act with ordinary prudence. When he voluntarily chooses the dangerous pathway, instead of a safe one beside it, we can see no escape from the conclusion that he is guilty of negligence, if there be no justifying or excusing circumstances." It would seem that this doctrine is peculiarly applicable to the facts of this case. Appellant, according to his own testimony, knew that in driving along appellee's right of way he would be exposed to danger; that he could have avoided such danger by slight inconvenience, but he did

not choose to do it. On the contrary, he voluntarily assumed the hazard of going along appellee's right of way near its engines and trains, knowing that it was usual for steam to escape from the engines making just such noise as frightened his mules on the occasion in question. Therefore the injury received by him as the result of such noise must be attributed to his failure to exercise ordinary care for his own safety, which precludes a recovery. *Railway Co. v. Byrd* (Sup.) 115 S. W. 1163, 20 L. R. A. (N. S.) 429; *Railway Co. v. Mathis*, 101 Tex. 342, 107 S. W. 530.

The views expressed dispose of the whole case, and assignments relating to the court's refusal to give certain charges need not be discussed.

The judgment of the court below is affirmed.

#### McLAIN et al. v. PATE et al.

(Court of Civil Appeals of Texas. Jan. 13, 1910. On Motion for Rehearing, Feb. 3, 1910.)

#### 1. EXECUTORS AND ADMINISTRATORS (§ 470\*)—SETTLEMENT OF ESTATE—PRESUMPTIONS—LAPSE OF TIME.

Under Rev. St. 1895, art. 1882, providing that, when letters testamentary have once been granted, any person interested may proceed after any lapse of time to compel a settlement when it does not appear that the administration has been closed, the administration is not closed until the discharge of the administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2014; Dec. Dig. § 470.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 137\*)—SALE OF PERSONALTY—WHAT LAW GOVERNS.

Where, 18 years after letters of administration were granted, but before final settlement, the administratrix sold a land certificate belonging to the estate, her rights and duties in regard to the sale are governed by the law in force at the time of sale, and not at the time letters were taken out.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 137.\*]

#### 3. PUBLIC LANDS (§ 174\*)—LAND CERTIFICATES—NATURE OF PROPERTY—"PERSONAL PROPERTY."

Land certificates prior to their location are "personal property," which may be transferred as any other chattel.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 552; Dec. Dig. § 174.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5346-5358; vol. 8, p. 7753.]

#### 4. EXECUTORS AND ADMINISTRATORS (§ 148\*)—SALE OF PERSONALTY—COLLATERAL ATTACK.

Where a sale of land certificate by an administratrix is collaterally attacked, it devolves on the attacking parties to show the absence of some essential element, or the existence of some fact that would destroy the validity of the transaction.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 148.\*]

#### 5. EXECUTORS AND ADMINISTRATORS (§ 158\*)—SALE OF PERSONALTY—NECESSITY OF ORDER OF COURT.

Under Paschal's Dig. arts. 5612, 5613, 5629-5631, 5633, 5698, 5771, relating to settlement of estates of decedents and the sale of property of the estate, which do not specifically require that an order of court be had for the sale of personalty, the transfer of a land certificate by an administratrix before her discharge is valid without an order of court, though made 18 years after letters were taken out.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 634, 635; Dec. Dig. § 158.\*]

#### 6. HUSBAND AND WIFE (§ 276\*)—COMMUNITY INTEREST—SUFFICIENCY OF CONVEYANCE.

Where the administratrix of an estate was also the widow, a sale by her of a certificate for a league and labor of land by a conveyance reciting that she sold as wife, widow, and administratrix, and conveyed unto the grantee for a consideration paid a certain bounty warrant of her husband of which he had perfect title, and that she also further conveyed unto the said grantee a league and labor land certificate, etc., was sufficient to convey her community interest in such latter certificate.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1038; Dec. Dig. § 276.\*]

Appeal from District Court, Panola County; W. C. Buford, Judge.

Suit by Julia A. McLain and others against Alphonso Pate and others. From the judgment rendered, all parties appeal. Reversed and remanded.

R. W. Priest, for appellants Mrs. Julia A. McLain and T. B. Cone. J. H. Long, for appellant W. N. Hutto. H. N. Nelson and M. E. Richardson, for appellees.

HODGES, J. This suit was instituted by Julia A. McLain and others in 1908 against Alphonso Pate, Dave Sholar, and W. N. Hutto, in the form of trespass to try title, to recover certain premises described in the petition. Sholar disclaimed any interest in the land. Hutto claimed a portion, which, by agreement of the parties, was set off to him in the final disposition of the case, and Alphonso Pate is shown to have been the tenant of the appellees. Later in the proceedings E. B. Seigler filed a plea of intervention, claiming the land; and still later W. N. Seigler, Mrs. E. A. Warren, Florence E. Walker, Mrs. Ada Green, and Mrs. Emma Turner, all joined by their husbands, filed a plea of intervention, alleging ownership of the land and the tenancy of Pate. Upon the conclusion of the testimony, the court instructed a verdict in favor of the appellants for one half of the land sued for, and in favor of the appellees for the other half. All parties complain of this action of the court, and have assigned error.

The testimony shows that the land in controversy was located by virtue of a certificate for a league and labor of land issued to Mitchell Carpenter in 1838. In November, 1840, Carpenter conveyed the certificate and all right to the land that might be located

thereunder to W. N. Seigler, through whom the appellees, interveners below, claim title. W. N. Seigler died without ever having located the certificate. In March, 1854, his wife, Julia Ann Seigler, was appointed administratrix of his estate by the probate court of Smith county. It does not appear from the record before us whether she ever made a final settlement of the estate and procured a discharge from the probate court. In 1872 she conveyed the certificate to J. K. Williams by the following instrument of writing: "The State of Texas, County of Smith: Know all men by these presents, that I, Julia Ann Sigler, wife, widow and Admrx. of the estate of my husband Wm. N. Sigler, deceased, of Tyler, Texas, I being now a resident of Tyler, Texas, have this day contracted, bargained and sold, and by these presents do bargain, sell and convey unto the said John K. Williams of the county of Harrison and state of Texas, for the consideration of the sum of five hundred dollars, to me in hand paid by the said J. K. Williams (the receipt of which is hereby acknowledged), with a perfect title as was vested in my said husband, the following land titles (viz.): my said husband, Wm. N. Sigler's bounty warrant No. 2464, issued by the Adj. Genl. of the state of Texas, for (320) three hundred and twenty acres of land, said Williams being fully authorized to obtain from the Commr. of the Genl. Land Office said certificate, and the patent to the lands located by virtue thereof at said Williams' own discretion, and also I, the said Julia A. Sigler, further convey unto the said J. K. Williams for the aforesaid consideration, one League and Labor Land certificate, the Headright of M. Carpenter, No. 60, class No. 1, issued by the board of land commissioners for San Augustine county, for one league and labor of land conveyed by the said Mitchell Carpenter to my said husband Wm. N. Sigler with all and singular the lands located by virtue of the same and the Comr. of the Genl. Land Office is hereby authorized to issue patent to the said J. K. Williams in his own name and to give him full control of said certificate and transfers the lands or patent secured by virtue of the same unto the said J. K. Williams, his heirs, administrators, executors and assigns with all the appurtenances thereunto belonging or in any wise appertaining. In testimony whereof I hereunto set my hand and seal, using scroll for seal, this the 23 day of April, A. D. 1872, one thousand eight hundred seventy-two. Julia A. Sigler. [L. S.]"

It must be conceded that the appellants hold under a perfect chain of transfers from Williams, and that, if Williams by the conveyance above mentioned acquired a title to the entire interest represented by the certificate, they are entitled to recover the land sued for. Upon its face the deed purports

to convey the entire interest in the certificate without any reservation as "the wife, widow, and administratrix of \* \* \* Wm. N. Sigler," deceased. This language is broad enough, if the power existed, to convey, not only the community interest of Mrs. Seigler, but that of her deceased husband's estate. Her authority to make the conveyance is attacked upon the ground that the record fails to show any order of the probate court directing the sale, or approving the sale after it was made. About 18 years had elapsed between her appointment and the date of the sale. Under the rule adopted by the courts prior to the passage of the act of 1870 (Laws 1870, c. 81; Rev. Civ. St. 1895, art. 1882), it would in such an event be presumed that administration had been closed, and that she was at that time without authority to further act as the representative of the estate. But since the enactment of the provision above referred to no such presumption will be indulged, and an administration will not be regarded as closed till the administrator is discharged. *Blackwell v. Blackwell*, 86 Tex. 207, 24 S. W. 889; *Branch v. Hanrick*, 70 Tex. 731, 8 S. W. 539. The facts in evidence showed but few of the proceedings in the probate court concerning the Seigler estate. There were orders setting aside certain property to the widow and minor children requiring the administratrix to make and exhibit and show cause why she should not pay costs, and another continuing till the next term "the case of Julia A. Seigler for final settlement and distribution." The inventory returned did not contain the certificate in question. Whether there was ever any supplemental inventory returned does not appear. There was evidence which was undisputed that the probate records of Smith county had been searched, and no other orders or records pertaining to this administration could be found. This testimony would seem to negative the existence of any order discharging the administratrix, as well as any authorizing the sale of the certificate. But was such an order as that last named needed to convey a good title to the certificate at the time the sale purports to have been made? If we cannot indulge the presumption from mere lapse of time that the administration was closed in 1872, and upon that ground question the right of Mrs. Seigler to further act in her representative capacity, the logical inference from the testimony is that the administration had not been closed. If it had not, then she was still clothed with all the rights and powers of an administrator. Her rights and powers and the validity of her acts must be determined by the law in force at the time she made this conveyance. The probate law in force at the time of her appointment in 1854 had been superseded by the act of August 15, 1870, which latter was still in force at the time of her conveyance

of the certificate to Williams. Paschal's Dig. art. 5462 et seq.; Gammel's Laws of Texas, 141. This act did not require the administrator to obtain an order of the probate court to sell the personal property of the decedent, except in certain cases. The following provisions of that act appear to govern the rights, duties, and powers of administrators pertinent to this inquiry:

"Art. 5612. (144) The personal property passes to the executor or administrator, to be disposed of as hereinafter provided for, unless otherwise ordered by the court; and a sale of such property cannot be attacked, except for fraud in the purchaser.

"Art. 5613. (145) Real property merely passes to the possession of the executor or administrator, to be preserved and hired or rented, as provided in sections one hundred and fifty and one hundred and fifty-one, to be sold by order of the court, if necessary, for the payment of debts under; and if not required to be sold for the payment of debts, to be distributed or delivered up to the persons entitled to the remainder of the estate."

"Art. 5629. (161) The executor or administrator, as soon as practicable after the appraisalment, shall sell, at public or private sale, all the personal property belonging to the estate, except property exempt from forced sale, specific legacies, and personal property necessary to carry on a plantation or manufactory, giving such credit as he may deem most advantageous to the estate, not exceeding six months, and taking notes, with one or more sufficient sureties, for the purchase money.

"Art. 5630. (162) If any testator direct his personal estate, or any part thereof, not to be sold, the same shall be reserved from sale, unless such sale be necessary for the payment of debts.

"Art. 5631. (163) The executor or administrator shall keep, or cause to be kept, a true account of the sales made, making a list thereof, specifying each article sold, the price for which it was sold, and the name of the purchaser, and shall annex to such list an affidavit, showing that it is a true account of the sales made by him at the time specified, and shall file it within thirty days after the sale. Such accounts shall be recorded, after allowing one term for objections to be made thereto."

"Art. 5633. (165) The executor or administrator may sell any of the personal property of the estate at private sale, if it appear to him to be for the interest of the estate; but he shall be responsible for its being sold for a fair price, and shall make return of such sale within thirty days."

"Art. 5698. (230) If any person desire to obtain the possession merely of real property, or to recover personal property, it is sufficient to make the executor or administrator a party. But the title to land cannot be affected by a recovery in such suit."

"Art. 5771. (304) All proceedings in relation to the settlement, partition, and distribution of estates of deceased persons, that now remain unsettled in the county courts, where the administration has been commenced, shall be transferred to the district court of the same county, and shall be concluded under the provisions of this act: Provided, that no remedy to which a creditor is entitled under the provisions of the laws heretofore in force shall be impaired by this act. Proceedings heretofore had in the county courts in matters of probate may be revised by motion in the district court, specifying the errors or irregularities sought to be corrected, giving ten days' notice thereof to the party or parties adversely interested."

From the foregoing it will be seen that there is no provision requiring the administrator to procure an order from the probate court as a prerequisite to the sale of personal property. Land certificates prior to their location have always been treated by our courts as personal property, which may be transferred as any other chattel. *Dodge v. Litter*, 73 Tex. 322, 11 S. W. 331; *Melton v. Turner*, 38 Tex. 84. The objection to this conveyance from Mrs. Seigler to Williams being in the nature of a collateral attack on the sale, it devolves upon the appellees to show the absence of some essential element or the existence of some fact that would destroy the validity of the transaction. *Fisk v. Norvel*, 9 Tex. 18, 58 Am. Dec. 128; *Hurley v. Barnard*, 48 Tex. 87; *Lynne v. Sanford*, 82 Tex. 63, 19 S. W. 847, 27 Am. St. Rep. 852. This not having been done, we must hold that the sale from Mrs. Seigler as the administratrix of W. N. Seigler's estate had the legal effect of passing title to whatever interest in the certificate belonged to that estate.

We also think the language is sufficiently comprehensive to convey her community interest, and thus invest Williams with the entire ownership. It follows from this that the appellants had shown title to all of the land sued for, and that the court erred in the instruction given to the jury.

In view of the fact that upon another trial there might be other evidence obtained bearing upon the issues involved, we have thought it proper to remand the cause for another trial. The judgment of the district court is therefore reversed, and the cause remanded.

#### Motion for Rehearing.

In their motion for rehearing the appellees appear to rely upon the assumption that article 1882, Rev. Civ. St., did not become the law till 1895. This provision originated in 1870, and appears as section 46 of the acts of August 15th of that year (Laws 1870, c. 81). At that time it read as follows: "But where letters testamentary or of administration have once been granted, no presumption is admissible which is contrary to the rec-

ord; and the persons interested in the administration may proceed, after any lapse of time, to compel a settlement of an estate which does not appear from the record to have been closed." Paschal's Dig. art. 5507. Upon the adoption of the present Revised Statutes, the words, "no presumption is admissible which is contrary to the record," were omitted. That clause, however, does affect the question here in issue.

The motion is overruled.

### SIEVERT et al. v. UNDERWOOD.

(Court of Civil Appeals of Texas. Jan. 7, 1910.  
Rehearing Denied Feb. 3, 1910.)

#### 1. APPEAL AND ERROR (§ 742\*)—ASSIGNMENTS OF ERROR—ACCOMPANYING STATEMENTS AND PROPOSITIONS—NECESSITY.

Assignments of error as to which there are no statements from the record following the propositions thereunder, as required by rule 31 of the Court of Civil Appeals (67 S. W. xvi), need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.\*]

#### 2. COVENANTS (§ 102\*)—WARRANTY OF TITLE—RIGHT TO SUE—PURCHASE OF PARAMOUNT TITLE.

A contract between a covenantee and the attorneys for the owner of a paramount title that, in case suit by their client for a tract, including that in question, was finally determined in his favor, the attorneys, who held only a contract for an undivided one-fourth interest in the event of recovery, would protect the covenantee to the extent that he should receive out of their interest as much land as he lost was not such a purchase of the paramount title by the covenantee as would authorize a suit on the warranty.

[Ed. Note.—For other cases, see Covenants. Cent. Dig. § 157; Dec. Dig. § 102.\*]

#### 3. LIMITATION OF ACTIONS (§ 47\*)—ACCRUAL OF CAUSE OF ACTIONS—BREACH OF WARRANTY OF TITLE.

Till the final determination of a suit in favor of the owner of a paramount title against a covenantee and his warrantors, the covenantee has no cause of action on his warranty.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 254-258; Dec. Dig. § § 47;\* Covenants, Cent. Dig. § 178.]

#### 4. LIMITATION OF ACTIONS (§ 180\*)—BREACH OF WARRANTY OF TITLE—PETITION AS SHOWING BAR.

It does not appear from a petition for breach of warranty of title showing a contract of purchase of the paramount title that the action is barred by failure to sue within four years from the date of the contract, where it is not stated when the contract was made.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 671, 672; Dec. Dig. § 180.\*]

#### 5. PLEADING (§ 218\*)—DEMURRER—PRESUMPTION IN FAVOR OF PLEADING.

A plea in the nature of a general demurrer is subject to the rule that, as against it, every reasonable intendment will be indulged in favor of the pleading demurred to.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 555; Dec. Dig. § 218.\*]

#### 6. LIMITATION OF ACTIONS (§ 180\*)—PLEADING—DEMURRER SETTING UP STATUTE.

A defendant, setting up the statute by way of demurrer, must show that, on the face of his adversary's pleadings, the action is barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 671, 672; Dec. Dig. § 180.\*]

Appeal from District Court, Jefferson County; L. B. Hightower, Jr., Judge.

Suit by J. W. Underwood against Frank Sievert and others. A part of the defendants were dismissed from the suit, and from a judgment for plaintiffs, Sievert and another, the remaining defendants, appeal. Affirmed.

Eugene A. Wilson and M. S. Duffie, for appellants. A. D. Lipscomb, for appellee.

REESE, J. J. W. Underwood brings this suit in the district court against Frank Sievert and B. R. Norvell, administrator, and also the heirs of William Day, to recover upon covenants of warranty of title in the sale and conveyance of certain land by said Sievert and Day to S. M. Scott, and by said Scott to said Underwood. The amount sued for is \$834, with interest at 6 per cent. per annum from March 9, 1899. The heirs of Day were dismissed from the suit. Sievert and Norvell, administrator, by their amended answer excepted to the petition, on the ground that it appeared from the allegations thereof that plaintiff's claim was barred by the statute of limitation. Defendants further pleaded the general issue and the statute of limitation of four years in bar of the action. The exceptions were overruled, and upon trial without a jury there was a judgment for plaintiff for \$959, from which this appeal is prosecuted.

The evidence was sufficient to establish the liability of defendants for the amount of the judgment. Upon the issue of the statute of limitation, which is practically the only ground relied upon on this appeal, the evidence, which was undisputed, established that on March 9, 1899, H. L. Humphrey employed J. N. Votaw and J. D. Martin to bring suit to recover a tract of 900 acres of land, part of the D. Choate survey, entering into a written contract to convey to them one-fourth of whatever land might be recovered in such litigation. The said 900 acres of land included 139 acres of the land which had been sold by Sievert and Day to Scott, and by Scott to appellee, the covenants of warranty in which sale was the basis of the suit. On March 7, 1899, H. L. Humphrey, by his said attorneys, instituted suit against J. W. Underwood, Frank Sievert, and W. M. Day and other defendants for said 900 acres of land. On May 1, 1901, J. N. Votaw and J. D. Martin executed a certain contract in writing as set out their said contract with Humphrey, and the filing of the suit, and whereby, in consideration of the payment to them of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

\$1,350 by J. W. Underwood, they covenanted and agreed with him that if said suit was successful in behalf of plaintiff Humphrey, they would "see that the decree taken sets aside to said Underwood, as part of our undivided interest therein, an amount of said land equal in acreage to the amount of said 900 acres, which is included in the N.  $\frac{1}{2}$  of subdivision No. 12 of the said D. Choate league, being about 135 acres more or less," which was the land sold to Underwood, included in said tract sued for. This suit of Humphrey against Underwood, Slevert, and Day, upon trial in the district court, was decided in favor of defendants, but upon appeal to this court this judgment was reversed and judgment rendered in favor of plaintiff Humphrey. However, upon receipt of the mandate by the district court it appears that, by reason of the agreement between Votaw and Martin and Underwood, a decree was rendered protecting Underwood's title to his 139 acres. The judgment of the Court of Civil Appeals was rendered January 4, 1906, and the judgment of the district court above referred to on April 21, 1906. The original petition in the present suit was filed May 4, 1907, and with reference to the matter referred to, contained the following allegations: "That on or about the 7th day of March, 1899, said H. L. Humphrey, through his said attorneys, filed suit against this said plaintiff and others for the said 900 acres of land, and this plaintiff, then believing or fearing the title of the said H. L. Humphrey to be paramount, was compelled to pay, and did pay, to the said J. N. Votaw and J. D. Martin the sum of \$1,350 in cash as a consideration for the promises and agreement of the said J. N. Votaw and J. D. Martin to protect this plaintiff from dispossession of said 139 acres of land, through their one-fourth interest in the adverse title. That the said litigation was never finally determined until a judgment was rendered by the Court of Civil Appeals of the First Supreme Judicial District of Texas, on or about the 30th day of March, 1906, adjudging that the paramount title to the said 900 acres of land was in the said H. L. Humphrey, under which judgment this plaintiff would have been dispossessed but for the arrangement with said Votaw and Martin above detailed."

It may be said in limine that neither of the three assignments of error is so presented as to require consideration, as there is no semblance of a statement from the record following the propositions under each as is required by rule 31 (67 S. W. xvi). We have, however, examined the record sufficiently to be able to see that neither of the assignments is well taken.

The first assignment attacks the judgment on the ground that the evidence shows that appellee's suit was begun more than four years after the accrual of his cause of action, and is barred by the statute of limitation. Appellants' ground for this contention is that

appellee's cause of action arose at the date of the contract with Votaw and Martin hereinafore recited. Appellants seek to apply to the facts of this case the rule stated in *Rawls on Covenants of Title* (4th Ed. p. 168): "That a purchase by a covenantee of an outstanding paramount title, when that title is actually asserted, will constitute such an eviction as will entitle him to damages upon his covenants for quiet enjoyment or of warranty, measured by the amount he has thus paid." *Loomis v. Bedell*, 11 N. H. 74; *Turner v. Goodrich*, 26 Vt. 709; *Flowers v. Foreman*, 64 U. S. 132, 16 L. Ed. 407. The facts of this case do not fall within this rule. Appellee was sued along with his warrantors, and, pending this suit did not buy the paramount title, which was held by Humphrey, but the effect of his contract with Martin and Votaw was that, in the event that suit was finally determined in favor of the plaintiff, they who held only a contract for an undivided one-fourth interest in the event of recovery would protect Underwood to the extent that he should receive out of their one-fourth in the 900 acres as much land, in acreage, as he lost in the suit. It does not require any discussion to show that this was not such a purchase of the paramount title to the 139 acres conveyed to Underwood by Scott as would authorize a suit upon the warranty. Appellee's warrantors, Day and Slevert, as well as appellee, were defendants in this suit, and were defending this title, and the judgment of the district court was in their favor. Clearly, in these circumstances, appellee had no cause of action upon his warranty, until the final determination of that suit against him. It was only upon such termination that the contract of Votaw and Martin became operative at all.

The second assignment is directed to the action of the court in overruling the exception to the petition, on the ground that it appears therefrom that the cause of action was barred by limitation. We have set out the allegations of the petition on this point. Even if these allegations had showed a purchase of the paramount title sufficient to give appellee a cause of action on the warranty under the rule above stated, which they do not, it is not stated when this contract was made with Votaw and Martin, and therefore it does not appear that the suit was not instituted within four years of such date. The plea is in the nature of a general demurrer, and subject to the rule that, as against it, every reasonable intendment will be indulged in favor of the pleading demurred to. "A defendant, setting up the statute of limitation by way of demurrer, must show that, on the face of his adversary's pleadings the action is barred." *Rucker v. Dailey*, 66 Tex. 287, 1 S. W. 316.

There is no merit in the third assignment of error and proposition thereunder. The entire tract of 225 acres was sold to Underwood at \$6 per acre. There was no claim nor evi-

dence that the 139 acres lost was not of equal value with the rest, and the court did not err in holding that this price per acre was the proper measure of appellee's damages.

We find no error in the record and the judgment is affirmed.

**Affirmed.**

# **KRUEGEL v. COBB et al.†**

(Court of Civil Appeals of Texas. Jan. 8, 1910.  
Rehearing Denied Jan. 29, 1910.)

## **1. APPEAL AND ERROR (§ 854\*)—REVIEW—REASONS FOR RULING.**

A ruling dismissing a petition will not be reversed because the reason given therefor is unsustainable, where the ruling is proper on other grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3408; Dec. Dig. § 854.\*]

## **2. APPEAL AND ERROR (§ 10\*)—PETITION FOR REVIEW AS PRECLUDING WRIT OF ERROR.**

The remedy by petition for review, provided by Rev. St. 1895, art. 1375, to obtain a new trial of an adverse decree, is additional to the remedy by writ of error and not preclusive thereof; the remedies being concurrent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 36; Dec. Dig. § 10.\*]

## **3. NEW TRIAL (§ 166\*)—PETITION AFTER TERM—STATUTES.**

Rev. St. 1895, art. 1375, providing that, where a judgment has been rendered on service of process by publication without appearance, a new trial may be granted by the court on defendant's application for cause, supported by affidavit, filed within two years after the rendition of judgment, does not apply when defendant has been personally served or has appeared.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 246; Dec. Dig. § 166.\*]

## **4. NEW TRIAL (§ 166\*)—AFTER TERM—TIME OF APPLICATION—NATURE OF PROCEEDINGS.**

In an application for a new trial made subsequent to the term at which the judgment was obtained, complainant is not confined to the rules of practice prescribed by statute, but the proceeding may be treated as in the nature of an original suit in equity; and if it appears that the judgment was obtained by fraud, accident, or mistake, without any want of diligence of the person against whom it was rendered, or that by either of such means the complaining party, without fault, was denied a meritorious defense, the judgment may be reopened and a re-examination of the cause had on its merits, and such relief granted as justice and equity may demand.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 246; Dec. Dig. § 166.\*]

## **5. NEW TRIAL (§ 166\*)—AFTER TERM—APPLICATION—GROUNDS—PERJURY.**

Where an application is made for a new trial after the term, on the ground that the judgment was procured by the false testimony of the opposite party, the petition must show that the perjury was not discovered until after the close of the term.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 247; Dec. Dig. § 166.\*]

## **6. NEW TRIAL (§ 166\*)—AFTER TERM—PETITION—ALLEGATIONS AS TO DILIGENCE.**

A petition for a new trial, after the term, for denial of a meritorious defense, must not only show that complainant did not know of the

defense, but that his ignorance did not result from any lack of diligence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 247; Dec. Dig. § 166.\*]

## **7. TRESPASS TO TRY TITLE (§ 41\*)—PROOF OF TITLE—EXECUTION SALE.**

Where, in trespass to try title, complainant claimed under a constable's deed pursuant to an execution sale under a judgment against the common source of title, proof of the constable's deed without the judgment and execution on which it was based, or evidence of inability to produce the same, and of their contents, was insufficient to show title.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.\*]

## **8. NEW TRIAL (§ 166\*)—AFTER TERM—PETITION—REQUISITES.**

A petition for a new trial on equitable grounds, made after the term, must show sufficient matter to have entitled the petitioner to a new trial if applied for during the term, and sufficient legal excuse for not having then made the application.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 247; Dec. Dig. § 166.\*]

## **9. NEW TRIAL (§ 166\*)—AFTER TERM—PETITION—REQUISITES.**

Where a petition in the nature of a bill of review to obtain a new trial of a suit in trespass to try title did not show that complainant made any motion for a new trial at the term at which the judgment was rendered nor any excuse for failing to do so, the petition was demurrable.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 247; Dec. Dig. § 166.\*]

## **10. NEW TRIAL (§ 166\*)—AFTER TERM—PETITION—PERJURY.**

Where a petition in the nature of a bill of review to obtain a new trial of a suit of trespass to try title alleged that the judgment was obtained by the perjury of certain witnesses, but did not allege that complainant, for any reason, was prevented or unable to show the falsity of the testimony at such trial, nor that since the trial complainant had discovered testimony which was unknown to him at the time of the trial, and which could not have been discovered by the exercise of reasonable diligence by which the perjury could be established and a different result produced on another trial, but it appeared that complainant prior to the trial was convinced that the witnesses were not credible, but took no steps to impeach them, the petition was demurrable.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 247; Dec. Dig. § 166.\*]

## **11. CONSPIRACY (§ 20\*)—EXEMPLARY DAMAGES—ACTUAL DAMAGES.**

Where complainant in trespass to try title failed to establish his title or right of possession, he suffered no actual damage by judgment against him; and hence could not recover exemplary damages because of an alleged conspiracy between the defendants to prevent a recovery therein.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 27; Dec. Dig. § 20.\*]

## **12. JUDGES (§ 36\*)—JUDICIAL ACTS—CIVIL LIABILITY.**

A judicial officer is not civilly liable for his judicial acts whether negligently, willfully, or maliciously committed.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 165; Dec. Dig. § 36.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

**13. APPEAL AND ERROR (§§ 736, 742\*)—ASSIGNMENTS OF ERROR.**

Where assignments of error, presenting separate and distinct questions, are grouped and are not accompanied by any proposition, they will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3000, 3028; Dec. Dig. §§ 736, 742.\*]

**14. PLEADING (§ 225\*)—AMENDMENT—AFTER DEMURRER SUSTAINED.**

Where, after the sustaining of a general demurrer to complainant's original petition, he was granted leave to file an amended or supplemental petition, under which permission he presented two supplemental petitions, neither of which strengthened his case and to which a general demurrer was again sustained, the court was justified in refusing leave to file further amendments.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 575-582; Dec. Dig. § 225.\*]

Appeal from District Court, Dallas County; J. C. Roberts, Judge.

Bill of review by Herman Kruegel against Charles C. Cobb and others. From a decree dismissing the bill on demurrer, complainant appeals. Affirmed.

Herman Kruegel, for appellant. Cobb & Avery, for appellees.

**TALBOT, J.** This is a proceeding, styled a "bill of review," instituted by the appellant against Chas. C. Cobb, John M. Avery, J. P. Murphy, Chas. F. Bolanz, and Thomas F. Nash, in the district court of the Fourteenth judicial district of Texas, to set aside a judgment rendered in said court May 1, 1902, in cause No. 20,444, in which the appellant herein was plaintiff and the said Chas. C. Cobb and John M. Avery were defendants, and to grant appellant a new trial of said cause. In addition to the foregoing relief, appellant, upon general allegations of collusion between Cobb and Avery and the presiding judge, and of false testimony given by Murphy and Bolanz, to defeat a fair trial of said cause No. 20,444, prays judgment herein for actual damages in the sum of \$5,000 and exemplary damages in the sum of \$10,000 against all of said defendants. His pleadings are very voluminous, covering 100 pages of the record sent to this court, and purport to set out all the pleadings filed, all the material evidence introduced, and all the proceedings had in the original suit mentioned. Said pleadings allege, in substance, that appellant's suit No. 20,444 was an action of trespass to try title for the recovery of a lot and the improvements thereon situated on Main street, in the city of Dallas, house No. 253; that upon the conclusion of the evidence in the trial of said cause the court instructed the jury peremptorily to return a verdict for the defendants Cobb and Avery, which was done and judgment entered accordingly; that appellant prosecuted a writ of error from said judgment to the Court of Civil Appeals for the Fifth Supreme

Judicial District of Texas, which was by said court dismissed, because appellant failed to file printed briefs in said court; that after said writ of error was dismissed by the Court of Civil Appeals, and on April 29, 1904, appellant filed this proceeding in the district court of the Fourteenth judicial district. It is further averred in appellant's pleadings herein, in substance, that the petition in his suit of trespass to try title showed that Murphy & Bolanz was a copartnership firm composed of J. P. Murphy and Chas. F. Bolanz, and that said firm formerly owned the lot sued for in said action; that on July 25, 1893, said Murphy & Bolanz, pretending to be insolvent, executed a fraudulent general assignment purporting to convey all their property not exempt by law to one E. T. Loughborough as assignee for the benefit of accepting creditors; that Mrs. J. E. Harding, under whom appellant claims, was a creditor of said Murphy & Bolanz, but did not accept under their assignment; that, instead, she sued on her claim amounting to \$130, and recovered judgment therefor in December, 1893; that she caused an execution to be issued on said judgment, which was levied on the lot sued for in appellant's original suit of trespass to try title and sold by virtue of said execution on February 6, 1894; that Mrs. Harding became the purchaser of said lot at said sale and received a deed therefor which was properly acknowledged and duly recorded; that on February 1, 1894, while said assignment was still pending, Murphy and his wife and Bolanz and wife fraudulently sold and conveyed said lot to defendants Cobb and Avery by deed duly recorded, which deed recited a consideration of \$18,000, \$6,500 cash and balance on time; that said petition further showed that on said 1st day of February, 1894, the said Cobb and Avery also purchased, or pretended to purchase, said property from E. T. Loughborough, assignee of Murphy & Bolanz, for \$1; that said conveyances to Cobb and Avery were made to defraud the creditors of Murphy & Bolanz, which was well known to Cobb and Avery at the time of the execution and delivery of said deeds. Appellant's petition in this suit further set out the answer filed by Cobb and Avery in appellant's said action of trespass to try title, which shows that they plead in said suit not guilty, the statutes of limitation of three and five years, and that any cause of action which appellant and those under whom he claimed title may have ever had growing out of the frauds alleged in his petition in said suit arose more than four years before the commencement of said suit, and therefore barred by the statute of limitation of four years; that, in reply, appellant by supplemental petition pleaded that the acts of fraud set up by him could not have been discovered earlier than 1899, and that up to the middle of the year 1899

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Mrs. Harding, from whom he bought, was a married woman; that Murphy & Bolanz in September, 1898, filed a voluntary petition in bankruptcy, and June 9, 1899, were duly discharged; that they were not bankrupt in 1898, but were able to pay all their debts, and that they had notoriously failed to surrender all or any of their valuable property to the bankrupt court for the benefit of creditors. Following the allegations showing what the pleadings of the parties were in the trespass to try title suit, appellant's petition herein purports to set out substantially all the material evidence, oral and documentary, adduced on the trial of said suit, and then charges that the testimony of Cobb and Avery given on said trial, to the effect "that there was no fraud in this trade so far as Cobb and Avery were concerned, and that they had no notice or knowledge of any fraud by any one else, and that Cobb and Avery had no notice or knowledge of any fraud in the assignment of Murphy & Bolanz cannot be believed by honest and intelligent men," and the testimony of Murphy and of Bolanz to the effect that "they were still partners conducting a general real estate business in the city of Dallas and as such had never ceased to do business in their building, 253 Main street, that we intended then (meaning at the time when they bought the lot and built the building, 253 Main street) to make it our business homestead, and we always claimed it as our business homestead from that time up to February 1, 1894, when we sold the property to Cobb and Avery and never abandoned it as our business homestead, and always conducted our business in said building and never closed it, that their assignment on July 25, 1893, was not a prearranged and fraudulent assignment, and that they were not aware of an assignment until advised by their attorneys on the day they made it, on July 25, 1893," was false and uttered to deceive and mislead the jury and the court. Appellant's petition charges that Judge Nash, who presided at the trial of appellant's said action of trespass to try title, "was partial and biased against plaintiff and unusually favorably disposed towards defendants Cobb and Avery and their co-conspirators, Murphy & Bolanz, and that Judge Nash, to prevent a true verdict of the jury in favor of plaintiff against defendants, conspired and colluded with defendants Cobb and Avery and their witnesses against Kruegel and against law and undermined the principles of the jury system, and under a peremptory charge, by sophistry, under pretense of color of law, willfully, wrongfully, and unlawfully trespassed on plaintiff's constitutional rights and on the field and functions of the jury, and willfully and wrongfully and unlawfully usurped to himself the duty and functions of the jury to head off and circumvent a fair trial and a true verdict by a jury of plain-

tiff's peers—which conspiracy, collusion, and actions of the court are not errors, but willful, actionable wrongs that cannot be reached or cured by appeal." The petition concludes with a prayer for a rehearing of his trespass to try title suit; that the judgment rendered therein be set aside and annulled; that in lieu thereof that he have judgment for the property therein sued for; and that, on account of the conspiracy and wrongs alleged he have judgment against all the defendants herein, namely, Cobb, Avery, Murphy, Bolanz, and Nash, for the sum of \$5,000 as actual damages and \$10,000 as exemplary damages.

It appears from appellant's pleadings that a general demurrer to his "original petition for bill of review" was heard and sustained December 16, 1907, by Hon. Chas. F. Tucker, sitting as special judge, and appellant granted leave to file an amended or supplemental petition; that under the leave so granted appellant filed two supplemental petitions. The first, covering about 19 pages of the record, was filed October 26, 1908, and the second, covering about 7 pages, was filed November 6, 1908. These supplemental petitions in a large measure reiterate the charges of conspiracy, collusion, fraud, and perjury alleged in appellant's original petition herein, and, in addition thereto, aver, in substance, that appellant's petition in his said trespass to try title suit presents on its face a valid and meritorious cause of action; that the judgment in said suit, which is by this proceeding sought to be set aside, was obtained by fraud or mistake of the court and false swearing of witnesses in a manner that could not have been anticipated by appellant and over which he had no control and to which he had in no way contributed; that appellant claims the property in question under a better legal valid, prior, and superior title than the defendants in said suit obtained by him for a valuable consideration from Mrs. J. E. Harding, a married woman, though living separate and apart from her husband, whose whereabouts she does not know; that, after having learned the fraud, deception, and concealment of the fraud of Murphy & Bolanz, Cobb and Avery, and many others concerning said property and other matters incident thereto, he, appellant, paid her the price she asked, and she by quitclaim deed, duly executed and delivered, sold and conveyed to appellant all her right, title, an interest in said property. The defendants answered herein by a general demurrer and general denial. On November 7, 1908, the case was called for trial, and, upon presentation of defendants' general demurrer, it was sustained, and, the court having refused to allow appellant to again amend his pleadings, the cause was dismissed, to which action of the court the appellant excepted, and now has the case before this court on appeal.

We shall not quote and discuss in detail the several assignments of error. The prin-

cipal question involved is whether or not the appellant's petition shows upon its face that he is not entitled to the relief sought. In explanation of a bill of exception reserved by the appellant to the court's action in sustaining appellee's general demurrer and dismissing his case, the presiding judge states that said demurrer was sustained "on the theory that this is a suit to set aside a judgment obtained in the court at a former term, 1902, an appeal from which was dismissed in the honorable Court of Appeals on February 13, 1904"; and appellant seems to insist that, unless the court's ruling can be sustained on the ground that because he prosecuted an appeal from said judgment he is thereby precluded from maintaining this proceeding, the case ought to be reversed and remanded for trial. We are of the opinion, however, that appellant's petition shows on its face that he is not entitled to a new trial of his suit of trespass to try title against Cobb and Avery, and hence the court's action in respect thereto must be sustained, no matter whether he gave the correct reason therefor or not. Rulings of the courts, when brought in review before a higher tribunal, have frequently been upheld for reasons entirely different from those upon which such rulings were based. *Missouri, Kan. & Tex. Ry. Co. v. Waggoner* (Sup.) 115 S. W. 1172. What effect the prosecution of an appeal or writ of error from the judgment rendered in appellant's said trespass to try title suit has upon his right to reopen said judgment in this suit we deem it unnecessary to determine. It has been held, however, by the Supreme Court of this state that the remedy by petition for review given under a statute very similar to article 1375, Rev. St. 1895, our present statute upon the subject, was additional to the remedy by writ of error, and not preclusive thereof, and that said remedies are concurrent. *Chrisman v. Miller*, 15 Tex. 159; *Doty v. Moore*, 16 Tex. 592. But the appellant's right to reopen the judgment as prayed for in the present case, if any he has, is not given by article 1375, nor by any other provision of our statute. Article 1375 reads as follows: "In cases in which judgment has been rendered on service of process by publication, when the defendant has not appeared in person or by an attorney of his own selection a new trial may be granted by the court upon the application of the defendant for good cause shown, supported by affidavit, filed within two years after the rendition of such judgment." The effect of this statute, as is clearly expressed by its language, is to allow two years in which to make application for a new trial in suits where service is had upon the defendant by publication, and this only when the defendant has neither appeared in person nor by an attorney of his own selection. It has no application when the defendant has been personally served with citation or when he appears in person, or by an attorney selected by him. It seems to be well established, how-

ever, by the decisions that in applications for a new trial made subsequent to the term at which the judgment was obtained the complainant is not confined to the rules of practice prescribed by the statute. The proceeding may be treated as one in the nature of an original suit in equity, and whatever would be the subject of equitable cognizance would be of like cognizance in a suit for a new trial. If, in such a case, it appears that the judgment was obtained by fraud, accident, or mistake, without any want of diligence on the part of the person against whom it was rendered, or by either of such means the complaining party, without his fault or neglect, was denied a meritorious defense, our district courts, in the exercise of their equitable powers, may reopen the case, and by a re-examination of it on its merits grant such relief as equity and justice may demand. *Overton v. Blum*, 50 Tex. 417; *McMurray v. McMurray*, 67 Tex. 665, 4 S. W. 357. If relief is sought on the ground that the judgment was procured through the false testimony of the opposite party, it must appear by the allegations of the petition, or be fairly or reasonably inferred therefrom, that the falsity of the testimony was not discovered until after the close of the term at which such judgment was rendered; or if, because of the denial of some meritorious defense to the action, it is not sufficient that the complainant did not know of such ground of defense, but it must appear that ignorance of the defense did not result from any lack of diligence on his part. As before stated, appellant's petition alleges, in effect, that the judgment rendered against him in his suit of trespass to try title against Cobb and Avery was the result of false testimony given by Murphy & Bolanz on the trial of that case, and a conspiracy entered into between the several defendants in this suit to circumvent and defeat a fair trial. His pleadings, as has been seen, also aver that he claimed title to the property which was involved in the trespass to try title suit through Mrs. Harding, who purchased said property at a constable's sale made on February 6, 1894, by virtue of an execution issued upon a judgment in her favor against Murphy & Bolanz, and purports to set out the evidence, oral and documentary, adduced on the trial of said suit. We have carefully examined the record, and the only evidence we find that was offered in support of his claim of title is a constable's deed purporting to convey the lot and premises sued for by him as the property of Murphy & Bolanz to Mrs. J. E. Harding, and a deed from the said Mrs. Harding to him. Neither the judgment in favor of Mrs. Harding against Murphy & Bolanz nor the execution under which the property sought to be recovered was sold appears to have been introduced. Nor do we find that any testimony was offered showing or tending to show the loss or destruction of said judgment and execution, or that, for any reason, they could not be produced. Neither

do we find any testimony proving the contents of said judgment or execution. The parties claimed title to the property through Murphy & Bolanz as common source, and the introduction in evidence of this judgment and execution of proof of inability to produce them and of their contents was indispensable to appellant's right to recover. Without proof of his power to sell, a sheriff's or constable's deed must be treated as a nullity, and, unless it is supported by the judgment and execution, it will convey no title. *Wofford v. McKinna*, 23 Tex. 86, 76 Am. Dec. 53; *Leland v. Wilson*, 34 Tex. 79. No effort to deraign title beyond this common source seems to have been made. Again, it is well settled by the decisions of this state that a petition based on equitable grounds for a new trial and made after the adjournment of the term of court at which the case was tried and judgment rendered must show sufficient matter to have entitled the applicant to a new trial if applied for at the term at which the judgment was rendered, and also a sufficient legal excuse for not having made the application during such term. *Goss v. McClaren*, 17 Tex. 120, 67 Am. Dec. 646; *Cook v. De La Garza*, 13 Tex. 432; *Hough v. Hammond*, 36 Tex. 657; *Ragsdale v. Green*, 38 Tex. 193. Appellant's petition in this suit does not show that he complied with this rule. Indeed, he does not show that he made any motion for a new trial in the original suit of trespass to try title at the term of the court at which the judgment therein was rendered. Nor does he show, or attempt to show, why this was not done. It therefore follows that for the first above stated reason it was not only proper but became the duty of the trial judge to instruct the jury to return a verdict in said suit for the defendants Cobb and Avery; and for both, or either of the foregoing reasons, the general demurrer urged in this suit was properly sustained. Whether the property sued for by appellant in his said suit of trespass to try title was at the time of the execution sale under which appellant claims the business homestead of Murphy & Bolanz became a question on the trial of said suit; and that it was such homestead up to the 22d day of July, 1893, is clearly established, we think, by the undisputed evidence, but whether on that date it was abandoned and ceased to be the business homestead of said parties was probably an issuable fact. We are inclined to the opinion, however, that the preponderance of the evidence of probative force tended to establish the negative of the question, but we do not base our decision upon that phase of the case.

We are also of the opinion that the allegations of appellant, to the effect that the judgment sought to be vacated in this proceeding was obtained by the false testimony of J. P. Murphy and Chas. F. Bolanz, are insufficient to authorize the granting of a new trial, and were therefore subject to appel-

lees' general demurrer. This testimony related to defenses arising on the pleadings filed by Cobb and Avery in the original suit, and to grant a new trial on the allegations that said testimony was false would result in allowing appellant to try over again a case which had before been adjudicated between the same parties after notice, appearance, and an opportunity for a full hearing, followed by an adjudication upon the evidence offered in support of said defenses. The allegations do not present a case calling for an application of the established principle of jurisprudence that courts of justice have power in a proper proceeding to set aside or annul their judgments whenever it appears that an innocent party without notice has been aggrieved by a judgment obtained against him without his knowledge or fault by the fraud of the other party. The allegations of appellant are simply to the effect that certain testimony given by Murphy & Bolanz and possibly Cobb and Avery on the trial of his trespass to try title suit in relation to questions therein involved, and in which the judgment sought to be vacated by this proceeding was rendered, was false. He does not allege that for any reason he was prevented or unable to show the falsity of said testimony in the trial of said suit, nor does it appear that since said trial he has discovered testimony which was unknown to him at the time of the trial and which could not have been discovered in the exercise of reasonable diligence on his part by which the falsity of said testimony can be established and a different result produced upon another trial. On the contrary, by the testimony of appellant, given on the trial of said original suit, it appears that he discovered in 1890, long before he brought his suit against Cobb and Avery for the lot and premises described in his petition in said suit, facts and circumstances which convinced him that J. P. Murphy and Chas. F. Bolanz could not be believed on oath, and hence should have been prepared with such testimony as he could produce to impeach said witnesses or to rebut any material testimony given by them on the material issues raised by the pleadings. If by granting a new trial of said suit of trespass to try title upon appellant's allegations that the judgment therein was procured by the false testimony of Murphy and Bolanz the case should again be tried on practically the same evidence and again result in a judgment unfavorable to appellant, for the same reason as is now presented, he could again insist that such judgment be vacated, and so on indefinitely. A judgment cannot be called in question on the ground of fraud in its procurement in a separate and independent suit subsequently brought between the same parties, when it appears that the said judgment was entered after due notice to the adverse party, followed by an adjudication upon the evidence offered in support of the allegations in the first suit. Greene

v. Greene, 2 Gray (Mass.) 361, 61 Am. Dec. 454. Nor do the allegations in this suit show any cause of action against the appellees for the actual and exemplary damages sought to be recovered on the theory that there was a conspiracy entered into between the appellees to defeat by false testimony and the partiality of the trial judge a fair trial of appellant's original suit against Cobb and Avery. The claim made for such damages is evidently based upon the alleged fact that, by reason of the conspiracy charged, appellant failed to recover the lot and premises sued for in his action of trespass to try title against Cobb and Avery, whereby he lost the value of said property, \$25,000, and the rents and revenues arising therefrom, amounting to \$2,400 per annum, when as a matter of fact the allegations of his petition show that he failed to prove title in himself, and hence not entitled to recover said property whether the conspiracy and partiality alleged did or did not exist. His petition shows no other ground for actual damages, and, having failed to establish by proof his claim of title or right of possession to the property, he suffered no such damages, of which he can now justly complain, on account of the adverse judgment rendered against him, and, not having sustained any actual damages, exemplary damages were not recoverable. For another and different reason, no right of recovery against Judge Nash was shown, and the district court did not therefore err in refusing, as is insisted by appellant, upon the suggestion of Judge Nash's death to continue the case to make his legal representatives or heirs parties. It is a settled principle, "and the very foundation of all well-ordered jurisprudence, that every judge, whether of a higher or a lower court, in the exercise of the jurisdiction conferred on him by law, has the right to decide according to his own free and unembarrassed convictions uninfluenced by any apprehension of private prosecution." *Taylor v. Goodrich*, 25 Tex. Civ. App. 109, 40 S. W. 515; *Yates v. Lansing*, 5 Johns. (N. Y.) 282; *Rains v. Simpson*, 50 Tex. 495, 82 Am. Rep. 609. In the last-cited case, after making the above and other quotations from the case of *Yates v. Lansing*, supra, it is said that "from the very necessity of the case this immunity from private liability extends not only to negligent, but willful and malicious, judicial acts"—citing *Pratt v. Gardner*, 2 Cush. (Mass.) 69, 48 Am. Dec. 652, and *Weaver v. Devendorf*, 3 Denio (N. Y.) 117. In the last-mentioned case *Beardsley, J.*, speaking for the court, says: "No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which prompted it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to

judges from the highest to the lowest, to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power." It is said that the principles upon which these decisions rest "lie at the very foundation of all good government—the greatest good to the greatest number"—that "in the imperfection of human nature it is better that an individual should occasionally suffer a wrong than the course of justice should be impeded and fettered by constant and perpetual restraint and apprehension on the part of those who are to administer it" (*Garnett v. Ferrand*, 6 B. & C.); that the privilege is not intended so much for the protection of the judge as an individual, as for the protection of society by preventing the scandal and embarrassment which would follow should the judicial department, which represents one of the most sensitive and vital parts of sovereignty, be subjected to the separate prosecutions of private parties. *Rains v. Simpson*, supra. Of course, the application of this principle of immunity depends upon whether the particular or given act was ministerial or judicial. The action will in the former case be sustained, and in the latter it will not. The charges of conspiracy and collusion on the part of Judge Nash are manifestly based upon his action in directing a verdict in favor of Cobb and Avery. This action involved the exercise of discretion or judgment, and was therefore judicial. *Commissioner v. Smith*, 5 Tex. 471; *Arberry v. Beavers*, 6 Tex. 467, 55 Am. Dec. 791.

The third and fourth assignments of error are grouped. The third complains that the trial court erred in refusing after appellees' general demurrer had been sustained to grant appellant leave to amend his pleadings. The fourth asserts that the court erred in sustaining the defendants' general demurrer. These assignments present separate and distinct questions for decision. They are not accompanied with any proposition whatever, and under the rules are not entitled to consideration. We are of opinion, however, that neither assignment shows reversible error. The fourth has already been disposed of against appellant's contention. With reference to the third, it may be said that amendments of pleadings ordinarily are liberally allowed in our practice, but there is certainly a limit to such right. In this case it appears, as has been shown, that in December, 1907, a general demurrer to appellant's original petition was sustained, and appellant granted leave to file an amended or supplemental petition. Under this permission, appellant filed two supplemental petitions, the first covering 19 pages, and the second 7 pages, of the record. These supplemental petitions in our opinion failed to strengthen appellant's case, and when again called for trial, November 7, 1908, a general demurrer was again sustained. That appellant had been afforded ample time and opportunity to fully plead all the material facts constituting his cause of

action or grounds for the relief sought can hardly be questioned, and we think the court, under the circumstances, was clearly justified in refusing to entertain further amendments. It is said that, when such time and opportunity has been given to remedy defects in the pleadings, parties have not the right to delay the trial and hinder the progress of the business of the court for that purpose. *Trammell v. Swan*, 25 Tex. 500; *Alexander v. Brown* (Civ. App.) 29 S. W. 561.

After a careful consideration of appellant's assignments of error and of the record, we have been unable to discover any error which in our opinion authorizes a reversal of the case, and the judgment of the lower court is therefore affirmed.

### CITY OF TYLER v. COKER.

(Court of Civil Appeals of Texas. Jan. 20, 1910.)

#### 1. EVIDENCE (§ 22\*)—JUDICIAL NOTICE—GEOGRAPHICAL FACTS.

The Court of Civil Appeals will take judicial notice, as a geographical fact, that a certain railroad company has a main line and several branches traversing different portions of the state and reaching through different cities and counties, and that some of the branches do not touch the city of Tyler, and that it is not necessary, in their operation, for the railroad company's rolling stock to pass through or near such city.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 28; Dec. Dig. § 22.\*]

#### 2. EVIDENCE (§ 20\*)—JUDICIAL NOTICE.

The Court of Civil Appeals will take judicial notice of the fact that the rolling stock of a certain railroad, operating within the state, or at least the greater part of it, is required to be constantly in actual use in transporting its passengers and freight over its various lines, and that on the 1st day of January of each year a comparatively small portion thereof could be within the limits of a certain city, and that only a small portion would naturally and normally be kept within the city for any purpose connected with the railroad's business.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 24; Dec. Dig. § 20.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 966\*)—TAXATION OF RAILROADS—ROLLING STOCK—"LYING OR BEING WITHIN THE LIMITS OF ANY CITY OR INCORPORATED TOWN."

Const. art. 8, § 5, declares that all railroad property within the limits of any city shall bear its proportionate share of municipal taxation, and, if not previously rendered, the city authorities shall have power to require its rendition and collect the usual municipal tax thereon. Section 8 declares that property of railroad companies shall be assessed and taxes collected in the several counties in which the property is situated, including so much of the road-bed and fixtures as shall be in each county; and that the rolling stock shall be assessed in gross in the county where the principal office of the company is located, and the county tax paid on it shall be apportioned by the comptroller in proportion to the distance the road may run through any such county among the several counties through which the road passes, as a part of their assets. *Held* that, under Rev. St. 1896, art. 5068, providing for the general taxation of the rolling stock of railroad corporations,

and article 500, providing that only property situated within the limits of a city is taxable by it, a city containing the principal office of a railroad company was not, for that reason, authorized to levy municipal taxes on all the railroad's rolling stock, only a small portion of which would necessarily be within the city on the 1st day of January of each year; the term "lying or being within the limits of any city or incorporated town," etc., when applied to tangible movable property, meaning only such property as is actually and physically within the limits of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2053; Dec. Dig. § 966.\*]

#### 4. COURTS (§ 121\*)—JURISDICTION—DETERMINATION—PETITION.

Where an assessor sued for commissions for making an assessment on the rolling stock of a railroad company, basing his right to recover on the theory that all of the rolling stock of the road was taxable in such city, which was erroneous, and it did not appear that the commissions to which plaintiff would be entitled on an assessment of such portion of the rolling stock as the city was entitled to tax would amount to a sum within the jurisdiction of the trial court, the petition was demurrable under the rule that where plaintiff relies on different or separate groups of facts, some of which disclose no cause of action on their face, the jurisdiction of the trial court must be determined from the amount of the claim resting on those facts not subject to general demurrer.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 423; Dec. Dig. § 121.\*]

Appeal from Smith County Court; J. A. Bulloch, Judge.

Action by C. A. Coker against the City of Tyler. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

C. O. Griggs, for appellant. Gentry & Castle, for appellee.

HODGES, J. The appeal in this case is from a judgment rendered against the appellant in favor of the appellee for commissions claimed by him for assessing the rolling stock of the Cotton Belt Railway Company. The petition alleges that the appellee was, during the years 1905, 1906, and 1907, the duly elected, qualified, and acting assessor and collector of the city of Tyler; that the latter is a municipal corporation situated in Smith county; that during the year 1907 the appellee, in pursuance of an order theretofore made by the mayor and board of aldermen of the city of Tyler, and by virtue of the duties required of him under the ordinance of said city, assessed the taxes for the years 1905, 1906, and 1907 on the rolling stock of the St. Louis Southwestern Railway Company of Texas, a corporation duly incorporated under the laws of the state of Texas, with its principal office and place of business in the city of Tyler, Tex.; that the total amount assessed for the various funds as required by the ordinance of said city against said railway company on its rolling stock for said years was \$367,030; that under the ordinance of said city plain-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tiff was allowed and entitled to receive as his commissions .1 per cent. on said assessment, or the sum of \$367.03. The remainder of the petition alleges the presentation of the claim for the commissions mentioned, and the refusal of payment by the city council of the city of Tyler. Among other defenses pleaded by the city, was a general demurrer and a special exception, but neither of these appears to have been called to the attention of the trial court, as there is no order disposing of them. A trial before the court without a jury resulted in a judgment in favor of the appellee for the full amount sued for.

It occurs to us, from an inspection of the record, that this judgment should be reversed because it is fundamentally erroneous. Both the pleadings and the evidence show that the appellee sought and obtained a judgment for legal commissions for assessing for taxes the entire rolling stock of the St. Louis Southwestern Railway Company of Texas, commonly called the "Cotton Belt," situated in this state. We judicially know, as a geographical fact, that this railroad company has in this state a main line and several branches traversing different portions of the state and reaching through different cities and counties. Some of those branches do not touch the city of Tyler, nor is it necessary, in their operation, to go through or near that city. *Ry. Co. v. State*, 72 Tex. 410, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815; *Miller v. Texas*, 83 Tex. 518, 18 S. W. 954; 7 Ency. Evid. 943, 944. Upon the same principle the court should take cognizance of the fact that the rolling stock of this railway company, or at least the greater part of it, is required to be constantly in actual use in transporting freight and passengers over its various lines, and that on the 1st day of January of each year a comparatively small portion of it could be within the limits of the city of Tyler; and, further, that but a comparatively small portion of it would naturally and normally be kept within the city limits of the city of Tyler for any purposes whatever connected with the railway business. It was not alleged in the petition that the city was acting under a special charter; and, for the purpose of testing the sufficiency of this pleading, we must assume that it was operating under the general law governing the incorporation of cities and towns.

Section 5 of article 8 of the Constitution provides: "All property of railroad companies, of whatever description, lying or being within the limits of any city or incorporated town within this state, shall bear its proportionate share of municipal taxation, and if any such property shall not have been heretofore rendered, the authorities of the city or town within which it lies shall have power to require its rendition, and collect the usual municipal tax thereon, as on other property lying within said municipality."

In section 8 of the same article it is pro-

vided that: "All property of railroad companies shall be assessed, and the taxes collected in the several counties in which said property is situated, including so much of the roadbed and fixtures as shall be in each county. The rolling stock may be assessed in gross in the county where the principal office of the company is located, and the county tax paid upon it shall be apportioned by the comptroller, in proportion to the distance such road may run through any such county, among the several counties through which the road passes, as a part of their tax assets."

These provisions would appear to change the rule which seems to be adopted in some jurisdictions, of making the rolling stock of railroad companies taxable at the place of the corporate domicile. The terms "lying or being within the limits of any city or incorporated town," etc., when applied to the tangible and movable personal property, would hardly be considered as meaning other than that the property must be actually physically within the limits of the municipality where it is sought to be taxed, in order to be subject thereto. Laws affecting taxation are generally construed strictly against the government, or taxing power, and will not be extended beyond the plain import of the language used. *Atlantic, etc., Ry. Co. v. Lyons*, 101 Va. 1, 42 S. E. 932. The terms of our Constitution are as potent in excluding from the taxing powers of cities and towns personal property not "lying and being" within their limits, as in conferring the right to tax that which is. Under section 8 above quoted, Smith county, in which the city of Tyler is located, and of which it is the county seat, is entitled only to tax that portion of the value of the entire rolling stock of the Cotton Belt Railway Company as is measured by the proportion which the mileage in that county bears to the entire mileage of the road in all the counties in this state. We know that the mileage in Smith county is much greater than in the city of Tyler. It would be charging the framers of our Constitution with a grievous oversight to so construe the language they employed in sections 5 and 8 as limiting the right of taxation as to counties to only a portion of the rolling stock and as permitting cities located within such counties the right to tax for municipal purposes the entire rolling stock. It seems to be the general rule in this state that movable personal property is taxable where it is situated, except where otherwise provided by law. *Ferris v. Kimble*, 75 Tex. 476, 12 S. W. 689; *Rev. St. 1895*, art. 5068. Under the provisions of article 500 of the Revised Statutes of 1895 only property situated within the limits of a city is taxable by such municipalities. So far as our observation has extended, this case presents the only instance in which a city has undertaken to assess for taxation the rolling stock of an entire railroad solely on account of

the fact that the general office of the corporation was located within its limits. However, it is but just to say that we gather from the record and brief of counsel for the city that while the assessment was made the tax was not collected. It appears to have been the uniform construction adopted throughout the state by the officers and departments charged with the collection of municipal taxes, that cities and towns had no such right. Such a course of conduct, after the lapse of so many years, is not without force in determining the construction that should now be adopted by the courts. *Atlantic, etc., Ry. Co. v. Lyons*, supra. If the rolling stock of the Cotton Belt was not taxable in the city of Tyler it was not there subject to assessment for taxes by the appellee, and the municipal officers could confer no such authority upon him. This being true, the allegations of the petition show the performance of no service as assessor for which appellee would be entitled to recover commissions against the city. We do not mean to say that no part of the rolling stock of the railway company would be subject to taxation within the limits of the appellant city, although there seems to be authority for such a holding. *Davenport v. Mississippi, etc., Ry. Co.*, 16 Iowa, 349. But the undisputed facts in this case show that the assessment of the entire rolling stock was made in gross, thus making it impossible to separate that which may have been within the limits and subject to taxation from that larger portion which we know from the very nature of things could not have been so situated.

Article 5083 of the Revised Statutes of 1895 contains the only provision of law relating to the rendition of the rolling stock of railway corporations for taxation. That provides that every railroad corporation in this state shall deliver a sworn statement on or before the 1st day of April in each year to the assessor of the county in which its principal office is situated, setting forth the true and full value of the rolling stock of said railroad, together with the names of the counties through which it runs and the number of miles of roadbed in each of said counties, and that said assessment shall be submitted for review to the board of equalization of the county in which its principal office is situated. After providing for the method of equalizing such valuations with that of other property, it is required of this board that it shall certify the final valuation to the Comptroller of Public Accounts, who shall proceed at once to apportion the amount of such valuation among the counties through which the road runs, in proportion to the distance such road may run through any such county, and shall certify such apportionment to the assessors of such counties,

and this shall constitute part of the taxable assets of such counties, and the assessor of each of said counties shall list and enter the same upon the rolls for taxation as other personal property situated in said county.

Upon the trial of this case the appellee testified that he was instructed by the city council and mayor to assess the entire rolling stock of the St. Louis Southwestern Railway Company of Texas, and that in pursuance of that order he sent to the office of the Comptroller for certified copies of the state and county renditions of that railway company on its rolling stock for the years 1905, 1906, and 1907; that upon receipt of these copies he made the city assessments on the entire rolling stock for the years above mentioned; that he made out a supplemental tax roll for those assessments and submitted it to the city council, by which it was approved; that the aggregate amount of the taxes due for those years as shown by the roll was \$376,030, and that his fees allowed for assessing those taxes were 1 per cent., amounting to \$376.03.

If we hold, as we think we should, that the petition in this case shows upon its face that the appellee in stating his cause of action is relying in part upon facts which cannot furnish the basis of a recovery in this suit, we are unable to say that his action, if he has any, is within the jurisdiction of the court in which it was filed. Admitting that there was a portion of the rolling stock of the railroad company within the limits of the city of Tyler, and subject to assessment and taxation by the city, and for assessing which appellee would be entitled to commissions, it does not affirmatively, or even inferentially, appear from the petition that such commissions would amount to a sum within the jurisdiction of the court below. If, in stating his cause of action, the plaintiff in a suit relies upon different and separable groups of facts, some of which disclose no cause of action upon their face, the jurisdiction of the trial court must be determined by the amount of the claim resting upon those facts which are not subject to a general demurrer.

For the reasons mentioned, the judgment of the trial court is reversed and this cause remanded. It might be that under a proper pleading the appellee would be entitled to a judgment for some amount, but under the petition as presented here we do not think that he is; and for the purpose of preventing this judgment from operating as a bar to a cause of action in a court of competent jurisdiction to recover such sum as he may show himself entitled to, we have thought proper to reverse and remand the case, and it is accordingly so ordered.

**BAUGHN v. J. B. McKEE CO. et al.**

(Court of Civil Appeals of Texas. Dec. 23, 1909.  
On Motion for Rehearing, Feb. 3, 1910.)

**1. APPEAL AND ERROR (§ 150\*)—INTEREST OF APPELLANT.**

Where, in a garnishment proceeding, the garnishee answered, admitting an indebtedness to the debtor which the latter denied, claiming that the garnishee at the time he answered the writ was neither indebted nor in possession of effects belonging to him, the debtor had no sufficient interest to entitle him to appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934, 935, 938; Dec. Dig. § 150.\*]

**2. GARNISHMENT (§ 230\*)—RECOVERY OF PAYMENTS — PAYMENT BY GARNISHEE AFTER SERVICE.**

Where a garnishee pays the debt to the debtor after service of the garnishment writ, in violation of Sayles' Ann. Civ. St. 1897, art. 225, he cannot recover the money from the debtor.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 435; Dec. Dig. § 230.\*]

**3. GARNISHMENT (§ 230\*) — PAYMENT BEFORE SERVICE—RECOVERY BACK.**

Where a garnishee pays the debt to the debtor before service of the writ, he cannot recover the money merely because he appeared in the garnishment suit and answered that he was indebted.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 435; Dec. Dig. § 230.\*]

Appeal from Fannin County Court; H. A. Cunningham, Judge.

Garnishment by the J. B. McKee Company and others against J. F. Baughn, in which D. W. Haywood was summoned as garnishee. From a judgment against the garnishee, defendant appeals. Affirmed orally. On motion for rehearing. Denied.

J. W. Gross, for appellant. J. M. Baldwin, for appellees.

**WILLSON, C. J.** The J. B. McKee Company, having a judgment against appellant, had issued a writ of garnishment against D. W. Haywood. The latter answered that he was indebted to appellant for rent of certain land for the year 1908 in the sum of \$59.98. Appellant controverted Haywood's answer by a sworn plea, alleging that Haywood "is not now nor was he at the time of filing his answer in this cause, nor at any other time subsequent to the ——— day of ——— 190—, same being the date on which the sheriff had a conversation with the said garnishee in which said garnishee agreed to accept service of the writ of garnishment, indebted to this defendant in any amount; that on the date of the filing of his answer herein, as well as at all other times subsequent to the said date on which said garnishee agreed to accept service of said writ of garnishment, the said garnishee did not have in his hands any effects belonging to this defendant, no rent, no money nor any other property, for that long prior to said date the said gar-

nishee and this defendant had made a settlement regarding the rents due on account of the land which this defendant had rented to said garnishee for and during the year 1908." The court determined that the writ of garnishment was served on Haywood, and that at the time the writ was served on him and at the time he answered the suit Haywood was indebted to appellant in the sum of \$58.55. A judgment in accordance with such findings was rendered in favor of the McKee Company against Haywood. From this judgment Haywood did not prosecute an appeal. The appeal is by Baughn alone. He assigned as errors the action of the trial court in overruling a motion made by him at the January term of the court to quash the garnishment proceedings, on the ground that the writ of garnishment had not been served on Haywood, and the action of said court in overruling a motion made by him at the following April term of said court, on the same ground, to quash the writ of garnishment and the officer's return thereon. It appearing from appellant's plea under oath controverting the garnishee's answer that the latter at the time said answer was made was not indebted to him, and had in his hands no effects belonging to him, when the appeal was first considered by us we were of the opinion that appellant should not be heard to complain that the trial court had erred as contended in the assignments, and therefore that it did not devolve upon us to go behind the recitals in the judgment showing it to be a valid one, and determine whether as to Haywood it was valid or not. If Haywood at the time he answered the writ was not, as appellant swore he was not, indebted to appellant and did not have in his possession effects belonging to appellant, we are unable to see that it was any concern of his that the court nevertheless rendered a judgment against said Haywood in favor of the McKee Company. Obviously, we think, appellant's right to defend for Haywood and to have a judgment against him revised must be predicated upon the fact that his rights in some way would be injuriously affected by a judgment against Haywood. In his motion for a rehearing appellant calls attention to evidence in the record indicating that before he answered in the garnishment suit against him, Haywood had paid to him (appellant) the debt due him, and in fact was not indebted to him. Appellant then argues that, if the judgment appealed from should not be reversed, Haywood will be entitled to recover back from him the sum paid him, and that, because Haywood in such an event would be entitled to such a recovery as against him, he (appellant) is entitled to have the judgment revised. But we think if Haywood, after service of the writ on him, paid to appellant the debt he was due him, he

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

could not recover back the amount of same. Not only was he under no legal obligation then to make such a payment, but he was prohibited by law from doing so. Sayles' Ann. Civ. St. 1897, art. 225. Being a payment voluntarily made by him, he could not recover it back. *Galveston Co. v. Gorham*, 49 Tex. 279; *Gilliam v. Alford*, 69 Tex. 267, 6 S. W. 757; *Taylor v. Hall*, 71 Tex. 216, 9 S. W. 141. On the other hand, if Haywood paid his debt to appellant, and at the time he paid it he had not been served with the writ of garnishment, he certainly would not be entitled to recover back the sum paid merely because, having voluntarily appeared in the garnishment suit, he had answered that he was indebted to appellant when in fact he was not indebted to him.

The motion for a rehearing is overruled.

### CLARK v. LOWE.

(Court of Civil Appeals of Texas. Jan. 19, 1910.)

#### APPEAL AND ERROR (§ 327\*)—WRIT OF ERROR—NECESSARY PARTIES.

In an action to recover personalty, or the value thereof, plaintiff obtained a writ of sequestration under which the property was seized by the constable, and defendant retained possession by filing a replevy bond. Judgment was rendered for plaintiff for the title and possession of the property, and, in the alternative, for a specified sum, and he brought error complaining of the quashing of the writ of sequestration, and of the refusal to render judgment against the sureties on the replevy bond. *Held*, that the sureties were necessary parties defendant to the writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1833; Dec. Dig. § 327.\*]

Error from Tom Green County Court; Milton Mays, Judge.

Action by D. M. Clark, administrator of N. R. Clark, deceased, against Bob Lowe. There was a judgment granting insufficient relief, and plaintiff brings error. Affirmed.

Thomas & McCarty, for plaintiff in error. Anderson & Dumas, for defendant in error.

KEY, J. D. M. Clark, as administrator of the estate of N. R. Clark, deceased, brought this suit against Bob Lowe for the title and possession of two horses, or \$195, the value of the horses, in the event possession of the horses could not be obtained. The plaintiff sued out a writ of sequestration, under which the horses were seized by the constable. Thereupon the defendant filed a replevy bond, and by reason thereof retained possession of the horses. Thereafter, on motion of the defendant, the court quashed the sequestration bond and the writ of sequestration. The case was then tried and judgment rendered for the plaintiff, Clark, against the defendant, Lowe, for title and possession of the two horses sued for, and, in the alternative, for \$195, the value of the

horses, and the court refused to render judgment in favor of the plaintiff against the sureties on the replevy bond.

The plaintiff has brought the case to this court by writ of error, making the defendant, Lowe, the sole defendant in the writ, but has assigned no error as against him. Only two assignments are presented in the briefs, and they assert the proposition that the court committed error in sustaining the motion to quash the sequestration bond and writ, and in refusing to render judgment for the plaintiff against the sureties on the replevy bond. The sureties referred to are interested in both questions; and yet they have not been made parties to the proceeding by which the case was brought to this court. By signing the replevy bond they became parties to the suit in the sense that, if the sequestration proceeding had not been quashed, the court could have rendered judgment against them as well as the defendant; and, before any relief can be had against them in this court, it was necessary that they be made parties to the appeal or writ of error. This was not done, and therefore we decline to decide the questions referred to in the briefs.

The judgment is affirmed.

### POSTAL TELEGRAPH CABLE CO. OF TEXAS v. SMITH.

(Court of Civil Appeals of Texas. Jan. 8, 1910. Rehearing Denied Jan. 29, 1910.)

#### 1. TELEGRAPHS AND TELEPHONES (§ 37\*) — FAILURE TO DELIVER TELEGRAM—DELIVERY TO WRONG ADDRESS—NEGLIGENCE.

Where a telegraph company delivered a message at the Oriental Hotel, instead of in care of the Oriental Oil Company, to which it was addressed, the company was negligent.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 24, 29, 32; Dec. Dig. § 37.\*]

#### 2. TELEGRAPHS AND TELEPHONES (§ 67\*) — FAILURE TO DELIVER TELEGRAM—NOTICE—LIABILITY.

A telegraph company is liable for all damages that flow from its negligence, of which it had notice, or which might have been reasonably anticipated at the time it received the message, in the event of a breach of its contract.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 64-68; Dec. Dig. § 67.\*]

#### 3. TELEGRAPHS AND TELEPHONES (§ 67\*) — FAILURE TO DELIVER TELEGRAM—NOTICE.

Though a message stating that "D. died this morning three o'clock. Will make all arrangements" was notice to the company that the sendee would probably set out at once to attend the funeral, it did not by the expression "will make all arrangements" give notice that the remains would be carried to a place other than that from which the message was sent.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 64-68; Dec. Dig. § 67.\*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by J. Mayrant Smith against the Postal Telegraph Cable Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed, and judgment rendered for defendant.

A. P. Wozencraft and D. A. Frank, for appellant. Wendell Spence and J. E. Gilbert, for appellee.

RAINEY, C. J. This suit was originally brought by Mrs. J. Mayrant Smith as a feme sole against the appellant to recover damages for mental anguish sustained by her by reason of the delay in the delivery of a message dated Belton, Tex., November 25, 1904, addressed to her in care of the Oriental Oil Company, Dallas, Tex., reading as follows: "Dave died this morning three o'clock. Will make all arrangements. [Signed] Wm. Thatcher." By amended petition J. Mayrant Smith, the husband, was made a party plaintiff. The court sustained a special exception to the misjoinder of parties plaintiff, and J. Mayrant Smith alone prosecuted the suit. The petition, among other things, alleged that the "Dave" mentioned in the message was Dave Terry, a brother of Mrs. J. Mayrant Smith, and that said David Terry died at Austin, Tex., and by previous family arrangements was buried at Houston, Tex.; that she could and would have reached the place of the funeral in time to have seen her brother before the burial and attend the funeral services, had said message not been delayed in delivery, and for which she prays damages. Defendant answered by general and special exceptions, general denial, and contributory negligence. The exceptions were overruled, and upon a trial a verdict and judgment rendered for \$650 in favor of plaintiff, and defendant appeals.

The first assignment of error is as follows: "The court erred in overruling defendant's third special exception to that part of the fourth paragraph of plaintiff's said petition, which alleges that 'according to his request and the family arrangements therefor his body was carried to Houston, Tex., for interment,' for the reason that the defendant had no knowledge of any such request or arrangement, and the said petition nowhere alleges that this defendant had any such notice."

The same question is presented by assignments of error Nos. 2 to 7, inclusive, having been raised in course of the proceedings below by objections to evidence, to the charge of the court, to the refusal of special charges requested, and in a motion for a new trial, all of which assignments will be considered together.

The petition of plaintiff did not allege any fact showing notice to the company of any conditions out of which damages might arise by the failure to promptly transmit and deliver the message other than is given by the

face of the message. The appellant was negligent in failing to deliver the message, having delivered it to the care of the Oriental Hotel in Dallas, instead of the Oriental Oil Company, and the law holds it liable for all damages that flow from its negligence of which it had notice, or which might have been reasonably anticipated at the time it received the message, in the event of a breach of its contract. Upon the receipt of the message for transmission and delivery, the appellant was put upon notice that the parties therein mentioned were related, and that upon its receipt by Mrs. Smith she would probably set out at once to attend the funeral of the deceased. *Telegraph Co. v. Carter*, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826. The expression in the message, "will make all arrangements," would convey to the ordinary mind that all arrangements for the funeral at Belton, the residence of the sender, would be made, and does not convey the idea or indicate that the funeral was to take place at some point removed from that community. There is nothing in the telegram that can be held to give notice to the telegraph company that the remains would be carried to Houston for burial. Therefore it cannot be said that damages resulting to Mrs. Smith in not being notified in time to attend the funeral at Houston was contemplated by the company at the time the contract to transmit and deliver the message was entered into. Therefore the company is not liable for damages resulting to Mrs. Smith in not being able to attend the funeral at Houston caused by the delay in delivering the message. We think the case of *Telegraph Co. v. Kuykendall*, 99 Tex. 323, 89 S. W. 965, is decisive of this point, and upon it our holding is based. See, also, *Telegraph Co. v. Ayers*, 41 Tex. Civ. App. 627, 93 S. W. 199.

There are other assignments of error, but, in view of the foregoing holding, it is unnecessary to discuss them. Some of them relate to the admission of testimony in regard to the understanding had between the members of the family as to the burial of Dave Terry at Houston. The effect of our holding, as above expressed, disposes of this matter adversely to appellee.

As it appears from the evidence that plaintiff was not entitled to recover, the judgment of the district court is reversed, and judgment here rendered for appellant.

#### McKNIGHT v. McKNIGHT.

(Court of Civil Appeals of Texas. Jan. 19, 1910.)

#### 1. APPEAL AND ERROR (§ 327\*)—WRIT OF ERROR—PARTIES.

Where in trespass to try title, brought against husband and wife to keep the wife from getting a homestead by limitations, the wife

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was affected by the judgment denying relief to plaintiff, though she was not mentioned therein, and the judgment was final as to her, plaintiff must make her a party defendant in a writ of error to review the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1814-1820, 1822-1835; Dec. Dig. § 327.\*]

## 2. APPEAL AND ERROR (§ 79\*)—FINAL JUDGMENT.

In trespass to try title brought against husband and wife to keep the wife from getting a homestead by limitations, a judgment denying relief to plaintiff, awarding to the intervener an undivided half interest in reversion, depending on the homestead rights of the husband and confirming the remaining undivided half interest in the husband, his heirs and assigns, etc., without mentioning the wife, is not a final judgment, and writ of error does not lie to review it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 484-493; Dec. Dig. § 79.\*]

Error from District Court, Bexar County; Arthur W. Seelgson, Judge.

Action by R. A. McKnight against John McKnight and another, in which Mrs. Cornelia Mitchell intervened. There was a judgment denying relief, and plaintiff brings error, making John McKnight defendant in error. Dismissed.

Sallway & McAskill, for plaintiff in error.  
Geo. R. Gillette, for defendant in error.

NEILL, J. This suit was brought by plaintiff in error, hereinafter called plaintiff, against John McKnight and his wife, Mary E. McKnight, in the ordinary form of an action of trespass to try title to certain lots of land situated in the city of San Antonio, Tex., designated as lots Nos. 50, 51, and 52 in block 14, city block No. 1,600, on the corner of Cooper and Gevers streets, and are further designated in plaintiff's petition as the "same lots sold and conveyed by Mrs. Alice E. Moore and A. J. Moore, her husband, to Mrs. Sarah E. McKnight on December 31, 1900, by deed recorded in volume 226, page 355, of the Records of Deeds of Bexar County," which deed is alleged to be the common source of title under which plaintiffs and defendants claim title to the property.

Mrs. Cornelia Mitchell intervened in the case, and in her petition of intervention alleged that she is the legal and equitable owner and holder of the land described in plaintiff's petition; that such land was the separate property of the estate of Mrs. Sarah E. McKnight, who died intestate, leaving as her only heir her son, R. A. McKnight, the plaintiff in this suit; that thereafter intervener acquired by purchase at execution sale all the right, title, and interest of said R. A. McKnight to said land, and that defendants, nor either of them, have any right, title, or interest whatever in the land; that on November 1, 1907, intervener agreed to sell all the land to plaintiff for the sum of \$625 and

costs of sheriff's sale, amounting to \$25 or \$30; that she ratifies and confirms said agreement, adopts the pleadings of plaintiff, and joins in his prayer for the recovery of the land, etc. The defendants pleaded not guilty to both plaintiff's and intervener's petitions.

The case was submitted for trial to the court, without a jury, which, on conclusions of fact and law found by the trial judge, on April 15, 1908, rendered the following judgment: "Now at this day coming on to be heard the above entitled and numbered cause, and the plaintiff appearing in person and by counsel, and the intervener appearing by her counsel of record, and the defendants also appearing by their counsel of record, and in person of John McKnight, and a jury having been waived and the matters at issue, as well of fact as of law, having been submitted to the court, and the court having heard the evidence and argument of counsel and being fully advised in the premises, being of the opinion that the property in controversy was the community homestead of defendant John McKnight, and his deceased first wife, Sarah E. McKnight, and that the plaintiff, R. A. McKnight, as her sole heir took upon her decease an undivided one-half interest, subject to the homestead right then and now enjoyed by said John McKnight, which interest of said R. A. McKnight was purchased by the intervener, Cornelia Mitchell, it is therefore by the court hereby considered, ordered, adjudged, and decreed that the plaintiff R. A. McKnight take nothing by his suit in this behalf, and that the intervener, Cornelia Mitchell, do have and recover of and from the defendants John McKnight and Mary E. McKnight, free from all claims or pretensions of title thereto on the part of said defendants, or either of them, the title to an undivided one-half interest in and to the property in controversy, to wit, lots Numbers (50) fifty, (51) fifty-one, and (52) fifty-two, in block No. (14) fourteen, city block 1600, of South Heights Addition, in the city of San Antonio, Bexar county, Texas, said one-half interest hereby awarded to intervener, however, is and shall be a reversionary estate, depending upon the homestead rights in said property now and hereafter to be possessed, exercised, and enjoyed by defendant John McKnight, whose possession of said entire property thereunder may continue during his life, and shall be free from all molestation by intervener, his heirs, personal representatives, or assigns, and that the title to the remaining undivided one-half interest in said property be, and the same is hereby, confirmed in the said defendant John McKnight, his heirs and assigns, and it is further adjudged that defendants pay all costs herein, excepting the costs of filing the plaintiff's original petition, which are hereby adjudged

\*For other cases see same topic and section—NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

against plaintiff, for all of which costs execution may issue."

R. A. McKnight made application for a writ of error to have said judgment reversed by this court, and alleged in his application that John McKnight and the intervener, Cornelia Mitchell, are the only parties interested adversely to him in the case; the writ of error bond was made payable to John Mitchell and Cornelia Mitchell; but the writ of error was issued and served upon John Mitchell and Cornelia Mitchell, service being had upon each of them on April 29, 1909. The motion of defendants in error to dismiss the writ is upon this ground: "Because it appears from the pleadings and judgment in said original cause, as exhibited by the transcript herein (pages 10 to 18), that Mary E. McKnight was a party defendant thereto; and because the said Mary E. McKnight is not named as a party defendant in plaintiff's application for this writ of error, and is not named as an obligee in the writ of error bond filed therewith, and does not appear to have been cited as one of the defendants in error upon this writ."

It will be noted from our statement of the case that Mary E. McKnight was a party defendant in the case, and, while her name is not mentioned in the judgment, it is apparent from the pleadings taken in connection with the findings of the trial judge that she is affected by it, and that it is final as to her. If, however, we should be mistaken as to this, an insuperable objection to this court's jurisdiction would appear, which is that the judgment upon which the writ of error is sued out is not final. That Mary E. McKnight was a necessary party to the writ cannot be more clearly shown than by a quotation from plaintiff in error's brief, viz.: "The court will readily see that this suit was brought to keep John McKnight's second wife" (Mary E. McKnight) "from getting a homestead by the five-year statute of limitation, she claiming the property, asserting ownership to same in her own right, holding under a deed duly registered."

It is elementary that all adverse parties to a judgment against the party seeking to have such judgment reversed by an appellate tribunal must, either on appeal or a writ of error, be brought before such a court in order to give it jurisdiction.

Wherefore the motion is sustained and the writ of error dismissed.

#### MATSON v. STEWART.

(Court of Civil Appeals of Texas. Jan. 19, 1910.)

#### 1. CONTRACTS (§ 319\*)—WORK AND LABOR (§ 14\*)—PART PERFORMANCE—REMEDY.

Where a contract has been performed in part by a party thereto, and full performance is

prevented by the adverse party, the party may sue on the contract, or he may recover on a quantum meruit for the services actually performed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1499; Dec. Dig. § 319;\* Work and Labor, Cent. Dig. § 82; Dec. Dig. § 14.\*]

#### 2. MASTER AND SERVANT (§§ 36, 73\*)—WORK AND LABOR (§ 14\*)—CONTRACT OF EMPLOYMENT—PART PERFORMANCE—REMEDY.

Where one contracting to take charge of another's flock of goats for a specified period, in consideration of receiving a specified number of goats and their increase during the period, was discharged before the expiration of the period, he must prove that up to the discharge he performed his part of the agreement, in which case he can recover the specific property and increase, and damages or, in the alternative, he may recover the reasonable value of the services.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 42, 99; Dec. Dig. §§ 36, 73;\* Work and Labor, Cent. Dig. § 32; Dec. Dig. § 14.\*]

#### 3. APPEAL AND ERROR (§ 1010\*)—FINDING—CONCLUSIVENESS.

A finding supported by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.\*]

Appeal from Edwards County Court; A. P. Allison, Judge.

Action by John Matson against R. A. Stewart. From a judgment for defendant, plaintiff appeals. Affirmed.

Fisher & Walker, for appellant. Jno. W. Hill, for appellee.

NEILL, J. This is a suit by the appellant against the appellee to recover from him the possession of 50 head of nanny goats and their increase from February 2, 1907, up to the date of filing suit, which was February 2, 1909, alleged in the aggregate to be 137 head, besides 70 kids, all of which were alleged to be reasonably worth \$621; or, in the alternative, the value of the animals, and also the value of the mohair sheared from said goats since February 1, 1907, which was alleged to be \$125. The plaintiff alleged that he was entitled to the possession of said goats as his property by virtue of a certain written contract made between him and defendant on February 2, 1907, the substance of which is alleged in his petition to be as follows: "By the contract plaintiff agreed to take charge of defendant's entire flock of goats, consisting of about two thousand head, for the period of three years from February 1, 1907, and during such period to look after, control, herd and care for the goats and the increase from year to year in a prudent, careful and businesslike manner, and do everything that might be necessary to promote the general interest and welfare of the goats, and to give the whole of his time and attention thereto, the goats to be run on such range as might be furnished by the defendant; and, upon the expiration of said time to quietly and peace-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fully turn over and deliver to defendant or his authorized agent all of said goats and their increase except such of said goats as may be owned by plaintiff under the contract as therein specified. That defendant on his part agreed to cut out of his flock of goats fifty head of nannies, such as might be agreed upon by him and plaintiff, and deliver possession thereof for the period of time specified, said nanny goats and their increase to be placed in such marks and brands as might be agreed upon, in order to distinguish them from other goats; and that, in the event plaintiff should comply with the terms and conditions of the contract, then, at the expiration thereof, plaintiff should have and own absolutely and be entitled to hold as his own all of the fifty nanny goats and all increase therefrom during said period of time, otherwise the same to remain the property of the defendant. That defendant further agreed for said period to furnish all necessary range, water and salt, and expense of shearing all of said goats, except the nanny goats set aside for plaintiff, which expense was to be borne by him; that it also stipulated that the defendant was authorized during the period of the contract to sell all the goats except the nannies set apart to plaintiff and their increase; but that, in case he should sell the whole of his flock, the plaintiff should be entitled to receive the fifty head of nannies and their increase." The petition then alleges that plaintiff and defendant at once cut out the 50 head of nanny goats and designated them by marks and brands, as provided by the contract; that their increase in the spring of 1907 was also marked and branded in the same manner; that the increase for the next spring was not marked nor branded, but could be readily identified by plaintiff; that plaintiff at once took charge of the defendant's goats, comprehended by the contract, on the range furnished by defendant, and controlled, herded, and cared for the same and their increase in a prudent, careful, and businesslike manner, and did everything that was necessary to promote the general interest and welfare thereof and the increase, and gave his whole time and attention thereto from February 2, 1907, continuously up to December 19, 1908; that on the last-named day defendant, without cause, took all of said goats, including 50 head of nannies and their increase, from the care and custody of plaintiff and ousted him from the range, notifying him that he (defendant) would not permit him to further care for the goats, and that defendant would no further recognize or abide by the contract; that plaintiff performed his part of the contract from its date until December 19, 1908, as required thereby, and has been ready and willing to continue its performance up to the date of its expiration, but was prevented from doing so by the defendant; and that his services were reasonably worth \$25 per month during that period. The plaintiff prayed judgment for the nanny

goats and their increase or for the value thereof, and, in the alternative, for the value of his service during the period of time he was in charge of and cared for said goats. The defendant answered by a general denial, and the case was tried without a jury, and judgment was rendered for the defendant.

The only assignment of error complains of the court's rendering judgment for the defendant; for the reason that under the undisputed evidence it should have been for the plaintiff. The proposition asserted under the assignment is as follows: "Where a contract has been performed in part, and its full performance has been prevented by the defendant, the plaintiff may maintain an action of covenant upon the contract, a complete performance on his part being excused by the act of the defendant, or he may recover upon a quantum meruit for the services actually performed." The proposition is undoubtedly sound law; but it assumes that plaintiff faithfully discharged his obligation to perform the services required of him under the contract, which was the very fact at issue. There is no dispute about the contract having been entered into by the parties, nor question regarding its construction. In order for the plaintiff to recover the specific property sued for or its value, it was incumbent upon him to prove that up to the time defendant discharged him he had performed his part of the agreement. Such proof would have shown a breach of the contract on the part of defendant which would have entitled plaintiff to recover, not only the goats and their increase which he was to receive as compensation for his services, but any other damages that might be shown to have proximately ensued from such breach; or, in the alternative, the reasonable value of his services. If he didn't perform the services in the manner he contracted, the defendant had the right to discharge him, and if his services were of no value he could recover nothing on a quantum meruit. It was only in the event plaintiff complied with the terms and conditions of the contract that he should have title to the goats and their increase stipulated for as his compensation. Otherwise, the same were to remain the property of the defendant. Plaintiff had agreed and obligated himself "to look after, control, herd, and care for said goats and their increase from year to year in a prudent, careful, and businesslike manner, and to do everything necessary to promote the general welfare and interest of said goats." If defendant's testimony be true—which was for the trial judge, and not us, to determine—plaintiff did not perform such obligation. Such testimony is to the effect that plaintiff did not attend to the goats nor herd them properly; that he let them scatter all over the country, and that plaintiff cost him more in the loss of goats than he was worth, and that he had to get rid of him because he was worthless and expensive. The defendant's testimony is corroborated by that of another

witness who testified substantially to the same effect.

There being evidence tending to support the evident findings of the court that plaintiff did not perform the services he contracted to render, and that his services were of no value, it is not our province to disturb the judgment, and it is affirmed.

**MISSOURI, K. & T. RY. CO. OF TEXAS v. BYRD.**

(Court of Civil Appeals of Texas. Jan. 20, 1910.)

**1. RAILROADS (§ 425\*)—INJURY TO ANIMALS—PROXIMATE CAUSE.**

A finding that negligence in the operation of a train at an excessive speed was the proximate cause of the killing of an animal on the track cannot be sustained in the absence of proof of causal connection between the negligence found and the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1527-1533; Dec. Dig. § 425.\*]

**2. RAILROADS (§ 415\*)—INJURY TO ANIMALS—DUTY TO KEEP LOOKOUT.**

Where by ordinance an animal killed by a train running at excessive speed, was unlawfully running at large, the railroad owed no duty to keep a lookout for the animal, but might assume that no such animal was at large.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1477; Dec. Dig. § 415.\*]

**3. RAILROADS (§ 441\*)—INJURIES TO ANIMAL—PRESUMPTIONS.**

Where, because an animal was unlawfully running at large, the railroad owed no duty to look out for the animal, it could not be presumed from the fact that the track was straight where the animal was killed and the view unobstructed that the employees discovered the animal on the track.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 441.\*]

**4. EVIDENCE (§ 54\*)—PRESUMPTION ON PRESUMPTION.**

One presumption cannot be made the basis of another presumption.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 74; Dec. Dig. § 54.\*]

**5. RAILROADS (§ 419\*)—INJURIES TO ANIMAL—CARE REQUIRED ON DISCOVERY.**

Where a horse unlawfully running at large is killed by a train, the railroad owes no duty as to the horse until its employees discover the animal to be where he might reasonably be expected to be injured by the operation of the train in the manner they operated it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1489-1500; Dec. Dig. § 419.\*]

**6. RAILROADS (§ 443\*)—INJURIES TO ANIMALS—SUFFICIENCY OF EVIDENCE.**

In an action for the killing of a horse by a train, in which it was shown that the train was running at an excessive speed, and the horse unlawfully running at large, evidence held insufficient to show that the railroad employees discovered the horse to be where he might be expected to be injured by the train in the manner they operated it, and hence failed to show that the railroad owed any duty with regard to the horse.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 443.\*]

**7. NEGLIGENCE (§ 1\*)—EXISTENCE OF DUTY.**

In the absence of a duty violated, there can be no negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.\*]

Appeal from Hopkins County Court; F. W. Patterson, Judge.

Action by D. H. Byrd against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Coke, Miller & Coke and L. L. Wood, for appellant. J. M. Melson, for appellee.

**WILLSON, C. J.** Appellee recovered a judgment against appellant for the sum of \$125 as the value of a horse belonging to the former alleged to have been negligently killed by the latter in the operation of one of its trains within the corporate limits of the town of Sulphur Springs. The horse was killed, as found by the trial court, at a point on appellant's line of railroad it was not required to have fenced, between League street, in said town, and Moore avenue, the street nearest to League street on the east and running parallel with it.

It is reasonably certain from the evidence that the horse was killed by one of appellant's east-bound trains at some hour not shown by the record during a night in September, 1908, but as no one saw the train strike him, it is only by inferences from the testimony that the circumstances surrounding the accident can be determined. Appellee testified that when he last saw the horse alive he was in his lot, near and north of appellant's line of railroad and near and east of League street. He found the horse dead in a cut at a point about six feet south of the track of said railroad and 70 or 80 feet east of the point where appellant's track crossed League street. Appellee further testified: "I saw his (the horse's) tracks on the railroad right at the crossing. I saw where he scrambled to get off the railroad track, but I never saw his tracks up to where he was lying. From where I first saw the horse's tracks I could not tell from the tracks he made as to whether he was running, but the tracks just dug in the ground and I suppose it was where the engine struck him." It was shown that from the place where the horse was found dead to a point more than 500 yards west of same appellant's track was straight, and that the view of operatives of its trains going east from that point to the place where the animal was found dead was wholly unobstructed. An ordinance of the town of Sulphur Springs made it unlawful to run a steam engine on a railroad within its limits at a greater rate of speed than 6 miles per hour. A witness testified that a train moving at the rate of 6 miles per hour striking a horse would not knock him 10 feet from the side of the track, "but I suppose,"

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

he said, "it might knock him off five feet to one side, as five feet would be a small distance. Or," he added, "it might catch the animal on the pilot of the engine, which is three or four feet elevation, and the animal would fall off the side of the track five feet." When found the horse's hind legs were broken just above the hocks, and his neck was broken. The findings of the trial court, made the basis of his judgment, that appellant was guilty of negligence in that it was operating within the corporate limits of said town in violation of said ordinance, at a greater rate of speed than six miles per hour, the train that killed the horse, and that such negligence was the proximate cause of the horse's death, are challenged as being without support in the evidence. If it should be conceded that the evidence was sufficient to support the finding that the train which struck the horse was being operated at a speed in violation of the ordinance, we think it was insufficient to support the finding that the death of the animal was the result, proximately, of the violation of that ordinance. As was said in *Ry. Co. v. Latham*, 115 S. W. 891, "if the engineer was guilty of negligence in running the train at the speed it was run \* \* \* then in order to determine that such negligence was the proximate cause of the accident, it would be necessary to first find that the animal was on the track under such circumstances as would support the conclusion that the accident was the natural and probable consequence of such negligence, and that an accident of that character ought reasonably to have been foreseen as such a consequence in the light of attending circumstances. *T. & P. Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162. Whether there was any causal connection between the negligence of the defendant found by the court and the accident is left wholly to conjecture, and, in the absence of evidence to support it, such a connection can no more be presumed than negligence can be presumed without proof to support it. *T. & P. Ry. Co. v. Shoemaker*, 98 Tex. 451, 84 S. W. 1049." There is no evidence in the record before us showing when and under what circumstances the horse got upon appellant's track, and there is no evidence tending to show that its employes in charge of the train which killed the horse ever discovered him to be on the track. By the terms of an ordinance in force in said town it was unlawful for the horse to be at large at the place where he was killed, and therefore appellant's said employes not only did not owe appellee the duty to keep a lookout for the animal, but had a right to assume no such animal was at large at said place. *Ry. Co. v. Cocke*, 64 Tex. 154. As they did not owe such a duty, it should not be presumed from the fact that the track was straight and their view unobstructed that they discovered him upon the track.

And, if such a presumption could be indulged, it could not be made the basis of a further presumption that said employes discovered the animal to be on the track in time by the use of due care to avoid injuring him. The animal being at the time in the position of a trespasser on its track, notwithstanding appellant may have been negligent in operating its train at too great a speed, it would not be liable for the death of the horse if its employes did not discover him to be in danger from the train in time to avoid injuring him in its operation. *Ry. Co. v. Russell*, 43 S. W. 576. In other words, the horse being a trespasser on its track, appellant owed to appellee no duty with reference to him until its employes discovered the animal to be in a place where, reasonably, he might be expected to be injured by the operation of the train in the manner they operated it. The testimony failing to show that said employes discovered the horse to be in such a place, it failed to show appellant to owe appellee a duty with regard to him, and hence failed to show a liability on the part of appellant to appellee. In the absence of a duty violated, there can be no liability on the ground of negligence.

The judgment is reversed, and the cause is remanded for a new trial.

#### BRADY v. MADDOX.

(Court of Civil Appeals of Texas. Dec. 22, 1909. On Motion for Rehearing, Feb. 2, 1910.)

#### 1. APPEAL AND ERROR (§§ 994, 1002\*)—REVIEW—CONTRADICTORY EVIDENCE—CREDIBILITY OF WITNESSES.

A verdict is conclusive on the appellate court as to conflicting evidence and the credibility of the witnesses.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3901-3906, 3935; Dec. Dig. §§ 994, 1002.\*]

#### 2. BROKERS (§ 86\*)—ACTION FOR COMMISSIONS—EVIDENCE.

In an action by a broker for commissions, evidence to support a finding that it was through the broker's efforts that a prospective purchaser was procured.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 116; Dec. Dig. § 86.\*]

#### 3. BROKERS (§ 8\*)—ACTION FOR COMMISSIONS—EVIDENCE.

In an action by a broker for commissions, evidence held to support a finding that a contract of employment between the broker and the owner was in force when the owner sold the land.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 9; Dec. Dig. § 8.\*]

#### 4. BROKERS (§ 88\*)—ACTION FOR COMMISSIONS—INSTRUCTIONS.

In an action by a broker for commissions, where there was evidence that the owner had at one time refused to sell to a subsequent purchaser, and that afterward the owner had placed the property for sale with the broker without stipulating against the sale to such purchaser, but no evidence that the purchaser had sub-

mitted an offer to the broker after the owner's refusal to sell, a charge that, if the purchaser had submitted an offer to the broker which was refused by the owner, defendant should recover upon the theory that, if the owner refused to sell to the purchaser and he then went to the broker with his offer, defendant was entitled to recover, did not necessarily require a verdict for defendant.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121-127; Dec. Dig. § 88.\*]

#### 5. BROKERS (§ 88\*)—ACTION FOR COMMISSIONS—INSTRUCTIONS.

The evidence being conflicting as to whether the property was withdrawn from the market before or after the owner's employment of the broker, a charge in the broker's action for compensation that, if before the broker submitted the property for sale to a prospective purchaser the owner had refused the offer of the prospective purchaser, defendant should recover, did not require a verdict for defendant.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121-127; Dec. Dig. § 88.\*]

#### 6. TRIAL (§ 286\*)—INSTRUCTIONS.

A general charge that the jury should find a verdict upon "a preponderance of the evidence under the foregoing charge," followed by defendant's special charges, was not erroneous as requiring the jury to find a verdict under the general charge alone and to ignore the special charges, since the jury could not have understood that, after the special charges were given, they were to be ignored.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 700; Dec. Dig. § 286.\*]

#### 7. HUSBAND AND WIFE (§ 258\*)—"COMMUNITY PROPERTY"—HUSBAND'S IMPROVEMENTS ON WIFE'S SEPARATE PROPERTY.

If a wife inherited a lot from her father and her husband erected improvements thereon, the improvements would be "community property," so that the husband would have an interest in the property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 909; Dec. Dig. § 253.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1343-1344; vol. 8, p. 7608.]

#### 8. BROKERS (§ 61\*)—RIGHT TO COMMISSIONS.

Where a husband negotiated with a broker for the sale of a lot which was his wife's separate property, though there was evidence that improvements thereon were community property, and the broker knew that the wife's signature and separate acknowledgment of a deed to the property was essential to a conveyance, he would not be entitled to a commission upon finding a purchaser if the real reason the deed was not made was that the wife would not execute it, and such failure was not participated in by the husband.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 77, 78; Dec. Dig. § 61.\*]

#### 9. APPEAL AND ERROR (§ 213\*)—REVIEW—FAILURE TO SUBMIT ISSUE OF FACT.

Where there was in the evidence an issue of fact, proper for submission, but which defendant did not ask to have submitted, he cannot urge the failure to submit as ground for reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1304, 1305; Dec. Dig. § 213.\*]

Error from Bexar County Court; Phil H. Shook, Judge.

Action by J. W. Maddox against T. F. Brady. Judgment for plaintiff, and defendant brings error. Affirmed.

Joseph Ryan, for plaintiff in error. Webb & Goeth, for defendant in error.

JAMES, C. J. Maddox sued to recover 5 per cent. of \$7,000 as a broker's commission, alleging his employment by Brady to sell a piece of property for the price of \$7,000, for which, under said employment, he alleged he secured a purchaser in the person of A. Cohen at the price of \$7,500. Defendant denied the employment, and alleged that, if the property was ever placed for sale with plaintiff, the same was recalled long before any such offer was secured, all of which was known to plaintiff as well as Cohen. A jury returned a verdict for plaintiff in the sum of \$350.

The first assignment of error is that the court erred in refusing a new trial because the verdict was contrary to the evidence and to the court's charge, in that the undisputed testimony showed that plaintiff did not secure the alleged purchaser, but that Cohen, desiring to purchase the same, first made an offer to defendant, which was refused, and after refusal, with full knowledge of the fact that defendant had withdrawn said property from the market and from sale, submitted an offer to plaintiff; that neither said offer submitted to defendant or to plaintiff was satisfactory to defendant; and that, therefore, the sale was never consummated on the terms proposed by said Cohen and unlawfully accepted by plaintiff. Under this assignment appellant's proposition is: "Plaintiff, not having secured the proposed purchaser, Cohen, and not having been the procuring cause of said Cohen's offer, which \* \* \* was not satisfactory to defendant Brady, and which had been previously refused by him, and the sale not having been consummated, was not entitled to a recovery." We have no power to pass on the contradictory testimony, nor on the credibility of the witness. The jury settled all such questions.

The testimony was as follows:

Maddox testified that about October 10, 1906, Brady told Maddox that he and his wife wanted to sell this property, and that they would accept \$7,000 for it, and requested Maddox to find a buyer at that price, agreeing to pay 5 per cent. commission, and that he would furnish abstract and necessary papers. Maddox exerted himself to find a buyer, showed the property first to a Mr. Applewhite at that price, who declined to buy it. Then he showed it to Mr. Kincaid at that price, who also declined to buy it. He requested Mr. Griff Jones, his former partner in the real estate business, to assist him in making a sale, and Mr. Jones one day came to him and told him that he thought plaintiff could get Abe Cohen to buy it. Thereupon he got into Jones' buggy

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and went with him to Cohen. Cohen asked him if he had authority to sell and how much it would take to buy the property, and plaintiff gave him a price of \$7,500, which plaintiff explains he did in order to have a margin to come down on to \$7,000, as persons buying property generally desired to trade before buying. This was about November 5, 1906, and, after some discussion of the matter and after deliberation, Cohen agreed to purchase it at that price for his wife, Harriet Cohen, and the trade was closed. Cohen deposited \$100 in a bank with a receipt, which read as follows: "Nov. 5, 1906. I, J. W. Maddox, agent for Thos. F. Brady and his wife, Mary E. Brady, have this day sold to Harriet Cohen the storehouse No. 408 situated on the south side of Military Plaza, for the sum of seventy five hundred (\$7,500) dollars, also the  $\frac{1}{4}$  interest in alley running back to Nueva Street and all other interests in said property. The said Harriet Cohen deposited the sum of One Hundred Dollars as earnest money at Frost Nat'l Bank, the said Brady and wife to give a good title and abstract attached, said Brady and wife to pay all taxes up to date. Thos. F. Brady, Mary E. Brady, By their authorized agent, Joseph W. Maddox. Dec. 10, '06. Received the above mentioned \$100.00. A. Cohen."

Maddox further testified: That he then went to the residence of Mr. Brady and informed him of what he had done, Mrs. Brady being present, and that Brady turned to her and asked her what she was going to do about it, and she said she did not know, had not made up her mind whether she would sell or not and requested time to consider. That Brady himself made no objections to the sale. That plaintiff met Brady two or three days afterwards on Houston street, and asked what they had decided to do. Brady replied that Mrs. Brady had not made up her mind yet, but that he would use his influence to get her to execute the deed. Again, four or five days after that, plaintiff met Brady, and asked him to carry out the sale, and stated to him: "I think, Mr. Brady, that you, by talking to Mrs. Brady, can get her to execute the papers," and he said he would do all he could. That about a week afterwards he met him again, and he then told plaintiff that Mrs. Brady declined to execute the papers. Plaintiff communicated the fact to Cohen, who said to let the money stay in bank; that Mrs. Brady might change her mind. That about two weeks afterwards he saw Cohen, and told him that Mrs. Brady still refused, and he said, "Well, I have been over to the bank to get my money, but they won't give it to me unless you go with me." That plaintiff went over with him and he got back the money. Maddox also testified that some time before November 5, 1906, he had a conversation with Brady in Mrs. Brady's presence at their resi-

dence, and then told them that he thought he had a buyer for the property at \$7,000, and Mr. Brady said, "All right." Mrs. Brady did not say anything. That he had only the one interview with Cohen in regard to this sale, and had not submitted the property to him before.

Griff Jones testified that he had been partner of Maddox; that Maddox gave him a list of property that he had for sale, among others the property in question, and told witness that he had offered it to Joe Kincaid and some one else, but they had both turned it down. Witness had never spoken to Brady or Mrs. Brady about this property, but got it for sale from Maddox, with whom he sometimes worked. Witness knew a Mr. Lange, to whom he showed this property, and he turned it down. Afterwards Lange told witness that Abe Cohen wanted to see him, and witness went with Lange to see Cohen. The latter asked witness if he had this Military Plaza property for sale, and witness told him he did, and that it could be bought for \$7,500. He asked if witness was authorized to make the sale, and witness stated he was not, but that he had it through Joe Maddox. As he seemed anxious, he told him he would get Maddox, which witness did at once. Maddox told Cohen he was authorize and the deal was made. Witness never spoke to the Bradys about the property, and neither of them ever gave him any property to sell.

Abe Cohen testified that in November, 1906, he heard that Maddox had this property for sale. Maddox and Jones came to him and asked him to purchase it. He asked Maddox if he was agent for it, and he said he was, and said he could sell it for \$7,500. After some discussion and after considering it, witness agreed to purchase it for his wife, and the matter was closed by depositing \$100 in bank, with the memorandum that his wife then and after that was ready and able to pay the purchase price. Some days after that he was told by Maddox that Mrs. Brady might decline to sign the deed, and, after waiting 10 or 15 days, he was informed that Mrs. Brady would not sign, and the deposit was withdrawn. This witness, Mr. Cohen, on cross-examination stated that in 1905 or early in 1906 Mr. Brady offered him the property for \$7,000, but witness refused to give more than \$6,000, and nothing more was said about it for some time; that six or twelve months before November 6, 1906, witness thought he and Mr. Brady had some talk about the property, and witness may have asked him if the \$7,000 offer was still good, but witness did not remember distinctly what occurred; that some time after that a Mr. Lange, who had been investing in some San Antonio property, came to see witness and told him he had a chance to buy the house for \$7,000, but had turned it down. Witness asked who had offered it to him and he said Griff Jones,

and witness asked him to bring Jones to see him, and he went and got Jones. Witness then detailed what followed substantially as stated in his direct examination. He testified, also, that he never met Griff Jones until Lange brought him, and never met Maddox until Jones brought him.

Mr. Brady testified: That some time before the fall of 1906 he and his wife were discouraged about this property, and he offered it to Cohen for \$7,000, who offered \$8,000, and he told Cohen this would not do. That nothing more was said about it until in the fall of 1906, when property was beginning to take a spurt, and Cohen asked him if the property was still for sale at \$7,000, and he told Cohen "No," that it was not on the market because Mrs. Brady had sold some of her other property and had paid off the mortgage they had on this property, and there was then no reason to sell. Witness heard nothing more about it until some time afterwards, when Maddox told him he had sold the place for \$7,500, and witness told him it was not for sale. That he did not say who the buyer was nor that anything had been deposited. That he came to where witness and his wife had rooms, and both he and Mrs. Brady told him emphatically that the place was not for sale, and that he had no authority to sell it. That afterwards witness learned that Cohen was the prospective purchaser, and that he had gone through the ceremony of putting up some money in a bank. That at the time witness offered the property to Cohen he had said to Maddox, as he said to any one who would listen, that they were being taxed to death on this Military Plaza property, and that he thought his wife would sell for \$7,000. That he did not tell Maddox to sell it, and never employed him to do so. Witness never spoke to Jones or Lange about the property, and the property was withdrawn from the market when said mortgage was paid off. Witness stated that he never authorized Maddox to sell the property to Cohen or any one else at any time, and he certainly did not do so in the fall of 1906. That he had only a general conversation with Maddox about the sale of this property, the same as he might mention to any one on the street, and this was several years before the fall of 1906, and that witness took the property off the market soon after and long before the time that Maddox claims witness authorized him to sell the property.

The above is a statement of the testimony.

Brady and Cohen may be said to substantially coincide on what Brady said occurred between them, but they do not agree on when the conversation took place. Brady says that it was in the fall of 1906 that Cohen asked him if the \$7,000 price was still good, and he told him "No," that the property was not on the market. Cohen says this was 6 or 12 months before the fall of 1906. Brady says that, if anything he said to Maddox might

be construed into an authorization to sell the property, it occurred long before the fall of 1906. But Maddox says the only employment he ever had was in October, 1906, at which time Mr. Brady expressly authorized him to make a sale for \$7,000.

The jury were called upon to pass on this conflicting testimony, and could not make a finding or findings therefrom without disbelieving somebody. Suppose they believed Maddox. They must in that event have found that Brady expressly employed Maddox in October, 1906, agreeing to pay the commission for finding a purchaser. Suppose, in addition, they believed Cohen, then their finding must have been that it was not in the fall of 1906 that Brady informed Cohen that the property was not for sale for \$7,000 or at all. We readily see if this transaction was had between Brady and Cohen in the fall of 1906, as stated by Brady, it would be a very strong circumstance going to disprove the probability of his giving the property to Maddox to sell for \$7,000, and paying him a commission, when at that very time he could have sold it himself for \$7,000 without paying a commission. But if the jury accepted the testimony of Maddox and of Cohen on this matter, instead of that of Brady, it would of necessity lead them to find the contract of employment to be as Maddox testified.

Did Maddox secure the purchaser, Cohen? The testimony of Maddox and of Jones warrants such a finding. Jones was an assistant of Maddox, and an agency adopted by Maddox to find purchasers for this and other property that he had for sale. Lange was sought by Jones to buy this property, but declined it. It was through Lange, and hence through the exertions of Jones, that Cohen was seen about purchasing it, and a sale to Cohen brought about. Unquestionably this evidence was sufficient to show that it was through Maddox's employment and efforts that the proposed purchaser, Cohen, was secured, and that Maddox was the procuring cause, and the fact that this sale was not satisfactory to Brady, or the fact that Brady, previous to making the contract with Maddox, may have refused to sell the property to Cohen for any price, furnished no legal reason why the contract he made with Maddox should not be carried out.

A second proposition under the first assignment is that, "Brady having in good faith withdrawn the property from the market before Maddox was found by Cohen, said Maddox was not entitled to a commission." The evidence fully supports the conclusion that it was long after any withdrawal of the property from the market that Brady entered into this undertaking with Maddox, and that the agreement between them was in force, when the latter sold to Cohen.

Under the second assignment appellant alleges that the following special instruction being given to find for defendant if certain facts existed, and the uncontroverted evi-

dence showing they did exist, the verdict should have been set aside. The special charge was: "If from the evidence you find that one Abe Cohen submitted an offer for the property described in plaintiff's petition, and that defendant Brady refused to accept the same, and you further find that said Cohen then submitted said offer to plaintiff Maddox which was refused by said Brady, you are instructed that plaintiff cannot recover, and your verdict must be for the defendant." If this special charge was a correct one, it is evident that the evidence was not such as required, under it, a verdict for defendant. The theory upon which it proceeds is that if Brady refused to make a sale to Cohen, and Cohen then went to Maddox with his offer, defendant was entitled to a verdict. There was no evidence that Cohen submitted any offer to Maddox. There was evidence that went to show that Brady refused to sell to Cohen for \$7,000 or for any sum, but there was also evidence that this happened long before the fall of 1906. Appellant says that Brady's testimony that in the fall of 1906 Cohen asked him if the property was still for sale at \$7,000, and Brady said "No," that it was not on the market. This was not contradicted, because Cohen fixes the date of this interview previous to the fall of 1906. If the jury credited the testimony of Cohen in this matter, which they had the right to do, and found that some time after this Brady put the property with Maddox for sale at \$7,000 generally, without stipulating against a sale being made to Cohen, appellant could not deny liability for a commission on a sale to Cohen at the price authorized. The charge, in view of the evidence, did not necessarily require a different verdict than the one rendered.

The third assignment is that the verdict ought to have been set aside upon the evidence, in view of the following special charge given: "If from the evidence you believe that, though plaintiff may have been employed by defendant to make sale of the property described in plaintiff's petition on the terms therein stated (if you so find), yet you are charged that defendant would have the right to revoke such employment at any time before plaintiff made or begun such sale. If, therefore, you find from the evidence that, before plaintiff submitted such property for sale to one Abe Cohen (if you find he did so), the defendant Brady had refused to accept the price offered by said Cohen (if you find said Cohen made such an offer to defendant Brady), then you will find for the defendant." This charge was given evidently in view of the testimony of Brady that in the fall of 1906 he withdrew the property from the market, after any employment he had made of Maddox, which employment Brady states was made long before the fall of 1906, if he made it at all. When we bear in mind that Cohen's testimony fixes the date of the withdrawal of the prop-

erty months prior to the fall of 1906, and not in the fall of 1906, as stated by Brady, and Maddox fixes the date of the contract in question as in October, 1906, the jury could have found, in accordance with the testimony of Cohen and Maddox, that Brady did not withdraw the property after his contract with Maddox. The assignment is therefore overruled.

The fourth assignment complains of the charges, in this: that the general charge states: "You will find your verdict upon a preponderance of the evidence under the foregoing general charge." Then defendant's special charges were given, and in connection with them the charge on the preponderance of the evidence was not mentioned. Appellant contends that by directing the jury to find their verdict "under the foregoing charge" the court in effect told the jury to find their verdict under the general charge alone and to ignore the special charges. This we overrule. A jury cannot be supposed to have taken any such view. Appellant says that the "foregoing charge" excludes the idea that special charges subsequently given on separate sheets, if paper shall be considered. We know that the court gave the special charges requested, and the jury could not have conceived the idea, after they were given, that they were given to be ignored, if we presume, as we must, that they had average intelligence.

Under the fifth assignment we have this proposition: That as Maddox knew the property belonged to Mrs. Brady, and having contracted for her and in her name, her husband, the defendant, cannot be held for the subsequent dealings with Mrs. Brady and her refusal to sell, and the verdict should have been set aside for that reason. The undisputed evidence does not show that the property was entirely the separate property of Mrs. Brady, and that Mr. Brady had no interest in it. He testified that the lot was inherited by her from her father's estate, and that the improvements thereon, costing about \$6,000, were erected during their marriage. Both he and his wife had other property of their own. It is true Brady stated that Mrs. Brady owned this Military Plaza property as her separate estate. Maddox testified that he was familiar with their property, and knew that Mrs. Brady received this lot from her parents, and he stated, further, that the building was placed upon it by Mr. Brady. From this evidence the jury could have found that the improvements were community property, and that Mr. Brady had an interest in it.

We think, however, with appellee that, as Mrs. Brady owned the lot as her separate property, her signature and separate acknowledgment to a deed to the property was essential to a conveyance of the property to Cohen, and, as Maddox knew this he would have no claim to a commission, if the real reason the deed was not made was that Mrs.

Brady would not execute it, and such failure was not participated in by Mr. Brady. There was testimony from which the jury could have found that Brady was not at fault in this matter. But from circumstances they might have concluded the contrary. There was in the evidence an issue of fact on this subject, which it would have been proper to submit. But appellant did not ask to have it submitted, and he cannot ask a reversal because it was not.

Judgment affirmed.

#### On Motion for Rehearing.

That part of the motion which shows that if Mr. Brady placed improvements on the property in question, which was his wife's separate property, he might be reimbursed from the community estate, but the improvement would belong to the separate estate upon which it was built, and he could not assert his claim in any way that would incumber or affect the title of the wife, is fully sustained by *Schmidt v. Huppmann*, 73 Tex. 116, 11 S. W. 175. But it will be seen from the opinion on file in this case that we hold that, notwithstanding the improvements may have been placed on the lot by Mr. Brady, his wife's signature and acknowledgment were just as essential as if her money had gone into the improvements, and if Mr. Brady was not in fault, in any way, for her refusal to execute a deed to Cohen, he would not be liable for this commission. This is the substance and effect of the main opinion.

The real ground for a rehearing is expressed in the motion as follows: "The undisputed testimony of all the parties, including Maddox, shows that the failure of Mrs. Brady to execute the conveyance was not participated in by Mr. Brady. On the contrary, the testimony of Maddox shows that Mr. Brady did all he could to get his wife to sign the deed, and there were no circumstances from which the jury could have found or might have inferred the contrary." The above is directed against the last paragraph of our opinion which disposed of the appeal, affirming the judgment, as follows: "We think, however, with appellee that, as Mrs. Brady owned the lot as her separate property, her signature and separate acknowledgment to a deed to the property were essential to a conveyance of the property to Cohen, and, as Maddox knew this, he would have no claim to a commission, if the real reason the deed was not made was that Mrs. Brady would not execute it, and such failure was not participated in by Mr. Brady. There was testimony from which the jury could have found that Mr. Brady was not at fault in this matter. But from circumstances they might have concluded the contrary. There was in the evidence an issue of fact on this subject, which it would have been proper to submit. But appellant did not ask

to have it submitted, and he cannot ask a reversal because he did not." The testimony of Maddox is set forth in the main opinion. From it Mr. Brady's conduct would bear the appearance of his having been willing to make and desirous of making the deed, and that the failure to execute it was due to the unwillingness of Mrs. Brady alone. That is why we said that there was testimony from which the jury could have found that Mr. Brady was not at fault in the matter.

The present motion, however, is conspicuous in not referring to the testimony of Mr. Brady, and inferences that might be drawn from it. His testimony, as set forth in the main opinion, shows that neither he nor Mrs. Brady had any intention of selling the property at any time in the fall of 1906, and, further, that, when Maddox came to their rooms and reported this sale, both of them told him emphatically that the place was not for sale. Mr. Brady denied ever having employed Maddox, and emphatically testified that neither he nor his wife had any intention of selling the property from and after some time before Maddox says he was employed. The jury are the judges of the facts and the inferences to be made therefrom, and they may believe part of a witness' testimony and reject the rest in getting at what they believe are the true facts. They would have had the right to accept so much of Mr. Brady's statement as they saw proper. They could have believed what Maddox said took place at the interviews, and still have believed from what they gathered from Mr. Brady's testimony that, though the latter appeared at those interviews to have been in favor of the execution of the deed, yet he really had no such intention or disposition.

The issue existed in the testimony, and therefore we adhere to what is stated in the opinion.

The motion is overruled.

EL PASO & N. E. RY. CO. et al. v. LANDON et al.†

(Court of Civil Appeals of Texas. Jan. 5, 1910.  
Rehearing Denied Feb. 2, 1910.)

#### 1. CARRIERS (§ 308\*)—INJURIES TO PASSENGERS—PARTIES LIABLE.

Where a passenger purchased a through ticket over several roads from one of them, authorized to act in this regard for the others, all the roads are liable for injuries to her from the negligence of any one of them.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1268; Dec. Dig. § 308.\*]

#### 2. CARRIERS (§ 234\*)—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—STATUTES.

A statute of New Mexico requiring a party claiming damages for injury to file notice thereof within 90 days does not affect the right of recovery for injuries received in New Mexico where asserted under a contract to safely car-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

ry a passenger made in Texas; the passenger being a nonresident of New Mexico.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1263; Dec. Dig. § 234.\*]

**3. CARRIERS (§§ 276, 277\*)—CARRIAGE OF PASSENGERS—BREACH OF CONTRACT—DAMAGES**

Damages for the breach of a contract for carriage of a passenger resulting from a derailment are the same as are recoverable in an action of tort on the same fact, and the carrier's liability is subject to the same rules, and may be established by like testimony and presumptions, as in cases of torts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1078, 1079, 1082–1084; Dec. Dig. §§ 276, 277.\*]

**4. CARRIERS (§ 253\*)—CARRIAGE OF PASSENGERS—BREACH OF CONTRACT.**

Where a party purchased a ticket for passage over defendants' roads, they assumed the relation of common carrier toward her, and thereby assumed to perform all the duties of such carrier, and it is immaterial, so far as its liability for injuries is concerned, whether these duties arose by express stipulation or by a contract which necessarily involved their observance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1011; Dec. Dig. § 253.\*]

**5. WITNESSES (§ 383\*)—EXAMINATION—CONFESSION OF ONE'S OWN WITNESS.**

In an action for injuries to a passenger, where defendants' counsel asked one of their witnesses if the person injured had not told her that she had attempted to commit abortion on herself, to which she answered no, they were not entitled under the claim that she had stated to them that she would answer "yes" to ask her if she had not told them that plaintiff had so stated to her; the witness' statement not being injurious to them.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. § 383.\*]

**6. EVIDENCE (§ 314\*)—HEARSAY.**

In an action for injuries to a passenger, evidence by a witness that the person injured had told her that she had attempted to commit abortion on herself would be hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1168; Dec. Dig. § 314.\*]

Appeal from District Court, El Paso County; A. M. Walthall, Judge.

Action by J. W. Landon and another against the El Paso & Northeastern Railway Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Hawkins & Franklin, for appellants. G. G. Wright and F. G. Morris, for appellees.

**JAMES, C. J.** This action is brought to recover damages for personal injury alleged to have occurred to the wife of appellee while a passenger near a place called Toney, in New Mexico, the particular railway on which she was when injured by a derailment being that owned by the El Paso & Rock Island Railroad Company, one of the defendants. There was a general verdict for plaintiffs for \$3,585, upon which the court entered a judgment against all of the defendants, viz., the El Paso & Southwestern Railroad Company, the El Paso & Northeastern Railway Company, and the El Paso & Rock Island

Railroad Company. The petition alleged and proved a joint contract of said railway companies to carry Mrs. Landon from El Paso to Kansas City.

It was agreed at the trial as follows:

"The parties to the above-styled cause, through their respective attorneys, make the following agreement to be filed in the above-styled and numbered cause, and to be used on the trial by either of the parties hereto:

"First. That the derailment of the part of a train in which plaintiff Mrs. Landon is alleged by plaintiffs to have been injured occurred on the El Paso & Rock Island Railroad near Toney Station, in the territory of New Mexico, on the 5th day of March, 1907, between Santa Rosa, N. M., and Carrizoso, N. M.; it not being intended by the defendants to admit that said Mrs. Landon was in fact injured in any manner in said derailment, as to this proof being required of plaintiff.

"Second. It is agreed that on the 4th day of March, 1907, there was sold to the plaintiff Mrs. Landon at the Union ticket office in El Paso, Tex., a through ticket from El Paso, Tex., to Kansas City, in the state of Missouri, in the name of and by the El Paso & Southwestern System, as agents of defendants, except defendant El Paso & Southwestern Company, for transportation over the lines operated in that name, which included all of the defendants in this suit to Santa Rosa, N. M., and over the Rock Island System from there to Kansas City, Mo.

"Third. That the ticket agent at said Union Depot in said El Paso, Tex., who sold said ticket, had full authority to sell the same in the name of said system for the defendants in this case. That plaintiff Mrs. Landon paid the full first-class fare for transportation over each of defendant's roads and over the Rock Island System from El Paso, Tex., to Kansas City, Mo. \* \* \*

"Fifth. That it is further agreed that the attached form of ticket is a true copy of the form of ticket purchased by said Mrs. Landon, and that it was duly signed by her and officers authorized to act for defendants, and that the blanks therein and punches required to make it a first-class ticket from El Paso, Tex., to Kansas City, Mo., were all properly filled out, and that the form hereto attached may be used in evidence by any of the parties hereto in connection with this agreement with like effect that the original might be used without producing the original or laying predicate for using a copy; it being conceded that the original cannot be produced."

The form of ticket attached to the stipulation is that of a contract and coupons, all under the name of the El Paso & Southwestern System, and signed by her and by officers authorized to act for defendants. There

\*For other cases see same topics and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

is no dispute in the evidence of the fact that under the name of the El Paso & Southwestern System the three lines of railway were being operated at the time.

The court's charge, in effect, assumed the liability of all of the defendants for the negligence of any one of them resulting in the injury of the passenger while traveling on any of said lines on said ticket. This we think was correct. *Railway v. Lynch*, 97 Tex. 25, 75 S. W. 486; *Blanks v. Railway*, 116 S. W. 377. And we therefore overrule all the propositions in appellants' brief which assert that, the injury occurring on the line of one of these defendants, the others were not equally responsible.

Under appellants' first assignment, which complains of the refusal of a peremptory instruction, there are several propositions. It is contended, first, the statute of New Mexico in force at the time, which required as to liability for personal injury or death caused by a person or corporation in the territory that the party claiming same should within 90 days after the accident give notice of the claim by affidavit to the person or corporation, and, that appellees having failed to give such notice, appellants were entitled to the peremptory instruction asked. There was no evidence that plaintiff had not given the notice, but, in view of what we state hereafter, we need not pass upon the question whether or not it was incumbent on plaintiff to prove that it was given.

We need not set forth the statute invoked, as it will be found copied in the opinion in the case of *Sawyer v. Railway Co.*, 106 S. W. 720. In *Railway v. Sawyer*, 119 S. W. 107, in which case the Supreme Court denied a writ of error, the ruling was upheld that said statute does not affect the right of a person to recover for injuries received in the territory, where such right is asserted through a contract to safely carry a passenger; the person being a nonresident of the territory, and the contract being entered into in another jurisdiction from which the journey began. The plaintiff in this case was not a citizen nor resident of New Mexico, and the contract was made and was to be performed in part in Texas. We think, further, that the principles declared in *Railway v. Thompson*, 100 Tex. 185, 97 S. W. 459, 7 L. R. A. (N. S.) 191, bring the contract in question within the laws of Texas; it having been entered into in this state and to some extent performable in this state, although the violation of the contract occurred in New Mexico. What has just been said disposes also of appellants' third proposition, and we overrule the proposition which asserts that the refusal of the peremptory instruction was a denial of appellants' right under the Constitution and laws of the United States to have full faith and credit given to the statute of New Mexico.

We overrule the second proposition under the said first assignment, and also overrule

the second assignment of error, upon the authority of *Railway v. Sawyer*, 119 S. W. 107, and for the reason that the damages recoverable for the breach of the contract of carriage resulting from a derailment are the same as are recoverable in an action of tort on the same facts, and that the defendants' liability is subject to the same rules and may be established by like testimony and presumptions as in cases of torts. We also overrule the fifth proposition under the first assignment, and also the third assignment of error, which contend that the obligation to safely carry Mrs. Landon was not express, but implied, and therefore the liability of defendants is determinable by the statute of New Mexico; and, also, that there being no express agreement in the ticket to safely carry, or to exercise a high degree of care for the safety of the passenger, such duty did not exist, and the court erred in charging that it did. On this question we think that defendants by the contract assumed the relation of common carrier toward the passenger, and thereby assumed to perform all of the duties of such carrier to its passenger, and it is immaterial whether these duties arose by express stipulation or by a contract which necessarily involved the observance of such duties.

And, in view of all of the foregoing remarks, we overrule the fourth, sixth, and seventh assignments of error. We find the charge not subject to the criticism made by the fifth assignment.

The eighth assignment presents the following question: Appellants placed upon the stand Mrs. Moore, who appears to have stated to appellants' attorneys that she would testify that Mrs. Landon had stated to her prior to this accident that she had attempted to commit abortion on herself, but, when the question was put to the witness, she stated that Mrs. Landon did not make such statement. When this testimony was given, appellants' counsel sought to ask her if she had not told them that Mrs. Landon had so stated to her. The court refused to allow the question. The reason advanced by the assignment why they should have been allowed to do so is that they were surprised by Mrs. Moore's testimony and were injured by her refusal to testify as she had stated to them she would. The witness had not given any testimony injurious to defendants by her said statement, and they were not entitled to discredit her. Defendants were not entitled to discredit or contradict their own witness in this manner. If she had been allowed to answer the question affirmatively, it would have been hearsay. *Railway v. Crump*, 110 S. W. 1013. If defendants were surprised at her statement under the circumstances, and had announced ready relying on her testifying to what she had told them, the court might, if applied to, have granted them a continuance or postponement of the case.

The ninth assignment complains of the re-

fusal of the application for new trial for certain newly discovered evidence, to wit, the testimony of Dr. Robinson, a physician living in Mexico, to the effect that prior to the accident and early in 1907 Mrs. Landon attempted to get him to commit abortion on her, which testimony, shown by Dr. Robinson's affidavit attached, it was alleged did not come to the knowledge of defendants or their attorneys or agents until February 18, 1909, the trial having concluded by the verdict on February 17th.

The judge heard testimony concerning the time defendants' counsel received information of this witness and his testimony, and, after hearing it, overruled the application. The judge was warranted by it in coming to the conclusion that during the trial and in ample time before the conclusion of the evidence defendants' counsel were informed of the witness and his probable testimony in order to have required in the exercise of proper diligence some effort to obtain a postponement for his testimony. No movement was made to that end, and it is fairly presumable that defendants were willing to risk their case without such testimony, expecting, nevertheless, a favorable verdict from the jury, and, if not that, then relying with confidence on their being entitled to an instructed verdict.

Other reasons are suggested by appellee why a new trial should not have been granted for the testimony of Dr. Robinson, but the above is deemed sufficient.

Judgment affirmed.

#### PENIX et al. v. RICE.

(Supreme Court of Arkansas. Jan. 10, 1910.)

#### 1. TAXATION (§ 764\*)—TAX SALES—DEEDS—SUFFICIENCY—DESCRIPTION OF PROPERTY.

A tax deed, describing the land sold as part of the southwest quarter of the northwest quarter of a specified section, township, and range, is void for uncertainty in the description.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1520; Dec. Dig. § 764.\*]

#### 2. TAXATION (§ 805\*)—TAX SALES—SUITS TO SET ASIDE—LIMITATIONS.

The two-year statute of limitations (Kirby's Dig. § 7114) does not begin to run where the tax deed is void on its face for failing to describe the land sold.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.\*]

#### 3. ADVERSE POSSESSION (§ 28\*)—NECESSITY OF VISIBLE POSSESSION.

A sister-in-law of the owner, living with him as a member of his family, purchased land at a tax sale. The land was adjacent to and in the same subdivision of land as the residence of the owner. There was no evidence of a visible change in possession. After the forfeiture for nonpayment of taxes, the owner mortgaged the land and machinery thereon and proceeded to erect new buildings thereon, and exercised the same acts of ownership that he had always done. No rent was agreed on or paid. *Held*, that the

sister-in-law was not in the adverse possession of the land under the tax deed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 123; Dec. Dig. § 28.\*]

Appeal from Boone Chancery Court; T. H. Humphreys, Chancellor.

Suit by Alforetta Rice against C. A. Penix and another. From a decree for plaintiff, defendants appeal. Reversed, with directions to dismiss for want of equity.

G. J. Crump (E. G. Mitchell and G. L. Trimble, of counsel), for appellants. Pace & Pace, for appellee.

HART, J. This action was commenced in the Boone chancery court by Alforetta Rice against C. A. Penix and Joe E. Keef on the 19th day of March, 1909. The complaint alleges: That certain real estate in Boone county, Ark., was assessed for taxation as a part of the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 4, township 20 north, range 18 west, and as such was forfeited to the state for nonpayment of taxes. That on the 5th day of November, 1898, she purchased the same from the state, and obtained a deed therefor from the commissioner of state lands. That she went into possession of same and has continuously held possession of same ever since. That C. A. Penix became the owner of a judgment heretofore rendered in said court in favor of J. N. Milum against John Morrow, and has caused an execution to be issued and levied upon said real estate as the property of said John Morrow. That said levy was made by the defendant Joe E. Keef as sheriff of Boone county. The prayer of the complaint is that a sale under said execution "be suspended until the rights of the parties are determined" and "for all general and equitable relief." The defendants answered and admitted the levy of the execution was made as alleged in the complaint, but aver that plaintiff's deed is void. They deny that plaintiff took possession of the land, and that she has held adverse possession of the same ever since. The chancellor granted a temporary injunction, restraining defendants from proceeding further under the execution until the final hearing of the cause.

The facts are substantially as follows: The land involved in this suit comprises 2.25 acres. It originally belonged to John Morrow and was used by him for a mill and gin site. It was assessed for taxes as part of the S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 4, township 20 north, range 18 west, and in the year 1894 was forfeited to the state under that description for the nonpayment of taxes. On the 5th day of November, 1898, the plaintiff, Alforetta Rice, purchased said land from the state and obtained a deed therefor under the description above set out. The purchase price was \$3.81. Alforetta

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Rice was a sister of the wife of said John Morrow and lived with him as a member of his family. At the time the plaintiff purchased the land from the state, all the improvements on it had been burned off except an engine and boiler. Afterwards John Morrow and his son Brice Morrow, who were at the time partners in business, bought new machinery and placed it on the land. On the 17th day of September, 1896, John Morrow, as guardian for Brice Morrow, a minor, John Morrow, and Mary J. Morrow, his wife, executed a mortgage on the following described lands in Boone county, Ark.: "A part of S. W.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of sec. 4, Twp. 20 N., R. 18 W., containing three acres." The land is further described as the land on which is situated the mill site and residence of said John Morrow. The mortgage was given to secure the purchase price of certain machinery bought and placed on the mill site. Later John Morrow sold his interest in the machinery to Brice Morrow in consideration that he finish paying for it. Brice Morrow then erected some new buildings on the land, and paid the balance of the purchase money on the machinery. Both he and the plaintiff testify that she rented the mill site to him. There was no agreement as to what he should pay as rent except he was to pay the taxes, and give her feed for her turkeys. Both he and the plaintiff lived with John Morrow as members of his family, and, when Brice Morrow was away, John Morrow ran the mill. The plaintiff only claims the land and engine and boiler. She says that the buildings and machinery erected on the land by Brice Morrow belong to him. On final hearing the chancellor found that the plaintiff was the owner in fee simple of said lands, and the temporary injunction was made perpetual. The defendants have appealed.

In construing descriptions in tax deeds similar to the one in question, this court has held that the deed does not purport to convey the title to any land, because none is described therein. *Dickinson v. Arkansas City Improvement Company*, 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170, and cases cited. In that case the court said: "A deed failing to describe the land is equivalent to no deed at all. In order to put this statute (referring to section 7114, Kirby's Dig.) in operation, the adverse holding must be under a deed purporting to convey the land pursuant to a tax sale." The deed in question, upon its face, therefore, shows that the forfeiture of the land for the nonpayment of taxes was void, and did not put the statute of limitations in operation.

The defendants in their answer denied that plaintiff had been in adverse possession of the property for the statutory period and thereby acquired title. The proof establishes that fact. Both the plaintiff and Brice Mor-

row lived with John Morrow as members of his family at the time of the alleged forfeiture for nonpayment of taxes. There was no evidence of a visible change of possession. The alleged forfeiture occurred in 1894, and in 1896 the Morrows executed a mortgage on the land and machinery situated thereon. They proceeded with the erection of buildings to take the place of those burned down and exercised the same acts of ownership over it that they had always done. The mill site was adjacent to and in the same subdivision of land as the residence of John Morrow. No fixed amount of rent was ever agreed upon or paid. Taking into consideration all the facts and circumstances connected with the transaction, it is manifest that the possession of the plaintiff was colorable only, and not with intent to hold the property as her own. *Baldwin v. Williams*, 74 Ark. 316, 86 S. W. 423, 109 Am. St. Rep. 81. Therefore the decree is reversed, with directions to dismiss the complaint for want of equity.

#### KANSAS CITY SOUTHERN RY. CO. v. FROST et al.

(Supreme Court of Arkansas. Dec. 6, 1909.)

#### 1. WITNESSES (§ 351\*)—IMPEACHMENT—LAYING FOUNDATION.

Where the deposition of a witness is read as evidence in behalf of plaintiffs in an action for death, and his testimony is important and material, the defense may not show by another witness that deponent offered such witness whisky, and tried to induce him to testify that the cars by which decedent was killed were defective, without laying a foundation therefor by interrogating the deponent as to the matters about which the defendant offered their witness.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 351.\*]

#### 2. TRIAL (§ 296\*) — INSTRUCTIONS — ERROR CURED BY OTHER INSTRUCTION.

In an action for death of a switchman by defective cars, an objection to the charge given that it is general, indefinite, and permits a recovery irrespective of what the defect in the cars may have been, is unavailing, though abstractly true, where the evidence was confined to the issues made by the pleadings, and the charge was limited by another instruction, given at the instance of defendant, in which the jury were in effect told that the only negligence they could consider was that alleged in the complaint.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 296.\*]

#### 3. DEATH (§ 81\*)—PROPER PARTIES TO SUE—MOTHER.

Under Kirby's Dig. § 6290, creating a right of action for death, and providing that in the absence of a personal representative the action shall be brought by the heirs at law of the deceased, and any amount recovered shall be for the exclusive benefit of the widow and next of kin, to be taken by them as distributees under the laws of descent and distribution, where a decedent has left children, and administration has not been taken out, his mother is not an heir at law within the terms of the statute, and hence is not a proper party to the death action,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

though he contributed to the support of the mother.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35-46; Dec. Dig. § 31.\*]

**4. DEATH (§ 95\*)—DAMAGES RECOVERABLE—CHILDREN.**

Under Kirby's Dig. § 6290, creating a right of action for death, and providing that the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, damages sustained by children of a decedent cannot be limited by the court to the time before majority, since it is wholly a matter of evidence for the jury to determine whether any loss would occur to the children after majority.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 95.\*]

**5. DEATH (§ 99\*)—EXCESSIVE DAMAGES—SUFFICIENCY OF EVIDENCE.**

Where a switchman killed by defective cars earned from \$80 to \$90 a month, and at one time served as conductor and earned from \$100 to \$125 per month, and was 34 years old, and had an expectancy of 31¾ years, and was industrious, attentive to business, economical, strong and healthy, affectionate and always kind to his family, and used his earnings in support of his family, a recovery of \$15,000 for his death was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.\*]

**6. MASTER AND SERVANT (§ 278\*)—INJURIES TO SWITCHMAN—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.**

In an action for death of a switchman by the overriding of one car by another, caused by dissimilarity in size, and a defective coupler, evidence held sufficient to show that defendant was negligent.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.\*]

**7. MASTER AND SERVANT (§ 276\*)—INJURIES TO SWITCHMAN—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.**

In an action for death of a switchman by the overriding of one car by another, caused by dissimilarity in size, and a defective coupler, evidence held sufficient to show that the negligence of defendant was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.\*]

**8. MASTER AND SERVANT (§ 281\*)—INJURIES TO SWITCHMAN—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.**

In an action for death of a switchman by the overriding of one car by another, caused by dissimilarity in size, and a defective coupler, evidence held to show that plaintiff was not negligent.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 281.\*]

Appeal from Circuit Court, Miller County; J. M. Carter, Judge.

Action by Daisy Frost and others against the Kansas City Southern Railway Company. From a judgment for plaintiffs for \$15,000, defendant appeals. Affirmed.

Read & McDonough, for appellant. Wilkins & Vinson, Webber & Webber, and Wolfe, Hare & Maxey, for appellees.

BATTLE, J. On the 14th day of November, 1906, H. L. Frost was a switchman

in the employment of the Kansas City Southern Railway Company at Mena, Ark. On the night of that day Frost and others were engaged in making up a freight train. While he was standing on the platform or steps of a car, it, with other cars, was moved against the end of a standing car, and in the collision he was fatally injured, insomuch that he died about six hours thereafter. He left surviving him Daisy Frost, his widow, and Earl Frost, Bernice E. Frost, and Hardy L. Frost, his children, who are minors, and his only heirs at law. He died intestate, and no one administered upon his estate. His widow and children, by next friend, brought an action against the railroad company for the damages sustained by them through the death of the deceased. They relate in their complaint the manner in which the deceased was injured as follows:

(5) "That on the 14th day of November, 1906, said H. L. Frost in the capacity of switchman, together with other employes of the defendant, were engaged in making up a fast merchandise freight train for the north; that said train was being made up on said track number three, and as a part of the work of making up said train, after a great number of cars had been placed on said track number three, there was a caboose, coach, and three other cars standing on said track number two, which were to be pulled out on the lead track and placed on said track number three and coupled to the cars that were standing on said last-named track; that the switch engine was taken in on said track number two and coupled to the said caboose, which was connected to said coach and said three other cars on track number two, and said caboose, coach, and said three other cars were pulled off of track number two onto said 'lead track' and then backed in on track number three to be coupled to the cars that were on track number three to finish making up said train."

(6) "That while said caboose, coach, and three other cars were being moved backward on said track number three, which was being done at the proper, customary speed and in a careful manner, the said H. L. Frost was standing on the caboose platform and on the west side and the north end thereof, which was the proper and customary place for him to be in the discharge of his duties, the northernmost of said moving cars struck the south car of the string of cars that were standing on said track number three and all heavily loaded and the coupling apparatus at the south end of said coach gave way causing the platform of said coach to telescope the north platform of said caboose, and the said H. L. Frost was then and there caught between the north end of said caboose and said south platform of said coach and was mashed and crushed and so injured that he died by reason of said injuries."

(7) "That the death of H. L. Frost was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

directly and proximately caused by the negligence of defendant in this, that the coupling apparatus of said coach at the south end of same was old and worn and out of repair in whole and in every part and parcel of it, and was improperly and negligently constructed, and so constructed that the said coupling apparatus and every part and parcel of it was without sufficient strength and power of resistance to withstand the blows, knocks, and bumps ordinarily and usually incident to the switching and making up of freight trains, such as being done at the time said H. L. Frost was fatally injured, and it was negligence to allow or permit said coach to be put into and made a part of said train as was being done. And said coach was not properly a part of said train, was not necessary to the uses to which said train was intended to be applied, and was indeed a menace to the defendant's employes, as defendant well knew, and the platform, drawheads, coupling apparatus, and bumpers on said coach were constructed and placed higher than were the platform, drawheads, coupling apparatus, and bumpers on said caboose and were negligently allowed to be and remain in that condition by defendants, making the same dangerous; that the platform and coupling apparatus on the north end of said caboose was out of repair, was sagged down, and lower than the coupling apparatus and platform on the south end of said coach, and was negligently allowed to be and remain in that condition, so that a coupling between said coach and caboose could not be made so as to withstand the jars, knocks, and bumps received in the switching and handling of the same, in that said coupling would not hold, and would permit the drawheads on said coach and on said caboose to slip by each other and the platform of said coach to telescope the platform of said caboose, thereby rendering the same dangerous to the life of defendant's employes, and especially the plaintiff's decedent; that the defendant knew or should have known the facts in this paragraph alleged in time to have remedied the same, but the same were unknown to the said H. L. Frost and he was himself free from any negligence or want of care."

The defendant denied these allegations.

From the evidence adduced in the trial in the action we find that the jury in the case could have reasonably found the facts as follows: On the 14th day of November, 1908, about 8:45 o'clock in the evening, in defendant's yards at Mena, Ark., Frost and others were engaged in making up a train No. 52, which was interstate and carried freight into the states of Oklahoma, Missouri, and Kansas. The first part of it had already been made up, and the night crew was completing it. In the train was a caboose No. 554 and a coach No. 128. Frost was the switchman who followed the engine and passed signals to the engineer. In operating the engine the engineer received signals from Frost and an-

other switchman named Clements. The engineer was moving several cars, one of which was coach No. 126, which was then coupled to the caboose, and was a part of so much of the train as was already made up by the day crew. He received a signal from Frost and Clements to slow up, and then another to go ahead. At this time Frost was standing on a step or the platform of the caboose, where he could pass signals to the engineer. It was not his duty to stand or be in any particular place further than to be where he could receive and pass signals. The engine, at the time the signal to go ahead was given, was moving about two miles an hour; had just enough steam on it to keep it moving. When the signal to go ahead was given the engineer barely touched the throttle of the engine. The cars moved by the engine struck other cars which were standing. The platform of the caboose went under the coach, knocking off the steps of the coach and breaking the hand railings on the caboose. One witness testified that two follow plates, the carrier irons, and the timbers in the platform of the coach were broken; and that the follow plates were made of wrought iron and were "28x12 inches and two inches thick." No other platforms, drawheads, or apparatus were broken in that train at that time. Frost was seriously injured by the collision, and died in about six hours afterwards.

The drawhead on the caboose was five or six inches lower than the drawhead on the coach, and an effort was made once or twice to couple them and they would not stay coupled. One witness noticed the condition of the drawhead on the caboose about one week before the accident. The effect of this condition was to let the caboose drawhead go under that of the coach.

The deceased at the time of the accident was 34 years old; his widow was 37; his son Earl was 12 years; Bernice was 6 years old in March, 1909; and Hardy at the time of the trial, on the 7th of December, 1908, was about 4 years old. Deceased was industrious, attentive to business, and economical, affectionate, and always kind to his children. He was qualified to discharge the duties of switchman and conductor on railroads. His widow testified that he earned as switchman from \$80 to \$90 per month. The pay checks introduced in evidence showed that he averaged \$67.43 per month from January 1st, to the date of his death. He was conductor at one time and earned from \$100 to \$125 a month. He used his earnings in supporting his family.

In the progress of the trial O. H. Lowry's deposition was read as evidence in behalf of the plaintiff. His testimony was important and material. Defendant offered to prove by Gano Scott that Lowry offered to him whiskey, and tried to induce him to make a statement in the case to the effect that the cars were defective. Upon objection of the plain-

tiff the court refused to admit the testimony.

The court gave the following instruction over the objection of the defendant:

(1) "You are instructed that it was the duty of the defendant to exercise ordinary care and prudence to provide the said H. L. Frost with cars and appliances reasonably safe for use in and about the work that said H. L. Frost was engaged in at the time he was injured; and if you believe from the preponderance of the evidence that said H. L. Frost came to his death by reason of the failure of said defendant to exercise such care and prudence in furnishing such cars and appliances, reasonably safe for use in the work that he was then engaged in, and that he was killed as a direct and proximate result thereof, and that said deceased, at that time was engaged in the performance of his duties as an employé of said defendant, and that said deceased was not guilty of such negligence as contributed to his injury, then it will be your duty to return a verdict in favor of the plaintiff."

And refused to instruct the jury, at the request of the defendant, as follows:

(2) "If the jury find from the evidence that Mrs. M. R. Frost was the mother of the deceased, H. L. Frost, and that said mother was in part supported by said H. L. Frost, they will find for the defendant."

(27) "If the jury find for the plaintiffs, they will find for the children such damages as they are entitled to as compensation from the time of the death of H. L. Frost to the majority of each child. The girl will arrive at her majority when she is 18 years of age, and the boys when they are 21 years of age."

(28) "If the jury find for the plaintiffs, in assessing the damages, they will consider the amount of damages due each plaintiff, allowing each of the children such compensatory damages as will fairly compensate him for the loss of his father to the date of his majority; and to the plaintiff, Daisy Frost, such compensatory damages as will fairly compensate her during the expectancy of her life, if she was older than her husband, or during the expectancy of his life, if he was the older."

The plaintiffs recovered a verdict and judgment for \$15,000, and, from that judgment, defendant appealed.

No foundation was laid for the admission of the testimony of witness Scott. Witness Lowry was not interrogated as to the matters about which the defendant offered the testimony of Scott, the object of which was to discredit the testimony of Lowry, the same object, in effect, as is sought to be accomplished by showing that a witness has made contradictory statements. The same methods should be observed, if practicable, in the former as in the latter case. There is no good reason why a witness should be entitled to greater consideration in one case than in the other. Lowry should have been first interrogated about that which the de-

fendant proposed to prove by Scott. It could have done so; and it was right and just that Lowry should have had the opportunity to admit and explain or deny before his credibility or testimony was attacked. *Weaver v. Traylor*, 5 Ala. 564; *State v. Stewart*, 11 Or. 52, 238, 4 Pac. 128; *Edwards v. Sullivan*, 30 N. C. 302; *State v. Angelo*, 32 La. Ann. 407; *Hollingsworth v. State*, 53 Ark. 387, 14 S. W. 41.

The defendant objected to the instruction given by the court over its objection and copied in this opinion, because it "is general, indefinite, and permits a recovery, no matter what the defect in the cars may have been." The objection may be abstractly true, but the instruction should be read in the light of the evidence which was confined to the issues made by the pleadings. Then, too, this instruction was limited by another instruction given at the instance of the defendant in which the jury, in effect, were told that the only negligence they could consider was that alleged in the complaint.

The defendant's request numbered 2, and copied in this opinion, should not have been granted. There was no administration upon the estate of H. L. Frost, deceased, and this action was properly brought by his widow and children. The right of action was created by a statute, which, in the absence of a personal representative, provides that an action for damages on account of the death of one caused by the wrongful act, neglect, or default of another shall be brought by the heirs at law of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and they are such as can take as distributees of the estate under the laws of descent and distribution. *Kansas City Sou. Ry. Co. v. Henrie*, 87 Ark. 443, 112 S. W. 967. The deceased in this case having left children his mother was not an heir, and had no right to sue, notwithstanding the son contributed to her support in his lifetime. *Kirby's Dig.* § 6290.

The defendant sought by instructions to confine the right of the children to recover in this case to the damages they will suffer during their minority. The right to recover is limited only by the statute to the damages suffered, and not to any period of life. The right of children to recover beyond minority depends upon evidence. Their damages are the pecuniary loss suffered by them, which is "the probable aggregate amount of his contributions to them, reduced to present value." *Kansas City Southern Ry. Co. v. Henrie*, 87 Ark. 454, 112 S. W. 971. It is probable the contributions of a father to the support of a child after he reaches his majority may cease altogether, or be less. That, of course, will depend upon the ability of the child to take care of himself and his success in life. Parental affection for the child will not, probably, cease after minority, and the fa-

ther may still continue to contribute to the support of the child. That is a question for the jury to decide according to the evidence of the assurance the parental affection may give of aid and support to the child after minority. *Railway Co. v. Davis*, 55 Ark. 462, 18 S. W. 628.

Defendant contends that the damages recovered were excessive. Mrs. Frost testified that deceased earned as a switchman from \$80 to \$90 a month, and that he served as conductor at one time and earned from \$100 to \$125 per month. He was 34 years old and his expectancy was 31¼ years. He was industrious, attentive to business, economical, strong and healthy, affectionate, and always kind to his family. He used his earnings in support of his family. Plaintiffs recovered \$15,000. The evidence was sufficient to sustain the verdict of the jury. *Kansas City Sou. R. Co. v. Henrie*, supra.

The evidence was sufficient to sustain the verdict. The jury could have found from the evidence that the signal to go ahead did not accelerate the speed of the engine, and that no act of plaintiff contributed to his injury, and that the defendant was guilty of the negligence charged in the complaint, and that it (negligence) was the proximate cause of his injury.

Judgment affirmed.

#### ST. LOUIS & N. A. R. CO. v. BRATTON.

(Supreme Court of Arkansas. Jan. 17, 1910.)

##### 1. JUDGMENT (§ 299\*) — AMENDMENT AFTER TERM—RULE AT COMMON LAW.

At common law, a judgment could not be amended after the term at which it was rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 583-586; Dec. Dig. § 299.\*]

##### 2. JUDGMENT (§ 299\*) — AMENDMENT AFTER TERM.

Under the modern practice, where the entry of a judgment, through some plain error, fails to correspond with the judgment that was actually rendered, the court may amend its record to make it speak the truth by nunc pro tunc order; but, where the judgment expresses the entire judicial action taken at the time of its rendition, the court cannot, after the expiration of the term, enlarge or diminish it in matter of substance, or in any matter affecting the merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 583-586; Dec. Dig. § 299.\*]

##### 3. RAILROADS (§ 161\*) — LIEN — STATUTORY PROVISIONS.

Kirby's Dig. § 6861, provides that every person who shall sustain loss or damage from any railroad for which a liability may exist at law shall have a lien for such damage on the railroad and its property. Section 6862 provides that such lien shall not be effectual, unless suit shall be brought upon the claim within one year after its accrual. Section 6863 provides that the lien shall be mentioned in the judgment rendered for the claimant in the ordinary suit for the claim. *Held* that, as before a judgment can be declared for the lien, it must first be found that the suit was brought within the specified time, the court itself must make a ruling

and adjudication, in order to declare the lien in the judgment, so that a person recovering judgment would not be entitled to the lien as a matter of course; and, the court having failed to so adjudge, the mention of the lien was not properly a part of the judgment originally rendered, and after the term could not be incorporated therein by amendment.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 161.\*]

Appeal from Circuit Court, Searcy County; Brice B. Hudgins, Judge.

Action by Benjamin Bratton, administrator of Benjamin Bratton, Sr., against the St. Louis & North Arkansas Railroad Company. Judgment for plaintiff amending a former judgment nunc pro tunc, and defendant appeals. Reversed and remanded, with directions.

W. B. Smith and J. Merrick Moore, for appellant. U. S. Bratton, for appellee.

FRAUENTHAL, J. This is an appeal from a judgment of the Searcy circuit court correcting or amending by a nunc pro tunc order a former judgment of that court entered at a former term. At the February, 1909, term of the Searcy circuit court the plaintiff below, Benjamin Bratton, administrator, filed this motion for a nunc pro tunc order, in which he stated that on January 10, 1906, he filed a complaint against the defendant to recover damages for the wrongful killing of one Benjamin Bratton, Sr., and that on March 18, 1907, said cause was tried in said court, and a verdict returned by a jury in favor of the plaintiff for \$2,500, that a judgment was entered upon said verdict at that term of said court, but that by oversight it failed to mention the lien which goes with such a judgment. He asked that the judgment as entered at said former term of the court "be corrected by a nunc pro tunc order so as to mention the fact that a lien goes with the judgment as against the property of the defendant, which it owned at the time the cause of action accrued." Upon the trial of the original action the jury returned the following verdict: "We, the jury, find for the plaintiff, Benjamin Bratton, administrator of the estate of Benjamin Bratton, Sr., deceased, the sum of \$2,500"—and the following judgment was entered thereon: "It is therefore considered, ordered, and adjudged by the court that the plaintiff, Benj. Bratton, Jr., as the administrator of the estate of Benj. Bratton, Sr., deceased, have and recover of and from said defendant said sum of \$2,500, and all his costs in this suit laid out and expended, and in default of payment let execution go therefor." The motion for the nunc pro tunc order was submitted to the court upon an agreed statement of facts. This statement includes the complaint and answer in the original suit, the verdict of the jury upon the trial of the action, and the former judgment en-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tered therein, and also the following: "(2) That from the record of the case it does not appear that the plaintiff made any request to have granted it the lien mentioned in sections 6661 and 6663 of Kirby's Digest. (3) It is further agreed that the judge of the circuit court, in accordance with his custom, left the form of the judgment to be drawn by the clerk of the court, intending that said judgment would be drawn to conform with the law and the facts, that his attention was never called to the lien mentioned in the above sections of Kirby's Digest, and that his mind never passed upon it." The circuit court granted said motion, and entered in full a judgment *nunc pro tunc*, in which it stated in substance that "the judgment, being a lien" on the property of the defendant which belonged to it at the time the cause of action upon which the verdict was rendered, accrued. From this judgment thus correcting or amending the judgment entered at the former term of the Searcy circuit court, the defendant prosecutes this appeal.

The plaintiff bases his right to the above lien by virtue of section 6661, Kirby's Dig., which in substance provides that every person who shall sustain loss or damage to person or property from any railroad, for which a liability may exist at law, shall have a lien for said damage on said railroad and its property. And he contends that he is entitled to have said lien mentioned as a matter of right and of course in the judgment for the recovery of the damages, by virtue of section 6663, Kirby's Dig., which provides that: "Said lien shall be mentioned in the judgment rendered for the claimant in the ordinary suit for the claim \* \* \* and may be enforced by ordinary levy and sale under final or other process of law or equity." The plaintiff urges that he is entitled to have the former judgment of the court which failed to mention said lien amended in that regard, either because of the clerical misprision of the clerk in entering the judgment, or because the mention of the lien is necessarily and properly a part of the judgment, by reason of the fact that he was entitled to it as a matter of course. The question that is thus presented for determination by this appeal is in what regard and to what extent can a court amend or correct its judgment after the expiration of the term at which the judgment was rendered and entered. In order to give to the record of a court the utmost sanctity and an absolute verity the common law declared that no judgment could be amended after the term at which it was rendered. But where the entry, through some plain error, fails to correspond with the judgment that was actually rendered, the principles of justice obviously require that it should be corrected; and therefore this rule of the common law has been modified in modern

practice to that end. The record should speak the truth; and, as was said by Chief Justice Cockrill in the case of *Hershy v. Baer*, 45 Ark. 240, "the power of a circuit court to amend its record so as to cause it to speak the truth is one inherent in the idea of justice." The entry in the record should correspond with the judgment which was actually pronounced, and the court has the power, and it is its duty, even at a subsequent term, to make such changes in the entry so as to make it conform to the truth. But where the judgment expresses the entire judicial action taken at the time of its rendition, the court has no authority after the expiration of the term to enlarge or to diminish it in matter of substance, or in any matter affecting the merits. Under the guise of an amendment there is no authority to revise a judgment, or to correct a judicial mistake, or to adjudicate a matter which might have been considered at the time of the trial, or to grant an additional relief which was not in the contemplation of the court at the time the judgment was rendered. "The authority of a court to amend its record by a *nunc pro tunc* order is to make it speak the truth, but not to make it speak what it did not speak, but ought to have spoken." *Malpos v. Lowenstine*, 46 Ark. 552; *Cox v. Gress*, 51 Ark. 224, 11 S. W. 416; *Gregory v. Bartlett*, 55 Ark. 30, 17 S. W. 344; *Tucker v. Hawkins*, 72 Ark. 21, 77 S. W. 902; *Liddell v. Landau*, 87 Ark. 438, 112 S. W. 1085; *Bouldin v. Jennings*, 122 S. W. 639.

If there was some issue which the court should have passed upon, and pronounced judgment thereon, but did not actually do so, such omission cannot be supplied by an amendment at a subsequent term of the court. The entry should correspond only with the judgment actually intended and pronounced by the court; and, if the entry does not do this because of any clerical mistake, or because some matter actually adjudicated has been inadvertently omitted, then it can be corrected so as to conform to what was actually done. "In regard to the power of amending judgments by supplying omissions, it is necessary not to lose sight of the principle that amendments can only be allowed for the purpose of making the record conform to the truth, not for the purpose of revising and changing the judgment. Hence if anything has been omitted from the judgment which is necessarily or properly a part of it, but failed to be incorporated in it through the negligence or inadvertence of the court or the clerk, then the omission may be supplied by an amendment after the term. If, on the other hand, the proposed addition is a mere afterthought, and formed no part of the judgment as originally intended and pronounced, it cannot be brought in by way of amendment." 1 *Black on Judgments* (2d Ed.) § 156; 23 *Cyc.* 873.

In the case at bar the plaintiff was entitled, upon a recovery of the damages for which he sued, to have a lien upon the property of the defendant, and, under certain circumstances of the case, to have that lien mentioned in the judgment. But he was not entitled to such lien under any and all circumstances of the case; he was not entitled to the lien in event the suit had not been brought within one year after the claim had accrued. He was therefore not entitled to the lien necessarily and as a matter of course. Section 6882, Kirby's Dig., provides: "The lien mentioned in the preceding section shall not be effectual unless suit shall be brought upon the claim \* \* \* within one year after said claim shall have accrued." Before, therefore, a judgment could have been declared for said lien, it must first have been found that the suit was brought within the time specified in the above section. In order to declare and mention said lien in the judgment it was necessary that the court itself should make a finding and then an adjudication; and, if no such finding and adjudication was actually made by the court, the omission cannot now be supplied by an amendment of the judgment, for such amendment would not speak the truth, but would speak what should have been done, but was not. Under the agreed testimony in the case neither before nor at the time of the rendition of the original judgment was the attention of the court called to this lien, and his mind never passed on it. The matter was therefore never actually adjudicated by the court. To make the adjudication and pronounce judgment thereon it was necessary for the court to judicially investigate the matter. It may be that from the evidence or the admissions of the parties the court would have found that the suit was brought within the prescribed time. But the testimony might have supported a different finding, in which event the lien should not have been mentioned in the judgment. It was not within the province of the clerk to determine whether the suit had been brought within the required time; that was a matter for the judicial determination of the court. The court did not make that determination, and therefore did not pronounce the judgment as is now entered in the nunc pro tunc order. The mention of the lien was therefore not necessarily and properly a part of said judgment as originally rendered; and, after the expiration of the term at which the judgment was pronounced, it could not be amended so as to incorporate this matter therein. We do not intend to decide by this opinion that the right of plaintiff to a lien on the defendant's property is in any manner affected or impaired by the failure to mention it in the judgment; upon that question we express no opinion. We only decide that under the

evidence in this case it was error to sustain the motion of the plaintiff herein to correct by a nunc pro tunc order the original judgment in this case as asked for by him.

The judgment is reversed, and the cause is remanded, with directions to deny the motion for a nunc pro tunc order.

#### ST. LOUIS, I. M. & S. RY. CO. v. DAVIS.

(Supreme Court of Arkansas. Jan. 10, 1910.)

##### 1. MASTER AND SERVANT (§ 180\*)—INJURY TO SERVANT—FELLOW SERVANT RULE.

Under Act March 8, 1907 (Laws 1907, p. 162), making the master liable for injuries to servants due to the negligence of fellow servants, where a switchman was injured while riding on the tender to a switch engine, the negligence, if any, of those operating the engine was negligence for which the master was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-368; Dec. Dig. § 180.\*]

##### 2. MASTER AND SERVANT (§ 180\*)—INJURY TO SERVANT—FELLOW SERVANT RULE.

Under Act March 8, 1907 (Laws 1907, p. 162), making the master liable for injuries to servants due to the negligence of fellow servants, where a switchman was injured by the engine on which he was riding taking an open switch, the negligence of another switchman, if any, in leaving the switch open was negligence for which the master was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-368; Dec. Dig. § 180.\*]

##### 3. MASTER AND SERVANT (§ 240\*)—MASTER'S LIABILITY FOR INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a switchman, injured by a backing switch engine taking an open switch and colliding with cars on a side track, was riding on the footboard to the tender, facing the same way the engine was going, and directing the engineer by signals what to do, so that he could have seen, by the position of the switch target, that the switch was open in ample time to have escaped injury, he was guilty of contributory negligence, as a matter of law, barring recovery, for his injury.

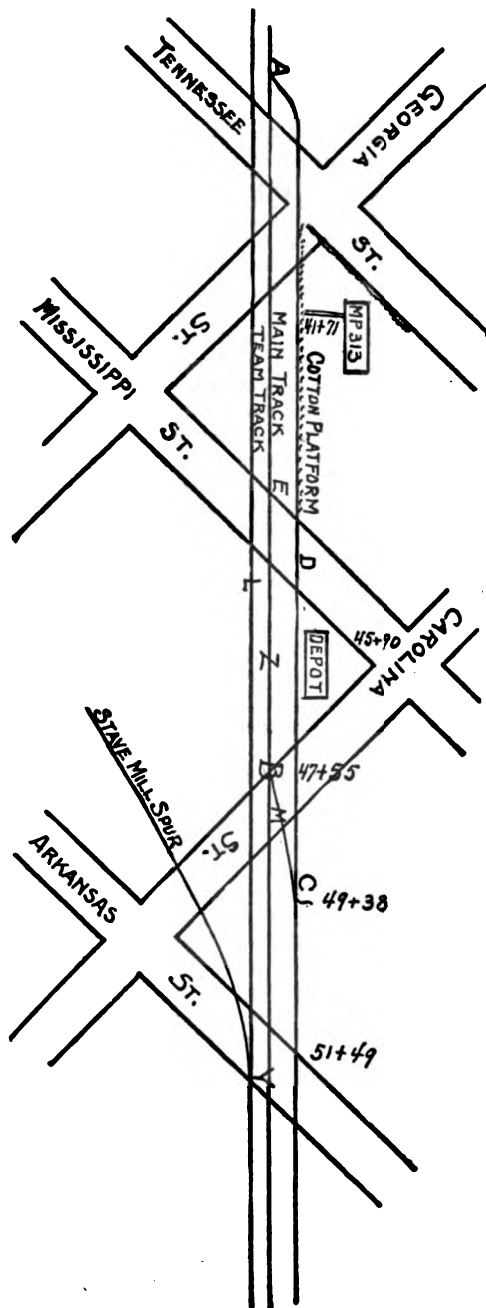
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 751-756; Dec. Dig. § 240.\*]

Appeal from Circuit Court, Cross County; Frank Smith, Judge.

Action by Mrs. Annie Davis, administratrix, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. H. Davis was a brakeman in the employ of appellant. On the 22d day of August, 1908, he had charge of the "switching list" at Marianna, and in consequence thereof it was his duty to direct how the switching was to be done. It was the duty of the other members of the crew, the engineer, fireman, and brakeman, to follow the directions of Davis in making whatever switching was necessary in the yards at Marianna after the train arrived there that day. The train came into Marianna from the South,

and was cut in two in the edge of town. The engine, with three or four cars, was moved northward toward the depot. The crew accompanying it consisted of the engineer, the fireman, another brakeman named Holland, and Davis. To make the statement intelligible we will use the plat that was in evidence.



"B, M, C," is a switch connecting the main track and the passing or house track, "A, D, C, T." When the engine and cars proceeding northward on the main track arrived at the point "B," the brakeman Holland

opened the switch at that point, and it remained open until the accident and death of Davis occurred.

Taking the most favorable view of the evidence for appellee, the jury might have found that, after the switch was opened by Holland at "B," the engine and cars with the balance of the crew, including Davis, continued on the main track passing out at the switch "A," and back down to the depot, there "spotting" or leaving to be unloaded two cars that were attached to the engine and tender. In spotting these two cars other cars that were on the passing track in front of the depot were pushed down south on the passing track toward "C." After the two cars were spotted Davis cut the engine and tender loose, and got on the rear end of the tender. The engine then went north on the passing track beyond switch "A." Davis signaled the engineer to come back down the main line. He dropped off and opened the switch for the main line at switch point "A." When the engine and tender backing south passed switch "A," Davis closed the switch "A"; then got back on the southeast corner of the tender. "He sat down, and crossed his legs, with his arm in the handle on the tank." He signaled the engineer to back down the main track, which the engineer did at a speed of about 15 or 20 miles an hour. The engine and tender ran into the open switch at "B," and collided with the cars that were standing on the house track near "C," producing the injury that resulted in the death of Davis. From the point "A" down the main track "A, E, B," to "B" is 961 feet, and 600 feet of that distance the track was perfectly straight, and there was nothing at the time of the occurrence to obscure the vision for that distance between Davis on the tender and the open switch at "B." There was at switch "B" the ordinary switch stands, with the usual targets to show whether the switch was open or closed. The target showing that the switch "B" was open was a dull red color. It was turned that day at the time, so as to indicate that the switch was open. On a clear day such as that was the target indicating the open switch could have been seen from 150 to 200 feet away. The target indicating "safety," or when the switch was closed, was colored green. Davis was facing in the direction the tender was moving.

On behalf of appellant the engineer who was on the engine at the time of the accident testified in part as follows: "Mr. Davis was working that day as the 'swing man,' and at that time as the 'list man.' In the capacity of a list man a part of his work was to direct the movements of the engine. It was his place to direct us what movements to make. I looked to him for signals and directions for moving the engine. It was my duty to watch his signals and obey them. He was the one that signaled me to back down the main line. I know where the

switch stand was there at that time. I did not know that the switch was open. I was depending upon Davis to keep the lookout down the track. The only ones on the engine were the fireman, Mr. Davis, and myself, and Mr. Davis was in the best position to keep the lookout. Mr. Davis was the only man on the engine at that time that had an unobstructed view of the track on both sides, and we were depending upon him to keep the lookout. My view of the switch was obstructed by the body of the tank. The switch stand was on the side of the fireman. Mr. Davis was standing at the southeast corner of the tank right at the rear end. From the time that we got on the main line on down to the switch stand there was nothing to prevent Mr. Davis from seeing that the switch itself was open, and that the danger sign was exposed. I am well enough acquainted with the track to know there was nothing to obstruct his view. I was risking my life and depending wholly upon him to keep the lookout. While we were backing down the main track Mr. Davis was standing on the rear stirrup of the tank on my side holding with his right hand and signaling me with his left, with his face facing the track. He gave me a hurry up signal, which I ignored, and got my injector and put that on, and just after I put that on I felt the tank jump, and it flashed through my mind that he had failed to throw that switch, and I rushed around and pulled out the injector. He kind of raised his left hand, and I hollowed to him to jump. He kind of drew up and I threw the reverse lever, and it got this knee between it and the side of the cab and bound me there. I had hold of the reverse lever and valve until the engine stopped. I stood there until the side of the car came in to the window and bound me there. Instead of jumping Davis held onto the hand rail. I can't describe it, but the expression of his face looked to me like he realized what had been done by his negligence."

The fireman testified in part as follows: "As we were backing down, I saw that the switch was open. I saw the red color exposed. I did not call the engineer's attention to it because I knew the brakeman was there, and I supposed they were intending to go into the cut-off. I did not know the cars were standing there on the passing track. I was on the west side of the engine. I did not know that the cars extended down so as to block the cut-off. As we were coming down the track, I could see that the switch was open, but I thought Mr. Davis knew what he was doing, and that there was nothing on the track, and that they were going in there. I knew that it was the custom of the engineer to act on the brakeman's signals. My safety was depending upon Mr. Davis' directions, and I was relying wholly upon him as to that. I supposed that he

knew what he was doing, and that the track was clear."

The appellee sued appellant, alleging that the death of Davis was caused by the negligence of appellant in backing its engine at a rapid speed, and by leaving the switch open. The answer denied all the material allegations of the complaint, and set up the defense of contributory negligence.

Among other prayers by appellant was the following: "(1) You are instructed, under the law and the evidence in this case, to return a verdict for the defendant." The prayer was refused and exceptions duly saved. The verdict and judgment were for \$8,000, and this appeal has been duly prosecuted.

E. B. Kinsworthy and Lewis Rhoton, for appellant. N. W. Norton, Smith & Smith, and H. F. Roleson, for appellee.

WOOD, J. (after stating the facts as above). There was evidence to sustain a finding that appellant was negligent in causing the engine and tender to be backed at an unusual speed, and also in leaving open the switch. While this was the negligence of the fellow servants of Davis, yet under the act of March 8, 1907 (Laws 1907, p. 162), this was negligence for which appellant was liable. *Aluminum Company of North America v. Ramsey*, 89 Ark. 522, 117 S. W. 568. But the undisputed evidence shows that the negligence of Davis concurred with the negligence in producing the injury which resulted in his death, and such contributory negligence on his part is a complete defense to the suit. It was the duty of Davis, under the uncontroverted evidence, to keep the lookout for his own safety and that of his co-employees. "The lookout must be kept in the yards of the company, as well as on other parts of the track, and is for the benefit of employees of the company as well as others." *St. L. S. W. Ry. Co. v. Graham*, 83 Ark. 61, 68, 102 S. W. 700, 119 Am. St. Rep. 112; *K. C. S. Ry. Co. v. Morris*, 80 Ark. 523, 98 S. W. 363; *L. R. & H. S. W. Ry. Co. v. McQueeney*, 73 Ark. 22, 92 S. W. 1120. If Davis had been keeping such lookout, he could have seen the target that warned him of the open switch. This signal of danger was on, and according to all the evidence on the subject could have been seen by Davis had he been keeping the lookout. If he did not discover the peril in time, it was through his own negligence. There is nothing in the evidence to warrant the conclusion that the employees on the engine discovered the peril of Davis in time, by the exercise of ordinary care, to have averted the collision. The testimony of the engineer shows that he did everything in his power to avoid the injury after the peril of Davis was discovered. Contributory negligence was established as matter of law, and the court erred therefore in refusing appellant's prayer No. 1.

For this error, the judgment must be reversed, and the cause remanded for new trial. It is so ordered.

STATE ex rel. NORWOOD, Atty. Gen., v.  
CLAY COUNTY.

(Supreme Court of Arkansas. Jan. 17, 1910.)

1. CONSTITUTIONAL LAW (§ 15\*)—CONSTITUTION—CONSTRUCTION.

The Constitution must be considered as a whole, and sections relating to the same subject must be read in connection with each other.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 15.\*]

2. COURTS (§ 207\*)—SUPREME COURT—JURISDICTION.

Const. art. 7, § 4, giving the Supreme Court a general superintending control over inferior courts with power in aid of its appellate and supervisory jurisdiction to issue writs of quo warranto and other remedial writs, the Supreme Court has no original jurisdiction to issue quo warranto against the officers of a county to test their right to exercise jurisdiction over territory alleged to be outside the county.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 507, 508; Dec. Dig. § 207.\*]

3. COURTS (§ 207\*)—SUPREME COURT—JURISDICTION.

Const. art. 7, § 5, providing that in the exercise of original jurisdiction the Supreme Court shall have power to issue writs of quo warranto to officers of political corporations, when the question involved is the legal existence of such corporations, prescribes the limit of the jurisdiction in quo warranto, and the court cannot go beyond the express terms thereof, and the Supreme Court has no jurisdiction to issue quo warranto against the officers of a county to test their right to exercise jurisdiction over territory alleged to be outside the county.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 507, 508; Dec. Dig. § 207.\*]

Quo Warranto by the State, on the relation of H. L. Norwood, Attorney General, against Clay County. Demurrer to petition sustained, and writ denied.

Hal L. Norwood, Atty. Gen., and Huddleston & Taylor, for appellant. Spence & Dudley and G. B. Oliver, for appellees.

HART, J. This case invokes the original jurisdiction of this court. It is an application by the Attorney General in the nature of an information by the state against the officers of Clay county to test their right to exercise jurisdiction over certain described territory. The petition alleges that said officers and their predecessors in office since April 30, 1895, have unlawfully and wrongfully assumed jurisdiction over said territory, which it is alleged lies without the limits of Clay county, Ark., and within the limits of Greene county, Ark. The defendants demurred to the petition.

It is contended by the counsel for the state that the power to issue, hear, and determine the writ of quo warranto in the exercise of original jurisdiction is conferred

upon this court by section 4, art. 7, of our present Constitution. They chiefly rely on the case of State ex rel. v. Sam W. Williams, an unreported decision of this court, construing section 2, art. 6, of the Constitution of 1881, to sustain their contention. Section 2 reads as follows: "The Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, under such restrictions and regulations as may, from time to time, be prescribed by law. It shall have a general superintending control over all inferior and other courts of law and equity; it shall have power to issue writs of error and supersedeas, certiorari and habeas corpus, mandamus and quo warranto and other remedial writs, in aid of its appellate jurisdiction, and to hear and determine the same." The court held that the phrase "in aid of its appellate jurisdiction" limited only the words "other remedial writs," and that the Supreme Court had original jurisdiction to issue the writ of quo warranto under the section of the Constitution quoted.

The framers of the Constitution of 1874 transposed the words "in aid of its appellate jurisdiction," added thereto the words "and supervisory," and placed them before the clause which gives the court the power to issue certain writs. The section referred to is section 4 of article 7 of the Constitution of 1874, and it reads as follows: "The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedeas, certiorari, habeas corpus, prohibition, mandamus, and quo warranto, and other remedial writs, and to hear and determine the same. Its judges shall be conservators of the peace throughout the state and shall severally have power to issue any of the aforesaid writs." The only other section of the Constitution of 1874 bearing on the question is section 5 of article 7, which reads as follows: "In the exercise of original jurisdiction the Supreme Court shall have power to issue writs of quo warranto to the circuit judges and chancellors when created, and to officers of political corporations when the question involved is the legal existence of such corporations."

It is a familiar rule of construction that a Constitution must be considered as a whole, and that sections relating to the same subject must be read in connection with each other. In construing the sections in question, this court has uniformly held that ap-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pellate jurisdiction only is conferred by section 4, art. 7, of the present Constitution, and that the power to issue certain enumerated writs, and to hear and determine the same, is given "in aid of either its appellate jurisdiction upon the merits of a cause, or its supervisory control over inferior courts to compel them to perform their proper functions." The original jurisdiction of the Supreme Court is conferred by section 5, art. 7, and is confined strictly to writs of quo warranto in the two classes of cases named therein. This is the effect of our previous decisions construing sections 4 and 5, art. 7, of the Constitution of 1874. *Snoddy et al., Ex parte*, 44 Ark. 221; *Batesville & Brinkley Railroad Company, Ex parte*, 39 Ark. 82; *State v. Leatherman et al.*, 38 Ark. 81; *Featherstone v. Folbre*, 75 Ark. 511, 88 S. W. 554; *Carr v. State*, 122 S. W. 631; *Payne v. McCabe*, 37 Ark. 313; *Massey-Herdon Shoe Co. v. Powell*, 64 Ark. 514, 43 S. W. 506. Therefore we are of the opinion that the jurisdiction of this court is plainly defined by the Constitution, and that it has no original jurisdiction to issue writs of quo warranto under section 4, art. 7.

It is next insisted that such jurisdiction is conferred by section 5, art. 7. By that section original jurisdiction to issue writs of quo warranto is expressly limited to officers of political corporations when the question involved is the legal existence of such corporations." Does the information state a case within the terms of this clause of the section? We think not. The petition only states that the defendants as officers of Clay county have assumed jurisdiction over certain designated territory, which it is alleged lies without the limits of Clay county and within the limits of Greene county. It does not question the legal existence of either county. It only questions the right of the officers to exercise the functions of their office in certain designated territory, which it is alleged that they and their predecessors in office have done since 1895. Hence it may be said that the petition shows affirmatively that the legal existence of the county is not involved. Section 5, art. 7, of the present Constitution gives this court jurisdiction to issue writs of quo warranto, but prescribes its limits, and we cannot extend them beyond the plain and express terms of the Constitution. We base our opinion on the language of the Constitution itself, which is the source of our jurisdiction, and on former opinions construing the sections under consideration; but we cite the following authorities, which may be read with profit on the remedies available under the facts as alleged in the petition: *High's Extraordinary Legal Remedies* (3d Ed.) p. 574, and notes 1 and 2; *Spelling on Injunctions & Other Extraordinary Remedies* (2d Ed.) vol. 2, § 1802, and note 6.

The demurrer to the petition will be sustained, and the application for the writ denied.

#### NASHVILLE LUMBER CO. v. BAREFIELD. (Supreme Court of Arkansas. Jan. 10, 1910.)

##### 1. GUARDIAN AND WARD (§§ 33, 43\*)—AUTHORITY OF WARD.

In the absence of statutory restrictions, a guardian may sell the personality of his ward and compromise and compound debts without first obtaining an order from the court so to do, subject to the liability to account where he has acted without due regard to the ward's interest.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 147, 187; Dec. Dig. §§ 83, 43.\*]

##### 2. GUARDIAN AND WARD (§ 33\*)—COMPROMISE OF CLAIMS—VALIDITY.

Where the compromise by a guardian of a claim due his ward is made without sufficient justification or fraudulently, or on a grossly inadequate consideration, the compromise may be impeached on the trial of the action in which it is presented as a defense by proving that it was not made in good faith, but in fraud of the ward's rights.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 147; Dec. Dig. § 33.\*]

##### 3. GUARDIAN AND WARD (§ 33\*)—POWERS OF GUARDIAN—STATUTES.

Kirby's Dig. § 3823, providing that acquittances given by guardians for claims due their wards shall be valid in favor of all persons taking them in good faith, but the guardian shall be liable to the person injured where the acquittance is given illegally, and the statute restricting the power of the guardian over the land of his ward, do not restrict the power of a guardian to compromise a claim of the ward without first obtaining from the court an order so to do, and a compromise made in good faith, and not for a grossly inadequate consideration, or in fraud of the rights of the ward, is binding.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 147; Dec. Dig. § 33.\*]

##### 4. INFANTS (§ 82\*)—ACTIONS BY—NEXT FRIEND—POWER OF COURT.

Under Kirby's Dig. § 6021, providing that an action by an infant must be brought by next friend, and authorizing the court to change the next friend, the next friend of a minor plaintiff is at all times subject to the control of the court, and the court may at its discretion revoke the authority of the next friend to represent the infant and substitute another.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 230; Dec. Dig. § 82.\*]

##### 5. DOWER (§§ 113, 114\*)—ASSIGNMENT—RIGHT OF WIDOW.

The widow to whom land is assigned as dower becomes a life tenant thereof, and she must protect the land from injury to the freehold and not commit waste, and she may not sell the standing timber on the land when not essential to the legitimate use of the property for the purposes of husbandry.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 1, 2, 367-373; Dec. Dig. §§ 113, 114.\*]

##### 6. REPLEVIN (§ 84\*)—TRESPASS (§ 10\*)—DAMAGES.

A purchaser of standing timber from a widow to whom the land has been assigned as dower, who knew of the rights of the heirs of the deceased husband and of the want of authority of the widow to sell the timber, was a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

willful trespasser in cutting and removing the timber, and in replevin by the heirs for the timber he was liable for the timber cut and removed without any deduction for the money or labor expended in increasing its value.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 319; Dec. Dig. § 84;\* Trespass, Dec. Dig. § 10.\*]

#### 7. REPLEVIN (§ 84\*)—DAMAGES.

Where, in replevin for property willfully and wrongfully taken, the wrongdoer has since the taking expended money or labor in increasing the value of the property, he may not have any deduction for the money or labor so expended in assessing the value for the purpose of the alternative judgment, but, where defendant in replevin acted innocently and in good faith in obtaining possession of the property and expended money and labor on it in good faith, the owner can recover only the value before the increase in value.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 319; Dec. Dig. § 84.\*]

#### 8. CONFUSION OF GOODS (§ 12\*)—REMEDIES.

Where the identity of a specific article is lost by the wrongful act of another taking possession thereof, and commingling the same with his own of the same nature and character, the owner may recover in replevin from the mass a quantity equal to the amount he owned without identifying the property as his original property.

[Ed. Note.—For other cases, see Confusion of Goods, Cent. Dig. §§ 5-14; Dec. Dig. § 12.\*]

#### 9. CONFUSION OF GOODS (§ 12\*)—REMEDIES.

A plaintiff in replevin may show by facts that defendant has taken his property and has commingled it with property of his own of the same nature and character, and by facts trace the possession thereof to defendant, and recover from the mass a quantity equal to the amount he owned.

[Ed. Note.—For other cases, see Confusion of Goods, Cent. Dig. §§ 5-14; Dec. Dig. § 12.\*]

Appeal from Circuit Court, Howard County; Jas. S. Steel, Judge.

Action by Ed Barefield, a minor, by next friend, against the Nashville Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Sain & Sain, for appellant. W. P. Floyd, for appellee.

**FRAUENTHAL, J.** This was an action in replevin to recover the possession of a lot of lumber and logs or their value. The plaintiffs below were C. H. Barefield, Kate E. Barefield, and Ed Barefield, a minor, who sued by his next friend, C. H. Barefield. They alleged that they were the owners of certain lands in Howard county, Ark., and that the defendant, the Nashville Lumber Company, had willfully entered upon said land, and, knowing that the land was owned by plaintiffs, had cut and removed the timber therefrom, and converted same into said lumber and logs. The land had been owned by the father of the plaintiffs, who had died intestate a number of years before the institution of this suit. He left surviving him the plaintiffs as his only heirs and his widow, who was the mother of plaintiffs. The land had been assigned to the widow, M. E. Bare-

field, as dower by the probate court, and she had sold and conveyed the timber thereon, and the defendant had by mesne conveyances obtained the same from her grantee. After the institution of this suit, and before the trial thereof, the defendant made a settlement and compromise of the said claim of the plaintiffs upon which the action was founded and of said suit by paying to the adult plaintiffs and to M. E. Barefield as the statutory guardian of said minor plaintiff the sum of \$325, and the adult plaintiffs and said guardian of said minor executed to defendant a receipt in which they accepted said sum in full and final payment of all the said claims of all the plaintiffs against defendant and of said suit. The defendant filed a motion asking that the action be dismissed upon the ground that the matters therein involved had been settled, and that the plaintiffs did not desire to prosecute the same further. Upon the hearing of this motion, the circuit court sustained the same as to the adult plaintiffs, but overruled it as to the minor plaintiff. It thereupon discharged said C. H. Barefield as the next friend of said minor plaintiff, and appointed one T. H. Kent in his stead; and the cause then proceeded with said minor as the sole plaintiff. The defendant then filed its answer, in which it denied the material allegations of the complaint. It alleged that it had obtained the timber through said M. E. Barefield, and that it had removed same under the honest belief that it was the owner thereof. It also alleged as a defense the compromise and settlement of the claim and cause of action by the guardian of the minor plaintiff.

Upon the trial of the case the defendant offered to prove by M. E. Barefield that she was the statutory guardian of the plaintiff, Ed Barefield, and that as such guardian she had made a settlement with the defendant by which she had compromised the claim and suit of said minor plaintiff against the defendant, and had received full payment thereof. The court refused to permit the introduction of said testimony, and also refused to permit the introduction of the testimony of other witnesses to show said alleged compromise and settlement of the claim and suit by the guardian of said minor plaintiff. Amongst other instructions on behalf of the plaintiff it gave the following: "No. 6. Under the laws of this state a guardian cannot agree to any compromise or settlement by which the property interests of his ward are affected without the concurring sanction of the court, to which he must look for authority to bind his ward; so in this case, there being no evidence that the attempted compromise or settlement was made under authority of the court, you will disregard the compromise entirely in the consideration of the case." The jury returned a verdict in favor of the plaintiff Ed Barefield for his

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

proportionate amount of the lumber and logs, stating the amount in feet and assessing the value thereof at the increased value of lumber and logs, respectively. A judgment was then entered in favor of the plaintiff for a recovery of the lumber and logs or their respective values as fixed by the jury.

1. The first question to be determined upon this appeal is whether or not a guardian has the authority to agree to a compromise and settlement of a disputed claim of a minor, such as is involved in this case, without the order or concurring sanction of the court from which he received his appointment. The claim that is involved in this case is for the recovery of personal property, and in this state there is no statute restricting the power of a guardian over the control and disposition of the personal property or choses in action belonging to the minor. At common law the guardian had large authority over the personal assets of his ward, and he had the power to sell and transfer them to persons who dealt with him honestly and in good faith. To make such sale binding and effective, it was not necessary to obtain the order or sanction of the court where he acted fairly and justly; and he had the power with respect to choses in action coming into his hands to make such settlements thereof as the circumstances might render proper and which within his sound discretion he deemed best if he acted honestly and in good faith in making such settlements. *Field v. Schiefflin*, 7 Johns. Ch. (N. Y.) 150, 4 Am. Dec. 441; *Bank of Virginia v. Craig*, 6 Leigh (Va.) 428; *Mason v. Buchanan*, 62 Ala. 110. According to common law, Mr. Schouler, in his work on Domestic Relations, says a guardian "may compromise a claim of his ward when acting in good faith and with sound discretion." Schouler on Domestic Relations, § 343; 21 Cyc. 74.

In the case of *Maclay v. Equitable Life Assurance*, 152 U. S. 499, 14 Sup. Ct. 678, 38 L. Ed. 528, Mr. Justice Gray, speaking for the court, says: "A guardian, unless his powers in this regard are restricted by statute, is authorized, by virtue of his office, and without any order of court, to sell his ward's personal property and reinvest the proceeds and to collect or compromise and release debts due to the ward, subject to the liability to be called to account in the proper court if he has acted without due regard to the ward's interest." In the case of *Ordinary v. Dean*, 44 N. J. Law, 64, in speaking of the power of a guardian in this respect, it is said: "He stands in the same position as any other trustee, who may generally, acting in good faith, compound and release a debt due the trust estate; and such composition or release for a valuable consideration is *prima facie* valid and effective." If the compromise or release is made without sufficient justification or fraudulently or upon a grossly inadequate consideration, the guardian will be answerable for it in his accounts; and such

compromise can be impeached upon the trial of the action in which it is presented as a defense by showing that it was not made in good faith, but in fraud of his rights. *Torrey v. Black*, 58 N. Y. 185; *Weston v. Stuart*, 11 Me. 326; *Manion v. Ohio Valley R. R.*, 99 Ky. 504, 36 S. W. 530. In the case of *Mason v. Buchanan*, 62 Ala. 110, it is said that a guardian has the same powers as an executor or administrator with respect to choses in action coming into his hands, and that his authority to deal with the personal assets of the ward is equally as large as that of an executor or administrator. And in this state, where there is no statutory restriction, he has equally that power. In the case of *Wilks v. Slaughter*, 49 Ark. 235, 4 S. W. 766, Chief Justice Cockrill, speaking for the court, says: "Administrators had authority to compromise a claim or compound a debt before the statute was enacted. The common law recognized the power. \* \* \* In the absence of collusion between the administrator and the debtor or of fraud of the latter such as would vitiate the contract, the compromise or compounding was binding upon each of the parties to it if executed upon a sufficient consideration, just as if it would be if neither party was administrator." And in that case it was held that the right of the administrator to compromise the debt due to the estate which existed prior to the statute which provides that an administrator may in certain cases obtain authority from the probate court to compromise debts due the estate (*Mans. Dig.* § 74) was not taken away.

The case of *Rankin v. Schofield*, 70 Ark. 83, 66 S. W. 197, is not in conflict with the holding that a guardian has the power to sell the personal property of his ward and to compromise and compound debts that are due to him without obtaining the order and authority from the court to do so. In that case the real property of the minor was involved, and the compromise affected the interests of the minor in real estate. The guardian is restricted by the statutes of this state from selling the lands of his ward or from compromising his interests therein. The statutes of this state specifically provide that all such sales and actions must be had and done under the orders of the probate court. But there is no such restriction by the statutes of this state on the authority of the guardian relative to the personal property and choses in action of his ward. On the contrary, it is provided by section 3823, Kirby's Dig.: "Discharges, acquittances, and receipts given by guardians and curators during the continuance of their respective offices for debts, rents or other money or property due to their wards shall be valid in favor of all persons who take them in good faith; but guardians and curators and their securities shall be liable to the party injured if such discharges, acquittances and receipts shall be given illegally or fraudulently." It follows, therefore, that if the compromise of

the claim of the ward involved in this case was made honestly and in good faith, and not for a grossly inadequate consideration or in fraud of the rights of the minor, it would be binding on him, and would protect the defendant. The court therefore erred in refusing to permit the introduction of testimony relative to said alleged compromise and settlement of said claim, and in giving said instruction No. 6 on behalf of the plaintiff.

2. Inasmuch as this cause must be remanded for a new trial, we deem it proper to note the other questions that are presented upon this appeal. It is urged by the counsel for defendant that the court erred in removing the next friend by whom this suit was originally brought for the minor, and in substituting another person as next friend. It is the duty of the court to protect the infant fully in the progress of the cause, and to see that he is not prejudiced in the trial by any act or omission of the person by whom the suit is brought. The next friend of the minor is at all times subject to the control of the court, and the court may at its discretion revoke the authority of the next friend to represent him in the cause and to substitute another person as next friend whenever the court in its discretion may think that the infant might otherwise suffer. This is specifically provided for by section 6021, Kirby's Dig. 14 Encyclopedia Pleading & Prac. 1041.

In the trial of the case a number of instructions were given at the request of the plaintiff, and a number were refused which were asked for by the defendant. In its rulings upon these instructions we do not think that any error was committed by the lower court. The plaintiff claimed title to the land and the timber thereon which was cut and removed by the defendant by inheritance from his father; and the defendant claimed a right thereto through the widow of said decedent. The land upon which the timber stood had been assigned to the widow as dower. She was therefore only a life tenant of the land. It is the duty of the life tenant to protect the land from injury to the freehold, and not to commit waste. The "life tenant has no right to cut trees growing upon land or to allow them to be cut, except so far as it might be necessary to the proper enjoyment of the life estate in conformity with good husbandry, so as not to materially lessen the value of the inheritance." *McLeod v. Dial*, 63 Ark. 10, 37 S. W. 306. The widow has no right to make a sale of the standing timber on the land set apart to her as dower when the same is not essential to the legitimate use of the property for the purposes of husbandry. *Parker v. Chambliss*, 12 Ga. 235; 1 *Tiedeman on Real Property*, § 75; 1 *Washburn on Real Property*, § 270; *Cherokee Const. Co. v. Harris*, 122 S. W. 485. In this case, therefore, the widow had no right to sell the standing tim-

ber on this land in which she had a life estate, and the defendant acquired no title thereto by reason of any conveyance from her. The evidence tended to prove that before the defendant purchased this timber it knew of the rights of the plaintiff thereto and the entire lack of right or authority of the widow to sell same. It further tended to prove that the defendant was not innocently and in good faith claiming to own the timber when it cut and removed it, but was a willful trespasser in so doing. Where in replevin for property willfully and wrongfully taken or detained the wrongdoer has since such taking or detention expended money or labor in increasing the value of the property, he is not entitled to have any deduction for the money or labor so expended in assessing the value for the purpose of the alternative judgment. But if the possessor of the property did act innocently and in good faith in obtaining the same, and has expended money and labor upon it in good faith, so that the value of the property as compared to the value of the labor expended on it in its converted form is insignificant, the owner can recover only the value of the property less the increased value put upon it by the labor and expenditure. *McKinnis v. Railway*, 44 Ark. 210; *Stotts v. Brookfield*, 55 Ark. 307, 18 S. W. 179; *Eaton v. Langley*, 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474; *Central Coal & Coke Co. v. John Henry Shoe Co.*, 69 Ark. 302, 63 S. W. 49; *United States v. Flint Lumber Co.*, 87 Ark. 80, 112 S. W. 217. The instructions given by the court relative to assessing the value of the lumber and logs for the purpose of the alternative judgment, in effect, followed the above principles, and the defendant was not prejudiced by the giving of said instructions. A number of instructions relative to this same question were requested by defendant, but they were fully covered by the instructions on that point given by the court.

The evidence tended to prove that the defendant commingled the lumber and logs involved in this suit with other lumber and logs of its own of like grade and quality. Where the identity of the specific article is lost by the wrongful act of another in commingling the property with his own of the same nature and character, the owner can recover by replevin from the mass a quantity equal to the amount he owned without identifying each particular item as his original property. *Rust Land & Lumber Co. v. Isom*, 70 Ark. 99, 66 S. W. 434, 91 Am. St. Rep. 68. And the plaintiff may show by facts and circumstances that the defendant has taken his property and so commingled it with the property of the defendant in the mass of the same nature and character, and by facts and circumstances trace the possession thereof to the defendant. The court substantially instructed the jury to this effect. We do not deem it necessary to refer to the other instructions, or to set out any of

them in detail. The plaintiff claimed to be the owner of the land and the timber thereon which is involved in this suit. The defendant cut and removed said timber from said land, and converted same into lumber and logs; and the plaintiff seeks to recover said lumber and logs or their value. The above principles sufficiently define their rights under the evidence adduced upon the trial, and will be a sufficient guide on the further trial of the case.

We have examined into the matters relative to the motion to strike out certain portions of the complaint, the demurer thereto, and the offer to introduce in evidence the alleged order removing the disabilities of the minor, and we do not find that the lower court committed any reversible error in its rulings thereon. We do not think that it would serve any useful purpose to discuss these questions in detail. The above principles sufficiently define the rights of the plaintiffs in this action and any meritorious defense that the defendant may have thereto.

The only reversible errors which we find in the case are the refusal of the court to permit the introduction of testimony relative to the alleged compromise of the suit and claim herein involved by the guardian of the minor, and the giving of said instruction No. 6 on behalf of the plaintiff.

On account of said errors, the judgment is reversed, and the cause remanded for a new trial.

#### Ex parte GILBERT et al.

(Supreme Court of Arkansas. Jan. 17, 1910.)

#### 1. ABATEMENT AND REVIVAL (§ 58\*)—ABATEMENT OR SURVIVAL OF ACTION—COMMON LAW.

At common law, when a party to a suit for the recovery of land died pending the action, the suit abated, and it was necessary to bring a new suit against the surviving representative of the decedent.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 304; Dec. Dig. § 58.\*]

#### 2. ABATEMENT AND REVIVAL (§ 73\*)—DEATH OF PARTY AND REVIVAL OF ACTION—PERSONS AGAINST WHOM ACTION MAY BE REVIVED.

Under Kirby's Dig. § 6311, providing that upon the death of a defendant in an action for the recovery of real property the action may be revived against his heirs or devisees, an attempted revival, by making the special administrator of the decedent a party to the suit, was insufficient to give the court jurisdiction over the subject-matter of the suit.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 403-428; Dec. Dig. § 73.\*]

#### 3. FORCIBLE ENTRY AND DETAINER (§ 20\*)—CIVIL LIABILITY—RIGHT OF PLAINTIFF TO POSSESSION.

In an action of unlawful detainer under the statute, which is in derogation of the common law, and hence, strictly construed, the possession of the land by the defendant and those

claiming under him cannot be disturbed unless their rights are protected by a bond, and the court has no authority to order the land rented during the pendency of the suit.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Dec. Dig. § 20.\*]

Application by Julia Gilbert and another for a writ of certiorari to the Judge of the Bradley Circuit Court to review an order adjudging them guilty of contempt in disobeying an injunction issued by the judge in vacation restraining them from interfering with the possession of certain land by L. J. Daniel and another. Order quashed, and all proceedings against petitioners dismissed.

Herring & Williams, for appellants. Poale & Whitehead, for appellees.

**FRAUENTHAL, J.** The petitioners, Julia Gilbert and Erwin Gilbert, procured from this court writs of certiorari by which they seek to review and quash the order of the judge of the Bradley circuit court adjudging them guilty of contempt in disobeying an injunction issued by said judge in vacation.

On March 20, 1908, J. T. and L. J. Daniel instituted in the Bradley circuit court a suit of unlawful detainer against one Bob Gilbert, by which the plaintiffs in that case sought to obtain the possession of certain land in Bradley county. It was alleged in the complaint in that case that the plaintiffs had sold the land to said Bob Gilbert and had executed to him a bond for title therefor, in which they agreed to execute to him a deed upon the payment of the purchase money for which said Bob Gilbert had executed notes; upon failing to pay the notes they alleged that Gilbert thereafter agreed to pay to plaintiffs rent for said land, and that he also failed to do this. Before the return term of the court in which said suit was instituted, said Bob Gilbert died intestate, and left, him surviving, his widow, the petitioner Julia Gilbert, and 17 children, a great number of whom are minors, and one of whom is the petitioner, Erwin Gilbert. At the time of his death, Bob Gilbert was residing on the land involved in the case, and his widow and children after his death continued to reside upon the land as their home. At the first term of the Bradley circuit court after the institution of said unlawful detainer suit, the death of Bob Gilbert was suggested, and the cause was ordered revived in the name of J. E. Childs as special administrator of said Bob Gilbert, and the cause was continued with an order to the special administrator to collect rents for the pending year of 1908. It appears that in said unlawful detainer suit no bond was given by the plaintiff for a writ of possession, and that no writ of possession for the land was executed by the sheriff. At the January term, 1909, of the Bradley circuit court, an order was made directing the special administrator to rent the land in-

volved in the action for the year of 1909. The suit was never revived against the heirs of said Bob Gilbert, deceased, nor were they or his widow made parties thereto or served with any process therein. Under the above order the special administrator rented the land for the year of 1909 to L. J. Daniel and Left Preston.

On March 23, 1909, said L. J. Daniel presented to the judge of the Bradley circuit court in vacation his petition for an injunction, in which he set out that he had rented the land from the special administrator and had attempted to prepare it for cultivation; but that the said Julia Gilbert and others acting in concert with her were intimidating and preventing the tenants of said Daniel from cultivating the land; and he prayed for an order enjoining and restraining the said Julia Gilbert and her advisers from committing the acts complained of. On March 24, 1909, the said judge in vacation made an order perpetually restraining Julia Gilbert and all persons acting in concert with her from in any manner interfering with said Daniel and Preston or their employes in cultivating said land.

The above order was served on the petitioner Julia Gilbert, and this was the first notice or process served upon her in said suit or proceeding. Thereafter said L. J. Daniel applied to the said circuit judge in vacation for an order citing the said Julia Gilbert and Erwin Gilbert to appear before him and show cause why they should not be held in contempt by reason of a disobedience of said above order of injunction. The circuit judge issued such citation, and upon the day named therein for their appearance to answer they filed their response. The matter was heard by the circuit judge in vacation, and he found the respondents guilty of contempt. He entered fines of \$50 and \$25 respectively against Julia and Erwin Gilbert, and ordered them to give bond for their appearance at the following term of the Bradley circuit court, and upon their failure to make such bond he ordered them confined in jail until the said term of said court. The circuit judge further ordered that said Julia Gilbert would be permitted to remain in possession of the land upon her giving a rent note therefor, and upon her failure so to do she "was perpetually enjoined from living on or cultivating said land."

We do not think that it is necessary to discuss or to decide the question as to whether or not the judge of the Bradley circuit court would have had the power to make and issue the orders herein complained of in event the Bradley circuit court had jurisdiction to make the order renting out the land and which order he was endeavoring to enforce, for, if the court had no jurisdiction to make the order renting the land, the subsequent orders and writs were not issued in the exercise of a rightful jurisdiction, and were therefore of no effect. In the original

suit the plaintiffs had instituted an action for the recovery of real property only, and before the return day of the summons issued thereon the defendant in the action died. At common law, when a party to a suit for the recovery of land died pending the action, the suit abated. It then became necessary to institute a new suit against the surviving representatives of such deceased person, and after the death of the party nothing further could be done in the original suit. By the statutes of this state provision is made for making the representatives of the deceased party parties to the original action without abating the suit; but until such representatives of the deceased party to whom his right has passed are brought before the court by proper proceedings nothing further can be done in the action. 1 Cyc. 84.

This proceeding is called the revivor of the action; and after the death of a party and before the revivor thereof all proceedings in the action are suspended. *Brodie v. Watkins*, 31 Ark. 319. By section 6311 of Kirby's Digest it is provided that "upon the death of a defendant in an action for the recovery of real property only, or which concerns only his rights or claims to such property the action may be revived against his heirs or devisees." In the original suit herein, which was instituted against Bob Gilbert for the recovery of land, the proper parties against whom the action should have been revived were his heirs, and not a special administrator. *Ashley v. Cunningham*, 16 Ark. 168; *Haley v. Taylor*, 39 Ark. 104; *Evans v. Davies*, 39 Ark. 235; *Driver v. Hays*, 51 Ark. 82, 9 S. W. 853; *State Fair Ass'n v. Townsend*, 69 Ark. 215, 63 S. W. 65.

After the death of Bob Gilbert, the proper parties were not present in the suit by the appointment of a special administrator, and the proper parties to the suit would not be present until the cause was revived against the heirs of Bob Gilbert in manner prescribed by the statute. Without the proper parties before it, the court did not have the power or jurisdiction to make any adjudication in the case concerning the subject-matter of the suit. *Rankin v. Schofield*, 81 Ark. 462, 98 S. W. 674.

In this case all orders and adjudications relative to the land were made after the death of the defendant Bob Gilbert, and the action was not and never has been revived against his heirs. It follows that the order of the Bradley circuit court taking charge of and directing the renting of the land involved in the suit was made without jurisdiction and is therefore void. Furthermore, the suit that was instituted against Bob Gilbert for the recovery of the land was an action of unlawful detainer, and there is no provision in the statute giving authority to the court in such action to order that it be rented during the pendency of the suit. The provisions of the statute relative to unlawful detainer are in derogation of the common

law, and they should be strictly construed; and the plaintiff is entitled to no right or remedy that is not therein specifically given. Under the provisions of the statute relative to the action of unlawful detainer, the plaintiff may obtain a writ of possession for the land by executing bond; if the defendant should give a retaining bond and hold possession of the land, such bond would cover any damages that the plaintiff might suffer. The possession by the defendant and those who claim under him cannot be disturbed unless their rights are protected by a bond as provided for by the statute in event the plaintiff shall fail to recover in the suit.

From the above it results that the Bradley circuit court did not have the power or jurisdiction to order the special administrator to rent out the land involved in the action of unlawful detainer; and therefore all orders made thereafter by the circuit judge in the attempted enforcement of that order were without jurisdiction and of no effect.

The petitioners herein are entitled to the relief asked for by them from this court. *Ex parte Davis*, 73 Ark. 353, 84 S. W. 633; *Ex parte York*, 89 Ark. 72, 115 S. W. 948; *Pitcock v. State*, 121 S. W. 742.

There are a number of other questions involved herein which we think affect the power of the circuit judge to fine for contempt the petitioners under the proceedings brought before him; but we do not think that it is now necessary to pass upon those questions.

The order of the circuit judge of the Tenth judicial circuit made on May 25, 1909, finding that the petitioners were guilty of contempt, is quashed, and all proceedings against the petitioners are dismissed.

#### PACIFIC MUT. LIFE INS. CO. v. CARTER. (Supreme Court of Arkansas. Nov. 29, 1909.)

Dissenting opinion.

For majority opinion, see 123 S. W. 384.

**BATTLE, J.** One of the important questions in this case was: Was Claude D. Head a general agent of the Pacific Mutual Life Insurance Company? He testified that he was not. That was sufficient to make it a question for the jury to determine. But it is said that his testimony was inconsistent with this statement. Be that as it may, the question still remained for the jury to decide, and the inconsistent statements were for the jury to consider in determining the weight of his testimony. It is urged that he was designated as general agent on the company's stationery. To the reverse of this it was shown that he received and forwarded applications to the company for policies of insurance against accidents and for renewals of such policies, notices and proof of the accidents to the home office for action,

and if policies and renewals were granted they were sent to Head to be countersigned and delivered to the applicant, upon the payment of the premiums. These facts were known to appellee, and were sufficient to put him on inquiry as to the extent of Head's agency. They tend to show that Head was only a soliciting agent, with authority to solicit insurance against accidents, solicit and forward applications, receive policies and collect premiums, receive applications for renewals, receive renewals returned by the company and collect premiums, and to receive and forward notice and proof of accident, with no power to extend insurance by renewals. This evidence and these facts, it seems to me, presented questions of facts which should have been submitted to the jury for consideration, and that the trial court erred in instructing the jury to return a verdict in favor of the plaintiff.

HART, J., concurs.

#### FIDELITY MUT. LIFE INS. CO. v. CLICK. (Supreme Court of Arkansas. Nov. 15, 1909. On Rehearing, Dec. 20, 1909.)

##### 1. PAYMENT (§ 65\*)—PRESUMPTIONS—EFFECT OF RECEIPT.

On an issue as to whether a premium had been paid in an action on a life policy, the introduction of a receipt for the premium raised a presumption of payment.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 170; Dec. Dig. § 65.\*]

##### 2. INSURANCE (§ 668\*)—ACTION ON POLICY—QUESTION FOR JURY.

In an action on a life policy, the question whether a certain premium had been paid *held*, under the evidence, one for the jury.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 668.\*]

Battle and Hart, JJ., dissenting.

Appeal from Circuit Court, Howard County; Jas. S. Steel, Judge.

Action by Mary E. Click against the Fidelity Mutual Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. C. Rodgers and Rose, Hemingway, Cantrell & Loughborough, for appellant. W. P. Feazel, for appellee.

**HART, J.** This is an appeal by the Fidelity Mutual Life Insurance Company from a judgment rendered against it in favor of Mary E. Click for \$2,000 on a life insurance policy. The case turns on the payment of the third annual premium. If this premium was not paid, it is conceded that the policy sued on was void, and that appellee should not recover. On the other hand, if this premium was paid, the policy was in force at the death of the assured, and the appellee should recover.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

To show payment the appellee relied upon the following receipt: "The Fidelity Mutual Life Insurance Company of Philadelphia. Received \$62.16, for annual premium due September 18, 1905, subject to conditions indorsed thereon, under policy of life insurance indicated by number and name. L. G. Fouse, President. O. C. Bosbyshell, Treasurer. David E. Click, Mineral Springs, Howard County, Ark. ELP 140593. Countersigned at Little Rock, Ark. on the 23rd day of October, 1905. R. C. Bright, Cashier." The above was the receipt for the third annual premium. The policy provided that, after three years' premiums had been paid, it could be automatically extended for four years and seven months without any further payment. The assured died in August, 1908.

The defendants thereupon introduced the following testimony to sustain their defense:

O. C. Bosbyshell: "I was the treasurer of the defendant, Fidelity Mutual Life Insurance Company, during the years 1903 to 1908, inclusive. My duties were to receive and receipt for all premiums paid upon policies of insurance issued by said defendant. The third annual premium upon the said policy in suit in this action was never paid to defendant, Fidelity Mutual Life Insurance Company. Although said premium was never paid to said defendant, I wrote and mailed to the cashier at said defendant's office in the city of Little Rock, Ark., a letter directing said cashier to countersign and deliver to the insured under said policy a receipt for such third annual premium; that said letter was so sent because of a clerical error made by one of the employees of the defendant insurance company in mistaking the record of the payment of the premium on another policy, which had been paid, for the premium on the policy in controversy, this record being on a line of the books immediately next to the record of the policy in controversy, and the mistake was made in losing the proper line when running it out for any payments and thereby a payment on another policy was mistaken for the third annual payment on the policy sued on; that said letter was erroneous and said receipt should not have been countersigned and delivered by said cashier, as said premium had not been received by defendant insurance company as stated in said receipt."

William L. Hunter: "I am the employé of the defendant, the Fidelity Mutual Life Insurance Company, who made the clerical error referred to in the testimony of O. C. Bosbyshell. The third annual premium was not paid to the defendant insurance company."

Francis V. Shannon: "I was the bookkeeper employed by the defendant, Fidelity Mutual Life Insurance Company, at its Little Rock office at the time the letter referred to in the testimony of O. C. Bosbyshell was written and mailed to the Little Rock office by him. Said letter was received by me,

and, as instructed therein, I countersigned and mailed to David E. Click the official receipt for the third annual premium upon the policy in suit. Said premium was not paid to or received by me at any time. Said receipt was not issued because the said premium was paid, but was so countersigned and mailed by witness because of the letter mentioned from O. C. Bosbyshell, and for no other reason."

It is not contended that the third annual premium was paid unless the receipt itself is sufficient to establish that fact. It is conceded that the receipt only makes a prima facie case, which may be overcome by testimony of witnesses, unimpeached, uncontradicted, reasonable, and consistent in itself; and such is the rule recognized and followed by this court. *Industrial Mutual Indemnity Co. v. Perkins*, 87 Ark. 70, 112 S. W. 176; *Southern Express Co. v. Hill*, 84 Ark. 368, 105 S. W. 877, and cases cited.

We think the evidence on the part of the appellant overthrows the prima facie case made by the delivery of the receipt. The receipt was countersigned at Little Rock and mailed to the assured because the officers of the company there received an express order to that effect. That order was given because a clerk in the home office, whose duty it was to make up from the records of the company a list of premiums paid, by mistake reported the books as showing that this premium was paid, when in fact such was not the case. The testimony plainly showed that the receipt was issued and delivered by mistake.

Counsel for appellee insists that the explanation is not reasonable and consistent because the mistake was made on October 1, 1905, and no attempt was made to show why it was not discovered before the death of the assured, which did not occur until nearly three years later. But it is not shown that the appellant would have been likely to have discovered the mistake. Indeed, it seems unlikely that the company, considering the magnitude of its business, should have discovered it unless there had been occasion for further examination of the records of payment of premiums in regard to this policy, which does not appear to have been necessary.

Under the testimony as disclosed by the record, the court should have directed a verdict for the defendant. Therefore the judgment is reversed, and the cause remanded for a new trial.

#### On Rehearing.

McCULLOCH, C. J. The introduction of the receipt in regular form, properly signed and countersigned by those authorized to do so, raised a presumption of payment with the terms of the receipt, and cast upon appellant the burden of overcoming this presumption by affirmative proof of nonpay-

ment. Appellee introduced no other proof of payment and perhaps had none, as the person shown by the face of the receipt to have made the payment was then dead, and the receipt was executed nearly three years prior to his death. She rested merely on the presumption of payment raised by the receipt. This presumption reached to every available mode of payment, and, in order to overcome it, the burden was on appellant to close up by affirmative proof every avenue through which payment could have been made. Appellant's witnesses attempt to show that the receipt was executed and delivered by mistake. They do not pretend to know or to state from personal recollection that the premium could not have been paid to some other authorized agent of the company. Those who testified could not have known that payment was not made to some other agent. They merely attempted to show that they did not receive payment, and that the receipt was executed and delivered through mistake. The explanation given of the alleged mistake is that the record of another policy was "on a line of the book immediately next to the record of the policy in controversy, and the mistake was made in losing the proper line when running it out for any payments, and thereby a payment on another policy was mistaken for the third annual payment on the policy sued on." The witness who so testified did not make the error himself, but he says it was made by another employé. That other employé does not give any explanation of it, but merely says that he is the one who made the error referred to, and that no payment was ever made. Neither explain why the error was never detected and an effort made to recall the receipt. It would appear to be quite unusual for a receipt to be executed and mailed out without some entry being made on the cashbook or other book evidencing the daily receipt of remittances. It is a matter of common knowledge that in fairly well-regulated business institutions of any considerable magnitude an accurate system of bookkeeping is practiced, whereby there is a corresponding debit entered for each credit, and vice versa. The accounts should balance at all times, and a discrepancy will necessarily discover itself to a competent bookkeeper or accountant. It need not be assumed that appellant in the operation of its business practiced the usual accurate methods of keeping accounts; but the suggestion of such glaring mistake and the failure to detect it for so long a time calls for some explanation. The fact that for nearly three years after the delivery of this receipt the alleged mistake was not detected, or, if detected, that no effort was made to recall the receipt, the fact that nothing was said about the alleged mistake until after the death of the policy holder, is significant and

raises some doubt about the correctness of the statement of the witnesses. To use the language of this court in a case quite similar to this, "it presents an unusual, if not unreasonable, story," and makes a question of fact for the jury to determine whether or not it should be credited. *Ind. Mut. Ind. Co. v. Perkins*, 81 Ark. 87, 98 S. W. 709. The decisions of this court in *Southern Express Co. v. Hillm*, 84 Ark. 368, 105 S. W. 877, and *Ind. Mut. Ind. Co. v. Perkins*, 87 Ark. 70, 112 S. W. 176, where the testimony of witnesses was found to be uncontradicted, reasonable, and consistent, should not, we think, be held to control the decision in the present case, when we conclude that the testimony given by the witnesses in contradiction of the receipt is not reasonable and consistent, or at least when we can see that the jury could not have regarded it as unreasonable.

It is true that these witnesses were not examined, but an admission as to what they would testify was read to the jury, in order to obviate postponement of the trial. They might, if examined and cross-examined, have given a more reasonable explanation of the transaction. We must, however, assume that the statement of their testimony, prepared by counsel for appellant, contained all that the witnesses would say on examination.

A careful re-examination of the evidence introduced convinces a majority of the court that it presented a disputed issue of facts, which was properly submitted to the jury. A rehearing is therefore granted, and the judgment is affirmed.

BATTLE and HART, JJ., dissent.

#### ADAMS v. STATE.

(Supreme Court of Arkansas. Jan. 10, 1910.)

##### 1. WITNESSES (§ 405\*) — IMPEACHMENT — SEDUCTION.

In a prosecution for seduction, where prosecuting witness testified in her examination in chief that she had never had sexual intercourse with any other man, accused could prove that she had had sexual intercourse with another person since the seduction to impeach her credibility.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1273, 1275; Dec. Dig. § 405.\*]

##### 2. SEDUCTION (§ 40\*)—ADMISSIBILITY OF EVIDENCE — RESEMBLANCE OF CHILD TO ACCUSED.

In a prosecution for seduction, evidence of the prosecuting witness that the child resembled accused was admissible, and the weight of the evidence should be left to the jury uninfluenced by any opinion of the court as to the child being old enough to possess settled features or other corporal indications.

[Ed. Note.—For other cases, see *Seduction*, Dec. Dig. § 40.\*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Will Adams was convicted of seduction, and he appeals. Reversed and remanded.

Ben Cravens, for appellant. Hal L. Norwood, Atty Gen., and O. A. Cunningham, Asst. Atty. Gen., for the State.

BATTLE, J. Will Adams was indicted for seducing Rowena Hamblin, and convicted. He prosecutes an appeal to this court from this conviction.

Rowena Hamblin testified in the trial of the defendant that he in the month of October, 1908, obtained carnal knowledge of her by virtue of a false promise of marriage made to her by him, and of this intercourse a child was born. In her examination in chief she testified that she never had sexual intercourse with any other man at any time or anywhere. Defendant offered to prove that Charles Abels had sexual intercourse, with her since the last day of November, 1908, which is since the day of seduction, at different times, for the purpose of contradicting her and thereby impeaching her credibility, and the court refused to allow him to do so.

The prosecuting witness was allowed to testify over the objection of the defendant that the child resembled him.

In *Butler v. State*, 34 Ark. 485, it is said: "In order to avoid an interminable multiplication of issues, it is a settled rule of practice that, when a witness is cross-examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party putting the question. The test of whether a fact inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea? This limitation, however, only applies to answers on cross-examination. It does not affect answers to the examination in chief. 1 *Wharton, Evidence*, § 559."

In *McArthur v. State*, 59 Ark. 431, 27 S. W. 628, "the indictment, in substance, charged that appellant slandered one Pearl Jones by falsely uttering and publishing about her words which in their common acceptation amounted to charge the said Pearl Jones with having committed fornication and adultery with the sons of appellant. On the trial of the case Pearl Jones was introduced as a witness for the state, and testified that she never had sexual intercourse with either of defendant's sons or any one else. On cross-examination she was asked if she had not had sexual intercourse with Joe Darr, and concerning other circumstances having no connection with the charge in the indictment. To contradict the prosecutrix, and to show that she was a woman of lax morals, the appellant was allowed to introduce proof to show that she had committed fornication with Joe Darr, and had been guilty of other criminal acts."

Justice Riddick, speaking for the court,

said: "The general rule is that, when a witness is cross-examined on a matter collateral to the issue, his answer cannot be subsequently contradicted by the party putting the question; but this limitation only applies to answers on the cross-examination. It does not affect answers to the examination in chief. *Wharton's Crim. Ev. (8th Ed.)* § 484; *State v. Sargent*, 32 Me. 429. When a party in his examination in chief is allowed to inquire about collateral acts, the opposing side will be usually allowed to contradict the witness by evidence showing to the contrary. The prosecuting attorney, after having asked Pearl Jones whether she had had sexual intercourse with either of the sons of defendant, elected to proceed further, and to ask her if she ever had sexual intercourse with any man. It was therefore proper to allow defendant to contradict her by evidence to show that she had been guilty of such acts of illicit intercourse, though such evidence could not go in justification of the crime, but, at most, only to contradict and impeach the witness." *Polk v. State*, 40 Ark. 482, 485, 48 Am. Rep. 17.

The testimony of Charles Abels offered to show that he had illicit intercourse with Rowena Hamblin should have been admitted to contradict or impeach the prosecuting witness.

In *Land v. State*, 84 Ark. 199, 105 S. W. 90, it was held that in a case of bastardy the child may be exhibited in the trial to show its resemblance to the putative father; and in *State v. Horton*, 100 N. O. 443, 6 S. E. 238, 6 Am. St. Rep. 613, 617, in a case of seduction, it was held that such a child may be exhibited for the same purpose. This evidence, it seems, should be admissible in both classes of cases for the same reason. The admissibility of the testimony of the witnesses to prove the resemblance of the features of the child to those of the putative father is doubtful. Prof. Wigmore discussed this subject in a satisfactory manner, and concluded as follows: "The sound rule is to admit the fact of similarity of specific traits, however presented, provided the child is in the opinion of the trial court old enough to possess settled features or other corporal indications. It is to be noted that the evidence is relevant, not merely in bastardy proceedings, but also in trying the legitimacy of a child born during marriage, whenever the presumption of legitimacy allows the issue to be raised, as well as occasionally in other proceedings." 1 *Wigmore on Evidence*, 166, and notes; 3 *Ib.* §§ 1974-1977. We think that such evidence is admissible in cases of seduction. *Wright v. Hicks*, 15 Ga. 160, 60 Am. Dec. 687; *Paulk v. State*, 52 Ala. 427. The weight of the evidence should be left to the jury, uninfluenced by any opinion of the court as to the child being old enough to possess settled features or other corporal indications.

Reversed and remanded for new trial.

# MONTGOMERY & CO. v. ARKANSAS COLD STORAGE & ICE CO.

(Supreme Court of Arkansas. Jan. 10, 1910.)

## 1. APPEAL AND ERROR (§ 997\*)—REVIEW—CORRECTNESS OF POLICY.

On appeal from a judgment on a verdict directed for plaintiff, the court must view the testimony in its light most favorable to defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4024; Dec. Dig. § 997.\*]

## 2. TRIAL (§ 139\*)—QUESTION FOR JURY.

Where the evidence introduced by defendant tended to establish every allegation of the defense and counterclaim, the issue of fact should have been submitted to the jury with appropriate instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 338-341; Dec. Dig. § 139.\*]

## 3. EVIDENCE (§ 460\*)—PAROL EVIDENCE.

Where a written contract for the storage of apples provided that it was subject to all rules and regulations governing the storage of apples, but was silent as to what the rules and regulations were, it was necessary to resort to evidence aliunde to ascertain what they were.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2123; Dec. Dig. § 460.\*]

## 4. WAREHOUSEMEN (§ 10\*)—WRITTEN CONTRACT—PAROL AGREEMENT—EFFECT.

Plaintiff contracted in writing to store apples for defendants, the contract providing that it was subject to the rules and regulations governing the storage of apples. Plaintiff's manager who executed the contract orally agreed that defendants could refill the space made vacant by the sale of apples with other apples. There were printed rules and regulations, but none upon the question whether the space once vacated could be refilled. Defendant, after vacating part of the space, was refused permission to refill it. *Held* that, there being no established rule or regulation on the subject which was brought to the attention of defendants when they entered into the contract, the statement and verbal agreement of the manager who executed the contract for plaintiff had the effect of establishing a regulation governing the performance of the contract.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 11-14; Dec. Dig. § 10.\*]

## 5. PRINCIPAL AND AGENT (§ 101\*)—WRITTEN CONTRACT—GENERAL AGENT—PAROL AGREEMENT.

Where a manager of a cold storage plant who was clothed with power to execute contracts contracted with defendant to store apples, he was a general agent, and in entering into such contract he stood in the place of his principal, and the principal could not deny defendants the privileges held out to them by the manager as an inducement to enter into the contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 255; Dec. Dig. § 101.\*]

## 6. EVIDENCE (§ 448\*)—UNCERTAINTY—PAROL EVIDENCE.

A written contract is neither varied nor contradicted by parol testimony which merely makes certain that which the face of the contract leaves uncertain as to what the intention of the parties was.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2071; Dec. Dig. § 448.\*]

## 7. WAREHOUSEMEN (§ 34\*)—CONTRACT OF STORAGE—MEASURE OF DAMAGES.

In an action to recover for storage charges, where plaintiff wrongfully refused to permit de-

fendants to store 722 barrels of apples without further charge, defendants could not augment their damages by allowing the apples to remain out of cold storage, but could counterclaim only for the price for storing 722 barrels of apples.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 82; Dec. Dig. § 34.\*]

Appeal from Circuit Court, Washington County; J. S. Maples, Judge.

Action by the Arkansas Cold Storage & Ice Company against Montgomery & Co. Judgment for plaintiff, and defendant appeals. Affirmed, provided plaintiff remits a certain amount of the judgment; otherwise reversed and remanded.

McDaniel & Densmore, for appellant. Walker & Walker, for appellee.

MCCULLOCH, C. J. Appellee operated a cold storage plant at the city of Fayetteville during the season of 1907 and 1908, and sued appellants in the circuit court of Washington county for a balance alleged to be due on a contract for the storage of apples, as follows: "Fayetteville, Ark., August 31, 1907. Arkansas Cold Storage & Ice Co., Gentlemen: Please reserve for me space in your storage for 2,800 standard size barrels of apples, for which I hereby contract for and agree to pay you for said reservation the sum of \$0.50 per barrel for the above stated number of barrels, subject to all your rules and regulations governing the storage of apples. Montgomery & Co. Swan. Accepted, Ark. Cold Storage & Ice Co., by W. S. Nettleship, Genl. Mgr." Appellants pleaded as a defense and counterclaim that "their agents, W. E. Payne and J. H. Swan, applied to W. S. Nettleship, the general manager, to store about 3,000 barrels of apples, and at the time fully explained to said general manager of plaintiff the manner in which defendants intended to use and utilize said space in said storage; explained to him that defendants were apple dealers engaged in buying and selling fruit, and that after storing apples in the space so leased would expect from time to time, as they sold and removed apples from the space so leased, to refill said space during the storage season with other apples; that, after so disclosing to plaintiff's general manager the manner in which the space applied for would be used, the said manager assented to such use of said space and assured defendant's said agents that plaintiff would not object to such use of such space by defendants, and that, if defendants contracted for said space, they would have the right to refill the same with other apples as often as they might make shipments of fruit from said room; that they, said defendants, contracted for said cold storage space, and stored therein from 2,800 to 3,000 barrels of apples, and signed the written order set forth in the complaint in reliance upon the assurance of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff's agent and manager that defendants would have the right to refill with apples the space so leased from time to time during the storage season, as sales and shipments might be made therefrom; that, in reliance upon such assurance of plaintiff, they purchased and had in dry storage other apples which were well preserved up to a date long subsequent to the time when sufficient shipments of their apples in cold storage had been made, so as to admit other apples so held by them outside said cold storage; that plaintiff refused to permit defendants to refill such space with other apples; that defendants had on hand outside of said cold storage about 722 barrels of apples which they could and would have placed in the space so leased from plaintiff in cold storage, if permitted by plaintiff to do so; that, after being denied by plaintiff the right to refill in said cold storage so leased, the apples so held by them in dry storage, without fault on their part, greatly deteriorated, whereby defendants were damaged in the loss of apples by decay and in the inferior quality of those thereafter placed upon the market in the aggregate sum of \$1,277.30." The jury returned a verdict in favor of appellee on peremptory instruction of the court for the full amount claimed. Judgment was rendered on the verdict, and an appeal was taken to this court.

In testing the correctness of the peremptory instruction given by the court, we must, of course, view the testimony in its strongest light most favorable to appellants; for, if they introduced testimony sufficient to warrant a verdict in their favor, the case should have been submitted to the jury. They introduced their two agents, Payne and Swan, who executed the contract for them, and the testimony of both these witnesses tended to establish every allegation of the defense and counterclaim. We are of the opinion that the issue of fact should have been submitted to the jury with appropriate instructions.

The meaning of the written contract is not altogether clear whether so much space was rented for storage purposes, or whether merely the given number of barrels was to be stored. If the former be the correct interpretation, then, of course, appellants had the right to refill the space when barrels were removed, subject to established rules and regulations. But, be that as it may, the written contract is silent as to what the rules and regulations were, and it was necessary to resort to evidence allunde to ascertain what they were. The evidence introduced by appellee shows that there were printed rules and regulations, but none on the question at issue. The most that is shown with respect to the practice of allowing customers to refill space is that instruc-

tions were given to the manager of the plant. There being no established rule or regulation on this subject which was brought to the attention of appellants when they entered into the contract in question, the statement and verbal agreement of the manager who executed the contract for appellee had the effect of establishing a regulation governing the performance of this contract. The manager was clothed with power to execute a contract. He was a general agent, and in contracting with appellants he stood in the place of his principal, and the latter cannot be permitted to deny appellants the privileges which were held out to them as an inducement to enter into the contract. The written contract is neither varied nor contradicted by the parol testimony showing what was held out to them as the regulation governing the performance of the contract. The testimony merely makes certain that which the face of the contract leaves uncertain as to what the intention of the contracting parties was. *McCarthy v. McArthur*, 69 Ark. 313, 63 S. W. 56.

We do not, of course, undertake to decide what the facts of the case were, but there was sufficient evidence introduced by appellants to warrant a submission of the case to the jury.

Appellants were not, however, entitled to recover on their counterclaim, or as a defense to reduce appellee's claim more than the price for storing the 722 barrels of apples which appellee refused to allow refilled into the storage place. Appellants could not augment their damage by allowing the apples to remain out of cold storage because appellee wrongfully refused to permit them to put them in cold storage without further charge. This charge for cold storage amounted to \$361, and, if the jury had found in favor of appellants, they would have been entitled to that much and no more.

If appellee will, within 15 days, remit this much of the amount recovered, the judgment will be affirmed; otherwise, it will be reversed, and the case remanded for new trial.

#### MILLER v. HAMMOCK.

(Supreme Court of Arkansas. Jan. 17, 1910.)  
TRIAL (§ 237\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

A charge on the issue of the authority of an agent which required that the facts be sufficiently distinct "to leave no doubt" about the intention of plaintiff is erroneous, as a preponderance of evidence only is required.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 548; *Dec. Dig.* § 237.\*]

Appeal from Circuit Court, Saline County; W. H. Evans, Judge.

Action by M. E. Hammock against Adelia Miller, executrix. From a judgment for

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff, defendant appeals. Reversed and remanded for new trial.

W. R. Donham, for appellant. D. M. Cloud, for appellee.

**BATTLE, J.** M. E. Hammock brought this action against A. J. Miller to recover the possession of a horse. A. J. Miller died during the pendency of the action, and it was revived against Adelia Miller, as executrix of his last will and testament.

J. W. Hammock was the husband of the plaintiff. He sold the horse, a mare, to one Spann, and he sold her to A. J. Miller. Evidence was adduced tending to prove that the husband exercised acts of ownership over the horse, selling her at one time, and mortgaging her at another, and that he offered her for sale. The wife permitted him to use the mare. He claimed to be plaintiff's agent, but did not at all times deny his authority to sell, and acted as though he had such authority. To what extent plaintiff permitted him to hold himself out as her agent as to the horse is not certain.

At the instance of plaintiff, the court instructed the jury, over the objection of the defendant, in part, as follows:

"In this case the defendant relies on circumstances to establish that the plaintiff's husband was and acted as her agent when the alleged trade was made with Spann. You are therefore instructed that the facts relied on to establish an agency by implication must be sufficiently distinct to leave no doubt about the intention of the plaintiff's appointing her husband as her agent, and, unless you believe from the evidence that the plaintiff's husband acted as her agent in trading off the mare in controversy, defendant cannot recover unless you should further find that Mr. Hammock was the owner of the mare in controversy."

The jury returned a verdict in favor of the plaintiff. Judgment was rendered according to the verdict, and the defendant appealed.

The court erred in giving to the jury the instruction objected to. Facts in civil cases are not required to be proved beyond doubt, but by the preponderance of evidence.

Reversed and remanded for a new trial.

#### SELLERS v. STATE.

(Supreme Court of Arkansas. Jan. 17, 1910.)

#### 1. CRIMINAL LAW (§ 438\*)—DOCUMENTARY EVIDENCE—PHOTOGRAPHS.

In a homicide case, wherein a photograph purporting to show the situation of the parties and the circumstances and conditions of the encounter was introduced, an eyewitness testified that, when it was taken, the surroundings were unchanged, and she placed the persons before the camera so as to correctly represent the situation and attitude of the parties. The photographer testified it accurately portrayed the

scene as pointed out by her, except that he touched it to show plainer powder marks on the fence. Another witness, to impeach its accuracy, said he saw only one bullet hole in the fence, when two were shown in the photograph. Held, that the court properly permitted the jury to view and consider it with the other testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 893; Dec. Dig. § 438.\*]

#### 2. CRIMINAL LAW (§ 1171\*)—TRIAL—MISCONDUCT OF COUNSEL—INAPPROPRIATE REMARKS.

A conviction will not be reversed for little side remarks made by counsel for the state in the presence of the jury to accused and other witnesses and to his counsel entirely inappropriate, but not such as to influence the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.\*]

#### 3. WITNESSES (§ 383\*)—IMPEACHMENT—CONTRADICTION—IMMATERIAL STATEMENT.

In a homicide case, wherein defendant called a brother of deceased as witness, and asked him if he did not on a certain occasion pull a pistol out of his pocket, and say that it was the one his brother shot at defendant, and that, if he could get a pop at him, there would not be any trial in the case, and he denied it, there was no error in refusing to permit defendant to impeach him, as the witness was not present at the killing and could not have known whether or not his brother had a pistol on that occasion, or shot at defendant, so that the statement was immaterial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. § 383.\*]

#### 4. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS—REQUESTS.

Error cannot be predicated on the refusal of instructions on subjects fully covered by full and accurate instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

Appeal from Circuit Court, Saline County; W. H. Evans, Judge.

Jim Sellers was convicted of voluntary manslaughter, and he appeals. Affirmed.

W. R. Douham and T. G. Mallay, for appellant. Hal L. Norwood, Atty. Gen., and Davis & Pace, for the State.

**MCCULLOCH, C. J.** Appellant was indicted for the crime of murder, and convicted of voluntary manslaughter. On the former appeal the judgment was reversed (120 S. W. 840), and appellant was again put on trial and convicted of the same degree of homicide. He again appeals, assigning numerous errors.

We reversed the case before on account of an error committed by the trial court in admitting in evidence, without its accuracy being verified by the testimony of any witness, a photograph purporting to show the situation of the parties and the circumstances and conditions connected with the fatal rencounter between appellant and the deceased. We held, however, that when the accuracy of a photograph is verified by the testimony of witnesses, showing that it faithfully represents the objects and situations

portrayed, it is admissible, subject to impeachment by other evidence. In the second trial the accuracy of the photograph was duly established. Mrs. Lawhorn, mother of the deceased, who was an eyewitness to the tragedy, testified that, when the photograph was taken, the surroundings were unchanged, and that she placed the persons before the camera so as to correctly represent the situation and attitude of the parties to the fatal encounter. The photographer was introduced as a witness, and he testified that the photograph accurately portrayed the scene as it was pointed out to him by Mrs. Lawhorn, except that he retouched the picture so as to make the powder marks on the fence show plainer. The testimony of another witness tended to impeach the accuracy of the photograph by stating that he saw only one bullet hole in the fence at the place where two are shown in the photograph. The testimony as to these alleged inaccuracies went to the jury for what it was worth, and did not render the photograph inadmissible. The court properly permitted the jury to view and consider it in connection with all the other testimony in the case.

Various acts and statements of special prosecuting counsel, made during the progress of the trial, are assigned as misconduct constituting prejudicial error. We have considered each assignment; and, while we do not approve the remarks made by counsel, we fail to discover anything calculated to prejudice the rights of appellant. The alleged misconduct consisted mainly of little side remarks made by counsel, in the presence of the jury, to appellant and other witnesses and to his counsel which were entirely inappropriate; yet we reverse judgments only for errors substantially calculated to prejudice the rights of litigants, and not merely for misconduct which could have had no influence on the jury in arriving at a verdict.

Error is assigned in the refusal of the court to permit appellant to impeach the testimony of witness Esco Lawhorn, a brother of deceased, by proving contradictory statements of the witness. It is conceded that Esco Lawhorn was not a witness to the fatal encounter between his brother and appellant, but the latter called him as a witness, and asked him the following question as to a statement alleged to have been made on a former occasion: "Did you not pull this pistol out of your pocket on that occasion, and say, 'This is the pistol that my brother shot at Jim Sellers with, and, if I could get a pop at him, there wouldn't be any trial in this case?'" He replied that he did not make the statement, and appellant introduced another witness to impeach him by proving that he did make it. As the witness was not present at the killing, he could not have known whether or not his brother

had a pistol on that occasion, or shot at appellant. So the statement was immaterial. A party cannot examine a witness as to collateral, immaterial matters, and then impeach him by proof of contradictory statements. *Plunkett v. State*, 72 Ark. 409, 82 S. W. 845.

Appellant complains at the refusal of the court to give instructions which he requested on the question of reasonable doubt and presumption of innocence. These subjects were fully covered by other full and accurate instructions given by the court. The instructions on each phase of the case were correct, and the evidence sustained the verdict.

Judgment affirmed.

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CHICAGO, R. I. & P. RY. CO. v. DYAL.  
(Supreme Court of Arkansas. Jan. 17, 1910.)  
RAILROADS (§ 482\*)—SETTING FIRE—EVIDENCE.

Evidence in an action against a railroad company for setting fire *held* sufficient to authorize a finding that hot journal boxes on defendant's freight car set fire to hay.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1730-1736; Dec. Dig. § 482.\*]

Appeal from Circuit Court, St. Francis County; Hance N. Hutton, Judge.

Action by J. T. Dyal against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

T. S. Bugbee and Jno. T. Hicks, for appellant. S. H. Mann, for appellee.

HART, J. This is an appeal by the Chicago, Rock Island & Pacific Railway Company from a judgment against it in the St. Francis circuit court in favor of J. T. Dyal for damages alleged to have been sustained by him on account of property destroyed by fire, which was caused by a hot journal box on one of defendant's freight cars. The only question raised by the appeal is as to the sufficiency of the evidence to support the verdict. In other words, did the testimony, when considered in its most favorable light to appellee, warrant the jury in finding that the destruction of the property was caused by fire from the journal box of one of appellant's freight cars?

The evidence on the part of the appellant was to the effect that four empty box cars had been picked up on the afternoon of February 3, 1909, at Crow Creek, east of Forrest City, and about 18 miles distant from the scene of the fire. The cars were taken into the train between 3 and 4 o'clock in the afternoon and arrived at Goodwin four hours later. Because the spur track at Blossom, where the cars were to be set out, was not connected at the west end, it became necessary to push the four cars ahead of the

engine, and in this way the engine proceeded from Goodwin westward to Blossom. When the train reached Blossom, the four cars were pushed upon the spur track against a loaded car already on the track. The engine then backed out of the spur track and proceeded westward toward Brinkley.

Appellee lived at Goodwin, about 1½ miles east of Blossom Switch. A few minutes before 9 o'clock p. m. of the day the four empty box cars were placed on the spur track he was informed that his barn or hay shed was on fire. The barn was on the south side of the spur track, and was at its nearest point six feet from the spur track. A car had been loaded from the barn on that day, and loose hay was scattered along the passageway in the barn, and from the door of the barn to the spur track. When appellee reached the barn, the barn was on fire all on the inside, extending through the roof, and the flames were jutting out of the door of the barn next to the spur track. The loose hay between the door and the spur track had been burned away. One of the empty cars had been placed immediately in front of the barn on the east track. The west journal box of the south side of this car was burning, and the car itself was on fire about the middle, where the door was. The blaze from the journal box was six or eight inches high. The fire on the side of the car was from two to four feet from the journal box. The journal boxes on the car east of this car were not on fire; but the journal box on the east end, on the south side of the car next east, was on fire. In other words, the four empty cars were placed on the spur track as follows: One in front of the door of the barn, and one west and two east of it; and the journal boxes that were on fire were on the car in front of the barn and on the extreme east end.

The theory of the appellant is that the journals caught on fire from the barn, and that of appellee is that the barn caught from the journal boxes. The journal boxes are packed with waste saturated in oil to keep them from getting hot from the friction of the moving train. Appellant's witnesses say they never saw a journal box on an empty car catch on fire in going a distance of 18 miles; but the testimony shows that the cars in question were next to the engine, and remained attached to it while the switching was being done at the various stations along the route. Then, too, the cars had been on the side track at Crow Creek for several days before they were picked up; and the testimony shows that in such cases a part of the packing is often taken from the journals, in which event they more easily become hot. It is true that the train crew say that the boxes were not hot, because, if such had been the case, they would

have seen the flames, or would have smelt the odor from the burning waste; but it does not necessarily follow that the journals were not hot. The witnesses may have been mistaken. They had nothing to do at Blossom Spur but to set out the cars. Doubtless they were in a hurry, and, not anticipating that the journals would become hot, did not notice the flame, and the wind, being from the south, may have carried the odor from them. Besides, the evidence shows that the journal boxes are kept closed, except when they are left open for the purpose of putting out fire in them, or placing packing and oil in them. The journal boxes that were on fire were both open, and no explanation of that fact is made by appellant. While the evidence is not very satisfactory, it is sufficient to fairly warrant the conclusion that the fire did not originate from some other cause, and the jury might have drawn the inference from all the facts and circumstances adduced in evidence that the journal boxes became hot enough to set on fire the loose hay under it, which acted as a fuse to carry the fire to the barn.

The judgment will be affirmed.

#### GERSHNER v. SCOTT-MAYER COMMISSION CO.

(Supreme Court of Arkansas. Jan. 17, 1910.)

##### 1. APPEAL AND ERROR (§ 1002\*)—REVIEW—VERDICT—CONFLICTING EVIDENCE.

Where the testimony sharply conflicts, and there is evidence to sustain the verdict, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

##### 2. PARTNERSHIP (§ 37\*)—RELATION AS TO THIRD PERSON—HOLDING OUT AS PARTNER.

The doctrine that, before one can exact payment from one holding himself out as a partner, he must show that he extended credit on the faith of the acts and conduct of such alleged partner, and exercised due diligence to ascertain the true facts, is inapplicable where defendant directly and affirmatively, either by word or deed, holds himself out to plaintiff as a partner, and induces him to extend credit on the faith of such representation.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 37, 52; Dec. Dig. § 37.\*]

##### 3. PARTNERSHIP (§ 38\*)—RELATION AS TO THIRD PERSONS—PUTTING OUT REPORT OF PARTNERSHIP.

When one puts out a report that he is a partner, he will be liable to all selling goods to the firm on the faith thereof.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 53; Dec. Dig. § 38.\*]

##### 4. PARTNERSHIP (§ 250\*)—RELATION AS TO THIRD PERSONS—HOLDING OUT AS COPARTNER—CONTINUANCE OF RELATION—PRESUMPTION.

When one holds himself out as a partner, those who deal with the firm on the faith of such representation are entitled to act on the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

presumption that the relationship continues till notice is given of its discontinuance.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 599; Dec. Dig. § 259.\*]

**5. PARTNERSHIP (§ 50\*)—ACTION AGAINST PARTNER—COMPETENCY OF EVIDENCE.**

In an action for goods sold to a firm in reliance on defendant having held himself out as a partner, both parties introduced testimony as to how the firm business was operated, and defendant introduced testimony as to how firm funds were deposited in a bank and checked out, and, on cross-examination of the two confessed members of the firm, it was shown without objection that they gave plaintiff a check before their store was destroyed by fire, and thereafter they withdrew all the funds from the bank before it was paid. *Held*, that it was proper to refuse to strike out the testimony as to the withdrawal of funds, as it was competent to continue the examination as to the condition of the bank account up to its conclusion, and to show what became of it after the fire.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 73; Dec. § 50.\*]

**6. JURY (§ 87\*)—DISQUALIFICATION OF JUROR—INTEREST IN RESULT OF TRIAL.**

Though a juror asserts that his direct interest in the result of the trial will not influence his judgment, the law presumes him to be under a disqualifying bias, and public policy forbids him to sit notwithstanding his avowal.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 407; Dec. Dig. § 87.\*]

**7. NEW TRIAL (§ 54\*)—DISQUALIFICATION OF JUROR—DISCOVERY—DILIGENCE OF OBJECTING PARTY.**

When objection is made to a juror after verdict for the first time, the objecting party must show due diligence to discover the disqualification.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 112-114; Dec. Dig. § 54.\*]

**8. APPEAL AND ERROR (§ 978\*)—DISCRETION OF COURT—OBJECTION TO JUROR AFTER VERDICT.**

When objection to a juror is made after a verdict for the first time, it becomes to some extent a matter of discretion whether or not the verdict should be set aside; and, when no fraud or collusion of the successful party is shown, an order denying new trial will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3867; Dec. Dig. § 978.\*]

Appeal from Circuit Court, Pulaski County; Jas. H. Stevenson, Judge.

Action by the Scott-Mayer Commission Company against A. Gershner. From a judgment for plaintiff, defendant appeals. Affirmed.

H. H. Myers and Wiley & Clayton, for appellant. Morris M. Cohn, L. E. Hinton, and Robert W. Irwin, for appellee.

**MCCULLOCH, C. J.** This is an action instituted by the Scott-Mayer Commission Company against A. Gershner on a verified account for merchandise sold and delivered by plaintiff to the firm of Gershner & Rosenthal, of which defendant is alleged to be a member. Plaintiff also contends that, even if defendant was not a member of said firm, he held himself out to plaintiff as such. The is-

ssues were tried before a jury, and a verdict and judgment resulted in favor of plaintiff.

Defendant's first insistence is that there is not sufficient evidence to sustain the verdict. There is a sharp conflict in the testimony, and we are of the opinion that there is enough to sustain the verdict on both issues. No useful purpose is to be served by detailing the various circumstances of the conduct and statements of defendant which tend in varying degree to sustain the finding that he was, in fact, a member of said firm, and that he held himself out to plaintiff as such. Defendant and his son, who was a member of said firm, and I. E. Rosenthal, another member, all testified positively that defendant was not a member; but the jury rejected their testimony and found from the other facts and circumstances proved that he was a member, or that he held himself out to the plaintiff as a member of the firm. We cannot say that there was no evidence to sustain the finding.

The case was submitted on the following instructions, the last being one requested by defendant:

"If the defendant Gershner held himself out by words or acts to the plaintiff or to its agent to be a member of the firm of Gershner & Rosenthal, or the owner of the business conducted in that name, and the plaintiff sold goods to said business for which it is now indebted to the plaintiff, upon the faith of said acts of defendant, then the defendant is estopped to deny such matters, and you will find for the plaintiff."

"If you find for the plaintiff under the preceding instruction, you will find in its favor for the amount of its account which you may find was owing, together with interest thereon from date of maturity and demand at the rate of 6 per cent. per annum."

"Although the plaintiff sold goods and charged them on its books to Gershner & Rosenthal, it might, if it chose to do so, bring its suit against any one or all of the members of said firm, and if from the evidence you find that A. Gershner was the owner of the business done in the name of Gershner & Rosenthal, or was a member of said firm, then it was a legal right of the plaintiff to sue the said defendant."

"Before the plaintiff can recover in this case, he must prove by a preponderance of the evidence that A. Gershner was actually a partner of the firm of Gershner & Rosenthal, or that he held himself out to plaintiff as a partner in that firm, and that plaintiff extended the credit to the firm on the strength of such holding out, if any is shown by a preponderance of the testimony, and the burden of proof is on plaintiff to show these facts which are necessary to a recovery."

The court refused to give the following instruction requested by defendant, and this ruling of the court is assigned as error: "You

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

are instructed that it was the duty of the plaintiff at the time he extended the credit to Gershner & Rosenthal to use due diligence to ascertain who composed the firm—that is to say, such diligence and make such inquiries as an ordinarily prudent business man would make under similar circumstances—and, if you believe from the testimony that defendant was not actually a partner in the firm of Gershner & Rosenthal and that the use of such diligence by plaintiff would have ascertained that fact, then you will find for the defendant.” Counsel cite authorities holding that a person who relies on acts and conduct of another which amount to holding himself out as a member of a partnership must show that he extended credit on the faith of such reliance and exercised due diligence to ascertain the true facts before he can exact payment from the person so holding himself out as a partner. *Herman Kahn Co. v. Bowden*, 80 Ark. 23, 96 S. W. 128. But this doctrine is not applicable against one to whom a representation of partnership is directly made by act or word. When a person directly and affirmatively, either by word or deed, holds himself out to another as a partner, and thereby induces him to extend credit to the partnership on the faith of such representation, he cannot shield himself from liabilities behind the failure of the party to ascertain the true facts. And, when a party puts out a report that he is a partner, he will be liable to all those selling goods to the firm on the faith of such report. *Herman Kahn Co. v. Bowden*, supra, and cases therein cited. When a person holding himself out as a co-partner, those who deal with the firm on the faith of such representation are entitled to act on the presumption that the relationship continues until notice of some kind is given of its discontinuance.

It is contended that prejudicial error was committed by the court in its refusal to strike out certain testimony in relation to withdrawal of funds from the bank by Gershner & Rosenthal after their store was destroyed by fire. They gave plaintiff a check for \$400 shortly before the fire occurred, and after the fire they withdrew all the funds from the bank before the check was paid. No objection was made to the testimony when it was elicited on the cross-examination of Nathan Gershner and Rosenthal, but afterwards defendant asked the court to exclude it. Both parties introduced testimony as to how the business was operated, and defendant introduced testimony as to how the funds were deposited in bank and checked out. The above testimony came out on cross-examination, as already stated, and was not objected to. We think it was competent to continue the examination as to the condition of the bank account up to its conclusion, and to show what became of the account after the fire, against which the unpaid check given

to plaintiff had been drawn. We discover no prejudicial error.

Another ground set forth in the motion for new trial is that C. K. Lincoln, one of the trial jurors, was interested in the result of the trial, in that he was an officer and stockholder in a corporation which was a creditor of Gershner & Rosenthal at the time. Plaintiff filed a response setting forth that it had no information until the motion for new trial was filed that the corporation named was a creditor of Gershner & Rosenthal; and also filed the affidavit of Juror Lincoln stating that when he was selected as a juror, and during his service as such, he did not recall to mind the fact that his corporation was a creditor. No questions were asked the juror as to his interest in the outcome of the trial, and no diligence is shown to have been exercised by defendant in ascertaining whether or not the juror was interested. His son and son-in-law, Nathan Gershner and I. E. Rosenthal, the two confessed members of the firm, were present at the trial, and knew, not only that the corporation named was a creditor of the firm, but also that Juror Lincoln was interested in the corporation. Though a juror asserts that his direct interest in the result of the trial will not influence his judgment, the law presumes him to be under a disqualifying bias, and public policy forbids that he sit as a juror, notwithstanding his avowal. *Railway Co. v. Smith*, 60 Ark. 221, 29 S. W. 752. But, when objection is made to a juror after the verdict for the first time, due diligence to discover the disqualification must be shown by the objecting party. At that stage of the case it becomes to some extent a matter of discretion with the trial court as to whether or not the verdict shall be set aside; and, when there is no fraud intended or wrong done or collusion on the part of the successful party, it is not reversible error for the trial court to refuse to set aside the verdict. *Fain v. Goodwin*, 35 Ark. 100; *Shinn v. Tucker*, 37 Ark. 580.

We find no prejudicial error in the record, and the judgment is affirmed.

#### TERRE NOIR DRAINAGE DIST. No. 3 v. THORNTON et al.

(Supreme Court of Arkansas. Jan. 17, 1910.)

##### 1. DRAINS (§ 28\*)—DRAINAGE DISTRICTS—ESTABLISHMENT—PETITION.

Under Kirby's Dig. §§ 1414, 1415, conferring on the county court power to construct drainage ditches when the same shall be conducive to the public health, convenience, or welfare, or will be of public utility, and providing that the court shall establish the ditch on petition of landowners setting forth the necessity therefor, with a general description of the proposed ditch, the jurisdiction of the county court is special and exercised in a special manner, and the petition must allege the essential facts required; yet a petition which states the essen-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tial facts from which the court may find that the proposed ditch will be conducive to the public health, convenience, or welfare, or will be a public utility, is sufficient, though the allegations of the petition do not follow the language of the statute.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 20-23; Dec. Dig. § 28.\*]

## 2. DRAINS (§ 28\*)—DRAINAGE DISTRICTS—ESTABLISHMENT—PETITION.

A petition for the construction of a drainage ditch by altering, widening, or straightening a stream for 25 miles, which alleges that the stream is crooked, that the adjacent lands are subject to frequent overflows, that the improvement is necessary to drain the adjacent land, and which gives the starting point, route, and terminus of the proposed improvement, is sufficient within Kirby's Dig. §§ 1414, 1415, authorizing the county court to construct a ditch when the same shall be conducive to the health, convenience, or welfare of the public or when it will be a public utility, on petition of the landowners setting forth the necessity therefor, etc.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 20-23; Dec. Dig. § 28.\*]

## 3. DRAINS (§ 25\*)—ESTABLISHMENT—STATUTORY PROCEEDINGS.

Where the judgment of the county court in proceedings for the construction of a drain set forth the petition therefor, and found that it stated a necessity for the proposed improvement and designated the starting point, route, and terminus, and the viewers appointed to make a preliminary survey, reported that the proposed improvement was necessary, and would be conducive to the public health, convenience, and welfare, and the court found in favor of the improvement and recited the facts in its judgment, the statute relating to the establishment of drains was substantially complied with, which was all that was necessary.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 16, 17; Dec. Dig. § 25.\*]

Appeal from Circuit Court, Clark County; Jacob M. Carter, Judge.

Petition for the establishment of a drainage district resulting in the establishment of the Terre Noir Drainage District No. 3, in which C. S. Thornton and another filed, on appeal to the circuit court, a demurrer to the jurisdiction of the court. From a judgment sustaining the demurrer, the district appeals. Reversed and remanded.

Callaway & Hule, for appellant. W. E. Hemingway, E. B. Kinsworthy, Jno. E. Bradley, Jno. H. Crawford, and Jas. H. Stevenson, for appellees.

HART, J. This is an appeal by the Terre Noir Drainage District No. 3 from a judgment of the Clark circuit court. The proceedings were commenced in the Clark county court, where the judgment was in favor of appellant. Upon appeal to the circuit court, C. S. Thornton, St. Louis Iron Mountain & Southern Railway Company, and others filed a demurrer to the jurisdiction of the court.

The basis of the proceedings was a petition filed in the county court, which, omit-

ting the style of the court and the signatures to it, is as follows: "We, the undersigned petitioners, respectfully state that Terre Noir creek, running through Clark county, is a very tortuous stream, and, by reason thereof, the greater portion of the land lying thereon and adjacent thereto is subject to frequent and violent overflows, and especially that part between the points hereinafter mentioned; that we desire said stream altered, widened, and straightened for the purpose of properly draining the lands lying thereon and between the points hereinafter mentioned; that said proposed altering, widening, or straightening of said stream is to be done by ditch or ditches and excavations of necessary depth, size, and dimensions to aid in promptly carrying off the waters of said stream during overflows; that said proposed work is to begin about the southeast corner of section 5, township 8 south, range 21 west, and running in a southeasterly direction with the general course of said stream, through township 8 south, range 21 west, and townships 8 and 9 south, range 20 west, and townships 9 and 10 south, range 19 west, and township 10 south, range 18 west, to or near the point where said stream empties into the Little Missouri river, in section 35, township 10 south, range 18 west, as aforesaid; making said proposed improvement covering a distance of about 25 miles in length; that we are the owners of land liable to be affected by or assessed or reassessed for the construction of same; that it is desired that bonds be issued for the purpose of making said improvement. Wherefore we pray the court that said stream be straightened, altered and improved as aforesaid; that all proper and necessary orders be made and entered by this court for the purpose of carrying out said proposed improvement, as provided by sections 1414, 1415, 1416, et seq., and, as amended, of Kirby's Digest of the Statutes of Arkansas."

Section 1414 of Kirby's Digest confers upon the county court power to cause to be constructed a ditch "when the same shall be conducive to the public health, convenience or welfare, or when the same will be of public utility or benefit." Section 1415 provides that the court shall establish the ditch when a petition of a designated number of landowners setting forth the necessity therefor, with a general description of the proposed ditch shall be filed with the county clerk. In construing similar sections of a former drainage act, the court in the cases of *St. Louis Iron Mountain & Southern Ry. Co. v. Dudgeon*, 64 Ark. 108, 40 S. W. 786, and *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707, held, that the jurisdiction of the county court is special and is to be exercised in a special manner, and for that reason

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the petition must set out all the essential facts required by the statute. The necessity contemplated by section 1415 of the Digest is, as shown by section 1414, that the proposed ditch shall be conducive to the public health, convenience, or welfare, or will be of public utility or benefit. It is true that the allegations of the petition do not follow the exact language of the statute; but the essential facts are stated, and it is from these facts that the court must find that the proposed ditch will be "conductive to the public health, convenience or welfare" or will be "of public utility or benefit."

The petition states that the proposed improvement is the "altering, widening, or straightening" of a stream for the distance of 25 miles; that, because the stream is crooked, the land adjacent thereto is subject to frequent and violent overflows; and that the improvement is necessary to drain the adjacent lands, and to carry off the water during overflows. The starting point, route, and terminus of the proposed improvement is set out in the petition. It is manifest that the effect of these frequent overflows will cause the low lands to be filled with water, and thus become swamps and marshes, and that the proposed improvement will relieve these low lands of their stagnant water. The result will be to prevent disease and open up for use a large body of land, 25 miles in length. The length of the proposed improvement shows the extent of the area to be drained, and is indicative of its public character. In our judgment this was in substantial compliance with the statutory requirement; and a substantial compliance with the statute is sufficient. *Cribbs v. Benedict*, supra.

The order or judgment of the county court sets forth in extenso the petition, and finds that it states the necessity of said proposed improvement, and it designates the starting point, route, and terminus; and viewers were appointed to make a preliminary survey and ascertain whether it will be conducive to the public health, convenience, or welfare. They reported that the proposed improvement was necessary, and that it would be conducive to the public health, convenience, and welfare; and the court found from the report in favor of making said improvement, and these facts were recited in its judgment. This was a substantial compliance with the statute, and a substantial compliance as we have seen is all that is necessary. *Cribbs v. Benedict*, supra; *Chapman & Dewey Land Co. v. Wilson*, 120 S. W. 391.

Therefore, the circuit court erred in sustaining the demurrer to the petition, and the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

# PARAGOULD & M. R. CO. v. SMITH.

(Supreme Court of Arkansas. Jan. 17, 1910.)

## 1. EVIDENCE (§ 594\*)—WEIGHING EVIDENCE—CREDIBILITY.

The falsity of testimony may be determined by all the facts and circumstances proved, though it is not directly contradictory.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.\*]

## 2. PAYMENT (§ 36\*)—INTENTION OF PARTIES.

Where there are two separate accounts between the parties, the application of a payment which could be applied to either account is determined by the intention of the parties.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 99; Dec. Dig. § 36.\*]

## 3. PAYMENT (§ 75\*) — SUFFICIENCY OF EVIDENCE.

In an action for work done for defendant, in which he claimed that a payment made by another, for whom plaintiff had also worked, and who made special payments on defendant's account as well as his own, was made on defendant's account so as to discharge its indebtedness to plaintiff, evidence held to sustain a finding that the payment was made on the account of such other, and not of defendant.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 239; Dec. Dig. § 75.\*]

Appeal from Circuit Court, Mississippi County; Frank Smith, Judge.

Action by D. A. Smith against the Paragould & Memphis Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. H. Bradley and M. P. Huddleston, for appellant. T. A. Turner and Taylor & Little, for appellee.

**FRAUENTHAL, J.** This was an action instituted by D. A. Smith, who was the plaintiff below, to recover the sum of \$2,110 for work done for the defendant. The defendant pleaded payment.

The defendant by written contract employed the plaintiff to clear and grade 187 stations of its right of way and agreed to pay him therefor \$10 per station; and later it employed him to make 2,000 ties for which it agreed to pay 12 cents per tie. It was admitted that the plaintiff had performed all this work. The defendant was engaged in building to its main line of railroad a spur track which extended to a large body of timber land, and which was owned by the Decatur Egg Case Company, a foreign corporation with its domicile at Decatur, Ind. A short time after entering into the above contracts with the defendant, the plaintiff entered into a contract with said Decatur Egg Case Company by which he agreed to do logging for that corporation, and under said contract performed work for it. The two corporations were separate and distinct, but, by arrangements made between them, the Decatur Egg Case Company made payments to the plaintiff for the defendant upon the work done by him for defendant; and it al-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

so made payments from time to time to plaintiff for the work done by him for this latter corporation upon said logging contract. The plaintiff admitted that he had received from the defendant through the Decatur Egg Case Company the sum of \$1,800. This sum was paid by three drafts. The first two drafts were for \$500 each and were signed by the Decatur Egg Case Company and made payable to the order of plaintiff and were drawn on the Decatur Egg Case Company at Decatur, Ind. In one of the drafts it was written that it was given for cutting right of way, and in the other that it was given for building spur. The third draft was executed for \$1,400, and was also signed by the Decatur Egg Case Company and drawn on the same company. It however stated that \$800 of the draft was paid on the account of the switch contract and \$600 on the account of the logging contract. A few days after this the Decatur Egg Case Company gave to the plaintiff a draft on the same drawee for \$352.80. This draft was made payable to the order of the Crescent Commission Company, and in the draft it stated that it was for feed account of plaintiff, and also stated therein the following: "Charge to timber." This draft was used by plaintiff in paying for a car load of feed stuff which he had purchased from said Crescent Commission Company. It is contended by the defendant that this payment by the above draft for \$352.80 was made for the defendant and should be applied upon the account of the plaintiff with the defendant for clearing said right of way and making said ties. It is contended by the plaintiff that this draft was given to him in payment upon the account and contract which he had with the Decatur Egg Case Company for logging. The sole question involved in this case is: To which of these accounts should this payment be applied? For if it shall be applied to the account between plaintiff and defendant it will more than pay the balance of \$310, which is the largest amount which the plaintiff, under his admission, can in any event claim to be due to him by the defendant. But if this draft for \$352.80 shall be applied upon the account of plaintiff with the Decatur Egg Case Company then according to the uncontroverted testimony in the case the defendant is indebted to the plaintiff in the sum of \$310 and interest.

The cause was tried by a jury which returned a verdict in favor of plaintiff for the sum of \$310 and interest. The defendant did not in the lower court, and does not here, complain of any instruction given or refused by the circuit court. So that the sole question to be determined upon this appeal is whether or not there is sufficient evidence to sustain the verdict of the jury. The plaintiff was performing work for these two corporations under separate contracts. For the defendant he was clearing its right of

way and making ties; and he was logging for the other corporation. While the Decatur Egg Case Company was making payments upon these two accounts, it was making the payments upon one account for the defendant and charged such payments to the defendant; and on the other account it made the payments for itself. The two accounts were therefore distinct and separate. The manager of the defendant testified that, when the draft for \$1,400 was given, the plaintiff spoke to him relative to the amount due by him to the Crescent Commission Company for the feed, and that he stated to the plaintiff that when draft was given for the amount of that item it would pay off all due by the defendant to plaintiff, and that plaintiff assented thereto. It is urged by counsel for defendant that, because this testimony was not denied or contradicted by the direct and express words of the plaintiff in his testimony, the uncontroverted evidence shows that this payment was applied upon the account of defendant. The plaintiff testified in the case before the manager of defendant, and he was not questioned relative to these statements afterwards testified to by said manager, and he was not called in rebuttal. But the plaintiff had a right to rely upon all the facts and circumstances adduced in evidence; and, if those facts and circumstances and the effect of his own testimony tended to contradict the testimony of said manager of defendant in regard to these statements, it was not necessary for the plaintiff to specifically deny them. An issue can be established by all the facts and circumstances proved in a cause, and the falsity of testimony may be established by the same character of evidence.

According to the evidence adduced on the part of the plaintiff the draft for \$1,400 was given in payment upon both accounts; \$800 of it upon the account of the plaintiff with the defendant, which was specifically named in the draft as the switch account, and \$600 of it upon the account of the Decatur Egg Case Company, which was named in the account and known as the "timber account." At the time this draft was given the plaintiff had cleared 180 stations of the right of way for defendant; for that amount of work under the contract defendant was due to plaintiff \$1,800. Defendant had prior to that time paid to plaintiff two drafts amounting to \$1,000; so that at the time of giving this third draft it owed plaintiff \$800; and by this draft it paid to plaintiff that sum. At that time plaintiff had not made any ties; so that when this third draft was given and accepted it owed nothing to plaintiff. The plaintiff testified that according to their custom of doing the business the defendant never paid him in advance. Three days after the draft for \$1,400 was paid to plaintiff, the draft for \$352.80 was given. When this last draft was given, the plaintiff had an account with the Decatur Egg Case Company,

which was unsettled, and the account between that corporation and plaintiff is still unsettled; and the plaintiff testified that this latter corporation is now indebted to him in a large amount after the account with it is credited with this \$352.80. When this draft for \$352.80 was given, the manager of the Decatur Egg Case Company, who executed it, wrote in it that it was for feed and "charge to timber." The contract and account which plaintiff had relative to timber, and which was known and called by the parties as the "timber account," was solely with the Decatur Egg Case Company; and this draft, the application of which is in dispute, specifically stated that it should be charged to the timber account, which was the account of the Decatur Egg Case Company with plaintiff.

When there are two separate accounts between parties, and a payment is made which could be applied to either, the application of such payment is determined by the intention of the parties. Without going further into the details of the testimony of the case, we think it sufficient to say that we are of the opinion that there was some substantial evidence showing that the Decatur Egg Case Company and plaintiff intended that this draft for \$352.80 should be applied upon the timber account of the plaintiff with the Decatur Egg Case Company.

The judgment is affirmed.

#### ASHLEY v. ASHLEY et al.

(Supreme Court of Arkansas. Jan. 17, 1910.)

DEEDS (§ 61\*)—SALES (§ 146\*)—DELIVERY—CONDITIONS.

Deeds and bills of sale executed by one to his heirs in anticipation of death, intended as a division of his estate, and handed to a grantee to be placed in a chest, and there to remain subject to the grantor's control until his death and then to be delivered, but not intended to become effective in the event of his recovery, are ineffective to pass title on his death.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 141; Dec. Dig. § 61;\* Sales, Cent. Dig. § 344; Dec. Dig. § 146.\*]

Appeal from Circuit Court, Calhoun County; G. W. Hays, Judge.

Action by William Ashley and others against Charles Ashley. From a judgment for plaintiffs, defendant appeals. Reversed.

Thornton & Thornton and Powell & Taylor, for appellant. Poole & Whitehead, for appellees.

BATTLE, J. Upon an agreement in writing entered into by the parties to this action certain issues hereinafter appearing were submitted to and decided by the Calhoun circuit court. Kirby's Digest, §§ 6280-6282.

The following instruments of writing were

signed and acknowledged by Pink Ashley in his lifetime:

#### "Warranty Deed.

"Know all men by these presents:

"That I, Pink Ashley, for and in consideration of the sum of three hundred (\$300.00) dollars, to me paid by Charlie and Will Ashley, receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said Charlie and Will Ashley, and unto their heirs and assigns forever the following lands, lying in the county of Calhoun and State of Arkansas, to-wit:

"The S. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of the E. E.  $\frac{1}{4}$  of section nineteen (19), all in township fourteen, South range fifteen (15), west, containing 10 acres. Also the South  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , the southeast fourth of the N. E.  $\frac{1}{4}$ , East  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$ , all in section fourteen (14) South of range fifteen (15), West, containing in all 140 acres more or less, at my death.

"To have and to hold the same unto the said Charlie and Will Ashley, and unto their heirs and assigns forever, with all appurtenances thereunto belonging. I hereby covenant with the said Charlie and Will Ashley that I will forever warrant and defend the title to said lands against all lawful claims whatever.

"Witness our hands and seals on this 6th day of Sept. 1906.

his  
"Pink X Ashley. [Seal.]  
mark

#### "Warranty Deed.

"Know all men by these presents:

"That I, Pink Ashley, for and in consideration of the sum of (\$100.00) one hundred dollars, to me paid by Dora Strong, receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said Dora Strong and unto her heirs and assigns forever, the following lands, lying in the county of Calhoun and State of Arkansas, to-wit:

"The S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section five, township fourteen (14), South range fifteen (15), west, containing 40 acres less one acre in the southeast corner so long as used for school purposes. Also less as much pine timber as Charlie or I may need, for building purposes, at my death.

"To have and to hold the same unto the said Dora Strong and unto her heirs and assigns forever, with all appurtenances thereunto belonging. And I hereby covenant with the said Dora Strong, that I will forever warrant and defend the title to said lands against all lawful claims whatever.

"Witness our hands and seals on this 6th day of September, 1906.

his  
"Pink X Ashley. [Seal.]  
mark

"Bill of Sale.

"9-6-06, Locust Bayou, Arkansas.

"For and in consideration of seventy-five dollars paid to me by Will Ashley, receipt of which is hereby acknowledged, I do hereby grant, bargain, and sell unto Will Ashley the following stock, to-wit: One Clay Bank mare about six years of age, 14 hands high, one black cow and yearling, marked crop and split in each ear, branded with P on left shoulder and hip, the said Will Ashley is to have and to hold the above named stock for the amount named at my death.

his  
"Pink X Ashley.  
mark

"Witnesses:

"John Bush.

his  
"H. X Bowlie."  
mark

"Bill of Sale.

"For and in consideration of (\$20.00) twenty dollars, to me in hand, paid by Dora Strong, receipt of which is hereby acknowledged, I do hereby grant and sell to Dora Strong, one brown cow and calf, cow marked crop and split in each ear also branded on left shoulder and hip with letter P, to have and to hold same for the above named at my death.

his  
"Pink X Ashley.  
mark

"Witnesses:

"John Bush:

his  
"H. X Bowlie."  
mark

Did these deeds and bills of sale ever become operative? The circuit court held that they did.

The issues in the case were submitted to the court upon the deeds, acknowledgments of the same, and the bills of sale, and an agreed statement in writing as to the testimony of D. R. Furr and Charles Ashley in a certain matter before the Calhoun probate court, which is as follows:

D. R. Furr, a justice of the peace, testified before said court as follows:

"Pink Ashley some two weeks previous to his death, but while of sound mind and possessed of all his reasoning faculties, sent for the said D. R. Furr to come to his home, and, after arriving there, that the said Pink Ashley stated to the said D. R. Furr that he desired to make a disposition of his property between his respective heirs that there might not be any trouble or litigation after his death; that the said Furr advised him as to his real property it would be necessary to make and execute deeds to his respective heirs to that portion of the land that he desired them to have; that said Ashley made a division of his land between each of his

heirs; and that the said Furr prepared deeds to the same land, and, after said deeds were signed, said Furr took the acknowledgment thereto, and that, as to the personal property, bills of sale were prepared by the said Furr, signed by the said Ashley and acknowledged by the said Furr, and that after said deeds and bills of sale had been signed and acknowledged and turned over to the said Ashley and by the said Furr that the said Pink Ashley, deceased, handed the same to Chas. Ashley, and said to him to place the deeds and bills of sale in his chest, and that immediately after his death that said deeds and bills of sale be delivered to his respective heirs to whom they had been executed.

"That Chas. Ashley testified before the probate court at the same time and place that his father Pink Ashley handed him the deeds and bills of sale and told him to place them in his chest, but that he never gave him any direction to deliver them to the heirs of said estate as testified to by Furr, and that he had never delivered them to any one until filed as evidence in this case with the clerk, and that immediately after the death of his father he took out letters of administration on said estate."

The deeds and bills of sale mentioned in the testimony set out above are the deeds and bills of sale copied in this opinion. In the first deed Charlie and Will Ashley are named as grantees, and in the second Dora Strong, and in the bills of sale Will Ashley and Dora Strong. They were executed by Pink Ashley about two weeks before his death, and were intended to be a division and conveyance of his property to and between his prospective heirs, but were not to operate as a will. *Bunch v. Nicks*, 50 Ark. 367, 7 S. W. 563. They were not delivered to any one for the heirs, but were handed to Charles Ashley, not to hold, but to be placed in a certain chest (whether of Charles or Pink Ashley is not specified, but the presumption is of the latter), and there to remain until his death, when the instruments were to be delivered to those named therein as grantees. The instruments were executed in anticipation of his death, and were obviously not intended to become effective in the event he recovered. Charles Ashley was not authorized to possess or exercise any control over them in Pink Ashley's lifetime. They were to operate as a division of his estate in the event he died and were subject to his dominion so long as he lived. They were not delivered in his lifetime and never took effect or became operative. *Russell v. May*, 77 Ark. 89, 90 S. W. 617; *La Cotts v. Quertermous*, 84 Ark. 610, 107 S. W. 167.

Judgment reversed and the cause remanded, with directions to the court to enter a judgment in accordance with this opinion.

**FARMERS' UNION GIN & MILLING CO. v. SEITZ et al.**

(Supreme Court of Arkansas. Jan. 17, 1910.)  
**EXEMPTIONS (§ 61\*)—PROPERTY AND RIGHTS EXEMPT—INTEREST IN JUDGMENT.**

Under a constitutional provision allowing an exemption of \$500, a debtor who is a member of a firm owning a judgment for \$472, which is all the property owned by the debtor, is entitled to hold one-half of the same as exempt.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 83-87; Dec. Dig. § 61.\*]

Appeal from Greene Chancery Court; Edward D. Robertson, Chancellor.

Action by the Farmers' Union Gin & Milling Company against W. L. Seitz and others. From a decree dismissing plaintiff's complaint an appeal is taken. Affirmed.

Johnson & Burr, for appellant.

**BATTLE, J.** Farmers' Union Gin & Milling Company, a corporation, brought suit against W. L. Seitz, A. D. Grayson, George W. Cox, and the St. Louis Southwestern Railway Company in the Greene chancery court. It alleged that it commenced an action on the 20th day of December, 1907, before a justice of the peace, against the defendant Seitz to recover the sum of \$98, and recovered a judgment against him for that amount; and on the 14th day of January, 1908, sued out before said justice of the peace a writ of garnishment against the St. Louis Southwestern Railway Company, commanding the garnishee to appear before the justice of the peace on the 26th day of February, 1908, to answer what goods, chattels, moneys, credits, or effects it had in its hands belonging to Seitz, to which it answered that on the 17th day of February, 1908, the defendants, Grayson and Seitz, as partners, recovered a judgment in the Greene circuit court against it for \$422.78. And plaintiff further alleged that the judgment now amounts to \$472, and that Seitz is the owner of one-half thereof, and was on the 20th day of December, 1907, and has been continuously since that date to the present time, wholly and totally insolvent, and has no property whatsoever, either real or personal, out of which satisfaction of the above judgment could be made, except the interest of Seitz in the judgment recovered against the railway company. And it (plaintiff) asked for a judgment against Seitz for \$98 and interest and costs of action, and a decree charging the interest of Seitz in the judgment for \$472 against the railway company, with the payment of the judgment "in favor of plaintiff so to be rendered"; and that the railway company be ordered and adjudged to pay plaintiff out of the judgment against it in favor of Seitz.

Grayson answered and said that the total amount of the judgment rendered against the railway company is \$516.15, from which

is to be deducted \$211.05, leaving \$305.10 to be divided equally between defendants, Grayson and Seitz, the latter's half being \$152.55.

The railway company answered, and admitted the issuance of the writ of garnishment and its answer to the same.

The defendant Seitz, after giving notice to plaintiff of his intention to file a schedule claiming his exemptions, did so, and stated that he was a resident of the state of Arkansas, and a married man and the head of a family, and that he is the owner of the following described property in addition to the wearing apparel of himself and family, to wit, a one-half interest in a certain judgment recovered by himself and A. D. Grayson, as partners, against the St. Louis Southwestern Railway Company, the amount due him on account thereof, after paying costs and attorney's fees, being \$152.55, and claimed the same as exempt from garnishment or order of court in this suit; and he appended to such schedule an affidavit, in which he swore that the schedule embraced all of his property of every kind, except wearing apparel of himself and family, and that the personal property claimed as exempt does not exceed in value the sum of \$500, and that he is a married man and the head of a family and a resident of the state of Arkansas; and that the judgment in favor of plaintiff is for debt due upon contract.

Plaintiff demurred to the schedule (1) because the chancery court had no jurisdiction to hear and determine defendant's right to schedule his personal property in this suit. (2) Because the schedule shows upon its face that it is an attempt to schedule his interest in an unsettled partnership fund. (3) Because the affidavit attached to the schedule is insufficient in law.

The court upon final hearing overruled the demurrer, and found that the railway company had paid into court the amount of the judgment due from it to the defendants, A. D. Grayson and Will Seitz, and that the said Will Seitz is entitled to schedule and claim as exempt the part due him as against any claim or right of the plaintiff, and decreed that the railway company be discharged from any liability to the plaintiff or defendants, that the motion of plaintiff be dismissed, the schedule filed by Seitz be overruled, and that Seitz be permitted to schedule the fund paid into court against plaintiff's debt, and that such fund so paid be paid to Grayson and Seitz as their interests may appear, and dismissed plaintiff's complaint for want of equity. The plaintiff appealed.

Under the Constitution of this state Seitz was and is entitled to hold specific articles of his property to be selected by him, not exceeding in value \$500 in addition to the wearing apparel of himself and family, exempt from seizure on attachment, or sale

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on execution, or other process from any court on debt by contract. His selection of exemption is not confined to any particular property. If it be in partnership property he is entitled to select it when it is ascertained and segregated. *Porch v. Arkansas Milling Company*, 65 Ark. 40, 45 S. W. 51, 67 Am. St. Rep. 895. Appellant alleged in its complaint that one-half of the judgment for \$472 is all the property owned by him. That is an admitted fact. Whatever amount that may be it is certain that it is not equal to his exemption. He claims that as such, and he is entitled to it. Without further investigation or proceedings it is settled that appellant's complaint is without equity.

Decree affirmed.

### CROSBY v. STATE.

(Supreme Court of Arkansas. Jan. 10, 1910.  
Dissenting Opinion Jan. 24, 1910.)

#### 1. CRIMINAL LAW (§ 1153\*)—WITNESSES (§ 40\*) —DISCRETION OF COURT—COMPETENCY OF WITNESS.

There is no presumption of the capacity of a witness under 14 years of age to testify; the question of his competency being for the trial judge's discretion, the exercise of which is not reviewable, in absence of clear abuse or manifest error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3062; Dec. Dig. § 1153; \**Witnesses*, Cent. Dig. §§ 97, 98; Dec. Dig. § 40.\*]

#### 2. WITNESSES (§ 40\*)—COMPETENCY—AGE—CHILDREN.

To be competent as a witness, a child must not only have sufficient intelligence, but must appreciate the obligation of an oath, which requires that he have an immediate sense of responsibility to God and a consciousness of the wrong of falsehood.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 97, 98; Dec. Dig. § 40.\*]

#### 3. WITNESSES (§ 40\*)—COMPETENCY—CHILDREN.

When a 10 year old boy, offered as a witness, stated in answer to a direct question that it was wrong not to tell the truth, but said that he did not know what would be done with him if he did not tell the truth, and he was not asked, and did not state, anything from which it could be inferred that he knew of the danger or wrong of perjury, or comprehended the sanctity of an oath, he was not shown to be a competent witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 97, 98; Dec. Dig. § 40.\*]

#### 4. CRIMINAL LAW (§ 519\*)—CONFESSIONS—CONFESSIONS WHILE IN CUSTODY.

Confessions voluntarily made while accused was in jail and while he was in the jailyard were properly admitted in evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1167; Dec. Dig. § 519.\*]

McCulloch, C. J., dissenting.

Appeal from Circuit Court, Conway County; Hugh Barham, Judge.

Will Crosby was convicted of murder in the first degree, and he appeals. Reversed and remanded for new trial.

Sellers & Sellers and Moore & Reid, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

HART, J. Will Crosby was indicted, tried, and convicted in the Conway circuit court for the crime of murder in the first degree; and has duly prosecuted an appeal to this court.

The state relied for a conviction upon the confession of the defendant and the testimony of Will Howard, a little negro boy 10 years old, who was a witness to the killing. No evidence was adduced in behalf of the defendant. The killing occurred in Conway county, Ark. Both the deceased and the defendant were colored, and both were boys. The witnesses for the state, except the sheriff, stated that the defendant was 16 or 17 years old. The sheriff said he looked to be 21 or 22 years old. The killing occurred in the nighttime, and the weapon used was a cane hoe. The views we will hereinafter express render it unnecessary to make a detailed statement of the circumstances of the killing. It will be sufficient to say that the confession made to the sheriff, together with the testimony of the boy Will Howard, if competent, was sufficient to warrant a verdict for murder in the first degree.

Counsel for defendant object that the witness Will Howard was incompetent on account of his tender years, and his inability to comprehend the nature and binding obligation of an oath. The examination made by the court is as follows: "Q. What is your name? A. William Howard. Q. Were you sworn with the other witnesses a while ago? A. Yes, sir. Q. How old are you? A. Ten years old. Q. Do you know what it means to be sworn? A. No, sir. Q. Do you know what you mean when you hold up your hand and take the oath? A. Yes, sir. Q. What is it? A. Tell the truth. Q. If you was not to tell the truth, what would be done to you? A. I don't know, sir. Q. Would it be wrong? A. Yes, sir." Whereupon the court held him to be a competent witness, and counsel for defendant saved exceptions to the ruling of the court.

In the case of *Warner v. State*, 25 Ark. 448, the court held that in criminal cases the common-law rule in relation to the competency of witnesses had not been changed by the Code. And in the case of *Flanagin v. State*, 25 Ark. 92, the rule is stated as follows: "As to children there is no precise age within which they are absolutely excluded, or the presumption that they have not sufficient understanding. At the age of 14 all persons are presumed to have common discretion and understanding, until the contrary appears; but under that age it is not presumed. Hence inquiry should be made

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as to the degree of understanding which the child offered as a witness possesses; and, if he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he should be admitted to testify, no matter what his age may be." To the same effect, see 1 Greenleaf on Evidence (15th Ed.) § 367; Underhill on Criminal Evidence, § 205; Wharton's Criminal Evidence (8th Ed.) §§ 366-368; 1 Wigmore on Evidence, § 508, and volume 3, § 1820. It will be seen from the above authorities that under the age of 14 there is no presumption of capacity, and inquiry will be made on that point. The question of his competency is left to the legal discretion of the trial judge, and, in the absence of clear abuse or manifest error, the judicial discretion is not reviewable.

In the present case we do not think the examination of the witness by the circuit judge was sufficiently comprehensive. The child must not only have intelligence enough to understand what he is called upon to testify about, and the capacity to tell what he knows, but he must also have a due sense of the obligation of an oath, by which is meant, as we deduce from the authorities, *supra*, that the promise to tell the truth must be made under "an immediate sense of the witness' responsibility to God, and with a conscientious sense of the wickedness of falsehood." See, also, Bouvier's Law Dictionary, p. 529. In answer to a direct question the boy stated that it was wrong not to tell the truth, but also said that he did not know what would be done to him if he did not tell the truth. The examination proceeded no further. He was not asked, nor did he state, anything from which it could be inferred that he had a sufficient sense of the danger and wickedness of false swearing, or that he comprehended and appreciated the sanctity and obligation of an oath.

Counsel for the defendant objected to the admission of the evidence of his statements as made to Sheriff Hervey and to Geo. Brooks. The confession to Brooks was made while the defendant was in jail and that to the sheriff was made at a later date in the jailyard. The record shows that both statements were voluntarily made; and the statements were properly admitted in evidence. *Hammons v. State*, 73 Ark. 495, 84 S. W. 718, 68 L. R. A. 234, 108 Am. St. Rep. 66; *Youngblood v. State*, 35 Ark. 35, and cases cited.

We have carefully examined the instructions given by the court, and find them to be correct.

Counsel for defendants urge upon us as a ground for reversal certain remarks made by the prosecuting attorney in his argument to the jury, but this assignment of error will not likely occur on a new trial and need not be considered.

For the error in holding that the boy Will Howard was competent to testify under the

examination as disclosed by the record, the judgment will be reversed, and the cause remanded for a new trial.

McCULLOCH, O. J. (dissenting). I dislike to record a dissent in a case involving human life, but it seems to me that the court in holding the admission of the child's testimony to be reversible error is not only making a mistake, but is taking a backward step in the law of evidence, which is a field in which there has been a more wholesome growth than in any other branch of the law. The test of the competency of children under the age of 14 as witnesses in criminal cases is that they must be found on examination "to have sufficient natural intelligence, and to have been so instructed, as to comprehend the nature and effect of an oath." *Flanagin v. State*, 25 Ark. 92. This must be left largely to the sound discretion of the trial judge, who has an opportunity to see the child, and judge of the degree of intelligence which it possesses. An appellate court should not disturb the trial court's exercise of this discretion, unless it clearly appears to have been abused. I understand this to be the rule universally followed by all appellate courts.

In the present case the learned trial judge vouched for the competency of the child's testimony by his finding as to the latter's intelligence and understanding of the nature of an oath; and there is nothing in the record to show that the finding was erroneous. The child on his examination declared his belief that an oath meant to tell the truth, and that it is wrong not to do so. The court heard these declarations, and observed from the appearance of the child, not only its degree of intelligence, but the sincerity, with which they were made. We ought, therefore, to accept the finding of the trial judge, and in failing to do so we discard his exercise of discretion, when no abuse appears. It is true the child said he did not know what would be done to him if he failed to tell the truth. Whether he understood the question to refer to future punishment or to that to be immediately inflicted by the court for perjury we do not know; but doubtless the trial judge understood what the child meant.

The authorities on this question are collected in a note to the case of *State v. Meyer*, 135 Iowa, 507, 113 N. W. 322, 124 Am. St. Rep. 291, in 14 Am. & Eng. Ann. Cas. p. 1, and I think that, according to the great weight of authority, both English and American, the majority has reached the wrong conclusion in reversing the judgment on this point. I understand the effect of the decision to be that, before we can sustain the ruling of a trial court in admitting the testimony of a child, the record must affirmatively show that the child took the oath under an immediate sense of responsibility to God. In other words, that his answers must affirmatively show that he has an intelligent

conception of his responsibility to God, and takes the oath under a sense of that responsibility. This is in conflict with the decision of this court in *Flanagin v. State*, supra, where the test is declared to be sufficient intelligence and a capacity to comprehend the nature and effect of an oath. I think this is the only test approved by the great weight of authority. It seems to me that the court falls into error in holding that the record must affirmatively show the capacity of the child. In *Wheeler v. U. S.*, 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244, Judge Brewer, speaking for the court on the admissibility of the testimony of a child witness, said: "This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. \* \* \* So far as can be judged from the not very extended examination which is found in the record, the boy was intelligent, understood the difference between truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear." The best and most concise statement of the rule, and one fully sustained by the authorities, is found in *State v. Reddington*, 7 S. D. 368, 64 N. W. 170, as follows: "No witness, whether child or adult, is required to be able or willing to discuss with the court or counsel either the fact or condition of a future state. He may even have no established views of general theology. He is only required to be able to distinguish the moral difference between right and wrong; and, when the law or the court says he must understand the obligation of an oath, it means only that, possessing such ability to discriminate, he understands that his position as a witness imposes upon him the moral and legal duty to tell only what is true. Whether a witness is so qualified is left in the first instance to the discretionary judgment of the trial court, after informing itself by proper examination."

The Kentucky Court of Appeals in a very recent case, in passing on the ruling of a trial court as to the testimony of a child, said: "His evidence was clear, and showed mental capacity, understanding, and memory sufficient to qualify him. It appears that he

was conscious that the oath bound him to speak the truth, and he knew the difference between telling the truth and telling a lie. It did not disqualify him as a witness that he was not able to define the legal obligation of an oath. Whether his religious training had been so developed that he comprehended his responsibility to God for lying was not made clear, nor was it material as affecting his competency." *Bright v. Commonwealth*, 120 Ky. 298, 86 S. W. 527, 117 Am. St. Rep. 590. The same court in an earlier case said: "The intelligence of the witness is the true test of competency, and that must be determined by the court, while the weight to be given to the evidence is for the jury. A child may be ignorant of 'God' and of the evil of lying and of the punishment prescribed therefor, both here and hereafter, and yet have sufficient intelligence to truthfully narrate facts to which its attention is directed." *White v. Commonwealth*, 96 Ky. 180, 28 S. W. 340. The Pennsylvania court in a case of this kind said: "It seems to us that the crude and shadowy beliefs of small children concerning God and the hereafter are so uncertain that the tests, based upon religious instruction, even though given by the trial judge himself, are of little or no moment, and should rather be discarded than followed in this enlightened age. The whole purpose of the trial is to ascertain the truth, and the oath is in pursuance of that object. If the witness understands that this is demanded and that punishment will follow its violation, it is sufficient. It is the substance, instead of the form, that is required, and, if we secure this, there would seem to be little benefit in pursuing the shadow. A witness may easily show intelligence and understanding without being asked each perfunctory question." *Commonwealth v. Furman*, 211 Pa. 549, 60 Atl. 1089, 107 Am. St. Rep. 594.

The evidence in the present case shows that the defendant is guilty of the horrible crime of which he was convicted. The testimony of the child witness was heard by the trial judge, who pronounced him of sufficient natural intelligence and of sufficient capacity to comprehend the nature and effect of an oath. The trial was a fair one, and the record is, I think, free from error, and the judgment should be affirmed.

#### HOGUE v. STATE.

(Supreme Court of Arkansas. Jan. 17, 1910.)

#### 1. HOMICIDE (§ 253\*)—MURDER IN THE FIRST DEGREE—EVIDENCE—SUFFICIENCY.

Evidence held to support a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 253.\*]

#### 2. HOMICIDE (§ 234\*)—MURDER—EVIDENCE.

Proof that accused and decedent went away from home and friends, and lived together in a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

deserted cabin in the woods, hunting and trapping; that accused was seen leaving the cabin early one morning; that about two months later decedent's decomposed body with gunshot wounds in the head was found in the cabin—established circumstances which, if unexplained by accused, tended to establish his guilt of murder.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 234.\*]

### 3. CRIMINAL LAW (§ 673\*)—EVIDENCE—ADMISSIBILITY.

Since proof of acts not tending to prove or disprove the charge is inadmissible, the mere admission of evidence is equivalent to a statement by the court that it tends in some degree to sustain the issue, though its weight is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 673.\*]

### 4. CRIMINAL LAW (§§ 763, 764\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE—"TEND."

An instruction that certain circumstances tended to establish accused's guilt, but were not alone sufficient to warrant a conviction, was not on the weight of the evidence, but was a statement that the circumstance might be considered in determining the issue; the word "tend" meaning to move in a certain direction, to be directed as to an end, object, or purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748; Dec. Dig. §§ 763, 764.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7814.]

### 5. CRIMINAL LAW (§ 823\*)—INSTRUCTIONS—SINGLING OUT PARTICULAR FACTS—PREJUDICIAL ERROR.

The giving of an instruction which singles out a circumstance and emphasizes it is not prejudicial, where the court in the charge directs the jury to consider all the facts proved, and that the facts must be consistent with each other, and with the guilt of accused to warrant his conviction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 823.\*]

### 6. CRIMINAL LAW (§ 761\*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

An instruction that, if accused has made false, improbable, or contradictory statements in attempting to explain suspicious circumstances, the jury may consider the same, is not objectionable as assuming the existence of suspicious circumstances for accused to explain, but leaves the question to the jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 761.\*]

### 7. HOMICIDE (§ 144\*)—MURDER—MOTIVE.

The state in a homicide case need not prove motive to establish the guilt of accused, and the fact that motive is not shown is not a circumstance in favor of innocence, though the absence of motive is a circumstance to be considered with other facts in determining guilt or innocence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 261; Dec. Dig. § 144.\*]

Battle and Hart, JJ., dissenting.

Appeal from Circuit Court, Perry County; Guy Fulk, Judge.

Walter Hogue was convicted of murder in the first degree, and he appeals. Affirmed.

Walter Hogue, pro se. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. Defendant, Walter Hogue, was indicted by the grand jury of Perry county at the February term, 1909, for the crime of murder in the first degree, charging him with the killing of Grover Misner in Perry county on November 29, 1908. The case was tried at the August term, 1909, and he was convicted of murder in the first degree as charged in the indictment. The testimony adduced by the state tended to establish the following state of facts:

Defendant lived in Scott county, Ark., and Misner lived in Crawford county with his mother, and he raised and gathered a crop of cotton that year. In the fall of the year defendant visited Crawford county, and while there he and Misner, who were both young men, planned to go on a hunting and trapping trip. They left home for that purpose early in November. Misner had just sold his crop, consisting of three bales of cotton, and had a considerable portion of the proceeds with him. Misner had a Winchester rifle, a watch, and a suit case when they started on the trip. The pair first went to Ft. Smith, thence to Mansfield, where they remained a few days, thence to Ola, and from Ola they went down into the bottoms near a lake. Misner purchased a lot of traps and other supplies for the trip. They remained on this lake for a while, and then went to Alpin, in Perry county, and camped near a bridge on Fourche bayou. On or about the 25th of November they moved their camp to a deserted cabin in the Fourche bottom, about two miles from Alpin. On Sunday, November 29th, two of the witnesses, hearing gun or pistol shots down in the bottom, went to the cabin, and there found the defendant and Misner engaged in skinning a coon, which they claimed to have caught in a trap that morning. This was the last seen of Misner until his decomposed body was found in the cabin by two of the witnesses on January 21, 1909.

Very early on the morning of November 30th defendant was seen to pass the house of a witness going toward Casa, Ark., and it was proved by another witness that he boarded a freight train at Casa that morning and paid his fare to Mansfield, exhibiting at the time a considerable roll of money. A witness who saw him at Mansfield about December 1st stated that he told him that he had gotten tired of trapping, and had sold out to his partner, who had gone to Louisiana. He also stated to this witness that he had made about \$80 trapping. The body of Misner was discovered by Dr. Matthews and a Mr. Wallace, who lived at Alpin, and, when passing the deserted cabin in the bottom, they were attracted by the odor which came from the inside, and on investigation found the decomposed body. The cabin door was fastened with a lock which Wallace had sold to defendant. The body was found in the corner of the cabin lying on some corn shucks, with

a wagon sheet under and over it. The face was turned toward the wall, and there were three bullet holes in the back of the skull. There was a piece of cloth with Misner's name on it sewed on the inside of the hip pocket of the pantaloons, and there was a tablet lying near the body with Misner's name on it. His shoes were sitting near the body when found. Defendant had a white hat when he left on the trip, and Misner was wearing a black hat, but, when defendant was seen going to Casa, he was wearing a black hat, and his own hat was in the cabin at the time Misner's body was found. A cuff button was found near defendant's cell in jail which was identified as the property of Misner, and, when arrested, he had a watch which the testimony tended to identify as one owned by Misner. A number of contradictory statements made by defendant were proved as to what became of Misner and where he left him, and, among other things, he stated to one witness that he had not been in Perry county. A fellow prisoner in jail testified that defendant confessed to him while in jail that he had killed Misner for his money. Taking all these facts and circumstances into consideration, there was abundant testimony to justify the finding of the jury that Misner came to his death at the hands of defendant, and that it was murder in the first degree.

The instructions given by the court were very full, and covered every phase of the case. Several were given at the instance of defendant's counsel, but many more requested by him were refused. Those refused related mainly to the question of reasonable doubt and presumption of innocence; but, as all of the refused instructions were substantially covered by others given, there was no error in refusing them. The instructions given and refused are too numerous to be copied here or discussed in detail.

The court gave, over defendant's objection, the following instruction, which is assigned as error: "(2) You are instructed that if you believe from the evidence in this case that the defendant was the last person ever seen with the deceased, and that he had never been seen since that time, and that the defendant had failed to account for or explain his absence, these are circumstances which tend to establish the defendant's guilt, but are not alone sufficient to warrant a conviction. It must also appear from the evidence that the deceased, Grover Misner, came to his death by the agency of the defendant." The instruction is objected to on the ground that it is a charge on the weight of the evidence, and that it improperly singles out one circumstance and emphasizes it. This instruction is almost an exact copy of an instruction which was approved by this court in *Edmonds v. State*, 34 Ark. 720. The peculiar facts of the *Edmonds* Case were such as to give greater force to the fact of the defend-

ant having failed to account for or explain the disappearance of the deceased. But this difference relates merely to the weight to be given to the circumstance, and not to the correctness of the instruction. In that case the deceased was a woman, whom defendant had brought from Kentucky, and with whom he was living in illicit relations when she disappeared. In the present case Misner was scarcely more than a mere boy, though only a few years younger than defendant, and they were both far from home, away from friends and acquaintances, living together in a deserted cabin in the woods. The peculiar circumstances surrounding their separation and the finding of the body of Misner in the deserted cabin after defendant had left it constituted a circumstance which, if unexplained by defendant, tended with great force to establish his guilt.

It is insisted that the use of the words "circumstances which tend to establish the defendant's guilt" was an instruction on the weight of the evidence. We do not so construe the language. Trial judges should not admit proof of circumstances which do not tend to prove or disprove the charge, and the mere admission of the evidence is equivalent to a statement by the court that it tends in some degree to sustain the issue, though the weight to be given to it is left to the jury. Webster defines the word "tend" as "to move in a certain direction; to be directed, as to any end, object or purpose; to aim; to have or give leaning; to exert activity, to influence; to serve as a means; to contribute." Now, to say that a thing tends or has a tendency to establish a certain state of facts is not a declaration as to the weight to be given to it, but is a mere statement that it is directed toward or moves in the direction of a certain result, the degree of its force not being mentioned. To say that a circumstance tends to prove the issue is no more than saying that it may be considered for the purpose of determining the issue.

This identical question has been passed on by the Supreme Court of Indiana in two cases—*Smith v. State*, 142 Ind. 288, 41 N. E. 595, and *White v. State*, 153 Ind. 689, 54 N. E. 763—and in both cases that court reached the same conclusion which we now announce. In the last-cited case the court said: "The statement that there has been evidence 'tending to show' a particular fact is equivalent to a statement that evidence has been offered relating to such fact. The force and effect of the evidence is in no sense suggested by the term. \* \* \* The word 'tending' has not that elastic meaning attributed to it by the appellant's counsel, nor has it a signification in judicial proceedings different from its common and ordinary use. In its primary sense it means direction or course towards any object, effect or result—drift. Webster's Int. Dict. 1484. And it must be presumed, in the absence of any showing to the contrary, that

the jury understood the term in its usual and ordinary sense, and that it was not applied in any way harmful to appellant."

The other objection to the instruction is that it singles out this circumstance and unduly emphasizes it. The practice of framing separate instructions on distinct circumstances, and thus, as it is said, singling them out, is not commendable, and it has been held by this court in several decisions that it is not error to refuse such instructions. *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900; *Ince v. State*, 77 Ark. 418, 88 S. W. 818. But the giving of such an instruction is not prejudicial error, where the court in the whole charge directs the jury to consider all the facts and circumstances proved in the case, and especially where, as in this case, the court instructs that "the facts and circumstances in evidence shall be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence." As already stated, the charge of the court in this case was very full and complete, and presented to the jury for their consideration every phase of the case; and, when the charge is considered as a whole, it cannot be said that any single circumstance is emphasized.

Another instruction given by the court was objected to, on the alleged ground that it assumed that there were suspicious circumstances or appearances in the case for defendant to explain. This instruction is as follows: "(7) If you find from the testimony that the defendant has made false, improbable, inconsistent, or contradictory statements in attempting to explain suspicious circumstances or appearances, then you may consider these matters in determining the guilt or innocence of the defendant." We do not think that this instruction contains an assumption that there were suspicious circumstances or appearances. It leaves that question to be determined by the jury from the evidence.

Error is assigned in the refusal of the court to give the following instruction requested by defendant's counsel: "(19) You are instructed if, upon a careful consideration of all the evidence in the case, you find that there is not shown a motive upon the part of the accused to commit the crime of which he is charged, this is a circumstance in favor of his innocence, which you consider together with all the other facts and circumstances in the case." This instruction was properly refused. The state is not bound to prove a motive in order to establish the guilt of the accused; and the fact that a motive is not shown is not a circumstance in favor of his innocence, though the absence of a motive is a circumstance to be considered with other facts and circumstances in determining his guilt or innocence.

After a careful consideration of the whole

record, we are convinced that the defendant had a fair trial, and that the evidence abundantly establishes his guilt. The judgment is therefore affirmed.

BATTLE and HART, JJ., dissent.

### BLANK et al. v. HUDDLESTON.

(Supreme Court of Arkansas. Dec. 20, 1909.  
On Rehearing, Jan. 31, 1910.)

#### 1. QUIETING TITLE (§ 29\*)—LACHES.

Where plaintiffs' ancestor died in 1861, and they asserted no claim to the land until an action to quiet title was commenced in 1904, and meanwhile defendant and those under whom he held claimed title under deeds running back to 1879, and had paid taxes on the land, and the same had greatly enhanced in value, the suit was barred by laches; an excuse that through financial loss care of the property was neglected not being sufficient.

[Ed. Note.—For other cases, see *Quieting Title*, Dec. Dig. § 29.\*]

On Rehearing.

#### 2. APPEAL AND ERROR (§ 835\*)—MATTERS REVIEWED ON REHEARING.

Questions to which the court's attention was not called in the original brief and abstract cannot be reviewed on rehearing.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3241-3246; Dec. Dig. § 835.\*]

Appeal from Arkansas Chancery Court; J. M. Elliott, Chancellor.

Action by Hannah Blank and others against W. H. Huddleston. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

H. A. Parker and W. N. Carpenter, for appellants. W. H. Huddleston, pro se.

MCCULLOCH, C. J. Plaintiffs (appellants) instituted this action in the chancery court of Arkansas county to quiet their title to two contiguous tracts of wild and unoccupied lands, situated in said county, and to cancel as clouds on their title certain deeds of conveyance under which the defendant is alleged to claim title. The original complaint, filed in 1904, included only one of the tracts, and the other tract was brought into action by an amendment to the complaint filed in September, 1904. Plaintiffs claim as heirs at law of one Jacob S. Blank, who owned the land and died intestate in the year 1861. They allege that defendant is claiming title to the land under a deed from Chas. Blank and wife, dated April 8, 1899, and also under deeds from R. S. Russell, dated July 12, 1879, and from Jesse Russell dated —, 1883. They allege that the defendant and his grantors have paid taxes on the land, and offered to refund same. Defendant filed his answer, in which he denied that the plaintiffs are the owners of the land, and alleges that he (defendant) is the owner thereof under

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the conveyances set forth in the complaint. He alleges also that he and those under whom he claims title have paid taxes on the land since the year 1883, and he pleads, as a defense, laches on the part of plaintiffs in not earlier asserting title to the land. Proof was introduced establishing the fact that plaintiffs are the heirs at law of Jacob S. Blank, and that Chas. L. Blank is not an heir of Jacob S. Blank. The defendant proved that the land had no market value practically 20 years before this time, but that the value had materially increased within the past 4 or 5 years, and had arisen to \$12 or \$15 per acre, and that defendant paid \$11.50 per acre for it. When the case came on for trial, defendant asked for a continuance, in order to take further proof, which motion the court overruled. But the court excluded certified copies of the patent and deed under which the plaintiffs claim title, on the ground that the loss of the originals had not been established, and rendered a decree dismissing the complaint for want of equity. Plaintiffs appealed.

The evidence was, we think, sufficient to establish the loss of the original patent and deed, and the court erred in excluding the certified copies. *Carpenter v. Dressler*, 76 Ark. 400, 89 S. W. 89. But we are of the opinion that upon the pleadings and proof the decree is correct, and should be affirmed, though the ground upon which the chancellor based it is erroneous. Plaintiffs' cause of action in equity is barred by their own laches. Their ancestor died in 1861, and they never asserted any claim to the land until the year 1904, when they commenced the present action. Meanwhile defendant and those under whom he held had claimed title under deeds running as far back as 1879, and had paid taxes on the land, and the same had become greatly enhanced in value. This is sufficient to bar plaintiffs' claim. *Turner v. Burke*, 81 Ark. 352, 99 S. W. 76; *Osceola Land Co. v. Henderson*, 81 Ark. 432, 100 S. W.

896; *Craig v. Hedges*, 119 S. W. 645. The only excuse they give for their failure to earlier assert their claim is that "through financial loss care of property was neglected." This excuse is not sufficient to relieve plaintiffs from the consequences of their negligent failure, under the circumstances of this case, to assert their claim to the land until after so great a lapse of time.

Decree affirmed.

#### On Rehearing.

Appellants now insist that we erred in saying in the former opinion that appellee claimed title to both tracts of land under deeds running as far back as 1879 and 1883, and they urge that, according to the record in this case, appellee's color of title to one tract runs back only to the deed from Chas. Blank to Ingram in 1899, which was about five years before the commencement of this action. If we made an error in this respect it was because of appellant's failure to properly abstract the record, and it is too late now to correct it. The decree should have been affirmed on account of the omission to properly abstract the record. But we undertook to decide the case upon the merits, and understood from the undenied allegations of the amended complaint that appellants were attacking appellee's color of title to both tracts of land under deeds executed in 1879 and 1883, respectively, as well as the additional color of title to one of the same tracts under deed from Blank to Ingram in 1899. The pleadings are open to that construction, and if that be correct the decision is right as to both tracts. If error has been made, the fault is with appellants in not properly abstracting the record.

The rules of this court do not allow matter overlooked by the court to be brought up on petition for rehearing, when attention was not called to it in the original abstract and brief. Rehearing is therefore denied.

**HUGHES v. COMMONWEALTH.**

(Court of Appeals of Kentucky. Jan. 13, 1910.)

**1. ROBBERY (§ 26\*)—PROSECUTION AND PUNISHMENT—QUESTIONS FOR JURY.**

In a prosecution for robbery, evidence held to take the question of defendant's guilt to the jury.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 37; Dec. Dig. § 26.\*]

**2. CRIMINAL LAW (§ 1159\*)—REVIEW—EVIDENCE—SUFFICIENCY.**

Where the evidence was sufficient to take the question of defendant's guilt to the jury, the verdict will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Appeal from Circuit Court, Jefferson County, Criminal Division.

"Not to be officially reported."

William Hughes was convicted of robbery, and appeals. Affirmed.

W. H. Sweeney, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

**BARKER, J.** The appellant, William Hughes, was indicted by the grand jury of Jefferson county, charged with the crime of robbery, committed by unlawfully and forcibly taking from the person of Lewis E. Byrom \$150 in money. To this indictment he pleaded not guilty, but a trial before a petit jury resulted in his being found guilty as charged in the indictment and his punishment being fixed at confinement in the penitentiary for a term of five years. From the judgment enforcing this verdict he has appealed.

The only question made in the brief for appellant is that the evidence was not sufficient to warrant his conviction. The witness Byrom testified positively that the accused met him on the street while the witness was very drunk, knocked him down, and took from his person something over \$100. The witness had been with Hughes during the earlier part of the night at a dance hall, and knew him by sight. He clearly recognized him, and, as said before, testified positively that the defendant was the guilty party. There were two other men with Hughes at the time, one named Bell, and the other Kelly. Bell testified in favor of Hughes, that he (Bell) and Kelly had committed the robbery complained of by Byrom, and that Hughes had nothing to do with it. Bell was contradicted by Officer Fitzgibbons, who testified that Bell had told him when arrested that Hughes, in company with him and Kelly, had committed the robbery. The jury evidently believed Byrom and disbelieved Bell and Hughes, as they had a right to do. There having been sufficient evidence to take the case to the jury on the question of the guilt or innocence of appellant, under our well-settled rule we will not disturb the verdict.

There is no complaint of any error of law committed during the trial to the prejudice of the appellant, and therefore the judgment must be affirmed, and it is so ordered.

**WESTERN UNION TELEGRAPH CO. v. BRASHER.**

(Court of Appeals of Kentucky. Jan. 28, 1910.)

**1. TELEGRAPHS AND TELEPHONES (§ 66\*)—OPERATION—ACTIONS FOR DAMAGES—EVIDENCE.**

Evidence of unsuccessful efforts by a telephone company to find the addressee of a telegram before it was sent is inadmissible to prove diligence of the telegraph company in trying to find him.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 62; Dec. Dig. § 66.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 66\*)—OPERATION—ACTIONS FOR DAMAGES—EVIDENCE.**

A message by a receiving operator who had not completed his search, which merely informed the sending operator that the addressee of a telegram could not be found, was inadmissible to show diligence in trying to find him.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 62; Dec. Dig. § 66.\*]

**3. TELEGRAPHS AND TELEPHONES (§ 66\*)—OPERATION—ACTIONS FOR DAMAGES—EVIDENCE.**

Evidence held to justify a verdict finding that a telegraph company was negligent in failing to deliver a telegram.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 63; Dec. Dig. § 66.\*]

**4. TRIAL (§ 252\*)—OPERATION—ACTIONS FOR DAMAGES—INSTRUCTIONS.**

Where there was some evidence that plaintiff could have reached his mother's bedside before her death if defendant had used due diligence in delivering a telegram announcing her illness, it was not error to instruct on that theory.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

**5. TELEGRAPHS AND TELEPHONES (§ 73\*)—OPERATION—ACTION FOR DAMAGES—QUESTION FOR JURY—REASONABLENESS OF REGULATIONS.**

Whether a telegraph company's rule governing the handling of messages is reasonable is a question for the court.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 76; Dec. Dig. § 73.\*]

**6. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.**

Where there was evidence that negligence in failing to deliver a telegram occurred both before and after the hours specified in a rule, under which messengers were not required to deliver telegrams between 7 p. m. and 7 a. m., an instruction that defendant had the right to make and enforce reasonable regulations governing the handling of messages, though defective in omitting to advise the jury that the rule was reasonable, was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

**7. TRIAL (§ 219\*)—INSTRUCTIONS—DEFINITION OF TERMS.**

The court having charged that defendant was only required to use reasonable diligence in

delivering a telegram, the failure to define "ordinary care" as used in the instructions was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 489; Dec. Dig. § 219.\*]

**8. TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS.**

It is not error to refuse instructions offered, though correct, where the jury have been fully instructed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from Circuit Court, Muhlenberg County.

"To be officially reported."

Action by W. E. Brasher against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. E. Richardson and Browder & Browder, for appellant. R. Y. Thomas, Jr., for appellee.

**SETTLE, J.** Appellee recovered of appellant in the court below a verdict and judgment for \$500 damages, on account of its alleged negligent failure to deliver, in a reasonable time, the following telegram sent appellee, at Central City, by his brother, through Harry Turner, from Russellville, Ky.: "1/26/1908. Russellville, Ky. To W. Brasher, Central City, Ky. Your mother is dying. D. Brasher." According to the averments of the petition, and evidence introduced in appellee's behalf, the telegram was delivered by the sender to appellant's Russellville operator about 2 o'clock p. m., Sunday, January 26, 1908, to be immediately transmitted and delivered to appellee at Central City, but it was not in fact received by appellee until a week later, upon his calling at appellant's Central City office for it, after being advised by a letter from his brother that the telegram had been sent him. The purpose of the telegram, as alleged in the petition, and shown by the evidence, was to apprise appellee of the fact that his mother was then believed to be dying; that he might reach her bedside before her death, or in any event, get to her residence in time to be present at her burial, neither of which was he able to do, as his mother died between 7 and 8 o'clock p. m., of January 26, 1908, and was buried between 12 and 1 o'clock in the afternoon of the following day, January 27, 1908. It was further alleged in the petition, and appellee's evidence tended to prove, that but for the negligence of appellant's agents in transmitting the telegram, and in the matter of failing to deliver it, he would have gotten to his mother before her death and been able to attend her burial, and that the negligence of appellant in thus preventing him from seeing his mother before her death, and from attending her burial, caused appellee great mental anguish, and suffering, for which he asked \$1,999, damages. Appellant's answer traversed the affirmative matter of the petition, except the averment of its

receiving, at Russellville and transmitting to Central City, the telegram in question, and as to this the answer alleged that the telegram was received by appellant's Russellville operator at 2:50 o'clock p. m., January 26, 1908, and transmitted at once over its lines to Central City, where it was received by its agent there at 4:23 o'clock p. m., and immediately placed in the hands of a messenger for delivery to appellee, but that after a reasonable effort to find appellee, and failing to do so, the telegram was returned by the messenger to its Central City office, where it remained until 7:30 o'clock a. m., on the following day, and was then given to another messenger for delivery to appellee; that this messenger also made diligent effort to find appellee, but failed to do so, whereupon he returned the telegram to the Central City office, where it remained until called for by appellee, a week later. Numerous grounds were filed in support of the motion for a new trial made in the court below, but we will notice only such of these as are urged for a reversal of the judgment appealed from.

It is complained by appellant that the circuit court erred in refusing to permit it to prove on the trial that Sargent, assistant messenger of a telephone company at Central City, attempted, without success, before the telegram was sent by Turner, to ascertain, in response to a telephone call from the latter, the residence of appellee, that Turner might by telephone inform him of the condition of his mother. We do not think this ruling of the court was improper. The failure of appellant's agents to find appellee could not have been excused upon the ground that another could not or did not do so; nor would the efforts of Sargent to find appellee show whether appellant's agents were properly diligent in their efforts to do so. In other words, the diligence or negligence of one person cannot be shown by the diligence or negligence of another person. Turner was allowed to testify, without objection, that he tried to reach appellee by telephone before sending him the telegram, and failed, and this, if competent at all, brought to the attention of the jury the fact that he was not, and could not be, advised of the condition of his mother by telephone, which was as far as the inquiry should have been carried.

It is also contended by appellant's counsel that the trial court erred in refusing to permit the introduction of a telegram appellant's Central City operator sent to its Russellville agent, informing him that appellee had not been, or could not be, found. This message was sent after the failure of the first effort of appellant's Central City agents to find appellee, indeed, in less than an hour of the time the original telegram reached Central City, and before the alleged attempt to find

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

him the next morning, and it did not indicate what efforts or means had been employed to find him, or show that they had used ordinary care to do so. The telegram might have been based upon the mere belief of the Central City operator that, as appellee was personally unknown to him, or there was no one present of whom his whereabouts could be asked, he could not be found. When the telegram was sent from Central City appellant's agents had not completed their search for appellee, and had not at that time reasonably discharged their duty either to appellee, or the sender of the original telegram. In the absence of proof showing that the telegram sent from the Central City office was intended for appellee's brother, sender of the original telegram, or Turner, both of whom lived five miles from Russellville, or of any effort to get it to them, it cannot fairly be claimed that the purpose of the Central City operator in sending it was to get information as to the whereabouts of appellee; indeed, the telegram contained no such request, and obtained no response. Such evidence is closely akin to the self-serving declaration of one charged with a negligent act, made following the act, and to excuse or justify it. We are therefore of opinion that the exclusion of the telegram in question was not error.

It is further contended by counsel for appellant that the verdict was flagrantly against, and not authorized by, the evidence, which, it is claimed, showed that appellant and its agents used all the care and diligence the law required of them in endeavoring to deliver appellee the telegram from his brother, and that had the telegram been delivered appellee as soon as received at Central City, he could not have gotten to his mother before her death, or if delivered to him the morning following, before the arrival at Central City of the first train going to Russellville, he could not have reached his mother's bedside before her burial. On the other hand, it is insisted for appellee that appellant's Russellville agent negligently delayed sending the telegram; that as Central City is but 37 miles from Russellville, even if the telegram was given the Russellville operator at 2:50 o'clock, as admitted in the answer, it ought to have been received at the Central City office more than an hour earlier than it was received, which would have given the messenger boy that much more time than he had, for trying to find appellee. It is also insisted for appellee that appellant's Central City agents could with ordinary care have found appellee, and delivered him the telegram in time for him to take the passenger train which passed Central City at 5:13 o'clock p. m., and arrived at Russellville at 7 p. m., which would have enabled him to get to his mother before her death, or, in any event, that with such a delivery of the telegram as they might and could have made, he could have taken a passenger train leaving Central City at 8:50 o'clock a. m. the next

day, which would have enabled him to reach Russellville at 10:50 a. m., and his mother's residence in time for her burial. As to these several propositions there was a contrariety of evidence. That of appellee showed that he was a miner by occupation, that he had lived in Central City, and been in the employ of the Central Coal & Iron Company more than three years, during the whole of which time his residence had been at the same place, and within 400 or 500 yards of appellant's telegraph office. He also proved by business men of Central City, such as Howey, Carr, Robertson, Casebier, Kittinger, and Franklin, whose stores or other places of business were near the telegraph office, that they knew appellee and his place of residence, and that inquiry of any of them by appellant's messenger would have enabled him to ascertain without difficulty where appellee lived, and how to find him. Appellee also proved that the Central Coal & Iron Company owned a large store situated near appellant's office, where appellee and others in its employ received their wages, purchased their supplies, and were in the habit of congregating when not at work, and that inquiry at this store would certainly have enabled the messenger to ascertain appellee's place of residence and of his work. It is true that the stores or other places of business of the persons named, except a drug store of one of them, were not open on the Sunday afternoon and evening the telegram to appellee was received by appellant's Central City office, but they were all open by 7 o'clock Monday morning and during the time of the alleged efforts then made by the messenger to find appellee, and yet he made no inquiry at any of these places. In proof of its diligence in trying to find appellee appellant introduced Gish, Crane, Boyd, and Woodburn, the last a physician, and all residents of Central City, to each of whom one or the other of the messengers sent out with the telegram made inquiry for appellee's residence. But none of them knew where he lived. This conflicting evidence all went to and was considered by the jury, and from it all it was their province to determine the question of appellant's diligence, or want of diligence, in the matter of delivering the telegram, and we cannot say that there was not testimony to justify their finding that appellant was negligent.

As to the question whether appellee could have reached his mother's bedside before her death, if the telegram had been delivered before the departure from Central City of the 5:13 o'clock afternoon train Sunday, there is much doubt, but we are unable to say that there was not some and at least a scintilla of evidence conducing to prove that he might have done so. According to the testimony of one witness the mother died between 8 and 9 o'clock Sunday evening. If this was true, appellee could have gotten to her before her death, as the 5:13 train arrived at Russell-

ville at 7 o'clock, and the distance of five miles to the mother's residence might reasonably have been made by 8 o'clock. On the other hand, if her death occurred about or shortly before 8 o'clock, it is still barely possible that appellee might have gotten there before she died. The fact, however, that another witness, the son who directed the sending of the telegram, indefinitely testified that she died between 7 and 8 o'clock, makes it extremely doubtful that he could have done so. But it is clear from the evidence that if the telegram had been delivered to appellee in time for him to have taken the 8:50 morning train, which arrived at Russellville an hour later, he could have gotten to the mother's residence before the burial.

Appellant's counsel seriously object to some of the instructions given by the trial court, and these objections, after careful consideration, we think untenable. They contend that instruction No. 1 should have omitted any mention of the right of the jury to find for appellee because of his failure to get to his mother before her death. In other words, that the instruction should have confined the right of recovery, if the jury had found appellant guilty of negligence in failing to deliver the telegram, to such a sum in damages as would have compensated him for mental anguish, if any, resulting from his inability to attend his mother's funeral. We do not think the instruction defective in the particular named; for, as previously indicated in the opinion, there was some evidence upon which to hypothecate that part of the instruction objected to.

We do not understand that instructions 2 and 3 are objected to by counsel, but it is complained of instruction 4 that it stopped short of properly presenting to the jury the right of appellant to adopt and follow the rule, shown in evidence, under which its messengers were not required to deliver at Central City telegrams between the hours of 7 p. m. and 7 a. m. The instruction in question is as follows: "The court instructs the jury that the defendant had the right to make reasonable regulations governing the handling of messages received by it for transmission, and to conduct its business in accordance with such regulations." It must be conceded that it would have been better for the court to have added to this instruction, if given at all, such words as would have enabled the jury to understand that the rule in question was one of the reasonable regulations which the appellant had the right to enforce, as the matter of whether such a rule was reasonable or otherwise, the facts showing the rule being admitted, was one for the court and not the jury to determine. But we are unwilling to hold that the instruction in the form given was prejudicial to appellant, for, according to the evidence appellant's negligence, if there was any, oc-

curred either before 7 o'clock p. m. or after 7 o'clock a. m. following its reception of the telegram at Central City, or both before and after those hours. Moreover, it is questionable whether the court should have given instruction No. 4 at all, in view of the fact that the rule contended for by appellant was not pleaded in its answer.

It is also insisted for appellant that the trial court erred in failing to give an instruction defining "ordinary care" as used in the instructions. In response to this we can only say that such an instruction would have been proper, but the failure of the court to give it was not error, in view of the fact that instructions 1, 2, and 3 all advised the jury in apt terms that appellant was only required to use reasonable diligence in sending or delivering the telegram.

Several of the instructions offered by appellant might with propriety have been given by the court; but, as those that were given seem to us to have presented all the law necessary for the guidance of the jury in arriving at a verdict, it was not error for the court to refuse those offered by appellant.

It follows from what we have said that there was no error in the refusal of the trial court to give the peremptory instruction asked by appellant; and, as on the whole record we have discovered no error that was prejudicial to the substantial rights of the appellant, the judgment is affirmed.

SPALDING v. WATHEN, MUELLER & CO.  
(Court of Appeals of Kentucky. Feb. 4, 1910.)

APPEAL AND ERROR (§ 45\*)—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY.

Under Ky. St. § 950 (Russell's St. § 2784), providing that no appeal can be taken to the Court of Appeals from a judgment for the recovery of money in amount less than \$200, no appeal lies from a dismissal on plaintiff's failure to plead further after demurrer sustained to his petition in an action to recover clerk's fees amounting to \$55.30.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 172-197; Dec. Dig. § 45.\*]

Appeal from Circuit Court, Marion County.  
"To be officially reported."

Action by Tom B. Spalding, clerk, against Wathen, Mueller & Co. From a judgment for defendant, plaintiff appeals. Dismissed.

John McChord and W. W. Spaulding, for appellant. Samuel Avritt, Lafe. S. Pence, and S. A. Russell, for appellee.

HOBSON, J. Tom B. Spalding is the clerk of the Marion circuit court. There were a number of indictments pending in that court against Wathen, Mueller & Co., in which Spalding's fees against them amounted to \$55.30. He brought this suit on October 12, 1909, against them to recover this amount, charging that the services were rendered to

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the defendants more than 60 days before the filing of the petition and since January 1, 1900. The defendants filed a general demurrer to the petition. The circuit court sustained the demurrer. The plaintiff failing to plead further, the action was dismissed, and the plaintiff has appealed to this court. The defendants have entered a motion to dismiss the appeal for want of jurisdiction; and this is the first question to be determined on the appeal.

Section 950, Ky. St. (Russell's St. § 2784), among other things provides: "No appeal shall be taken to the court of appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than two hundred dollars, exclusive of interest and cost." After specifying other cases not here material, in which no appeal may be taken, the section concludes with these words: "In all other civil cases, the court of appeals shall have appellate jurisdiction over the final orders and judgments of all courts." This is an action to recover \$55.30. The judgment dismissing the petition is simply a judgment refusing a recovery of \$55.30. The value in controversy is \$55.30. Nothing else is involved. The case, therefore, falls literally within the provision of the statute above quoted. The cases relied on by appellant in which this court took jurisdiction were all appeals from judgments which were not for the recovery of money or personal property. Thus in *Ex parte Herrick*, 78 Ky. 23, the appeal was taken from an order refusing to issue to a witness a certificate of his attendance. The thing there in controversy was the right of the witness to a certain paper. By the statute this court has jurisdiction in all cases subject to the exceptions it contains. One of the exceptions is that no appeal shall be taken from a judgment for the recovery of money or personal property if the value in controversy be less than \$200, exclusive of interest and cost. To bring a case within the exception, the appeal must be taken from a judgment for the recovery of money or personal property, and the value in controversy must be less than \$200. In the *Herrick* Case the value in controversy was less than \$200; but the appeal was not taken from a judgment for the recovery of money or personal property. In *Shackleford v. Phillips*, 112 Ky. 563, 66 S. W. 419, 68 S. W. 441, the appeal was taken from a judgment sustaining an injunction enjoining the collection of a fee bill. The value in controversy was less than \$200, but the judgment was not for the recovery of money or personal property. It was simply a judgment granting an injunction. In *Willis v. Thornton*, 78 S. W. 215, plaintiff obtained an injunction on the ground that she did not live within the taxing district, and was

therefore not liable to be taxed in it. The judgment was not for the recovery of money, but to enjoin the collection of a tax. The thing in controversy there was not the amount of the tax, but the liability of plaintiff's property to be taxed in the district. It is insisted for appellant that the thing in controversy here between the parties is the legality of the fee bills, and that this would appear if an answer was filed. Still, if an answer had been filed, and the court had sustained the fee bills, he would only have entered a judgment for the recovery of \$55.30; and, if he had held the answer good, he would simply have denied a recovery for \$55.30. Nothing but this sum of money is involved in the action. The fact that the value in controversy is less than \$200 will not deprive this court of jurisdiction, unless the judgment is for the recovery of money or personal property; but here the value in controversy is less than \$200, and the judgment is for the recovery of money. The motion to dismiss the appeal must therefore be sustained.

Appeal dismissed.

#### RAY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 2, 1910.)

##### 1. CRIMINAL LAW (§ 1156\*)—APPEAL—DENIAL OF NEW TRIAL—REVIEW.

Under Cr. Code Prac. § 281, providing that the decision of the court on a motion for a new trial shall not be subject to exception, the court on appeal cannot reverse for errors in refusing a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.\*]

##### 2. CRIMINAL LAW (§ 593\*)—CONTINUANCE—ABSENCE OF COUNSEL.

Where the counsel appointed for accused charged with murder obtained a disagreement on the first trial, and was absent at the time of the second trial, after he had investigated the case and had ascertained that accused had borne a reputation for peace and good order, and at times prior to the homicide had not been responsible, and had also found witnesses to corroborate those who testified for defendant on the first trial, the refusal to grant a continuance to give accused the benefit of the presence of counsel, and to compel him to go to trial with new counsel ignorant of the facts, was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1320; Dec. Dig. § 593.\*]

Appeal from Circuit Court, Logan County.  
"Not to be officially reported."

Dan Ray was convicted of murder, and he appeals. Reversed and remanded.

J. C. Browder, Geo. S. Hardy, and G. W. Merritt, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

NUNN, C. J. In the summer of 1908 appellant, a colored man, suddenly and without any apparent provocation, shot his wife five times and killed her, and, having no

more cartridges for his pistol, seized a butcher's knife and attempted suicide, cutting his throat, severing the windpipe, and otherwise dangerously injuring himself. The tragedy occurred in a residence portion of the town of Russellville on a Sunday afternoon. No one witnessed the full occurrence, though Dora Ballance, the six year old child of the dead woman, heard and saw a part of the occurrence. Neighbors, being attracted by the sound of the shots, hurried to the scene. They found the woman dead lying face down in the yard and appellant behind the corner of the house, kneeling, with the blood gashing from the apparently fatal wound in his throat. He could not speak. The physicians sewed the wound up at once, which required 42 stitches, and he recovered. At the following September term of the circuit court appellant was indicted for willful murder. His case came on for trial, and, he having no means, the court appointed an attorney, J. C. Browder, to defend him. The commonwealth introduced its proof. Appellant denied all remembrance of any part of the tragedy, and swore he knew nothing of it. A few responsible persons testified to his previous good character, and upon this testimony the jury failed to agree. At the next term of the court, in May, his appointed counsel, J. C. Browder, was in the state of Illinois attending court, and could not be present in the Logan circuit court at that term, and this fact was made known to the court when appellant's case was called for trial. The court, however, refused to pass the case or grant a continuance and appointed other counsel to represent appellant, and they filed an affidavit stating, in effect, that they knew nothing about the case or about appellant's defense; that Browder was necessarily absent; that he (Browder) understood, to some extent, appellant's case and defense, and asked a continuance of the case until Browder could return. The court refused the continuance, and compelled appellant to enter into trial with his newly appointed counsel. The commonwealth introduced its evidence, which showed that appellant shot and killed his wife without any known cause. Appellant was introduced and testified as before that he had no recollection or knowledge of the transaction; that he did not know when he shot his wife or when he cut his throat. It appears that his newly appointed counsel did not know that he had witnesses to prove his previous good character, and they were not introduced for that reason, although some of them were in the courtroom at the time of the trial. Upon this testimony the jury returned a verdict inflicting the death penalty. Soon after this verdict was rendered, Browder returned home, and he with the other counsel filed a motion for a new trial, setting forth, in substance, the above facts, together with a dozen or more affidavits showing the pre-

vious good reputation of appellant; that he was a hard worker and of a peaceable disposition, and for some years last past had been subject to spells of some kind, supposed to be epilepsy; and that, when under such spells, he seemed to be unconscious for several minutes or hours. Browder stated in his affidavit that between the two courts named he had investigated the case and learned a great many of these facts, but not all that were presented on a motion for a new trial, and that he intended to present them in appellant's defense on his second trial, but was prevented from so doing by reason of his absence from the May term of the court, as stated; that, before leaving, he informed the court of the trip he was compelled to take to Illinois; that he expected a continuance of the case, as appellant was then confined in jail and all the witnesses for the commonwealth resided in the town of Russellville, and the continuance of the case would not work a hardship upon or inconvenience any one.

Under section 281, Cr. Code Prac., this court cannot reverse for errors committed by the lower court in refusing to grant a new trial. Therefore the only question is: Did the lower court abuse its discretion in refusing to grant a continuance of the case for the reason of the unavoidable absence of his first appointed counsel? Appellant was in no wise responsible for Browder's absence. It appears that at the first trial Browder had investigated the case sufficiently to ascertain that appellant had borne a good reputation for peace, good order, and a good wage earner prior to his trouble, and with this testimony and that of appellant succeeded in averting a death penalty on the first trial, and he had found other witnesses who would corroborate those who testified on the first trial and would testify to other facts that would have in all probability been beneficial to his defense. The affidavit showed that appellant was deprived of the benefit of this testimony, as his newly appointed counsel had no information or knowledge thereof, as they had not expected to defend him until after the case was called for trial. The affidavits filed with the motion for a new trial tended to show that at times prior to the alleged offense appellant was not responsible for his conduct; that he was unconscious of his acts. We cannot say what effect this evidence would have had upon the mind of the jury. The verdict might have been the same, or it might have, at least, caused the assessment of a less penalty, and the court should have granted a continuance and have permitted appellant to have the benefit of his first appointed counsel and the testimony of the witnesses referred to.

For these reasons, the judgment of the lower court is reversed and remanded for a new trial.

**PERKINS v. COMMONWEALTH.**

(Court of Appeals of Kentucky. Jan. 26, 1910.)

**1. RAPE (§ 52\*)—STATUTORY RAPE—AGE OF PROSECUTRIX—EVIDENCE.**

Evidence on statutory rape held to authorize a finding that prosecutrix was under 16 years old.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 52.\*]

**2. RAPE (§ 52\*)—STATUTORY RAPE—EVIDENCE.**

Evidence held sufficient to warrant a conviction of statutory rape.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 52.\*]

**3. CRIMINAL LAW (§ 1159\*)—APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.**

The Supreme Court in a criminal case is, as to the sufficiency of the evidence, restricted to the inquiry whether there was any competent evidence conducing to show defendant's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

**4. CRIMINAL LAW (§ 1035\*)—APPEAL—REVIEW—DECISION ON MOTION FOR NEW TRIAL.**

Even though failure to exclude a witness from the courtroom while other witnesses were testifying was error, there can be no reversal therefor, the matter having been brought to the court's attention for the first time on motion for new trial; Cr. Code Prac. § 281, declaring decisions on motions for new trial not subject to exception.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1035.\*]

**5. CRIMINAL LAW (§ 665\*)—PLACING WITNESSES UNDER THE RULE—EXEMPTION—DISCRETION.**

A witness being an officer of the court, it may in its discretion exempt him from the operation of the rule.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1549-1566½; Dec. Dig. § 665.\*]

**6. RAPE (§§ 6, 13\*)—STATUTORY RAPE—FORCE.**

Under Ky. St. § 1155 (Russell's St. § 3773), declaring a punishment for carnally knowing a female under 16 years old, force or unlawful assault are not essential to the crime.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 6, 12; Dec. Dig. §§ 6, 13.\*]

**7. RAPE (§ 50\*)—STATUTORY RAPE—ATTEMPT.**

The offense denounced by Ky. St. § 1155 (Russell's St. § 3773), carnally knowing a female under the age of 16 years, being rape, evidence on a prosecution thereunder of unsuccessful attempts at intercourse warrants an instruction submitting the question of attempted rape, punishable under section 1153.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 50.\*]

Appeal from Circuit Court, Jefferson County, Criminal Division.

"Not to be officially reported."

Lee Perkins appeals from a conviction. Affirmed.

W. H. Sweeney, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

**SETTLE, J.** The appellant was tried and convicted in the court below, and his punishment fixed at 10 years' confinement in the

penitentiary, under an indictment charging him with the crime of carnally knowing a female under the age of 16 years.

Appellant's motion for a new trial, which the circuit court overruled, was based on the grounds: (1) That the jury were not properly instructed. (2) That the verdict was extremely harsh and not supported or justified by the law or evidence. (3) That the evidence conclusively proved the prosecutrix to be over 16 years of age when the alleged crime was committed. (4) That the court improperly allowed the arresting officer to testify for the commonwealth as to an alleged confession of guilt made by appellant on the examining trial without excluding him from the courtroom during the introduction of evidence with other witnesses.

The witnesses were few and the evidence brief. The prosecutrix, Jessie Nicholson, and appellant, are both negroes. The former testified that appellant required her to go black-berrying with him, and on the way compelled her to have sexual intercourse with him at a strawstack, the act being consummated by complete penetration and in the usual manner; that she was at that time, according to information received of her mother, 11 years of age; that appellant had on previous occasions repeatedly had sexual intercourse with her, and even earlier attempted such intercourse when she was too young to be penetrated by him. The mother of the prosecutrix, who was living in adultery with appellant at the time of his arrest and had so lived with him several years, testified that the daughter was 11 years of age at the time of the alleged commission by appellant of the last act of sexual intercourse with her, and also that the daughter a day or two after that occurrence, in order to escape the illicit pursuit of appellant, left her home and obtained employment in the neighborhood, and that upon returning home the following Sunday she was whipped by appellant for absenting herself.

The commonwealth proved by Tyler, the county patrolman who arrested appellant, that the latter on the examining trial admitted his guilt of the crime charged, and, furthermore, that, when he first attempted sexual intercourse with the prosecutrix, he was unable to penetrate her, and satisfied himself by using her with her legs crossed.

Upon being introduced in his own behalf, appellant denied that he at any time had sexual intercourse with the prosecutrix, but stated that she had tried to get him to do so. He, however, admitted in substance the confession to the examining court testified to by the arresting officer, but claimed that his purpose in doing so was to secure bail. He further testified that the prosecutrix was over 16 years of age at the time of the alleged commission of the crime for which he

was indicted; that she was but a babe when he commenced to live with her mother, but was old enough to walk when appellant commenced to work upon the farm of Charles Huntsinger in whose service he continued 11 years, and from whose service he entered that of Huntsinger's father, with whom he lived 4 years. Charles Huntsinger testified that it was his recollection that the prosecutrix was 18 months or 2 years old when her mother and appellant entered his service, and also his recollection that they have lived with his father several years since leaving him. Neither this witness nor the appellant gave any dates, not even the year, of the latter's entering or quitting the witness' service. In view of this lack of data and the otherwise indefinite character of the testimony of appellant and his chief witness, and of the fact that the mother should know better than all of others the age of her child, the jury evidently thought it safer to rely upon her knowledge and recollection of the matter. Besides, the girl was herself in the presence of the jury while testifying, which gave them a good opportunity of arriving at an approximately correct idea of her age. Two other witnesses for appellant testified as to his character for integrity; but this testimony doubtless had little weight with the jury in view of appellant's admitted adulterous relations, covering 11 years, with the mother of the prosecutrix. Manifestly we cannot sustain appellant's contention that the verdict was wholly unsupported by the evidence, for there was considerable evidence to authorize it, and in a criminal case this court is, as to the evidence, restricted to the single inquiry whether there was any competent evidence before the jury conducing to show the guilt of the accused.

It is unnecessary to respond to appellant's complaint that the verdict was extremely harsh in fixing his punishment, except to say that if the jury were satisfied of his guilt as charged in the indictment, which was obviously the case, the punishment cannot be declared too severe, and is, besides, the least allowed by the statute.

We find no just grounds for appellant's complaint that the trial court erred in permitting the county patrolman, B. F. Tyler, to testify as to the alleged confession made by appellant on the examining trial. It is contended by appellant's counsel that the court refused to exclude Tyler from the courtroom under the rule enforced as to other witnesses. The record does not show that the rule as to the exclusion of witnesses was enforced or asked on appellant's trial, and it also fails to show that any objection was made by appellant's counsel to the introduction of Tyler as a witness when or before he testified. It is true that, when he began to relate the confession which had been made by appellant on the examining trial, the latter's counsel objected to that part of his testimony upon the ground that it was not competent, but

the court very properly overruled the objection, as the testimony was clearly competent, the confession having been made voluntarily and without any sort of coercion or duress. It is patent, therefore, that the failure, if any, of the circuit court to exclude Tyler from the courtroom while the other witnesses were testifying, was brought to the attention of that court for the first time upon the motion for a new trial. This being true under section 281 of the Criminal Code of Practice, though it were error, we are without power to reverse for it. Moreover, Tyler was an officer of the court, and it was in the court's discretion to exempt him from the operation of the rule.

Appellant's remaining contention that the court erred in instructing the jury is likewise untenable. Instruction No. 1 follows the language of the indictment, and is in the usual form. We do not understand that this instruction is objected to by appellant's counsel. It is, however, more favorable to appellant than was proper, for it told the jury that, in order to convict appellant of the crime charged, they should not only believe from the evidence beyond a reasonable doubt that he had sexual intercourse with the prosecutrix and that she was under 16 years of age, but also believe from the evidence beyond a reasonable doubt that the act was committed with force and arms, and by assaulting the prosecutrix, whereas neither force nor unlawful assault was necessary to constitute the crime. The indictment was found under section 1155, Ky. St. (Russell's St. § 3773), which provides: "Whoever shall carnally know a female under the age of sixteen years, or an idiot, shall be confined in the penitentiary not less than ten, nor more than twenty years." In enacting this section, the Legislature did not have in mind the necessity for force in accomplishing the crime therein denounced, or that it was even necessary that the female should be put in fear, but according to the legislative intent, and the obvious meaning of the section itself, a female under 16 years of age "is presumed to be as an idiot, and in fact is without capacity and discretion to comprehend fully the consequences of yielding to the ravisher or strength of will to resist his influence and importunities. Hence carnal knowledge of her, even with her nominal consent, is in legal contemplation forcible and against her will, and though not deemed of as heinous a nature nor punished with the same severity as when, in fact, forcibly and against her consent, is nevertheless within the meaning of the statute rape, and punishable as such." *White v. Commonwealth*, 96 Ky. 180, 28 S. W. 340, 16 Ky. Law Rep. 421; *Payne v. Commonwealth*, 110 S. W. 311, 33 Ky. Law Rep. 229. Formerly the age of consent was 12 years, but by the section, supra, the statute was amended by substituting the word "sixteen" for "twelve."

But appellant's chief complaint is as to

instruction No. 2, which his counsel contends should not have been given at all. In this counsel errs. Attempted rape is a lesser degree of the crime for which appellant was indicted, and instruction No. 2 defines attempted rape and advised the jury under what state of facts, if shown by the evidence beyond a reasonable doubt, they would be authorized to find appellant guilty of that offense. As, according to the testimony of the prosecutrix, and the confession of appellant before the magistrate sitting as an examining court, he attempted on one occasion or oftener to have sexual intercourse with her, but without succeeding in making a penetration, it might well be said that this evidence, if the jury had doubted appellant's guilt of the crime charged in the indictment, would have justified their finding him guilty under the second instruction of attempted rape, the punishment for which, as provided by section 1153, Ky. St. (Russell's St. § 3771), is confinement in the penitentiary not less than 5 nor more than 20 years.

We do not understand from the brief of appellant's counsel that objection is made to the remaining instructions given by the trial court, but our examination of them convinces us of their correctness.

The record indicating no error that requires a reversal of the judgment of conviction, it is hereby affirmed.

**CHRISTIE v. LOUISVILLE & N. R. CO.**  
(Court of Appeals of Kentucky. Jan. 28, 1910.)

**1. RAILROADS (§ 407\*)—OPERATION OF TRAINS—NEGLIGENCE.**

Trainmen not knowing of the presence of a horse near the track do not make the railroad liable for frightening the horse by noises unless they cause the train to make unusual and unnecessary noises.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1403; Dec. Dig. § 407.\*]

**2. RAILROADS (§ 441\*)—OPERATION OF TRAINS—NEGLIGENCE.**

One suing a railroad for frightening his horse and causing it to run away by permitting the engine drawing a train upgrade to emit steam has the burden of proving that the cylinder cocks were kept open longer than was necessary to force the water from the cylinders, since it was necessary to open the cylinder cocks so that the steam would force the water out.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 441.\*]

**3. RAILROADS (§ 443\*)—OPERATION OF TRAINS—NEGLIGENCE.**

Evidence in an action against a railroad for frightening a horse and causing it to run away held not to show negligence in the operation of the train.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 443.\*]

Appeal from Circuit Court, Marion County.  
"Not to be officially reported."

Action by J. H. Christie against the Louisville & Nashville Railroad Company. From

a judgment for defendant, plaintiff appeals. Affirmed.

John McChord, for appellant. Benjamin D. Warfield, Chas. H. Moorman, W. C. McChord, and W. W. Spalding, for appellee.

O'REAR, J. Appellant's horse was injured, and destroyed, by running into one of appellee's passenger trains at Lebanon on the night of July 4, 1908. The horse was supposed to be gentle, and unafraid of railroad trains. It was being held by a boy on a public street about 50 feet from the railroad crossing. A heavy, fast passenger train then due to pass that point came along about 10 o'clock, p. m., having stopped at the passenger station a short distance back. The track was a steep grade from the station to a point beyond the crossing. The locomotive was making considerable noise, caused by the exhaust and emission of steam from the cylinder cocks on each side. The horse took fright at the sounds and sight, jerked loose from the boy and ran away, running against the train in its attempt to cross the track at the street crossing. The crossing was near the outer edge of the town, and in a comparatively sparsely settled neighborhood. Those in charge of the locomotive and train did not know of the horse's fright, or even of its presence, and could not have known of it from their position. The owner of the horse brought this suit against the railroad company to recover the value of the horse, charging that it was injured by the carelessness of those operating the train. The court directed a verdict for the defendant upon the close of all the evidence.

It is conceded that the rule is that unless those in charge of the train caused it to make unusual and unnecessary noises, when prudently operated, they not knowing of the presence of the horse, the company is not liable. The evidence is that for some distance back, perhaps for the length of a square, the locomotive was emitting steam from the cylinder cocks. It was also in proof and contradicted that when the steam became cold in the cylinders of the engine it condensed, causing water to form in the cylinders, and it was necessary, prudent, and customary to open the cylinder cocks so that the steam would force the water out at the open cocks. Otherwise, not only would the effect of the steam in moving the pistons be lessened, but it was quite likely to seriously impair the machinery, or might blow out a head of the cylinder. The engineer testified that when the cylinder was freed of the water, white steam, or steam unmixed with water, would alone come from the open cocks when the engine was running with steam on. There was some evidence that at the time the train got to the crossing white steam was coming from the open cocks. Everybody knows that

a heavy train, starting up grade, with cylinder cocks of the engine open, makes a series of loud, hissing noises, which, accompanied by clouds of steam, are well calculated to frighten an ordinarily well broke horse. Everybody knows also that it is necessary, usual, and probably prudent in operating steam locomotives to open the cylinder cocks to allow the condensed steam to be forced out so as to give free play to the steam in the cylinders. These occurrences are nearly as common as the noises caused by whistles, exhausts, and air brakes — all usual incidents, and expected, in the operation of railroad trains.

Appellant argues that as white steam was coming from the cylinder cocks that was evidence the cylinders were then free of water, and it was therefore unnecessary to keep the cocks open. Which may be true. But the weakness in appellant's position is that the evidence does not show how long the white steam had been coming from the cocks. Until the appearance of white steam, free from water, it would not be known that the cylinders were free of water; therefore it was necessary to keep the cocks open long enough for the white steam to show the condition. The burden was upon the plaintiff to show that the cocks were kept open too long—longer than necessary. Upon that point there was a failure of proof. The circuit court properly withdrew the case from the jury, when, upon the whole case, there was a failure of proof upon an essential element of the plaintiff's cause.

Judgment affirmed.

### FRAZIER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 28, 1910.)

#### 1. HOMICIDE (§ 340\*)—APPEAL—HARMLESS ERROR—"ESCAPE."

Where on a trial for the murder of a lone, unarmed woman, the evidence of the condition of her clothing and the scratches on the person of accused, and circumstances indicated that accused had made a wicked assault on her, and practically the only defense was defect of mind, the error in an instruction on self-defense that, if at the time accused killed decedent, he was in danger of death or of great bodily harm at the hands of decedent, and it was necessary, or believed by him to be so in the exercise of reasonable judgment, to kill decedent in order to "escape or avert" the danger, he was entitled to an acquittal on the ground of self-defense, arising from the use of the word "escape," implying that accused must seek safety in flight rather than in defending himself from impending danger, was not prejudicial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2460-2463.]

#### 2. CRIMINAL LAW (§ 723\*)—TRIAL—ARGUMENT OF PROSECUTING ATTORNEY.

The commonwealth attorney on a trial for murder may in his argument insist, within proper limits, that the jury shall inflict the death penalty, and may urge this from the

facts shown, and his statement that the jury should not send accused to the penitentiary to come back in a few years was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1676; Dec. Dig. § 723.\*]

#### 3. CRIMINAL LAW (§ 781\*)—TRIAL—INSTRUCTIONS.

Under Cr. Code Prac. § 240, providing that a confession, unless made in open court, does not warrant a conviction unless accompanied with other proof that the offense was committed, one cannot be convicted on a confession not made in open court, unless the corpus delicti is shown by other evidence, but the proof of the commission of the offense need not connect accused therewith; and, where the proof of the commission of the offense was clear and undisputed, the refusal to charge under the section was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1865, 1866; Dec. Dig. § 781.\*]

#### 4. CRIMINAL LAW (§ 511\*)—ACCOMPLICES—CORROBORATION.

Under Cr. Code Prac. § 241, declaring that a conviction cannot be had on the confession of an accomplice unless corroborated by other evidence tending to connect accused with the commission of the offense, it is not sufficient to merely show by other evidence commission of the offense and the circumstances thereof, but there must be other testimony connecting accused with the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511; Homicide, Cent. Dig. § 484.]

Appeal from Circuit Court, Letcher County.

"Not to be officially reported."

Floyd Frazier was convicted of murder, and he appeals. Affirmed.

David Hays, B. G. Williams, and R. M. Fields, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

HOBSON, J. Floyd Frazier was indicted for the murder of Ellen Flannery. On the first trial of the case the jury disagreed. On the second trial at the April term, 1908, the jury returned a verdict finding him guilty as charged, and fixing his punishment at death. On appeal to this court from the judgment entered in the circuit court the judgment was reversed for an error in the instructions of the court under the evidence then presented. See *Frazier v. Com.*, 114 S. W. 268. On the return of the case to the circuit court, it was tried again at the April term, 1909; and, the defendant being again convicted and sentenced to death, he appeals.

The facts shown by the record before us are these: Ellen Flannery was a widow living on Pert Creek in Letcher county with her five children, between 3 and 13 years of age. She was in good health. On the morning of May 21, 1907, she sent the two older children to town on an errand, and herself after breakfast went out to get some greens for dinner, leaving the three younger children at home. When the two older children returned, their mother was still absent, and could not be found. The five children

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stayed there alone that night, and the next morning the neighbors came in and began searching for her. After they had searched for her a while, she was found, not very far from the house, in a low place near the creek. A number of large rocks were upon her head and chest, which appeared to have been thrown upon her after she had fallen, and in some measure concealed her person. There was blood upon a bush near by, also blood upon the leaves and twigs and grass around, showing signs of a struggle. There were ugly knife wounds in her neck, and bruises about the head. Her skirt was torn off, but was under her. Her waist was on her, but much cut or torn. A short distance from her person was found some salad which she had cut, and as they went from this to the fence near by, blood stains were found on the fence where apparently bloody hands had been placed by some one in getting over the fence. Going on beyond the fence, the searchers found the track of a man made by a heavy brogan shoe, and there were an unusual number of tacks in the heel. Near by these tracks was found a case knife, and not far from it, between two logs and covered up with rocks, was found the woman's bonnet. The searchers followed the tracks further. These soon showed that the man was running, and were traced up to the big road, where from the amount of travel they could not be distinguished any further. The defendant lived down the big road at the first house below where the tracks entered it. The defendant was along with the searching party, and one of the men in the searching party noticed blood upon his shirt sleeve. The defendant started home, and the magistrate ordered him arrested. He complained of being arrested, but finally said to the magistrate that he had been over in the field the day before to get some sand, and he would show him his tracks. The magistrate went with him. He had measured the tracks where the knife was found, and the track which the defendant showed him over in the field corresponded precisely with the tracks which he had measured before near the knife, there being the same unusual appearance of tacks in the heel. Before the body was found, the defendant was coming down the hill with some men, and said that he would not go into that bottom for \$50; the bottom referred to being the bottom where the woman was found. When they had got down the hill a man they met down there started down into the bottom, and the defendant said to him: "She's not down there; there is no use of going down there." After he was arrested his clothing was carefully examined; blood stains were found on the shirt sleeves, and these had the appearance of having been washed at or rubbed in an effort to remove them. His nose had been bleeding, and he accounted for the blood stains on his sleeves in this way. But blood

stains were also found on the back of his shirt, on his pants, and at one point on his drawers; the blood having gone through his pants and stained his drawers. When stripped there that day an abrasion of the skin was found back of the shoulder and another on the arm. He accounted for this by saying that he had been carrying some briars the day before, and had scratched himself there. But the place looked different from a briar scratch. They went to his house, and there they found a pair of brogan shoes belonging to him, which measured the same as the tracks they had found, and had the same peculiar arrangement of tacks in the heel. These shoes had blood stains on them.

The deputy of the jailer testified to this statement, made by the defendant to him after he was put in jail: "He asked me what I thought they would do with him, and I told him I did not know, and he asked me again what I thought they would do with him, and I told him I did not know. Then I asked him if he killed the woman, and he said he did. He said he cut her throat and she bled to death." At one time he was taken to Pineville for safe-keeping. To the deputy sheriff who went there for him to bring him to Letcher county for the trial, he made this statement: "When I first went there he asked me what I thought they would do with him, and I never told him, and he asked me again, I don't know how many times he asked me, and finally I said to him, 'I think they will penitentiary you for life,' or something just about that way and then he said, 'I done it in self-defense,' and we went on a few steps further, and he said 'I done it because I had it to do.'" To a prisoner who was in the jail with him, he made this statement: "He told me he never killed her when he came to get the sand, but he got the sand and took it back home, and came back to fix up some fence, and she came to him, and he told her to come on around, and she would not come; said she would come when she got ready. And he said he picked up a rock and knocked her down, and she raised up and said: 'Don't do that; you have killed me already'—and she run or raised up, and he said he cut her throat and put some rocks over her, laid them on her, and said he done that to hide the blood." He did not testify on the trial in his own defense. His mother, who was introduced in his behalf, testified, in substance, that she had sent him to school a great deal; that he did no good at school; that he was 23 years old; that he would not do work unless somebody was out with him to show him and help him do the work; that he had not a good mind, and would fly into a passion without a reasonable cause, and seemed to have no control of himself. Her testimony was sustained by several other witnesses to the effect that he had less sense than an average person of his age; that he would fly mad all at once when

there was nothing to make him mad; that he did little good at school, was little account as a worker, and was peculiar.

On these facts the court gave the jury instructions admirably defining the law as to murder, manslaughter, and insanity. Of these instructions there is no complaint. On self-defense the court give this instruction: "If you shall believe from the evidence that at the time the defendant, Floyd Frazier, cut, stabbed, struck, and wounded the said Ellen Flannery, by cutting, stabbing, striking, and wounding her, from the effects of which she immediately died (if you shall believe from the evidence, beyond a reasonable doubt, he did so do), that the defendant was then in danger of death, or the infliction of some great bodily harm, at the hands of the deceased, and that it was necessary, or believed by the defendant, in the exercise of a reasonable judgment, to so cut, stab, strike, and wound the deceased, in order to escape or avert said danger, real or to him apparent, then you ought to acquit the defendant, upon the ground of self-defense or apparent necessity therefor."

In his final argument to the jury the commonwealth attorney said: "Don't send this man to the penitentiary—as the attorney for the defense asks you to do—where you know that every man returns in four or five years! Don't send him to the penitentiary to come back in four or five years!" to which statement of the said D. D. Fields the defendant at the time objected, and the court overruled said objection, to which the defendant excepted.

It is insisted that the instruction above quoted on self-defense was erroneous in using the word "escape"; and our attention is called to the fact that in *Howard v. Com.*, 67 S. W. 1003, 24 Ky. Law Rep. 91, the precise instruction was condemned as erroneous; the court saying that the use of the word "escape" implied that the defendant must seek safety in flight rather than in defending himself from the impending danger. But the facts of that case are altogether different from the facts here, and it will be observed that there was in that case another reason for the reversal of the judgment. A similar instruction was condemned in *Cockrill v. Com.*, 95 Ky. 26, 23 S. W. 659, 15 Ky. Law Rep. 328, *Eversole v. Com.*, 95 Ky. 627, 26 S. W. 816, 16 Ky. Law Rep. 143, and in *Arnold v. Com.*, 55 S. W. 894, 21 Ky. Law Rep. 1566. But in all these cases there were other grounds for reversal. It is manifest that if the word "escape" had been omitted, and the instruction had read "in order to avert said danger, either real or to the defendant apparent," it would have been beyond criticism. The addition of the word "escape" could not, under the facts of this case, have affected the result; and, if the word had been omitted, the defendant could not possibly have been benefited in any way. A lone, unarmed woman was found here dead. The

condition of her clothing, the scratches on his person, and all the circumstances indicate that the defendant made a wicked assault on her, and practically the only defense attempted to be made for him before the jury was defect of mind. We have recently held in a number of cases that a judgment of conviction will not be reversed for minor errors, not affecting the substantial rights of the accused. *Hargis v. Com.*, 123 S. W. 239; *Collett v. Com.*, 121 S. W. 426; *Mullins v. Com.*, 108 S. W. 252, 32 Ky. Law Rep. 1216. The error in the instruction here clearly belongs to this class.

It is within the proper limits of argument for a commonwealth attorney to insist that the jury shall inflict upon the defendant the highest penalty prescribed by law, and to urge this from the facts shown by the record. Persons sent to the penitentiary for a term of years, who do not die there, usually return to their homes. It is a matter of common knowledge that persons sent to the penitentiary are sometimes pardoned or paroled, or have their terms shortened by allowances for good conduct; and we cannot see how the defendant's substantial rights were prejudiced by what the attorney said.

It is also insisted that the court should have instructed the jury under section 240, of the Criminal Code of Procedure: "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed." Under this section the defendant cannot be convicted upon a confession not made in open court, unless the corpus delicti is shown by other evidence. But it is not necessary that the proof showing that the offense has been committed should connect the accused with the commission of the offense. *Patterson v. Com.*, 86 Ky. 313, 5 S. W. 387, 765, 9 Ky. Law Rep. 481; *Wigginton v. Com.*, 92 Ky. 282, 17 S. W. 634, 13 Ky. Law Rep. 641; *Dugan v. Com.*, 102 Ky. 241, 43 S. W. 418, 19 Ky. Law Rep. 1273; *Green v. Com.*, 83 S. W. 638, 26 Ky. Law Rep. 1221. The proof here that the offense had been committed was clear, satisfactory, and undisputed. There was therefore no error in not giving the jury an instruction under this section. There is a difference between sections 240 and 241. Section 241 provides that a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. Under this section there must be proof other than the testimony of an accomplice connecting the defendant with the offense; but, under section 240, which relates to a confession made by him out of court, it is only required that the confession shall be accompanied with other

proof that such an offense was committed.

On the whole case we are satisfied that the defendant had a fair trial.

Judgment affirmed.

# EDDINGTON-GRIFFITHS CONST. CO. v. TURNER.

(Court of Appeals of Kentucky. Feb. 1, 1910.)

## 1. CONTRACTS (§ 231\*)—RAILROAD CONSTRUCTION—COMPENSATION—ESTIMATION.

Where an unsigned subcontract for railroad grade construction stipulated for measurement in the borrow pits and not in the fill, by the engineers of the railroad company, but plaintiff did not complete his contract because improper borrow pits were furnished, and their condition was changed by the further excavation by defendant in the completion of the subcontract, so that measurement therein to ascertain the amount of earth removed by plaintiff was impossible, and the railroad engineers took only such measurements as were necessary to make estimates, plaintiff was not bound to prove the amount of his work by measurements in the pits, but could show the amount of earth removed by measurement in the fill.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 231.\*]

## 2. CONTRACTS (§ 323\*)—CONSTRUCTION—QUESTIONS FOR JURY.

In an action on a railroad grade construction subcontract, the quantity of earth removed by plaintiff under his contract, *held* for the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1543; Dec. Dig. § 323.\*]

## 3. CONTRACTS (§ 319\*)—PARTIAL PERFORMANCE—RETAINED PERCENTAGE—FORFEITURE.

Where plaintiff failed to complete his subcontract for the construction of a railroad grade because of defendant's failure to furnish borrow pits from which to secure the necessary filling material, as required by the contract, defendant was not entitled to retain a percentage of the contract price withheld to secure performance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1499-1503, 1506; Dec. Dig. § 319.\*]

Appeal from Circuit Court, Laurel County.

"Not to be officially reported."

Action by Jesse Turner against the Eddington-Griffiths Construction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Sam C. Hardin, for appellant. J. M. Robison, for appellee.

O'REAR, J. Appellants were contractors for the building of a double track railroad for the Louisville & Nashville R. R. Co., in Laurel county. They sublet certain parts of the grading to subcontractors. A part was sublet to appellee, which was making the fill for the track for a distance of about 2,000 feet. The fill was to be made of earth, and include the construction and material for two culverts, to be made of stone and concrete. The price for the culvert work is not in dispute. The price of the fill was to be 19 cents a cubic yard; material to be furnished to appellee, and he to furnish tools, teams, and labor. A written contract was

prepared by appellants (whose place of business was Knoxville, Tenn.), and sent to appellee for signature. He declined to sign it, but returned it with a letter indicating his objections. The contract as prepared was never signed. But it seems that the parties were then agreed in the main as to terms of the contract, and appellee went to work to execute it. In order to make the fill more earth was required than could be got from the work. The railroad company had agreed with its contractor to furnish necessary "borrow pits" adjacent to the work, from which to get the needed earth. Owing to the heavy rains and unusually wet season the borrow pit first furnished was not workable for much of the time. It was low, swampy ground, lower than the surface, which would drain it after it had been excavated to some extent, so that the rains soon filled it with water so that it could not be worked. Appellee demanded of appellants that they provide another borrow pit, which by letter they agreed to do, but failed. After waiting some weeks, appellee threw up the job, and brought this suit to recover for the work which he had done, at the contract price, less payments made to him, and for damages for the breach of the contract by appellants—suing to recover the profit he would have made if he had been allowed to finish the job.

The writing which was prepared to evidence the contract stipulated that the earth was to be measured in the borrow pits, and not in the fill. That is, the dimensions of the holes from which the earth was taken were to be ascertained by the engineers of the railroad company, and the solid contents put into the fill thus to be calculated and paid for at the contract price. Monthly estimates were to be made, and were made, by the railroad company's engineers, upon which appellants paid appellee 90 per cent. of the sum earned on the work thus shown to have been done. The remaining 10 per cent. was retained until the work was completed, as a guaranty of its proper execution. Appellee was paid 90 per cent. of the contract price upon the estimates so made, except for the last few days which he worked. After he quit appellants took charge of the work and finished it, and were paid for it by the railroad company. Before appellants took charge, appellee wrote them that he was not satisfied with the measurements that had been made, and that he proposed to have an engineer measure the work. Appellants answered for him to do so. He did employ an engineer of experience in that character of work, to measure the fill in January of 1908, who reported, and on the trial of the case testified, that the fill contained 20,932 cubic yards of earth. Appellants failed to settle with appellee, and he brought this suit, as stated.

Appellants contend that the measurement

made by appellee's engineer was upon the wrong basis; that he should have measured the borrow pits; that the difference is about 8 per cent. less in the borrow pit measurement as compared with the fill. They admit that the quantity of earth was 18,664 feet, measured in this way. If it should be conceded that the written memorandum, unsigned, constituted the best evidence of the contract, and correctly stated the contract on this point, yet it was not shown that appellants even caused the borrow pits to be measured by the railroad company's engineers when appellee quit the work, so as to ascertain the quantity of earth that had been removed from them. True, they had from time to time made estimates of the earth removed, but the evidence was quite conflicting whether the estimates were made upon measurements of the borrow pits. On the contrary, it seems that they were not always so made. At any rate they were only estimates, and were not conclusive, nor intended to be, upon anybody. The purpose was to approximate the work done, so as to ascertain what sum could be safely paid upon it. As they were not such measurements as the writing contemplated, upon which exact settlements would be made, they are not conclusive upon the parties. As appellants afterward went to work in these same pits, or some of them, and materially changed them, so that now it would be impossible, as it was when the suit was brought, to make an accurate measurement of them as of the date when appellee quit the work, the question arises, What method was open to the parties to ascertain the quantity of earth moved by appellee? He pursued a natural course, and that, too, after having apprised appellants of his purpose to do so, and with their tacit consent, which was to have another engineer of experience measure the work. The evidence was conflicting whether the measurement would show more earth in the pit than in the fill. One authority upon engineering, the only one introduced or alluded to by the engineers, holds that the measurement will show slightly less, as that by tramping the earth in hauling over it as it is placed loose in the fill, it will shrink to a less volume than when in its natural state before removal. The measurement in this instance was made some months after the work—the most of it—had been done; after it had been hauled over and allowed to settle by time and wet seasons. It is likely that the difference, if there was any, was not material, at any rate the measurement as done by appellee was the only method that was open to him, as the pits were filled with water so that they could not be measured accurately. After appellants took charge of the work and had made some progress upon it, the conditions were so changed that any other way of

measuring the work was impossible. By their own conduct they made it impossible to have a literal compliance with the conditions of the contract, assuming the writing shows the contract. Appellee was not bound to do the measuring of the work in any event. That was to be done by the railroad engineers. If they failed, as they did, appellee should not lose because of that fact. Nor is it now shown in the evidence what quantity of earth was removed from the pits by appellee, by measurements and calculations of the railroad engineers. They show estimates of work done from time to time, which are assumed to be approximately correct, but not until the work was finally turned over to the railroad company did they make the accurate measurement called for by the original contract. Under these circumstances it was for the jury to find from the evidence the quantity of earth actually removed by appellee under his contract.

If appellee had abandoned his contract without cause, and still assuming that the writing was the contract, he would have forfeited the 10 per cent. retained by appellants upon each monthly estimate as liquidated damages; such being the stipulation of the contract. If, however, appellants failed to furnish him the material, so that he could not finish the work, they will not be allowed to forfeit the sums retained. It may be true, as insisted by appellants, that the railroad company was to furnish the borrow pits. Still, as between appellants and appellee, the latter was not to furnish them, and the failure of the railroad company, if it did fail, was sufficient excuse for appellee's not completing the job. Suppose the railroad company had, when the work was half done, abandoned it altogether, would that make appellee liable in damages to appellants? But the facts appear to be that the railroad company did furnish borrow pits to the appellants, but they somehow failed to notify appellee of the fact. Such the jury found, and such we find from the record. Therefore, in no event, was appellee in default on the contract.

There was a dispute whether appellee completed one of the culverts, and as to how much he did on the other (the latter was condemned by the railroad company, and subsequently finished by appellants, but material gotten out of appellee was used in the work). These matters were submitted to the jury.

As to the damages for the breach of the contract—that is, for plaintiff not being allowed to finish the work—the court told the jury not to consider that branch of the case.

The views herein expressed were applied by the court in the conduct of the trial, and under the admirably clear instructions given the jury, the verdict was for appellee for \$1,000. We see no error.

Judgment affirmed.

# CHILDERS' EX'X et al. v. CARTWRIGHT et al.

(Court of Appeals of Kentucky. Feb. 2, 1910.)

## 1. WILLS (§ 163\*)—CONTEST—UNDUE INFLUENCE—BURDEN OF PROOF.

The burden of showing that a will is invalid, because procured by undue influence, is on contestants.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.\*]

## 2. WILLS (§ 163\*)—UNDUE INFLUENCE—MEASURE OF PROOF—EVIDENCE.

To set aside a will because procured by undue influence, it is not sufficient to show that there was an opportunity to exercise undue influence, or that there was a possibility that it was exercised, but there must be evidence showing its exercise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 163.\*]

## 3. WILLS (§ 1\*)—DISPOSITION OF PROPERTY.

One of sound mind and disposing memory may transmit his property by will in such manner as pleases him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 4. WILLS (§ 163\*)—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to show that the execution of a will was procured through undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 163.\*]

Appeal from Circuit Court, Hickman County.

"To be officially reported."

Will contest by Josie Cartwright and others against John M. Childers' executrix and others. From the judgment, defendants appeal. Reversed.

Shelbourne & Smith, for appellants. Joe W. Bennett and Robbins & Thomas, for appellees.

**BARKER, J.** This action involves a contest as to the validity of the will of John M. Childers, of Hickman county, Ky.

On the 24th day of January, 1907, John M. Childers caused to be prepared the paper in question, which he duly executed as his last will and testament. By the instrument he devised all his estate to his wife, Bettie Childers, for her life, with remainder to six of his nine children living at his death. By the fourth item of his will it is provided as follows: "I have three other children, namely: Lula Smith, Josie Cartwright and Minnie Clark, to whom, on account of their disobedience and disrespect to me and their mother, I give nothing." The three disinherited daughters were the contestants in the court below and are the appellees here. The will in question is the counterpart of an instrument executed by the testator on September 22, 1906, with the exception that in the first will he disinherited only two of his daughters, Lula Smith and Josie Cartwright, whereas by the second will (that in

contest) he added the name of his daughter Minnie Clark to those whom he disinherited. The testator died a short time after the execution of the second will, and the instrument was duly probated by order of the Hickman county court. From this judgment an appeal was prosecuted by the disinherited daughters to the Hickman circuit court, where a trial was had upon the issue whether or not the paper in question was the last will and testament of John M. Childers, with the result that the jury returned a verdict that the paper was not his last will and testament, and from the judgment based upon this verdict the beneficiaries under the instrument have prosecuted this appeal.

The only ground upon which the validity of the paper was assailed is that its execution was procured by the undue influence of the beneficiaries, or at least some of them. Upon this appeal no question is made as to the propriety of the instructions given by the court to the jury upon the trial. The only question now raised is whether or not the verdict of the jury is sustained by the evidence.

At his death, John M. Childers was 56 years of age; his wife 51. They had been married something over 30 years. At the time of their marriage, Childers had no property, but by hard work and frugality he acquired an estate which at his death is admitted to have been worth as much in value as \$20,000. So far as the record shows, the greater portion of his estate is farm land in Hickman county. Childers and his wife were rough, illiterate people, the husband being unable to sign his name. During their married life there were born to them nine children, six girls and three boys, all of whom are parties to this litigation. They kept no house servant, Mrs. Childers at first doing all the work, but after the girls were of sufficient age, they helped her discharge her onerous duties. Mrs. Childers was a faithful, energetic, and diligent housewife, frugal to a degree, and there can be no doubt that her faithful industry in keeping the house and taking care of the children contributed in large part to the acquisition of whatever fortune her husband left at his death. The appellees, the disinherited daughters, have left no stone unturned by which to besmirch the character of their mother. They picture her as a cruel mother and a heartless wife, who had no affection for her husband and who hated her own children. They say that she not only beat them cruelly, but procured and induced their father also to beat them. They testified that she exercised a dominating control over their father, and that she was of a disposition to rule or ruin. A great deal of the testimony is entirely irrelevant to the issue involved

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

here; and all of it, in our opinion, falls short of showing that the wife ever exercised, or even attempted to exercise, any influence over the husband in the making of his will. As samples of the irrelevant evidence, the daughters testified that more than 20 years before the death of the father, and when the oldest child was quite small, the mother left the house and went to a neighbor's, stayed all day and only returned at nightfall at the earnest solicitation of the husband that she should do so. The wife explains this circumstance (and as to this she is not contradicted by any one) by saying that she left the house under the influence of jealousy, her husband having told her that he was paying attention to a woman in Cairo. What this had to do with the validity of the will made 20 or 25 years thereafter is difficult to perceive, and we are quite sure that it has no tendency to establish a dominating influence by the wife over the husband. Again: The daughters testified that the mother frequently said that she did not love her husband; that she was disappointed in her marriage, and other expressions of a like character. How this evidence conduced to unduly influence the husband to favor in his last will the woman who hated him, we are not able to see. As a rule, it may be said that men may be influenced by love or fear, but we do not believe that any one ever induced another to make a will in his favor by exhibiting a hatred for the testator. And it is difficult to believe that the woman who bore her husband nine children and did all the housework necessary to conducting an extensive farming operation, patiently and faithfully for more than 30 years, living in the hardest and most frugal way, had no love for him for whom all this sacrifice seems to have been freely and uncomplainingly made. It was also testified by the daughters that their mother sometimes was harsh to them and sometimes inflicted corporal punishment upon them; but the admitted facts show that all these daughters were themselves disobedient, high-tempered, and self-willed. All of them ran away from home, and married contrary to the wishes of their parents, when quite young; Mrs. Cartwright being only 13 when she was engaged and fourteen when she married. Their testimony against their mother and the admitted facts show them to have been children who needed the repression of a strong hand and a dominating will. If they were not punished and restrained, as they grew up, the parents were neglectful of the high duty they owed them. But as said before, in the main all this evidence was irrelevant, and a careful reading of the record fails to disclose any evidence, whatever which satisfies our minds that there was any influence brought to bear upon the testator to make the will in question except the bad conduct and disobedience of those children who were disinherited.

We will now take up in detail that part of the testimony that is specifically relied upon by the contestants to show undue influence. Mrs. Cartwright was asked: "Have you ever heard her (the mother) say anything about this will before your father died? A. Said that if I married the boy that I did I would be out of the will." Dosie Faulkner, a witness for the contestants, was asked: "Did you ever hear Mrs. Childers say anything about any of the children should not have any of the property? If so, state what was said. A. Yes, sir; I heard her say that Josie would never get anything of the estate, and that she would see that Johnnie did not will her anything." To Martin Gills, a witness for the contestants, was propounded the following question: "Did you ever hear Mrs. Childers say anything about any of the children would not get any of their property? If so, state what she said. A. Over there one Sunday evening, and the conversation come up some way; she seemed to be a little irritated at Minnie Clark, and made the remark that Minnie would never remember of getting the rapping of her finger of their estate; she said that Johnnie would never give her any of the estate." A witness, Tom Williamson, was asked if he had heard Martin Childers say anything about his father's business in any way, to which he replied: "All I heard him say, Benton said something like this, that was the night that Mr. Childers lay a corpse, Benton said that he was pleased in the way that his father had his business fixed. Said that he was surprised that he had fixed it as well as he did. Then some little bit, and Martin says, 'Well I have talked to Pa a great deal about his business in the last few years, about the place, says I expect I caused him to fix it; anyhow seems he did.'" Another witness, Ledia Faulkner, in response to a similar question, said: "Said that his father's business was in good shape, and I reckon I was the cause of him leaving it that way." Now, in all of this there is not the slightest evidence that either Mrs. Childers or her son Martin said one word to John M. Childers about his will. So far as the testimony regards Martin, it does not appear that he was talking about his father's will at all. The testimony on this point shows that it was limited to the way his father had left his business affairs, and it does not appear that Martin knew at the time anything about the contents of his father's will. So far as the evidence affects Mrs. Childers' conduct, assuming what was said by the witnesses to be true, there is nothing that shows she ever spoke to her husband on the subject of his will. The testimony only goes to show that the mother was trying to control her headstrong daughters by appealing to their fear of being left out of their father's will. The sum total, so far as the mother was concerned, was a restraining threat of an anxious and, per-

haps, irritated parent; but that she ever actually said anything to her husband on the subject of his will is not shown by the testimony of any one.

There is no pretense that John M. Childers was not of sound mind and disposing memory. On the contrary, all of the evidence conduces to show that he was a man of strong mentality, although illiterate and ignorant of what is sometimes called book learning. That he was a shrewd, frugal, industrious man, who worked hard, raised a large family, and in spite of his illiteracy died leaving, for his neighborhood, quite a handsome estate, is not questioned. The great preponderance of the evidence, if not all of it, shows that he was a man not easily influenced, but who had his own way, and who managed his own affairs without the influence of any one. The appellees insist that the wife admitted in her evidence that her husband was childish. It is true, Mrs. Childers uses that word in her testimony, but, clearly, she did not mean that he was in anywise weak-minded or of a plastic disposition. The daughters testified that their father had sometimes been forced to sleep in what is called the washhouse, where he had a bed, for the reason the mother refused to allow him to sleep in the house because he was so dirty. The wife explained the husband's sleeping in the washhouse by saying he could not bear the noise of the children, and she describes his nervousness by the word "childish." Her whole testimony refutes the idea that she meant he was weak-minded or easily influenced in business matters.

There is a good deal of testimony in the case that the testator was a good man, and that he loved his children; and we have no doubt that this is true. But this does not show that any one influenced him to disinherit his three daughters. There is no reason shown why Mrs. Childers should have desired the appellees disinherited and their three sisters provided for. If she desired the estate for herself and could influence her husband, it would seem natural that she should have had the entire estate devised to herself, but, instead of this, she only received a life estate, with remainder to the six children who were not disinherited. When the second will was made, Childers went to the bank where the draftsman, Atwood, was employed, and dictated what he wanted, Atwood writing it on a typewriter. Neither Mrs. Childers nor any of the beneficiaries were present, nor is it shown that they knew the testator was making a will at that time. As said before, the second will was a counterpart of the first, with the addition of the name of Minnie Clark to the list of disinherited children. In neither case was it shown that the wife or any other beneficiary was present when either of the wills was prepared or executed. The rule is well settled that, after due execution is

proved by the propounders, the burden of showing that the instrument is invalid because procured by the exercise of undue influence is upon the contestants. This must be shown by evidence at least tending to establish that undue influence was exercised upon the testator. It is not sufficient that it be shown that there was an opportunity to exercise undue influence, or that there was a possibility that it was exercised; some evidence must be adduced showing that such influence was exercised. The law permits the owner of property, who is of sound mind and disposing memory, to transmit his property by last will and testament in such manner as pleases him, and juries are not permitted to make for him a will that accords with their ideas of justice and propriety; nor are they permitted to suspect away the right of the testator to dispose of his property in accordance with his own will and desire.

In the case before us the wife is shown to have done as much in the acquisition of the estate left by her husband as he did. It would have been impossible for him to accumulate the property he left without her aid given in the very manner in which she bestowed it. The wife who keeps the home, rears the children, does the work, and prevents waste in the household economy contributes as much to the acquisition of whatever estate is accumulated by the labor of the husband as he does; and although the legal title to the property may be in him, morally she is the owner of at least one-half of it. It was, therefore, not unnatural that the husband should desire to provide for the wife at his death; and it was, in our opinion, not unjust that he should leave her the use of the whole property during the few years remaining to her after his death. The husband was bound to know that a life estate in one-third of his real property would, perhaps, not support the wife in the way she deserved, and it was only right and just that he should give her the whole estate while she lived. The only question, then, so far as the justice of the testator's will is concerned, is whether or not he did right in disinheriting his three daughters for the reasons given in the will. Of this he was the best judge. He knew the facts, and it was for him to say whether or not they had been so disobedient and disrespectful to him and the mother as justified his disinheriting them. It should take more than mere suspicion or the possibility of the exercise of undue influence to destroy a will which provides for the comfortable maintenance of a wife who raised 9 children for her husband and who for more than 30 years worked by his side and sacrificed her whole life in aiding him to acquire what he left. A careful reading of all the evidence in this record convinces us that the court should have sustained the motion of the propounders, made at the close of all the testimony, to

peremptorily instruct the jury to find that the paper in issue was the last will and testament of John M. Childers.

The judgment is reversed for further proceedings consistent with this opinion.

# DAY et al. v. HICKS et al.

(Court of Appeals of Kentucky. Jan. 28, 1910.)

## CHAMPERTY AND MAINTENANCE (§ 7\*)—CONVEYANCE OF LAND—ADVERSE POSSESSION.

It is only when a deed is made to carry into effect a prior understanding or contract, made when the land was not adversely held, that the deed is not champertous as to those having adverse possession at the time of its execution.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 54-110; Dec. Dig. § 7.\*]

Appeal from Circuit Court, Menifee County.

"Not to be officially reported."

Action by Dock Hicks and another against John C. Day and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded, with directions.

C. C. Turner, T. L. Caudell, A. A. Hazelrigg, and Hazelrigg & Hazelrigg, for appellants. Robert H. Winn, for appellees.

CLAY, C. Appellees, Dock Hicks and T. P. Byrne, instituted this action against appellants John C. Day and others, to recover a tract of 271 acres of land situated in Menifee county. Judgment below was rendered in favor of appellees, and John C. Day and others appeal.

It is conceded that appellees' title is good of record, with the exception of certain proceedings instituted in the Menifee county court for the purpose of partitioning a tract of 2,439 acres, of which the tract of 271 acres in controversy is a part. It is insisted that these proceedings were absolutely void and not sufficient to pass title to the tract in controversy. In view of the conclusion of the court, we deem it unnecessary to pass upon this question. Appellants also defended on the ground that a certain deed made by J. W. Hoverdale to Byrne and Hicks, on June 24, 1897, was champertous, for the reason that the appellants at that time were in adverse possession of the land in controversy. Other deeds are attacked on the ground of champerty, but we deem it unnecessary to consider them.

Both appellants and appellees claim title through one Waldemar Mentelle. In 1814, Henry John James Robert conveyed a large tract of land embracing the land in controversy to Mentelle. In the year 1882 the heirs of Waldemar Mentelle conveyed said tract of land to William H. Robert, Jane O. Thomas and others, heirs of Henry John James Robert. It is recited in the deed that the deed from Robert to Mentelle, made in the

year 1814, was in fact a mere mortgage given to secure the indebtedness of the former to the latter; that this indebtedness had been paid, and the deed was for the purpose of investing title in the grantees. From this time on the title proceeded through various court proceedings and mesne conveyances to appellees.

In 1885, Judge B. F. Day procured an option on 2,100 acres of land in Menifee county from the alleged heirs of Patrick Gibson, Waldemar Mentelle, William Essex, English Yeiser, and Benjamin Stout. In 1890, the parties giving the option conveyed the 2,100 acres to appellant, the Kentucky Land & Supply Company. The true heirs of Mentelle did not unite in the conveyance. Judge B. F. Day joined in the conveyance. This, 2,100 acres included the land in controversy. Thereafter the Kentucky Land & Supply Company placed certain tenants on the land. Written leases were made to them. The evidence shows that on June 24, 1897, at the time of the deed from Hoverdale to Byrne and Hicks, appellants were in actual, adverse and notorious possession of the land in controversy. They had built a railroad across a portion of the land, had constructed and were operating three or four sawmills, had erected store houses and dwelling houses on the land; and, besides this, they had various tenants on the land located at different places. We regard this fact as firmly established by the evidence of John C. Day, Judge B. F. Day, M. C. Clay, and A. B. Cope, the latter a witness for the appellees. In this connection it is insisted that the spur track across the land was simply the holding of a right of way which was in fact an easement and did not constitute an adverse holding so as to make the champerty statute applicable. This may be true, but the evidence shows that, in addition to holding the right of way, appellants had various tenants occupying residences on the tract in controversy and holding the land for them.

But it is insisted that the deed from Hoverdale to Byrne and Hicks was made to carry into effect a previous oral understanding and that the deed is not, therefore, champertous. Evidence upon this point is to the effect that Hoverdale bought the land at a commissioner's sale for T. T. Cope and J. J. Byrne, and that the latter paid the purchase price; that Cope afterwards sold his interest to Hicks; that Hoverdale, in pursuance of the trust and oral agreement, made the deed of June 24, 1897. The evidence upon this point is by no means clear and satisfactory; but, even if true, the deed would still be champertous as to Hicks, for the evidence conclusively shows that between the time of the deed to Hoverdale and the deed from Hoverdale to Byrne and Hicks, the land was adversely held by appellants. That being the case, it must have been adversely

held at the time of any oral agreement made by T. T. Cope and Hicks. It is only when a deed is made to carry into effect a previous understanding or contract entered into when the land was not adversely held, that the deed is not champertous as to those having adverse possession at the time of its execution. *Cardwell v. Sprigg's Heirs*, 1 B. Mon. 369; *Greer, etc., v. Wintersmith*, 85 Ky. 516, 4 S. W. 232, 9 Ky. Law Rep. 96, 7 Am. St. Rep. 613; *Middlesboro Waterworks v. Neal, etc.*, 105 Ky. 586, 49 S. W. 428, 20 Ky. Law Rep. 1403. A careful reading of the evidence convinces us that both at the time of the deed from Hoverdale to Byrne and Hicks and at the time of the alleged oral agreement the land was adversely held.

There is evidence to the effect that Hicks placed upon the land in controversy a tenant by the name of John Neal; that thereafter Neal was persuaded to sign a lease under appellant Day. From this it is argued that Neal's attornment to appellant was void and ineffectual, and his possession continued to be the possession of appellees. There is nothing in the record, however, which fixes the time when Hicks placed Neal in possession. It is not shown that he was in possession under Hicks at the time of the deed from Hoverdale to Hicks and Byrne. Nor does it satisfactorily appear that Neal, as a matter of fact, was located on the land in controversy. The weight of the evidence is to the effect that the house in which he lived was not located upon the 271 acres. Nor do appellants rely upon Neal's possession as their possession; they had possession at the time through other tenants.

After a careful consideration of the record, we are of opinion that appellants' plea of champerty must prevail.

Judgment reversed and cause remanded, with directions to enter judgment in conformity with this opinion.

#### GORDON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 25, 1910.)

#### 1. CRIMINAL LAW (§ 741\*)—QUESTION FOR JURY—PEREMPTORY INSTRUCTION.

There being any evidence, however slight, tending to connect accused with the commission of the crime in any degree, defendant is not entitled to a peremptory instruction, but the case should go to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. § 741.\*]

#### 2. CRIMINAL LAW (§ 770\*)—INSTRUCTIONS—DUTY OF COURT.

The court in a criminal case must correctly instruct on every point warranted by the evidence, whatever instructions are asked for or offered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1803-1806; Dec. Dig. § 770.\*]

#### 3. HOMICIDE (§ 300\*) — SELF-DEFENSE—INSTRUCTION.

The act of deceased, when defendant struck out towards him with a whip, in getting out of his wagon, not being an assault on defendant, and there being evidence that after getting out of the wagon he made no effort to strike or harm defendant, till defendant had advanced on him with a pistol leveled on him, an instruction in effect that if such facts were found, there could not be an acquittal on the ground of self-defense was proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.\*]

#### 4. HOMICIDE (§ 338\*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Defendant having been found guilty only of manslaughter, the jury could not have believed that he was referring to deceased when he, on the way from the city to the place of trouble, said, as witnesses testified, that he had killed one person, and would or could kill another, but merely accepted it, as intended, as illustrative of what the witnesses testified, that he was drinking and in an ugly and quarrelsome mood, evidence of which character is admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.\*]

#### 5. CRIMINAL LAW (§ 384\*)—EVIDENCE—REMOTENESS.

Defendant, who was permitted to testify that he was sober at the time of the homicide, was not entitled to testify to the details of a business conversation he had an hour or so before as tending to show such fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 848; Dec. Dig. § 384.\*]

#### 6. CRIMINAL LAW (§ 390\*)—EVIDENCE—STATE OF MIND.

Defendant was not entitled to testify that as he was going along the road towards his home, and before the homicide he had no idea of killing any one, particularly deceased; it not being permissible for him to show what he thought.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 858; Dec. Dig. § 390.\*]

#### 7. CRIMINAL LAW (§ 959\*)—NEW TRIAL—HEARING OF MOTION—CROSS-EXAMINATION.

The Code prescribing no procedure, the court may, on a motion for new trial, permit cross-examination of the persons making affidavit of prejudice having been expressed by jurors against defendant, and, being of opinion that cross-examination of the persons making the counter affidavits, mainly of a negative character, can furnish no additional light, may refuse it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2409; Dec. Dig. § 959.\*]

#### 8. CRIMINAL LAW (§ 959\*)—NEW TRIAL—CONTINUING HEARING.

The hearing of a motion for new trial may be set over to the term after that at which it is made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2407; Dec. Dig. § 959.\*]

#### 9. CRIMINAL LAW (§ 1156\*)—APPEAL—DENIAL OF NEW TRIAL.

Denial of new trial, moved for on the ground of prejudice against defendant having been expressed by jurors, is not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.\*]

#### 10. CRIMINAL LAW (§ 1165\*)—APPEAL—AFFIRMANCE.

It appearing from the record that no substantial errors, calculated to prevent defendant

having substantial justice, were committed, conviction will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3085, 3086, 3088, 3089; Dec. Dig. § 1185.\*]

Appeal from Circuit Court, Boyle County. "To be officially reported."

George Gordon was convicted of manslaughter, and appeals. Affirmed.

Robert Harding, C. O. Bagby, and J. W. Rawlings, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

LASSING, J. Appellant was indicted in the Boyle circuit court, charged with the murder of Robert Brewer by shooting him with a pistol. Upon his plea of not guilty he was tried, found guilty, and his punishment fixed at 21 years' confinement in the state penitentiary. To reverse the judgment predicated upon this verdict he prosecutes this appeal. The grounds relied upon for reversal may be grouped into two classes: First, errors occurring during the progress of the trial in the admission and exclusion of evidence, and errors in instructing the jury; and, second, errors occurring after the trial, and during the pendency of the motion for a new trial.

The facts, as gathered from the voluminous bill of evidence, are as follows: Appellant and the man he killed were neighbors, living upon adjoining farms in Boyle county, Ky., and had been on friendly terms up to the time of the killing, which occurred on November 28, 1908. On this day, appellant and his brother William had been to Junction City on road wagons hauling lumber, and were returning home. A young man or boy named Owens was driving the team belonging to William Gordon on the return trip, and William was riding with appellant in his wagon some distance behind the boy. When the Owens boy reached his mother's home, where he lived, and which was about four miles out of Junction City, he stopped the wagon on the roadside, unhitched the team, and tied the horses to the fence and went on home. Shortly thereafter, appellant and his brother came up in appellant's wagon and stopped, with appellant's wagon nearly, if not quite, blocking the road. Robert Brewer had also been to town that day, and was returning home. With him in his wagon were George Hafley and William Johnson. Following behind Brewer's wagon came Denny Gordon in another wagon. Brewer drove his wagon up to where the Gordon wagons had stopped in the road, and here the difficulty occurred. The facts as thus far detailed are agreed to, but from this on the testimony of the witnesses for the commonwealth differs so materially from that of the witnesses for the

accused that it cannot be reconciled. This necessitates the giving of each theory.

Appellant testifies, and in the main is supported by his brother William, that when Brewer came up to where their wagons had stopped in the road he appeared in an ugly mood from drinking, and at once began cursing appellant, and demanded of him to get his wagon out of the road; that appellant thereupon spoke pleasantly to him, and at once drove his wagon up so that Brewer had ample room to pass; that after he had done this, and Brewer did not drive on, appellant asked him why he did not drive by, and offered, if Brewer wanted him to do so, to give the other half of the road; that at this offer on his part Brewer, with an oath, threw down his lines, leaped from his wagon, reached with his right hand toward the ground, and, as he arose from his stooping position, he was seized by both William Gordon and William Johnson, both of whom he threw or knocked down, and immediately began striking appellant over the head; that appellant backed away from him, and was against the fence and could go no further, and that he then shot him. On the other hand, the commonwealth shows, by the testimony of the witnesses George Hafley, Denny Gordon, and Lou and William Johnson, that when Brewer drove up behind appellant's wagon he said to appellant, "Get out of the road, or go on home so that I can pass," to which appellant replied, "I have given you half the road, you G— d— s— of a b—, and if you want anything else I will give you half of that." Brewer then said, "I don't ask you no odds," and appellant answered this statement in kind, and, being upon the ground, advanced towards Brewer's wagon, with his whip in one hand and a pistol in the other, and as he so advanced he cursed Brewer, and struck out or toward him with the whip. About this juncture appellant again called Brewer a s— of a b—, and Brewer said he would not or could not stand that, and got out of the wagon and stooped as though to pick up something, when he was seized by William Gordon and William Johnson. He jerked loose from the one and pushed the other back, and struck out and perhaps hit appellant, who was coming at him with his pistol leveled on him, and cursing him as he came. Just then the pistol fired, and Brewer fell, mortally wounded, and died in 15 or 20 minutes. The bullet entered in front and passed entirely through the body. Deceased was unarmed, save for a pocketknife which was found closed in his pants' pocket. Appellant was drinking. While these witnesses differ on many points, as to the exact location of the teams, wagons, etc., they substantially agree on the main questions as to what was said and done. In addition to this testimony of the eyewitnesses the common-

wealth proved by other witnesses that, while coming along the road from Junction City to the place where the difficulty occurred, appellant was boisterous, cursing, and swearing and shooting off his pistol, and declaring that he had killed one man and could or would kill another, some one or any one who crossed his path, or words to that effect.

On this evidence should the trial court have given a peremptory instruction? This court has often held that if there is any evidence, however slight, tending to connect the accused with the commission of the crime in any of its degrees, the case should go to the jury. *Vowells v. Commonwealth*, 83 Ky. 193; *Patterson v. Commonwealth*, 86 Ky. 313, 5 S. W. 387; *Commonwealth v. Murphy*, 109 S. W. 353, 33 Ky. Law Rep. 141; *Spencer v. Commonwealth*, 122 S. W. 800. If the testimony of these four witnesses is to be believed, the accused practically held deceased up in the road, and deliberately sought and provoked the difficulty by cursing him and attempting to strike him, and then, when he offered to protect himself, shot him down. The facts proven by the commonwealth are far from such as would authorize a peremptory instruction.

This brings us to a consideration of the correctness of the instructions given; for, it being the duty of the court in criminal cases to give the whole law of the case as warranted by the facts proven, it is immaterial what instructions were asked for or offered. If the instructions given do not accurately state the law, or the court fails to give an instruction on a point of law upon which the defendant is entitled to have the jury instructed, the case must be reversed; otherwise not. The court gave the following instructions:

"Gentlemen of the jury:

"(1) If you believe from the evidence beyond a reasonable doubt that in Boyle county, and before the finding of the indictment, namely, January 6, 1909, the defendant, George Gordon, willfully, feloniously, and with malice aforethought killed Robert Brewer by shooting him with a pistol from which shooting said Brewer presently died, then you will find the defendant guilty of willful murder, and fix his punishment at confinement in the penitentiary for and during his natural life, or at death.

"(2) However, if you believe from the evidence, beyond a reasonable doubt, that in this county, and before the finding of the indictment, the defendant, in sudden affray, or in sudden heat and passion, upon a provocation reasonably calculated to excite the passions of the defendant beyond the power of his control, willfully killed Robert Brewer by shooting him with a pistol, from which shooting said Brewer presently died, then you will find the defendant guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary for a term

of not less than 2 years nor more than 21 years.

"(3) If you believe from the evidence, beyond a reasonable doubt, that the defendant has been proven guilty under instruction No. 1 or No. 2, yet entertain a reasonable doubt as to the degree of the offense, then you will find him guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary for a term of not less than 2 nor more than 21 years.

"(4) Although you may believe from the evidence to the exclusion of a reasonable doubt that the defendant shot Robert Brewer with a pistol, from which shooting said Brewer presently died, yet, if you further believe from the evidence that when he did so he believed, and had reasonable grounds to believe, that he was then in danger of death, or some other great bodily harm about to be inflicted upon him by said Brewer, then he had the right to use such means as in reason appeared to him to be necessary to avert the impending danger, real, or to him, apparent, even to the extent of so shooting and killing said Brewer, and in this event you will return a verdict of not guilty.

"(5) Although you may believe from the evidence, beyond a reasonable doubt, that in this county and before the date of the finding of the indictment the defendant shot Robert Brewer with a pistol, and thereby killed him, and you further believe from the evidence that when he did he believed, and had reasonable grounds to believe, that he was then in real or apparent impending danger of death, or some other great bodily harm, about to be inflicted upon him at the hands of said Brewer, yet, if you further believe from the evidence, to the exclusion of a reasonable doubt, that when the defendant did not believe, and have reasonable grounds to believe, that he was in real or apparent danger of death, or other great bodily harm at the hands of said Brewer, willfully and feloniously brought on the difficulty by making demonstration to shoot said Brewer with a pistol with the intention of killing him and thereby made the danger to himself on the part of Brewer excusable or justifiable in the protection of himself, or that the defendant and said Brewer voluntarily entered into the actual combat with the intention upon the part of each to kill the other, or do the other some great bodily harm, then you cannot acquit the defendant on the ground of self-defense or apparent necessity.

"(6) You are instructed that, however abusive may be the language of one of the combatants, it will not justify an assault or battery upon the other, but an assault and battery may be opposed by same, and, further, that before either can take the life of the other, or do him other great bodily harm and be justified by the law, the one so doing must believe, and have reasonable grounds to believe, that at such time he himself is in real

or apparent danger of death, or some other great bodily harm, impending at the hands of the other.

"(7) If you have a reasonable doubt of the defendant being proven guilty, then you will return a verdict of not guilty."

These instructions are not open to the criticisms passed upon them. Nos. 1, 2, 3, and 4 are clear, concise, and well written. They simply embody the law of murder, manslaughter, and self-defense with a direction to the jury that in the event they find the accused guilty, and entertain a doubt as to the degree of his guilt, they must find him guilty of manslaughter. Instruction No. 5 is predicated upon the testimony of William Johnson in particular, who says: "I put my hand on his shoulder, and said, 'Bob, I wouldn't have no trouble; he is drinking; I wouldn't have no trouble'—and he stopped, and then Mr. Bill Gordon run up and grabbed him around the waist, and about that time here come Mr. George Gordon with his pistol, and he throwed it right down on him, calling him a s— of a b—, right that way, [indicating] throwed it right down on his breast like." Up to that time appellant, who had, according to the testimony of this witness, offered to fight deceased, and approached him in a threatening manner and struck at him with the whip, was the aggressor, and deceased had offered to do him no violence. Nor can the act of getting out of his wagon be construed to be an assault upon appellant, for he had a right to protect himself, and, it seems, started to do so when he was set upon by appellant's brother, and, just as he had freed himself from his grasp, this witness, Johnson, attempted to prevent trouble, and while he is doing so appellant again approaches deceased, with his pistol leveled upon him, after deceased had stopped, thus clearly provoking or renewing and bringing on the difficulty, and clearly justifying the court in giving instruction No. 5. No. 6 was given in appellant's favor, and for his benefit. No just ground of complaint can be made of these instructions. They are in no wise misleading or difficult to understand, and they cover fully every phase of the case as presented by the plea and evidence. As above stated, No. 5 was predicated upon the testimony of William Johnson; and, as he says that deceased made no effort whatever to strike or harm appellant after he got out of the wagon until appellant had advanced upon him with a pistol leveled upon him, it would have been an error prejudicial to the rights of the commonwealth for the court to have refused to instruct the jury as in instruction No. 5.

Now, as to the testimony of which appellant complains, given by the witnesses who saw, heard, and observed his conduct along the road between Junction City and the place of the difficulty. What does it all amount to? It simply goes to show that he was drunk and disorderly, and in an ugly, quarrelsome

mood. Further than this it had no bearing upon the case. He testified fully concerning it all, denied that he was either drunk or drinking to excess, denied all of the statements attributed to him by these witnesses, and explained how he came to fire off his pistol on the road. The jury understood fully both the tenor and purport of this testimony. They did not believe that, when he said he had killed one man and would or could kill another, he was referring to deceased. If they had, their verdict would have evidently been for a much more severe penalty. The jury simply accepted this testimony, as it was intended they should, as illustrative of what the witnesses who were present when the killing occurred say, to wit, that the accused was drinking and in an ugly, quarrelsome mood. The competency of evidence of this character was expressly approved in the recent case of *Potter v. Commonwealth*, 124 S. W. 317.

The excluded evidence of which appellant complains is as follows: He offered to testify to what he said to two men about a business matter an hour or so before the difficulty. What light the details of this business transaction could have thrown upon the question at issue we are unable to understand. Counsel contends that it would have shown him to be sober. He was permitted to testify that he was. He might have introduced these men with whom he had the business transaction, and had them testify that at that time he appeared to be sober, or was sober; but the court certainly did not err in refusing to permit him to give this conversation with them in detail. Again, appellant was asked if he had any idea of killing any one as he was going along the road toward his home on that afternoon, and particularly if he had any idea of killing deceased, and the court refused to permit him to answer; and in this ruling the court was entirely correct. He was permitted to show what he did, and he might, under some circumstances, be permitted to show what he said, but certainly not what he thought. He was charged with making certain statements. The question was not what he thought, but whether or not he made them. To allow him to testify to what he thought, rather than to what he said and did, would be to open the flood gates for all sorts of evil and the manufacture of testimony which the opposing side would have no possible way of meeting, and of which neither the truth nor the correctness could be ascertained. Appellant was permitted to deny such of the statements attributed to him along the road as he desired, and to explain his conduct where and as far as it was capable of explanation, and throughout the trial the court gave him much latitude, and permitted his testimony to take a wide range, amply sufficient to bring his defense in all its force fully and fairly before the jury. After a most careful and painstaking consideration of the record, we are unable to discern

any error prejudicial to appellant's substantial rights during the progress of the trial. This leaves for our consideration only those errors complained of as to the court's ruling in reference to granting appellant a new trial.

On the motion for a new trial appellant pressed the charge that two of the jurors, Prewitt and Duncan, had formed and expressed opinions of his guilt, and were very hostile towards him, and because of this fact he had been unable to get a fair trial of his case. This charge was supported by several affidavits. The judge went fully into this complaint, and permitted the commonwealth to cross-examine the witnesses upon whose affidavits appellant relied to support it, and, in addition, received and read affidavits offered by the commonwealth to disprove the charge. Appellant complains that this was error; that the commonwealth should not have been permitted to cross-examine his witnesses, unless he was also given the right to cross-examine the commonwealth's witnesses. The aim of the court was to get at the facts—to arrive at the truth of the charge—and we are unable to see how a full investigation can afford any just complaint. The cross-examination of the witnesses for appellant, who supported his charge, had the effect of better enabling the court to judge of the correctness of their testimony. If they could not stand the test of cross-examination, the searchlight of investigation, they should not furnish the foundation for a new trial. The counter affidavits were in the main of a negative character; and, as the trial judge was of the opinion that a cross-examination could throw no additional light upon what was set out therein, he properly refused to allow it. His effort was to satisfy himself as to the truth of the charges made, and he could best determine what points he wanted cleared up. The Code maps out no line of procedure, and hence the trial judge is left to determine how the hearing shall be conducted; and, if he does not regard the affidavits offered in support of the motion as sufficiently explicit, he not only may, but should, cause the witnesses to be brought before him for further examination and cross-examination. This method of procedure is approved by Abbott in his *Trial Briefs*, Criminal Cases, and is supported by the text in 12 Cyc. p. 753.

The next contention of appellant is that the court erred in continuing the hearing of his motion for a new trial from one term of court to the next. The Code is explicit as to when the motion for a new trial shall be made, but does not direct when it shall be disposed of. It is the duty of the trial court, when such a motion is made, to give it that consideration that the character of the case and the importance of the question raised demands, and if, in furtherance of justice, he finds that he cannot give to the question raised sufficient consideration at

the term when made, it seems the ends of justice and the rights of parties applying for such relief demand that he set the hearing over to the succeeding term, and even longer if need be, to enable him to finally determine the points and questions raised. This practice has been expressly approved in civil cases many times. *Louisville Rock Lime Co. v. Kerr*, 78 Ky. 12; *Harper v. Harper*, 10 Bush, 447; *Turner v. Johnson*, 35 S. W. 923, 18 Ky. Law Rep. 202; *Trapp v. Aldrich*, 67 S. W. 834, 23 Ky. Law Rep. 2432. And in the case of the *Louisville Chemical Works v. Commonwealth*, 8 Bush (Ky.) 179, decided in 1871, the same question was involved, and the action of the trial court, in setting over the hearing of a motion for a new trial to the succeeding term, was approved in the following language: "There is no judgment in fact upon the verdict of a jury until the motion for a new trial, if made in proper time, is disposed of. This motion suspends the judgment, and it has no more effect than the verdict of the jury until the application for a new trial is overruled. Any other construction of the law would deprive parties of the right to an appeal in all cases, where the court, for prudential reasons or otherwise, saw proper to continue the motion from one term to another, a right that the court can exercise, and over which neither the counsel nor his client have any control." And in the later case of *Commonwealth v. Tarvin*, Judge, 114 Ky. 877, 72 S. W. 13, this method of procedure was again recognized as correct. To the same effect is the text in 12 Cyc. 753, and *Shipman v. State*, 38 Ind. 549. In *Barnes v. Commonwealth*, 70 S. W. 827, 24 Ky. Law Rep. 1143, *Howard v. Commonwealth*, 110 Ky. 356, 61 S. W. 756, 22 Ky. Law Rep. 1845, *Hunt v. Commonwealth*, 12 S. W. 127, 11 Ky. Law Rep. 353, *Coleman v. Commonwealth*, 8 Ky. Law Rep. 607, and *Smith v. Commonwealth*, 31 S. W. 724, 17 Ky. Law Rep. 439, it is held that the refusal of the trial court to grant a new trial because some of the jurors had expressed opinions to the effect that they were prejudiced against the accused before they were accepted as jurors furnished no ground for exception under the Code. And, likewise, it had so frequently been held that the action and decision of the trial court upon a motion for a new trial are not subject to exception, and will not be considered upon appeal to this court, that a citation of authorities is all that is deemed necessary to answer this ground of complaint raised by appellant's counsel. *Underwood v. Commonwealth*, 119 Ky. 384, 84 S. W. 310; *Roland v. Commonwealth*, 119 S. W. 760; *Jenkins v. Commonwealth*, 113 S. W. 846; *Gipson v. Commonwealth*, 113 S. W. 334; *Commonwealth v. Huber*, 126 Ky. 456, 104 S. W. 345, 31 Ky. Law Rep. 929; *Thomas v. Commonwealth*, 111 S. W. 286, 33 Ky. Law Rep. 849. The tendency of courts generally, and of

this court in particular in its more recent decisions, has been to break away from technical rulings and to examine the record with a view of ascertaining whether or not the accused has been given a fair trial; and, if upon such examination it appears that during the progress of the trial no substantial errors were committed such as would be calculated to prevent the accused from having substantial justice meted out to him, the judgment has been affirmed. Applying that test to the case under consideration, we are of opinion that the accused was afforded every opportunity to fully and fairly present his theory of the case to the jury, and he did so, but the jury, as it had a right to do, accepted rather the theory of the commonwealth as to how the difficulty was brought on, and who was at fault, and found against accused. There being ample evidence to support the finding of the jury, in fact the preponderance of the evidence being in favor of such finding, we are of opinion that the judgment should be, and it is, affirmed.

#### AMERICAN NAT. BANK v. MATHEWS et al.

(Court of Appeals of Kentucky. Feb. 2, 1910.)

##### 1. HOMESTEAD (§ 159\*)—RIGHT OF SURVIVING WIFE.

A married woman entitled to a homestead in property owned by her in her own right is not deprived thereof by the death of her husband, but she is entitled thereto for her own use and benefit so long as she continues to occupy it as a homestead, whether she has a family or any person that she is under a legal or moral obligation to support residing with her.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 159.\*]

##### 2. HOMESTEAD (§§ 161, 162, 181½\*)—ABANDONMENT.

Whether acts of one owning a homestead amount to an abandonment thereof is a question of fact, depending on the intention as well as on the acts, and, though an actual removal to a location in another place with no intention of returning is an abandonment, yet, where the removal is only temporary and there is always an intention to return, the homestead is not lost, and the length of the absence is merely a circumstance in determining the intent.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 812-819; Dec. Dig. §§ 161, 162, 181½.\*]

##### 3. HOMESTEAD (§ 163\*)—ABANDONMENT.

A married woman owning a homestead in a city purchased a country house for a home for her daughter and her child, and for a country home for herself, where she might make money by keeping summer boarders. She claimed that she never intended to abandon her city home, but always regarded it as her permanent home, keeping there furnished rooms and a servant, and spending about one-half her time. The city home was mortgaged for practically its full value, and she bought groceries and other articles, and had them sent to the country home. *Held* not to show an abandonment of the homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 820-826; Dec. Dig. § 163.\*]

##### 4. CHATTEL MORTGAGES (§ 288\*)—SURPLUS—PERSONS ENTITLED—RIGHT OF MORTGAGEE.

The chattel mortgagee sold the property at auction under a power of sale for more than enough to pay the debt and expenses. While the auctioneer had a part of the proceeds in his possession, the mortgagee advanced to the debtor a part of the surplus. There was no evidence that the mortgagee and the debtor entered into a fraudulent agreement to defeat another creditor of the debtor or to enable the debtor to do so. *Held*, that the right of the mortgagee to the funds in the hands of the auctioneer was superior to the rights of the other creditor.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 288.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"Not to be officially reported."

Action between the American National Bank and Mary M. Mathews and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Henry Burnett, for appellant. Kohn, Baird, Sloss & Kohn, for appellees.

CARROLL, J. The two questions involved on this appeal are: First, whether the appellee Mrs. Mathews was entitled to a homestead right in what may be called the "Third street property" in Louisville; and, second, whether or not the Columbia Finance & Trust Company is entitled to a preference over appellant in a fund garnisheed in the hands of Burton-Whayne Company.

Taking up first the homestead question, the facts are substantially these: Mrs. Mathews owned in her own right the Third street property. Her husband died in November, 1904. At the time of his death she and her husband occupied this property as a homestead, and there was living with them their married daughter, her husband, and child. These parties continued to occupy the house with Mrs. Mathews until the summer of 1905, at which time Mrs. Mathews bought a house at Anchorage, some 12 miles from Louisville. Whether or not her daughter, husband, and child were charges on her bounty, or whether she was under any obligation to support them, does not seem material in the disposition of this feature of the question presented. Mrs. Mathews at the time her husband died was entitled to a homestead in this property. This right the death of her husband did not deprive her of, so long as she continued to occupy it as a homestead. It made no difference whether or not she had a family or any person that she was under a legal or moral obligation to support residing with her. She was entitled to the homestead for her own use and benefit. The wife has the same right to a homestead in property owned by her as the husband has to a homestead in property owned by him. *Herring v. Johnston*, 72 S. W. 793, 24 Ky. Law Rep. 1940.

As Mrs. Mathews during the life of her husband had a homestead, it continued for her benefit after his death, unless abandoned by her. *Rothwell v. Rothwell*, 104 S. W. 276, 31 Ky. Law Rep. 851.

The only remaining question then is: Did Mrs. Mathews abandon her homestead right? In buying the place at Anchorage Mrs. Mathews testified that her purpose was that she might have a home for her daughter and her daughter's child in the country as well as a country home for herself, where she might make money by keeping summer boarders; that she never intended to abandon her house on Third street, and always regarded it as her permanent home, keeping there furnished rooms and a servant, and spending about one-half of her time there. On the other hand, counsel for appellant insists that, as the Third street house was mortgaged for practically its full value and on the market for sale, the intention of Mrs. Mathews in buying at a large price a home in the country was evidently with a view of giving up her home in Louisville and taking up her abode permanently in the country. It must be confessed that there are some facts from which these inferences might well be drawn. But, aside from these inferences, there is little or no evidence of an intention upon the part of Mrs. Mathews to permanently abandon her home on Third street. She might have a summer home in the country and occupy it during the summer months or longer each year, and yet retain her homestead in her Louisville property. The fact that she bought groceries and other articles and had them sent to her country home does not at all conflict with the proposition that she did not intend permanently to live there, as she only bought these things while she was living at the country place. Whether the acts of a person amount to an abandonment or not is entirely a question of fact, depending upon the intention as well as the acts of the person. An actual removal to and location in another place with no intention of returning constitutes an abandonment; but where the removal is only temporary, and there is always present an intention to return, the homestead right will not be lost. The length of time that the absence continues is not a controlling feature, although a circumstance entitled to consideration in determining the intent in removal. *Herring v. Johnston*, 72 S. W. 793, 24 Ky. Law Rep. 1940; *Galloway v. Rowlett*, 74 S. W. 260, 24 Ky. Law Rep. 2503; *Cincinnati Leaf Tobacco Co. v. Thompson*, 105 Ky. 627, 49 S. W. 446, 20 Ky. Law Rep. 1439; *Ragsdale v. Watkins*, 76 S. W. 45, 25 Ky. Law Rep. 506. We conclude that Mrs. Mathews did not abandon her homestead.

The controversy with the Columbia Finance & Trust Company comes up in this way: Mrs. Mathews on March 19, 1906, executed to the Columbia Finance & Trust Com-

pany a mortgage upon her household goods to secure the payment of a note for \$1,750. Simultaneously with the execution of the note and mortgage she gave to the trust company this writing: "Columbia Finance & Trust Co. This is to authorize you to have an auction sale of my residence known as No. 1623 Third street at such day as you may select within the next month, and the day following the sale of the house you are to sell the furniture and furnishings as they now stand in the house, and continue from day to day until all shall have been disposed of. Out of such proceeds of the first monies received you are to pay off the note of \$1750. and any expenses that may be incurred for making said sale, after which the balance is to be turned over to me." In pursuance of the authority contained in this writing, the trust company employed Burton-Whayne Company, auctioneers, who sold the household goods on April 17, 18, and 19, 1906, for \$2,980. Out of this sum they paid to the Columbia Finance & Trust Company \$1,889 on April 18th and 19th, leaving in their hands some \$800, which they expected to pay in a few days or when the accounts were settled up. On April 20th the appellant bank attached this amount in the hands of Burton-Whayne Company. The trust company had no notice of any indebtedness of Mrs. Mathews to the appellant bank until April 20th, when this suit was brought and the attachment issued. On April 18th and 19th, knowing the amount that would be realized by Burton-Whayne Company for the sale of the furniture would largely overpay Mrs. Mathews' indebtedness to it, and not having any notice of her indebtedness to the appellant bank, the trust company advanced to Mrs. Mathews \$1,050 out of the money it had at that time received from Burton-Whayne Company. If the trust company had not advanced to Mrs. Mathews any part of this money, there would have been sufficient to satisfy, not only its debt, but the debt of the appellant bank. And so the contention of the bank is that the trust company should not have paid to Mrs. Mathews any part of the money received from the sale of the furniture until its debt of \$1,750 had been first paid, but that, instead of doing this, it advanced \$1,050 of the first money received to Mrs. Mathews, and it insists that the levy of its attachment on the remainder of the proceeds of the sale of the furniture in the hands of Burton-Whayne Company before they paid it over to the trust company is superior to the claim of the trust company. The trust company, on the other hand, contends that, as it had no notice of any indebtedness of Mrs. Mathews to the bank, it had the right as an accommodation to her to pay her either out of the first or last money received from Burton-Whayne Company the excess over the amount necessary to satisfy its debt. If the contention of the bank is sustained, the trust company

will lose a part of its debt, as it will require substantially all of the money attached in the hands of Burton-Whayne Company to satisfy the balance due on its note. As the trust company had no notice whatever of any indebtedness due by Mrs. Mathews to the bank, and as there is no evidence that it paid her the money with the fraudulent intention of defeating the bank in the collection of its debt, it seems to us its equitable claim to the balance in the hands of Burton-Whayne Company is superior to that of the bank. Mrs. Mathews had placed in possession of the trust company all of her furniture for sale for the purpose of satisfying its debt, with the agreement that, if any of the surplus was left, it was to be paid to her. When the trust company paid to her the \$1,050, it knew that it could safely do this, as the proceeds were sufficient to pay this \$1,050 as well as its debt. Under these circumstances, it seems to us immaterial whether the trust company paid Mrs. Mathews out of the first or the last money actually received by it from Burton-Whayne Company. Burton-Whayne Company was holding all the money as its agent. All the money was in fact in its possession at the time the payments to Mrs. Mathews were made. Even if it had known that the bank had a claim against Mrs. Mathews, it was under no duty to retain for the benefit of the bank any money. As there is no evidence that it entered into any arrangement with Mrs. Mathews to fraudulently defeat the bank in the collection of its debt, or to enable Mrs. Mathews to do so, its right is superior to that of the bank.

Wherefore the judgment is affirmed.

#### ISON et al. v. HALCOMB.

(Court of Appeals of Kentucky. Feb. 4, 1910.)

##### 1. WILLS (§ 88\*)—TESTAMENTARY PAPER—NATURE.

A paper, in form a deed, but testamentary in character, and not to take effect until the maker's death, must be probated as a will, to be valid.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 200; Dec. Dig. § 88.\*]

##### 2. DEEDS (§ 9\*)—VALIDITY—TIME OF TAKING EFFECT.

A deed, to be valid, must pass some interest vesting in the grantee on the delivery of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 5; Dec. Dig. § 9.\*]

##### 3. WILLS (§ 88\*)—DEED DISTINGUISHED FROM WILL.

A deed conveying all the real and personal estate the grantor shall have at his death, to be equally divided between the grantees, his children, living at his death, is testamentary in character and of no validity unless probated as a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 200; Dec. Dig. § 88.\*]

##### 4. EJECTMENT (§ 9\*)—TITLE OF PLAINTIFF—SUFFICIENCY.

One suing for the recovery of land must recover on the strength of his own title, and not on the weakness of the title of defendant.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 18; Dec. Dig. § 9.\*]

##### 5. EJECTMENT (§ 82\*)—PLEADING—VARIANCE.

One suing to recover land must prevail, if at all, on the cause of action alleged.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 222-228; Dec. Dig. § 82.\*]

##### 6. DESCENT AND DISTRIBUTION (§ 125\*) — RIGHT OF HEIRS.

The right to land by the heirs of the deceased owner is subject to the payment of his debts.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 457; Dec. Dig. § 125.\*]

##### 7. EXECUTORS AND ADMINISTRATORS (§ 356\*)

###### —SALES OF REAL ESTATE—ACTION FOR SALE.

Where, in a suit by the curator for the settlement of the estate of decedent, the petition alleged that he did not know the debts or the boundaries of the land of decedent, and the report of the commissioners to report the debts and the boundary of the land, which gave the debts and the boundary of the land was confirmed, a judgment directing a sale of the land described therein by metes and bounds as in the survey filed by the commissioner was not void because the land was not described in the petition.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1466; Dec. Dig. § 356.\*]

##### 8. EXECUTORS AND ADMINISTRATORS (§ 356\*)

###### —SALES OF REAL ESTATE—ACTION FOR SALE.

Where, in a suit by the curator for the settlement of the estate of a decedent, all the infants interested were properly served with process, failure to name one of the infants in the order appointing a guardian ad litem, who answered for all the infants, did not render a judgment directing a sale void as to the infant omitted.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1465; Dec. Dig. § 356.\*]

Appeal from Circuit Court, Letcher County.

"To be officially reported."

Action by Minerva J. Halcomb against Boyd Ison and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

D. D. Fields & Son, Ira Fields, Bailey P. Wootton, Jesse Morgan, and Greene, Van Winkle & Schoolfield, for appellants. H. L. Howard, for appellee.

HOBSON, J. George Ison died in the year 1887, the owner of a tract of land in Letcher county. By an order of the Letcher county court his estate was committed to D. D. Fields, the sheriff of the county, as curator, and he brought a suit for the settlement of the estate against the widow and children. This suit progressed to a final judgment, by which the land was ordered sold to pay the debts of the estate. The sale was had, and Gideon Ison, a son of the deceased, bought the land for \$1,123. The sale was had sub-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ject to the dower of the widow, and he afterward paid her \$400 for her dower. The land was then worth about \$1,500. Deeds were made to him by the commissioner and by the widow in the year 1892. On July 11, 1903, he deeded the land to his two sons, Boyd and James Ison, and not long after this he died. They took possession of the land, and were living upon it when this suit was brought against them on February 20, 1906, by Minerva J. Halcomb, Maggie Riddle, William H. Ison, and Jefferson D. Ison, claiming the land under a deed from George Ison and wife, which purports to have been executed and acknowledged on June 26, 1879. It was found in his trunk after his death, and was lodged for record and recorded on December 1, 1905. The defendants by their answer pleaded that George Ison had not executed or delivered the deed, and they set up their title by virtue of their father's purchase in the judicial proceeding above referred to. They also pleaded that the deed, if made, was voluntary and void as to creditors, asserting a lien for the money that their father had paid if the deed was upheld. The plaintiffs replied, setting up grounds to show that the judgment in the case referred to was void as to them, they being infants at the time, and charged that Gideon Ison, when he purchased, had full notice of their rights. On final hearing the circuit court upheld the deed, held the judicial proceeding void, but also held that the deed was only valid as to Ison's homestead, and that as to the land over and above the homestead, it was fraudulent as to creditors. He directed the homestead to be laid off to the plaintiffs. From this judgment the defendants appeal.

The deed under which the plaintiffs claim is in these words: "This indenture, made and entered into this 10th day of June, 1879, by and between George Ison of the county of Letcher (Linefork), of the one part and Minerva Jane Ison, Margaret Lear Ison, William H. Ison and Jefferson D. Ison of the other part, Witnesseth that for and in consideration of natural love and affection, and in consideration that I have given a great deal to my other heirs, and that the above-named vendees are of tender years, and to make them a portion of my estate equal with what the other heirs have received, I hereby give, grant, bargain, sell and convey unto the said Minerva Jane Ison, Margaret L. Ison, William H. Ison and Jefferson D. Ison, the following real and personal property, viz.: All the real and personal estate that I shall own at my decease to be equally divided between them and to save the trouble and expense of all lawsuits and expense of commissioners I hereby appoint my friend ——— to divide the above property between the above vendees who shall be living at my death. In witness whereof I have hereunto set my hand and seal this day above written."

A paper, though in form a deed, is testamentary in character, and to be valid must be probated as a will, if it does not take effect until the maker's death. A deed to be valid must pass some interest vesting in the grantee upon the delivery of the deed. The paper above quoted is manifestly testamentary in character. The property conveyed is "all the real and personal estate that I shall own at my decease to be equally divided between them and to save the trouble and expense of all lawsuits, and the expense of commissioners, I hereby appoint my friend ——— to divide the above property between the above vendees who shall be living at my death." Nothing that the grantor owned at the time the deed was made passed under the deed. All the property that he then had remained his, and subject to his disposition, just as it was before. The only thing that the deed operates upon is the real and personal property which he shall own at his death, and this is to pass to such vendees as shall then be living. If this paper was delivered to the vendees, they took no interest upon its delivery in any property then owned by the maker. The operation of the deed is wholly contingent upon his having the property at his death. It therefore passed at its delivery no interest in any property he then owned, and would be operative in no way until his death. It was therefore testamentary in character, and of no validity unless probated as a will.

The plaintiffs took no title to the land under this paper; and, as this is the foundation of their action, and the only title asserted by them, it is unnecessary for us to consider the other questions discussed. The plaintiffs must recover upon the strength of their own title. They cannot recover upon the infirmity of the defendant's title. They must recover upon the cause of action which they set up; and, if this is not sustained, they must fail. The only cause of action set up by the plaintiffs is under the above-quoted instrument; and, that being invalid, and the action having been submitted on the merits, the petition should have been dismissed.

It is true the plaintiffs are the four youngest children of George Ison, and this appears from the record, but they do not set up the fact in their pleadings, or assert any right to the land as his heirs at law. Whatever rights they took as his heirs were subject to the payment of his debts, and upon an inspection of the record of the proceedings in which the land was sold, we find nothing rendering them void. The court had jurisdiction of the parties and the subject-matter of the action. It was alleged in the petition that the plaintiff did not know the debts against the estate or the boundary of the land, and the case was referred to the commissioner to report the debts and the boundary of the land owned by the decedent at his death. The commissioner took proof and had the land

surveyed. He filed his report, giving the debts and the boundary of the land. The report was confirmed, and a judgment entered directing a sale of the land, which was described in the judgment by metes and bounds, as in the survey filed by the commissioner. The purpose of the action was to settle the estate, and the judgment was not void, because the land was not described in the petition. The name of one of the infants was omitted from the order of court appointing the guardian ad litem. He answered for all of them, and the court recognized the answer. All the parties were duly served with summons. The failure to appoint a guardian ad litem for one of the infants would render the judgment erroneous as to him, not void where he was properly served with process.

Judgment reversed, and cause remanded for a judgment as above indicated.

### HITE v. HITE†

(Court of Appeals of Kentucky. Jan. 27, 1910.)

#### 1. HUSBAND AND WIFE (§ 283\*)—RIGHT TO SEPARATE MAINTENANCE.

Where a husband, addicted to the excessive use of liquor, would, during his spree, assault his wife and abuse her openly and publicly, and would, in the presence of others, act as though she was not conducting herself properly, and he was spying on her to detect her improper relations with some one, and sought by hints in the presence of others to insinuate that she was too intimate with a friend of his, she was entitled to a decree of separate maintenance.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1064; Dec. Dig. § 283.\*]

#### 2. HUSBAND AND WIFE (§ 278\*)—CONTRACTS FOR SEPARATE MAINTENANCE—CONSIDERATION.

Where a husband and wife were living apart, and the wife was just recovering from a beating which the husband had given her, furnishing good cause for divorce, which would carry with it alimony, when she agreed with him to resume the marriage state, he promising to make suitable provisions for her support if she were again compelled to leave him, her waiver of her right to a divorce and her consent to return were sufficient consideration to support the contract.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1052; Dec. Dig. § 278.\*]

#### 3. HUSBAND AND WIFE (§ 278\*)—CONTRACT FOR SEPARATE MAINTENANCE—FRAUD IN EXECUTION—EVIDENCE.

Evidence held not to show that a husband was deceived in the execution of a contract with his wife for her separate maintenance, in case she should be compelled to leave him in the future.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 278.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Action by Mamie H. Hite against Louis Hite. Decree for plaintiff, and defendant appeals. Affirmed.

Johnson & Hieatt, for appellant. Carroll & Middleton and Helm & Helm, for appellee.

LASSING, J. Appellant is a member of an old and respectable family in Louisville, Ky. He received from his father's estate a considerable fortune. Appellee is an estimable lady of good parentage. After their marriage they resided in Louisville, and moved in what is known as the better circle of society. The income from the estate left to appellant was amply sufficient to support them comfortably. Not being burdened with the necessity of working for a living, appellant gave most of his time to society and social duties. His good fortune proved to be his undoing, for while leading a life of comparative idleness habits were acquired which were calculated to ruin his health, weaken his mentality, and deaden his sensibilities. These habits were indulged to such an extent that they undermined the whole fabric of his domestic life, and he became dissipated to such an extent as to excite the concern of his family and friends. It was agreed that he should go abroad with his wife and children, in the hope that a change of climate, surroundings, and associates would enable him to break away from habits which were wrecking his life and ruining his home.

Accordingly he took his family and went to Europe. While on the way there he drank heavily, and after reaching his destination in Europe he continued to drink to excess, and this conduct on his part so changed his nature that finally, while in a drunken condition, he assaulted his wife and beat her up in a most shameful and disgraceful manner. This unhappy and unfortunate culmination of his protracted debauch resulted in his wife's leaving him. After the separation he manifested much concern for the welfare of his wife and children, and expressed deep sorrow for his inexcusable treatment of her. When his wife had recovered from the effects of her injuries, appellant induced certain of his friends and associates to intercede with her for the purpose of effecting a reconciliation, and, while devising ways and means to induce her to return to him, he manifested a willingness to do anything that would satisfy and induce her to consent to live with him again.

Chief among their friends who endeavored to effect an adjustment of the marital woes of this unhappy couple was William A. Dell, an American then sojourning in Europe, whose acquaintance they had formed, and who had, in the course of their stay in Europe, been thrown much with them. On several occasions, at the request of appellant, he called upon Mrs. Hite and talked to her and her friends over the possibility of her returning to her husband and the terms upon which she would be willing to do so. Other friends likewise took part in this effort to effect a reconciliation. Finally she agreed that she would be willing to resume the mar-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied March 4, 1910.

ital relations with him if he would cease drinking and treat her as a husband should and enter into an agreement with her to settle a sum upon her sufficient to maintain her and her children in a manner commensurate with their station in life and his financial standing, in the event he again treated her in such a manner that she could not live with him, and provided he would further agree that, in the event they again separated because of his wrongdoings, she should have entire custody and control of their children, free from any interference on his part. The terms upon which she expressed a willingness to return to him were communicated by Dell to appellant, and he readily agreed thereto.

After learning that the terms submitted by her were acceptable to her husband, she wrote to Hon. St. John Boyle, a lawyer and acquaintance and friend of hers in Louisville, Ky., and requested that he put in legal form her proposed agreement with her husband as outlined in her letter to him. This he did, and sent to her a writing which he said would amply protect her along the lines suggested, and which had been practically agreed upon by the parties. Appellant had all along, during the progress of the negotiations between himself and wife, insisted that they settle their differences themselves without the aid of attorneys, and, in order to avoid any possible chance of having the peace negotiations blocked, it was agreed among appellee's friends that Dell should copy the contract which had been prepared by St. John Boyle and submit the copy so made by him to appellant. This he did, and after appellant had examined it, and fully considered its provisions, he agreed to it in its entirety, and expressed himself as more than pleased with it, and stated that, if it had been left to him alone, he would have been more liberal in dealing with his wife than she was asking him to be. Shortly thereafter he and his wife met and signed this contract and resumed their marital relations. The following is the contract in question:

"Caux Palace Hotel, Territet, Montreux.

"This agreement, made and entered into by Louis Hite and Mamie H. Hite, his wife, citizens of the United States and of the state of Kentucky, who are and have been living separate and apart, and as they believe it is for the good of their children and all concerned that they should again live together as husband and wife, by way of settlement, agree as follows:

"(1) That the said Louis Hite and Mamie H. Hite do hereby agree to live together as husband and wife.

"(2) The said Louis Hite agrees to pay to the said Mamie H. Hite, his wife, the sum of one hundred (\$100) dollars per month for her sole and separate use.

"(3) It is further agreed that, should it be necessary and proper for Mamie H. Hite,

the said wife, to separate herself from and live apart from her said husband, by reason of any such conduct as would justify her separation from him, he will not oppose such a separation, and agrees that their said children shall remain in the custody of their mother, and that he will not undertake, by any proceedings at law or otherwise, to take possession or control of such children.

"(4) In the event of any such condition arising as provided in the foregoing section, it is stipulated that any home in which they may then be living, together with all its contents and appurtenances, shall be under the control and disposition of the wife of the said Louis Hite for the use and benefit of herself and the said children, and that he will pay to his said wife, for the support of the said wife and children, the sum of five thousand (\$5,000) dollars a year.

"(5) In case of the death of the said Louis Hite during any such separation, then it is stipulated that his wife shall receive such portion of the said Louis Hite's personal estate as she may be entitled to by law, and that he will devise to her, by his last will, one-third of the income, as provided in the will of his father, and that if he should fail to make such will, or otherwise secure to her the payment of such one-third, then that his own estate shall be liable therefor.

"In testimony of all which the said parties have, in the presence of the subscribing witnesses, signed the foregoing instrument this 15th day of April, 1903.

"Mamie H. Hite.

"Louis Hite.

"Witnesses: M. Hotop.

"C. L. Auber."

For some time after their reconciliation, to all appearances, appellant lived up to his agreement and entirely left off the use of intoxicants, and during this time he and his wife, so far as can be gathered from the record, lived happily together. They moved about from place to place in Southern Europe as inclination and fancy led them in quest of pleasure, and so long as he was true to his word and did not drink there was nothing in his conduct toward or treatment of his wife of which she might complain. In the course of their travels they were thrown frequently with their American friends, whom they had known before the date of their domestic troubles, as well as with new American acquaintances which they formed, and it is agreed that during this time appellant was not only a kind, thoughtful, and indulgent husband, but a most genial, delightful, and entertaining companion. When drinking, however, his whole nature and disposition seemed changed, and he would become very unkind toward his wife and disagreeable toward his associates.

While out with a party of friends on a sleighing trip that was planned to cover several days, his wife discovered that he was drinking. Others of the party observed the

same thing, and all noted that a marked change had come over him. He became very ugly in his manner toward his wife and their friends, and finally acted so badly that the party was broken up and the trip abandoned. They returned to their hotel, and this trip marked the beginning of the end. From that date their marital woes multiplied. He abused his wife, openly and publicly insulted and humiliated her, and on one occasion so behaved toward her that, fearing he was again going to do her bodily harm, she fled from their apartments in the hotel to the public reception room and appealed to gentlemen there for protection. Appellant followed after her, and addressed a remark so insulting to a gentleman who asked what was the matter as to cause him to knock appellee down. Shortly thereafter appellee left her husband and returned to America, and her home in Louisville, Ky., with two of her children.

In the course of time she brought suit for a divorce from bed and board and the enforcement of the contract herein referred to. Appellant defended, and in his answer, in addition to traversing the allegations of the petition, practically charged his wife with being criminally intimate with his friend Dell, and alleged that the execution of the contract in question had been procured by fraud. He asked that the prayer of the petition be denied and the contract be annulled. The affirmative matter in the answer was traversed. Much proof was taken by appellee in support of the charges set out in her petition. No proof was taken by appellant. The case was heard by the chancellor, and upon consideration thereof he entered a decree giving to appellee the relief sought as to the separation, and declared the contract valid and binding upon appellant. He appeals.

Appellant's mistreatment of his wife during the latter part of their married life is better understood by a consideration of his general behavior toward her during this period, rather than by singling out particular acts of cruelty and unkindness, although the latter were amply sufficient to justify her in leaving him. But these particular acts of cruelty and threatened violence fade into insignificance when compared with his general behavior toward his wife during this time. It is shown by the evidence that he would sit around the lobby and corridors of the hotels and public places, and in the presence of friends, strangers, and servants act as though his wife was not conducting herself properly and he was spying on her in an effort to detect her improper behavior toward or relations with some one. Such conduct on his part was very annoying to his wife, and, while embarrassing in the extreme at times, it might have been excused on account of his drunken condition, and borne by his wife, if he had been content to stop at that. But it seems he was not. He acted as though

he expected her to withdraw herself entirely from the society of the friends and acquaintances whom he had made and selected for her, and retire to the seclusion of her room, and there remain during his protracted sprees. When she did not do so, he sought, by hints dropped to her in the presence of others, to insinuate that she was not conducting herself as a lady should, and was too intimate with his friend Dell. It was this conduct on his part toward her that created the chasm that could not be bridged. She could stand, and even forgive, the cruel and stinging blows which in his madness and delirium he had rained upon her face with his bare fist, but when he sought, by act and word, to destroy her good name and rob her in the eyes of the world of her purity and wifely virtue, she openly rebelled, her whole nature revolted, and any love or respect which she had for him was changed to hate, and she fled from him as from a pestilence.

His conduct toward her, during the period under consideration, is shown by the record to have been in keeping with his conduct during the progress of the trial. To his wife's plea for a partial divorce and separate maintenance, his defense is an attack upon her reputation as a virtuous woman, and an insinuation that, because of her misconduct, he was driven to drink. No word of proof has been offered by him in support of either charge, presumably because none was to be found. It is neither surprising nor unreasonable to believe that one who would make such charges against the mother of his children without some evidence upon which to base them would be guilty of the cruel and inhuman treatment with which appellant is charged and proven to have shown his wife. It is a singular fact that at no time during their entire married life, except when he was under the influence of liquor, did appellant find any complaint with his wife on account of her association with any of their friends, and particularly is this true with regard to the friends and acquaintances formed by them while in Europe. It was but natural that they, being Americans sojourning in a country among strangers and people whose customs, habits, and language were altogether different from their own, should have selected as their friends such of their countrymen as they found where they were stopping, and while the record shows that these American friends were thrown with appellant and appellee a great deal, there is nothing in it indicating in the slightest that at any time appellee conducted herself in any manner other than as a lady should under like circumstances. Appellant was altogether at fault, and in adjudging to her a separate maintenance, the chancellor rendered a most righteous judgment.

This leaves for our consideration the question of the correctness of the chancellor's ruling in upholding the validity of the con-

tract under consideration. At the time the contract was executed, the parties to it were living apart. The wife had just recovered from the effects of the terrible beating which her husband had given her. She had an unquestionably good cause for divorce, which would carry with it alimony. This right she was unwilling to waive and again resume the marriage state with her husband unless he would make suitable provision for her support in the event she was again compelled to leave him. He wanted her to return to him, and was willing to conform to her request and wishes in this particular to induce her to do so. This was ample consideration to support the contract, and, as said by this court in the case of *Woodruff v. Woodruff*, 121 Ky. 784, 90 S. W. 266, 91 S. W. 265, 28 Ky. Law Rep. 757, 1082, in construing a similar contract: "It simply secured to her something in consideration of her foregoing the rights she then had. \* \* \* It [the law] favors the reconciliation of husband and wife. A contract for the re-establishment of a ruined home is one which equity is swift to approve. Whether the contract in question is contrary to public policy is not to be determined from one clause of it, but from the whole instrument. The contract as a whole does not tend to produce estrangement between husband and wife. They were already estranged. The contract brought them together, and, taken as a whole, it is in aid of the marital relation, and is therefore not opposed to public policy, but in accord with it." Thus its execution is sanctioned by the law, and it should be upheld, unless appellant's contention that he was deceived in its execution is supported by the proof.

Turning to this, we find that for some time prior to the date of its execution he had expressed a willingness, in fact, a desire, to enter into such a contract with his wife, and when the contract in question was presented to him, he read it over and fully advised himself as to its provisions before it was executed, and he expressed himself as more than satisfied with the reasonableness of its provisions. There is no proof to the contrary. The fact that an attorney advised Mrs. Hite as to the form of the contract can be of no avail. It is not form, but substance alone, of which he might justly complain. That he fully understood the terms of the contract there is not the slightest doubt, and as the provision therein made for his wife is no more than the chancellor would have been justified in allowing her, considering her station in life and his annual income, which is shown to be from \$10,000 to \$15,000, we see no reason why he should be relieved from the contract into which he voluntarily entered, and which seems to us to be both equitable and just.

Judgment affirmed.

## MILLER v. GOODIN et al.

(Court of Appeals of Kentucky. Jan. 28, 1910.)

### 1. ADVERSE POSSESSION (§ 19\*)—ACTUAL POSSESSION—INCLOSURE.

Defendant, who lived on an adjoining tract, purchased the land in controversy at an execution sale, after which he entered thereon, and cleared and claimed the whole as purchaser. He remained in undisputed possession for 15 years, although he never received a deed from the sheriff, and failed to inclose the land on one side. Held, that he acquired the title by adverse possession; the tract being marked by a well-defined boundary.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 99-105; Dec. Dig. § 19.\*]

### 2. RECORDS (§ 17\*)—LOST RECORDS—SUPPLYING.

The loss of an execution under which land is sold by the officer having charge of it does not affect the purchaser's rights; the contents of the execution being subject to parol proof as any other lost writing.

[Ed. Note.—For other cases, see *Records*, Dec. Dig. § 17.\*]

### 3. EXECUTION (§ 306\*)—SALE—DEED.

A purchaser of land under an execution should take a deed from the sheriff and obtain a writ of possession from the court; but such steps are subject to waiver by those against whom the execution runs.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 306.\*]

Appeal from Circuit Court, Knox County.

"Not to officially reported."

Action by J. R. Goodin and others against Henry Miller. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, with directions.

B. B. Golden, for appellant. J. D. Tuggle, for appellees.

HOBSON, J. Ezekiel Goodin obtained a patent from the commonwealth on June 2, 1857 for 50 acres of land. He died in the year 1880. This action was brought in October 1905, by J. R. Goodin and others, as his children and heirs at law, against Henry Miller, to recover so much of this 50-acre patent as lies outside of a previous survey patented in the name of Samuel Dickey. Miller set up this defense: A. P. Wilson owned the Samuel Dickey patent, or a part of it. The Goodin patent conflicting with the Dickey patent, a litigation ensued between Goodin and Wilson, and in this suit Wilson recovered all of the land lying within the Goodin patent which was also included in the Dickey patent. There were about 20 acres included in the Goodin patent that lay outside of the Dickey patent. Wilson had an execution for costs against Goodin, amounting to \$35, and this was levied on the land owned by Goodin outside of the Dickey patent. The land was appraised at \$15 and was bought by Wilson at the execution sale. Wilson took possession of the land, and held it from that time on until he sold it to Miller in 1897. Miller entered upon the land when he bought it, and has since

held it. All of this is now shown by parol. The execution was not returned by the sheriff, or, if returned, cannot now be found. The record simply shows that the execution was issued in 1878; but there is no record of its return, or what was done under it. There is proof by two or three witnesses, however, to the effect above stated, as to the sale of the land, its appraisalment, and its purchase by Wilson for his debt. The fact that Wilson then took possession of the land, and held and used it from that time until he sold it to Miller, was shown by a number of witnesses. So far as appears from the proof, Goodin made no claim to the land after it was sold at the execution sale, and his heirs appear to have set up no claim to it until shortly before this suit was filed. In the circuit court the case was by consent transferred to equity, as Miller held under a title bond from Wilson, and as Wilson had no deed from the sheriff, or at least none could be found; Wilson having died some years before the suit was brought. On final hearing the circuit court entered judgment in favor of the Goodins, and Miller appeals.

The ground of the judgment of the circuit court appears to have been that the defendant had no record title, and that the possession by him and Wilson was not sufficient to give him a title by adverse holding. There was proof by one witness who testified in substance that she heard her father once suggest to Wilson to buy out the Goodin heirs in this land, and by another witness that Wilson told her father to cut on his land and not to get over on the Goodin land. But both these conversations occurred many years ago; and, while the ladies who testified to them no doubt have repeated them as they remembered them, this testimony cannot outweigh the great mass of evidence in the record, showing that Wilson took possession of the land and claimed it as his own. He cleared a large part of it and inclosed it. He cut a large quantity of bark from it. He cut timber from it, and his manner of dealing with the land from the time of his execution purchase shows beyond doubt that he was holding it as his own.

The judgment of the circuit court appears to be based upon the ground that Wilson did not have the land inclosed on one side, and that this fence was put up within 15 years before the suit was brought. But it was not necessary that Wilson should have an inclosure around the land to give him an adverse possession under the circumstances. He lived on an adjoining tract. He entered upon this land, cleared and inclosed a large part of it, claiming the whole as a purchaser; and although he did not put the whole under fence, his possession was not confined to his close, but extended to the whole bound-

dary. By living on one tract he could not get possession so as to acquire title to an adjoining tract by simply claiming it, or occasionally trespassing upon it; but when he entered upon the land which he had purchased with intent to take possession of the whole, and cleared and inclosed a part of it, this entry, there being then no adverse holding by Goodin, extended to the limits of the boundary he claimed. He claimed all the Goodin patent outside of the Dickey line. The lines of this patent were marked and well defined, and so he claimed to a well-defined, marked boundary, and took possession to the extent of his claim, although he did not actually inclose all of the land. When he thus remained in possession for 15 years, his right to the land became as absolute as if the sheriff had made him a deed.

When a record is lost, its contents may be proved by parol, as any other writing. That the execution is lost there is no question; but its loss by the officer having charge of it does not defeat the rights of the purchaser under it. His rights were acquired at the sale, and were not affected by the subsequent loss of the writ. Regularly he should have taken a deed from the sheriff and obtained a writ of possession from the court. But Goodin might waive this, and when he and those claiming under him acquiesced in Miller's possession his holding was rightful; and after so many years he and those claiming under him should not be disturbed.

On the facts shown, we therefore conclude that the right of the case is with the defendant.

Judgment reversed, and cause remanded, with directions to the circuit court to dismiss the petition.

# DOW WIRE & IRON WORKS v. SMITH. (Court of Appeals of Kentucky. Feb. 4, 1910.)

## 1. TRIAL (§ 811\*)—DELIBERATIONS OF JURY— MATTERS WITHIN PERSONAL KNOWLEDGE OF JURORS.

Where, in an action for injuries to a servant while unloading from a wagon a section of a fire escape, the section was described to the jury and the evidence showed the manner of unloading it, the jury could determine whether the manner of unloading was proper and whether sufficient men were provided for the work, and a verdict was sustained by evidence, though witnesses testifying that the manner of unloading was dangerous were not competent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 739; Dec. Dig. § 811.\*]

## 2. TRIAL (§ 309\*)—DELIBERATIONS OF JURY— MATTERS NOT DIRECTLY SHOWN—INSPECTION BY JURY.

Where one suing for a personal injury consisting of a broken leg testified as to his injuries and exhibited his injured limb to the jury, and the limb appeared to be an inch or more shorter than the other limb, a verdict for \$2,500 was not excessive on the ground that he did not

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

show the extent of the injuries by the physician who attended him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 733; Dec. Dig. § 309.\*]

**3. APPEAL AND ERROR (§ 1003\*)—VERDICT—CONCLUSIVENESS.**

A verdict sustained by evidence will not be disturbed because it is contrary to the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.\*]

**4. TRIAL (§ 133\*)—MISCONDUCT OF COUNSEL—IMPROPER ARGUMENT.**

The error in the argument of the counsel of a servant suing for a personal injury that it was the duty of the master to adopt and use the best known and most approved method of doing the work, and that it was liable if it failed to do so, was removed by the court stating that the instructions defined the duty of the jury, and thereby confined the jury to the instructions as to the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.\*]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by Louis Smith against the Dow Wire & Iron Works. From a judgment for plaintiff, defendant appeals. Affirmed.

S. M. Wallace and J. A. Sullivan, for appellant. Grant E. Lilly, for appellee.

**NUNN, C. J.** This is an appeal from a judgment for \$2,500 in favor of appellee for injuries received by him while unloading a section, the base, of a fire escape from a wagon. Appellant had a contract to erect two fire escapes to the school building in Richmond, Ky. On the day appellee received his injuries appellant had its foreman in the city who had the two bases hauled from the depot. Each of these was about 4½ feet in height and 6 feet in diameter, and, according to appellee's testimony, weighed about 1,000 pounds, and, according to appellant's, about 450 pounds. One of them was removed from the wagon when it reached the school building, and the wagon moved to where the second was to be unloaded, and it was while appellee was helping to unload this one that he received his injuries. It fell upon his leg, breaking it below and crushing it above his knee. Appellee alleged four grounds in his petition for a recovery: First. The place selected to unload this section was unsafe because a piece of pipe upon which he stepped and by which he was caused to fall was lying upon the ground. He alleged that he did not know the pipe was there, and that appellant's foreman placed it there immediately before he was injured. Second. The means employed in unloading the section were improper and unsafe. Third. The force of men employed was insufficient. Fourth. The requisite instructions were not given to him. Appellant specifically denied all these grounds, and a trial was had with the result stated.

The court in instructing the jury refused to submit any instruction authorizing the jury to find for appellee on the first and fourth grounds alleged, but submitted the other two by proper instructions. One or two witnesses for appellee testified that in their opinion these bases for the fire escapes were improperly unloaded, that it was dangerous to unload them in the manner in which it was done, and that the safe way would have been to have rolled them down on skids. Appellant's counsel contend that the witnesses who made these statements did not show themselves experts or competent to speak on this subject, and therefore the court should not have submitted that question to the jury, as appellee was without any competent proof on that subject. We cannot agree to this, for the reason that the section unloaded was described to the jury, which, we suppose, was composed of business men or farmers, and they knew the proper and safe way of unloading it. They also heard the evidence as to the manner in which it was unloaded, which was by moving it to the rear of the wagon, which was four feet and four inches from the ground, and four men, including appellant's foreman, undertook to let it down on one edge of the bottom, and then it was to be shoved back, and in shoving it back appellee was caught under it with the result stated. In unloading the first one the man occupying the position that appellee was in during the unloading of the second one saved himself from injury by coming up through the hole in the section. The jury also from the description of the base and the manner in which it was unloaded had as good an idea as to whether four men were sufficient to make it reasonably safe to unload it in that manner as any witness introduced during the trial.

It is contended that the verdict is excessive, because appellee received only a broken leg, that he was able to walk at the time of the trial without crutches, and that he did not show the extent of his injuries by any physician who attended him. The record shows that appellee testified as to his injuries and exhibited his injured limb for the inspection of the jury, which appeared to be an inch or more shorter than his other leg. A physician could not have made the extent of his injuries clearer to the jury than this inspection.

Appellant also contends that the verdict is contrary to the weight of the evidence. This may be true, but it was the jury's province to weigh the evidence, and, there being evidence upon which to base the verdict, we do not feel authorized to disturb it.

A reversal is also asked upon the ground of misconduct of appellee's counsel in his oral argument to the jury. The misconduct complained of was the making of the following statement: "Plaintiff's counsel in substance stated in said argument that it was

the duty of the defendant company to adopt and use the best known and most approved method of unloading the said machinery, and that if it failed in this regard, and the injury to the plaintiff resulted therefrom, that the defendant was liable. To which the defendant objected. Whereupon, on appeal to the court, no ruling was made thereon, but the court said to the jury that the instructions defined their duty." As appellant's counsel objected to only this one, we will not refer to any of the others. Counsel for appellee did not use this language to the jury as words of the instructions of the court. He simply gave his idea in the argument, and, conceding that he was not entirely correct, the statement of the court which confined the jury to the instructions as to the law of the case was sufficient to remove from their minds any erroneous impressions, if any had been caused by the remarks of the counsel.

Finding no material error committed upon the trial to the prejudice of appellant, the judgment of the lower court is affirmed.

#### ILLINOIS CENT. R. CO. v. FROST.

(Court of Appeals of Kentucky. Feb. 2, 1910.)

##### 1. RAILROADS (§ 478\*)—PLEADING (§ 362\*)—FIRES—ACTION—PETITION—SUFFICIENCY.

A petition in an action against a railroad for fire set by engines, which alleges negligence in the operation of engines not provided with spark arresters, and in permitting combustible material to accumulate on its right of way, and that fire escaped from the engines and damaged plaintiff's property, states a cause of action, though it does not charge that the sparks from the engine set fire to the debris on the right of way and was communicated therefrom to plaintiff's property, and the proper way to reach the allegation as to the debris is by motion to strike it.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 478; \* Pleading, Dec. Dig. § 362.\*]

##### 2. APPEAL AND ERROR (§ 959\*)—DISCRETION OF TRIAL COURT — AMENDMENT OF PLEADINGS.

The right to file amended pleadings, after the trial has begun, is within the discretion of the trial judge, and, unless abused, his action will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.\*]

##### 3. CONTINUANCE (§ 30\*)—GROUNDS—AMENDMENT OF PLEADINGS.

Where amendments are permitted after the trial has begun, the case should not be continued unless the amendment has so changed the cause of action as to justify the belief that opposing counsel has been taken by surprise, and cannot with the witnesses at hand meet the changed conditions.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 99-112; Dec. Dig. § 30.\*]

##### 4. PLEADING (§ 237\*)—AMENDMENT TO PETITION—DISCRETION OF TRIAL JUDGE.

Where the petition in an action against a railroad for fire set by engines alleged negligence in operating the engines without spark arresters and in permitting the accumulation of combustible materials on the right of way, and the railroad joined issue on the charge that debris was

allowed to accumulate on the right of way, the allowance of an amendment to conform to the proof that the fire from the engines set fire to the debris, and was communicated to plaintiff's property, was within the discretion of the trial judge.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 608-619; Dec. Dig. § 237.\*]

##### 5. CONTINUANCE (§ 30\*)—GROUNDS—AMENDMENT OF PLEADINGS.

Where an amendment to the petition to conform to the proof did not change the issue which defendant understood it was called on to meet, a motion for a continuance because of the allowance of the amendment was properly denied.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 99-112; Dec. Dig. § 30.\*]

##### 6. TRIAL (§ 28\*)—VIEW BY JURY—WHEN AUTHORIZED.

The practice of directing a view by the jury should be exercised with caution, and not allowed unless from the peculiar character of the case or the circumstances brought out in evidence it is manifest that without a view the jury cannot reach a just conclusion, and the denial of a view in an action for damages to property by fire is proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 77-79; Dec. Dig. § 28.\*]

##### 7. RAILROADS (§ 482\*)—FIRES—DAMAGES—EVIDENCE—SUFFICIENCY.

Where, in an action for the destruction of a fence by fire set by defendant's locomotives, the amount of the fence destroyed was not disputed and its condition and age was described, the jury had ample basis on which to reach a fair valuation of the fence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 482.\*]

Appeal from Circuit Court, Muhlenberg County.

"Not to be officially reported."

Action by Ed Frost against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Taylor & Eaves, R. Y. Thomas, Jr., Trabue, Doolan & Cox, and Blewett Lee, for appellant. Willis & Meredith, for appellee.

LASSING, J. Appellee sued to recover damages of appellant for the injury to and destruction of certain timber, fences, and stalk fields upon his farm, caused by the negligence of appellant in the operation of its engines without providing them with proper and suitable spark arresters, and by suffering and permitting grass and weeds to accumulate upon its right of way adjacent to his lands. The material allegations of the petition were traversed, and upon a trial before a jury appellee recovered a verdict for \$750. Alleging that this verdict is excessive, and also that the trial court committed errors prejudicial to its rights in the progress of the trial, the railroad appeals.

The first complaint is that the court erred in not sustaining a demurrer to the petition, as it did not state a cause of action. The petition, in substance, charges that plaintiff's damage was due to the negligence of

the defendant company in two particulars—operating its engines when they were not provided with suitable spark arresters, and in suffering grass, weeds, and other combustible material to accumulate upon its right of way; and because of these two acts of negligence his property was set on fire and damaged to the extent claimed. Clearly, if the engines were not properly constructed and provided with suitable spark arresters, so as to prevent the fire from escaping, and because of this improper construction the sparks and fire which escaped therefrom set fire to and damaged plaintiff's stalk field, timber, and fence, appellant would be liable, and the petition in this particular stated a good cause of action. It is true that the petition does not specifically charge that the sparks as emitted from the engine set fire to the debris on the right of way and was communicated from this to plaintiff's land, but the petition stated a cause of action independent of this allegation. The proper way to have reached this allegation was by motion to strike it from the petition as superfluous matter. This was not done, but defendant traversed it, and plaintiff was later permitted, over the objection of appellant, to file an amendment, stating that the fire from said engines set fire to the grass, weeds, etc., on the right of way and was communicated to the land. Of this ruling appellant complains, and insists that the court should not have permitted it to be filed, and, after it was filed, should have set aside the swearing of the jury and continued the case.

The right to file amended pleadings after the trial has begun is a matter that is properly left to the discretion of the trial judge, and, unless it appears that he has abused that discretion, his action in the premises will not be disturbed. When amendments are permitted to be filed, the case should not be continued, unless by the amendment the cause of action has been so changed as to justify the belief on the part of the judge that opposing counsel has been taken by surprise, and cannot with the information and witnesses at hand meet the changed conditions. Here the only possible way in which an accumulation of waste material on appellant's right of way could have been connected with appellee's injury was by communicating the fire to his land. Appellant had joined issue with appellee on the charge that the right of way had been negligently permitted to become in this condition, and hence was certainly not taken by surprise when called upon to meet this issue. The proof tended to show that the fire had spread from the right of way to appellee's land, and we do not think the court erred in permitting appellee to file the amendment, as it merely conformed the pleadings to the proof, and, as it in no wise changed the issue which appellant must have understood it was called upon to meet, the motion for a continuance was properly denied.

Nor does the fact that the court refused to send the jury in charge of the sheriff to view the premises burned over furnish any good ground for reversal. To have done so would have delayed the court in the discharge of its business, and could have served no good purpose. This is an ordinary suit for damages, and to hold that the defendant has a right to have the jury view the premises burned over, and which was some distance from the courthouse, would be to establish a precedent which would be productive of no good results, and as it would increase the cost of the litigation and unnecessarily delay the trial, would be most objectionable. Such a rule has never been adopted by any court, and is a practice which should always be exercised by the trial judge with great caution and never allowed, unless from the peculiar character of the case or the circumstances brought out in the evidence it is manifest to the court that without a view the jury cannot reach a just and proper conclusion. Then, and only then, would such a course be warranted. No such case is presented here.

Appellant's most serious complaint is that the verdict is excessive. The witnesses differ very much in their opinions as to the damage done to the growing timber and the fences. The stalk field was certainly not valued too high in the pleadings, if worth anything at all, for pasture or roughness, and, as it is undisputed that all the field burned over, there must have been some forage for stock on all parts of it, and if the jury, in reaching their conclusion, allowed upon this item all that was sued for, it could not be said that it was excessive. The amount of fence burned is not seriously disputed, but the value thereof is questioned. The average jury in a farming community as a general rule is composed of men who are pretty good judges of the value of fencing, and, as the condition and age of the fence burned was described by the witnesses, the jury was furnished an ample basis to enable them to reach a fair valuation of the fence burned.

The real fight comes over the damage done to the growing timber. The acreage burned over is not in dispute. It was in the main young oak timber, and according to the witnesses for the plaintiff was seriously damaged, while defendant's witnesses say the damage was slight. This is a condition with which juries frequently have to contend. They must gather from the experience of the witnesses in dealing with the subject under consideration the facts upon which they base their judgment, and from this decide which witnesses are the better qualified to speak upon the question at issue. Of the witnesses introduced in this case some were practical timber men, and some, while having a general knowledge of timber values, have been devoting most of their time and energies to other matters. The jury saw them, and heard and understood their op-

portunities for familiarizing themselves with the value of timber in general, and with the damage done to the timber which was the subject of this litigation. From the conclusion reached, they evidently regarded the witnesses of the plaintiff as the better qualified to speak, and accepted their estimate of the damage done. While the damage is apparently large, we cannot say that it is so excessive as to warrant us in setting aside the verdict on that account.

Judgment affirmed.

#### WARD et al. v. MIDDLETON.

(Court of Appeals of Kentucky. Feb. 4, 1910.)

##### 1. BOUNDARIES (§ 47\*)—PURCHASE OF LAND—STATEMENT AS TO BOUNDARIES—ESTOPPEL.

Where purchasers of land, before making the purchase, consulted with the owner of adjoining land as to the boundary claimed by him, and were informed that his boundary did not cover certain land, and the land was purchased on the faith of these statements, he was estopped from later setting up claim to the land as against the purchasers.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 228; Dec. Dig. § 47.\*]

##### 2. ADVERSE POSSESSION (§ 24\*)—OCCASIONAL OCCUPANCY.

The occasional cutting of timber or occasional occupancy of land is not adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 114, 115; Dec. Dig. § 24.\*]

Appeal from Circuit Court, Harlan County.

"Not to be officially reported."

Ejectment by John W. Ward and others against Chad Middleton. Judgment for defendant, and plaintiffs appeal. Reversed, and new trial granted.

H. C. Clay, for appellants. W. F. Hall, for appellee.

CARROLL, J. The appellants, as plaintiffs below, brought this action in ejectment to recover the possession of a tract of land "beginning at a stone or rock marked with a cross at the mouth of Rocky Fork of the Road Branch; thence westward to the top of the west ridge of said branch; thence up with said ridge to the top of the mountain; thence with the top of the mountain to the top of the east ridge of said branch; thence down the said ridge to opposite the beginning; thence west to the beginning, containing 260 acres." In his answer as amended, the appellee, Middleton, denied that the plaintiffs were the owners of or entitled to the possession of the tract of land or any part thereof which he claimed, describing it as follows: "Beginning at Jones creek at the east line of George Stewart's; thence southwardly with said George Stewart's line up Tan Trough Ridge to a stake in an old marked out line at George Stewart's

upper corner; thence with a marked line an east course to a marked beech and buck-eye on the bank of Road Branch; thence northwardly down said Road Branch to the said Jones creek; thence up said creek about 40 yards to a cliff on the north side of said creek; thence with a ridge up to a fence on top of said ridge; thence with the same ridge to the top of the mountain to George Stewart's line between Clover Fork and Jones creek; thence with the line of George Stewart's down a ridge to the beginning." He further set up that he had been in the adverse possession of the land described in his answer for more than 15 years before the institution of the suit, and was in such actual adverse possession when the land in dispute was conveyed to the plaintiffs. He also averred that the question whether or not the land claimed by him was within the boundary of land described in the petition depended upon the proper location of the exterior lines of plaintiff's boundary.

The reply controverted the answer, and further alleged that before the plaintiffs purchased the land which includes the tract in controversy, or accepted a deed to the same, they advised with Middleton as to the location of the lines of the survey they contemplated purchasing, as well as the lines of the land claimed by him, and that he pointed out to them the location of the lines of the land he claimed to own, and said it did not include any part of the land to which he now asserts title. That in purchasing the land they were influenced by, and relied on, his statements as to the exterior lines and the boundary claimed by him, and he was estopped by his representations from asserting title to the land within their lines to which he said he had no title before they purchased it.

The land in controversy contains about twelve acres. According to the contention of appellants, it lies on the northern end of their survey and within its lines; whilst the appellee claims that it is a part of the southern boundary of his tract. It seems very clear that appellee has no paper title to the land in controversy. Whether or not the paper title of appellants covers or embraces it is in dispute, depending upon the correct location of the mouth of Rocky Fork in the Road Branch. It appears from a large map made by W. T. Rice, as well as from the evidence of a number of witnesses, that there are two Rocky Fork Branches that run into Road Branch. If the one that enters Road Branch at "X" is the mouth of Rocky Fork mentioned in the title papers of appellants, as contended by them, then the land in controversy is included within their boundary. On the other hand, if the mouth of Rocky Fork mentioned in the title papers is where it enters the Road Branch at "CM," as contended by appellee, the land in controversy

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is not within the exterior lines of appellants' paper title.

It seems to us that there are really only three material questions in the case. First, the correct location of the mouth of Rocky Fork; second, assuming that Rocky Fork as mentioned in the appellants' deed enters Road Branch at the point "X," has the appellee had such adverse possession of the land in controversy as would invest him with a good possessory title? and, third, did appellee by his declarations estop himself from asserting claim to the land? Appellants are entitled to recover if they establish that their line is at "X," or if they establish that appellee represented that he did not claim any part of the land in dispute, in which event it makes no difference whether appellants' line is at "X" or "CM." Appellee is entitled to succeed if he can show a possessory title to the land in dispute by adverse possession, and has not by his declarations estopped himself from asserting claim to it. In other words, although appellee may show adverse possession of the land in dispute, he cannot succeed if he represented to appellants that his boundary did not embrace it. In this latter event, although appellants may not be able to show that their paper title covers the land in dispute, this fact will not avail appellee.

In our opinion the instructions given failed to properly submit to the jury the issues, and in addition thereto submitted issues not authorized by the evidence. On another trial the jury should be instructed in substance that:

"No. 1. If they believe from the evidence that the mouth of Rocky Fork mentioned in appellants' deeds is at the point marked 'X' on the large map made by W. T. Rice, they should find for appellants, unless they believe that appellee is entitled to it under instruction No. 3.

"No. 2. If they believe from the evidence that the mouth of Rocky Fork mentioned in appellants' deeds is not at 'X' but is at 'CM,' they should find for appellee, unless they believe that he has estopped himself to dispute appellants' title as defined in instruction No. 4.

"No. 3. If they believe from the evidence that the mouth of Rocky Fork is at 'X,' but further believe from the evidence that appellee and those under whom he claims title have been in the actual, open, adverse and continuous possession of the land in controversy for more than fifteen years prior to the institution of this action, holding and claiming the same to a well-defined boundary, they should find for appellee, unless they believe he is estopped to assert claim to it as defined in instruction No. 4.

"No. 4. Although the jury should believe from the evidence that the mouth of Rocky Fork mentioned in appellants' deeds is at the

point marked 'CM,' and should further believe from the evidence that appellee has been in the adverse possession of the land in controversy as defined in instruction No. 3, they should nevertheless find for appellants if they believe from the evidence that before appellants purchased the land they consulted or advised with appellee as to the boundary claimed by him, and were informed by him that the boundary claimed by him did not cover the land in controversy, and on the faith of these statements believing them to be true they purchased and paid for the land, then they should find for appellants, upon the ground that the appellee by his statements estopped himself from setting up claim to the land as against appellee.

"No. 5. The jury are instructed that occasional cutting of timber, or occasional occupancy of the land, is not adverse possession within the meaning of instruction No. 3."

Wherefore the judgment of the lower court is reversed, with directions to the lower court to grant a new trial in conformity with this opinion.

#### CITIZENS' TRUST CO. v. FIDELITY TRUST CO.

(Court of Appeals of Kentucky. Feb. 4, 1910.)

##### 1. WILLS (§ 439\*)—CONSTRUCTION—INTENTION OF TESTATOR.

The intention of testator is the cardinal rule in the construction of wills, to be determined by a consideration of all its provisions; and, if such intention can be clearly conceived, and is not contrary to some positive rule of law, it must prevail.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 439.\*]

##### 2. WILLS (§ 555\*)—CONSTRUCTION.

Testator, by the third paragraph of his will, bequeathed to his brother the residue of his estate for life, in case he survived testator, with power to dispose of all or any part thereof by will. By the fourth paragraph he provided that after the brother's death "(should he survive me and die without making a will)" testator bequeathed a certain farm to K. and wife, for life, remainder to their children. By the fifth clause testator bequeathed the rest and residue of his estate in trust for a niece and her children, and by the seventh clause provided that if the niece should die without surviving issue, testator bequeathed all the estate, devised in trust for her, to the American Bible Society in fee. *Held*, that all the bequests made in the paragraphs subsequent to the third were conditional on the failure of the brother to survive testator, or, surviving him, on his failure to dispose of the property by will; and hence, neither of such conditions having occurred, such subsequent provisions became nugatory.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1189-1202; Dec. Dig. § 555.\*]

Appeal from Circuit Court, Hardin County.  
"To be officially reported."

Action by the Fidelity Trust Company, as executor of the will of A. M. Kasey, deceased, against the Citizens' Trust Company, as administrator, etc., for the construction of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

will. Decree for complainant, and defendant appeals. Affirmed.

S. M. Payton, Hazelrigg & Hazelrigg, and George K. Holbert, for appellant. L. A. Faur-est, Spalding & Stites, and Benjamin S. Washer, for appellee.

LASSING, J. Two questions are raised by this appeal, first, the construction of the will of A. M. Kasey; and, second, is a perpetuity created by the seventh clause thereof? The following is the will under consideration:

"Item First—I appoint my brother, S. W. Kasey, executor of this my last will and request that he be allowed to qualify without giving security. If my said brother should for any reason fail or decline to qualify or should at any time cease to act as such executor, I appoint the Fidelity Trust and Safety Vault Company, of Louisville, Ky., executor of this my last will.

"Item Second—I direct my executor above named to pay all my just debts and funeral expenses as soon after my death as convenient.

"Item Third—I give, bequeath and devise to my brother, S. W. Kasey, all the rest and residue of my estate, real, personal and mixed, wheresoever situated for and during his natural life, should he survive me with power to dispose of all or any part of the same by last will.

"Item Fourth—After the death of my said brother (should he survive me and die without making a will) I devise the farm, about fifty acres, near Vine Grove, Ky., to Robert Kasey (of color) and his wife, Jane during their lives with the remainder in fee to their children.

"Item Fifth—All the rest and residue of my estate, including my United States and city of Louisville bonds, I bequeath and devise to the Fidelity Trust and Safety Vault Company of Louisville, Kentucky, in trust for my niece, Emma F. Kasey, and her children after her death. The said trustee shall pay all the taxes, insurance and repairs on the real and personal estate, including the farm devised to Robert Kasey during the lifetime of the tenants, and shall out of the income from the estate pay to said Emma F. Kasey one hundred (\$100) dollars per month for the support of herself and children, should she have any, and she shall have the right to use and occupy as a home for herself and family the house and lot in Cloverport, Ky. purchased by my brother and myself of Owen Ralitt and wife subject to their life estate.

"Item Sixth—After the payment of said taxes, expenses and one hundred (\$100) dollars per month to Emma F. Kasey, all the remainder of the income from my estate shall be invested in bonds of the city of Louisville and added to the principal of my estate, but in case there should be any extra expense on the property at Cloverport caus-

ed by fire, storm or other casualty, such loss shall be made good out of the surplus income of my estate.

"Item Seventh—If my said niece, Emma F. Kasey should die leaving no children or issue surviving her, or if such child or children should die before attaining the age of twenty-one (21) years, leaving no lawful issue surviving them, then in such event I bequeath and devise all the estate devised in trust for her to the American Bible Society in fee simple."

In the construction of wills the text-writers are agreed that it is the duty of the court to ascertain the intention of the testator, and this intention is arrived at by considering the will as a whole and giving to the language used its customary and usual meaning. Each section or paragraph thereof must be read in connection with the remaining sections or paragraphs, and that construction adopted, where it can consistently be done, which will effectuate and give force to each paragraph and clause of the will. The general rule of construction is aptly stated in Page on Wills, §§ 461, 462, as follows: "The sole object and intention of the rules upon the subject of construction is to ascertain the intention of the testator. As was said by Chief Justice Marshall: 'The intent of the testator is the cardinal rule in the construction of wills, and, if that intention can be clearly conceived, and is not contrary to some positive rule of law, it must prevail.' The purpose of the court in construing a will is solely to ascertain the intention of the testator as the same appears from a full and complete consideration of the entire will. The intention of testator is said, in a recent Virginia case, to be the 'life and soul of a will'; and, if this intention is clear, and is not in violation of any rule of law, it must govern with absolute sway. In construing a will the court has no intention to make a will for the testator, or to attempt to improve upon the will which testator actually made. Assuming, as we must in the case of construction, that the testator had testamentary capacity at the time of making the will, that he was under no restraint, and the will as made is in full compliance with the rules of law upon the subject, the sole question for the consideration of a court of construction is what testator meant by the provisions of the will which he has seen fit to make. This proposition has been put by the courts in such a variety of forms, and with such uniformity of view, that it is hackneyed. \* \* \* When testator's intention is clear, every rule of construction yields to such intention. As was said in a recent Maine case: 'There is, however, one fundamental rule or consideration which is paramount to all others, and which should never be overlooked, and that is that the intention of the testator, as declared by the will itself, shall be allowed to prevail, unless some principle of sound policy

is thereby violated.' The intention of the testator, which, as we have seen, the courts endeavor to ascertain and enforce, except where forbidden by positive rules of law, is to be ascertained from a consideration of the will of testator as a whole, and not from its disjointed fragments. The courts will approach the problem of construing a will with a *prima facie* assumption that the testator, in drawing and executing his will, had a purpose which was clear, definite, and thoroughly consistent. \* \* \* This intention must be collected from the language of the whole will, interpreted with reference to the obvious or manifest object of the testator; and all parts of the instrument must be construed in relation to each other so as to give meaning and effect to every clause and phrase, and, if possible, form one consistent whole, every word receiving its natural and appropriate meaning. This proposition, like the preceding one, is established by an enormous number of cases. Thus, as a particular application of this general principle, if two constructions are possible to a clause of a will, one of which is in harmony with the provisions of the remainder of the will, and the other of which is at variance with them, the court will assume that the correct construction is the one which will harmonize this clause with the rest of the will."

Applying this rule to the will under consideration, we find that the testator, in item 3 of his will, gave to his brother for life all of his estate of every kind, and authorized and empowered him to dispose of all or any part of same by will in the event his brother survived him. In items 4, 5, 6, and 7 we find a clearly expressed purpose on the part of the testator to dispose of his estate in the event he outlived his brother, or his brother died without exercising the power conferred upon him in item 3. There is nothing in the language used in items 4, 5, 6, and 7, or in any one of said items, that would indicate an intention on the part of the testator to limit the estate which he had given to his brother in item 3, or to withdraw or curtail the power of disposition conferred upon him in item 3. On the contrary, just the reverse of such an intention on the part of the testator is gathered from a reading of item 4, in which it is clearly expressed that it is to become effective only in the event that his brother survive him and die without making a will. Having given to his brother his entire estate for life, with full power of disposition by will of all of it in item 3, he provides in item 4 that in the event his brother survives him, and fails to exercise this power, a certain portion of his estate shall go, under certain limitations and restrictions, to his negro servants; and, thus having carved out of his estate a portion thereof, he directs in items 5, 6, and 7 what shall be done with the remainder. Clearly these clauses must be read

in connection with items 3 and 4 in order that the intention of the testator may be fully gathered and understood. When so read, it is apparent that the validity of items 4, 5, 6, and 7 is made to rest entirely upon his brother's surviving him, and then dying without making a will, or, in other words, without exercising the power given him in item 3 to do so.

It is conceded that S. W. Kasey survived the testator, and made a will disposing of all of the property, in which he took a life estate under the will of his brother, A. M. Kasey, and hence the contingency which items 4, 5, and 6, and 7 were made to meet never happened. As no estate whatever passed to the American Bible Society under item 7, it becomes unnecessary to enter upon a consideration of the question as to whether or not a perpetuity was created thereby.

The trial court having reached conclusions in harmony with the views herein expressed, the judgment is affirmed.

SWANN-DAY LUMBER CO. v. HALL et al.  
(Court of Appeals of Kentucky. Jan. 28, 1910.)

1. LOGS AND LOGGING (§ 35\*)—CONVERSION—ACTIONS—NECESSARY TITLE.

The owner of land sold certain branded poplar and oak trees standing thereon. Subsequently, by mistake, he conveyed the oak trees to a third person before the former purchaser's right to remove them had expired, possession and title to remain with the vendor until the lumber was paid for. The second purchaser removed some of the branded trees and others, and went into bankruptcy, not having paid for them. Held that, as to the logs cut from trees not previously sold, the second purchaser had at most an unliquidated demand against the vendor who had the legal title, and could bring trover against a third party for their conversion, and the trustee in bankruptcy, while he might be a proper party to the suit, was not a necessary party.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 35.\*]

2. CONFUSION OF GOODS (§ 5½\*)—APPLICATION OF DOCTRINE—WILLFUL INTERMIXTURE.

Fact that the vendor or purchaser wrongfully confused the logs cut from trees not embraced in the prior conveyance with the logs cut from trees which were so embraced would not preclude the vendor's right to bring trover for conversion of the ones not so embraced, especially where the number and value of the logs cut which were embraced in the prior conveyance were shown by the evidence, since the doctrine of confusion of goods only applies where there has been a fraudulent or willful confusion to prevent identification.

[Ed. Note.—For other cases, see Confusion of Goods, Dec. Dig. § 5½.\*]

Appeal from Circuit Court, Perry County.  
"Not to be officially reported."

Action by P. W. Hall and others against the Swann-Day Lumber Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Miller & Ward and J. J. C. Bach, for appellant. Greene, Van Winkle & Schoolfield and Wootton & Morgan, for appellees.

O'REAR, J. P. W. Hall, owner of a boundary of some 1,600 acres of land in Perry county conveyed by deed to H. Herman in 1893 certain branded poplar and oak trees standing on a boundary of about 640 acres within the larger tract. The deed gave the grantee the right to remove the timber within 10 years, or after that time, but if the grantor should require, by 24 months' written notice to the grantee, after the 10 years, to remove the timber, the grantee should then remove it. Hall, laboring under a mistake as to the covenants of his deed, and believing that his grantee was limited to 10 years within which to remove the trees, sold the oak trees to one Brashears after the 10 years, deeming that the title to the trees had reverted. The sale which also included other trees not branded to Herman was to Brashears by parol and for immediate severance. But it was the agreement between Hall and Brashears that Hall was to retain the possession, as well as the title until he was paid by Brashears. Brashears failed to pay, although he cut and hauled to a nearby water course and road about 140 logs cut from the trees, those branded to Herman and those not branded. Then Brashears went into bankruptcy. Appellant took possession of all the logs, 140 in number, and converted them to its own use. Appellee Hall brought this suit against appellant to recover the value of the timber. Appellee filed a counterclaim for damages for \$1,050 for the timber cut by Hall and Brashears, which, it was alleged, included other trees than that represented by the logs now in controversy.

Upon the issue of ownership and value, the court instructed the jury that Hall could not recover for any of the timber conveyed to Herman by the deed of 1893, but if the appellant company took and converted any other timber of appellee Hall the verdict should be for appellee for its value. The jury found for appellee \$150.

Appellant urges as error that the trial court should have peremptorily directed a verdict for it, upon the theory that the title, where not in appellant, was in Brashear's trustee in bankruptcy, and not in appellee. Whatever equity Brashears had in the timber, if any, is an unliquidated demand against Hall. While the trustee of Brashears may have been a proper party to the suit, had he appeared, he was not a necessary party. The legal title was in Hall, who could maintain the action of trover for the conversion of the logs in which he had a special, if not the entire, interest. By virtue of the proven agreement between Brashears and Hall the latter retained the legal title and possession

of the logs as security for their purchase price, and until they were paid for, and could maintain detinue or trover to recover the logs or their value from one wrongfully converting them. There was not error in overruling the motion for peremptory instructions.

Appellant next assigns as error the refusal of the trial court to instruct the jury that if Hall or Brashears wrongfully commingled and confused the logs cut from Hall's land, not embraced in the Herman deed, with those logs cut from the Herman timber so that they could not be distinguished, the verdict should be for the defendant. Appellant misconceives the rule of law on this subject. It is not every wrongful confusion of goods that warrants the application of the rule contended for. It is only where there has been a fraudulent confusion, or willful confusion for the purpose of preventing identification, that the rule applies. 2 Bl. Com. 405. In the case of *Well, etc., v. Silverstone, etc.*, 6 Bush, 698, cited by appellant, a case of willful and fraudulent confusion, made by a stranger to hinder, delay, and defraud the creditors of the debtor, the court observed: "It needs scarcely to be suggested, however, that these principles do not apply where the property of a debtor is intermingled with that of another from casualty or accident, or without any design of covering the property of the debtor."

*Reid v. King*, 89 Ky. 388, 12 S. W. 772, 11 Ky. Law Rep. 615, was an action to recover certain pieces of timber called "headings," cut out of trees taken from the land of one of the parties. There the headings had been intermingled with other headings of the same general kind and quality, indisputably the property of the defendant. The rule now contended for was invoked. It was denied, upon the ground that the confusion resulted from an innocent mistake as to the title rather than from a fraudulent purpose to thereby deprive the owner of the property. Furthermore it was held that the plaintiff might have set apart to him the kind and number of headings to which he was entitled out of the general bulk. While oak logs of different dimensions and quality may have distinctive values, and therefore be not subject to the rule last mentioned, yet the evidence in this case shows that the logs were substantially of the same quality and contents (about 800 feet each). It was also shown that of the 140 logs one-third were cut from timber other than that branded to Herman, and that the logs were of value of \$3 each. The verdict of the jury consists with that testimony. The instruction refused was properly refused.

There was no evidence offered upon the counterclaim, hence it was properly ignored.

No error appearing, the judgment is affirmed.

**NEWMAN v. NEWMAN et al.**

(Court of Appeals of Kentucky. Feb. 4, 1910.)

**CANCELLATION OF INSTRUMENTS (§ 47\*)—EVIDENCE—SUFFICIENCY.**

Plaintiff, after a second marriage, sued his children by his first wife to set aside a deed to the first wife, made nine years before, alleging that he made it to evade payment of an anticipated judgment against him, and, upon a demurrer being sustained to his petition, amended by striking therefrom that allegation and alleging that he made the conveyance for a consideration of \$100, and love and affection. The action was dismissed, and five years later he sued again, alleging that the deed was procured from him by the fraud and misrepresentation of his first wife and her brother-in-law, but not alleging in what the fraud and misrepresentation consisted; and his deposition in the suit did not intimate that his wife or her brother-in-law had induced him to execute the deed, but gave as his reason that there was a state of lawlessness existing in the vicinity, and he wanted to go to another state, and made the conveyance so that his wife might sell the land and go to him when he had selected a home. There was evidence that plaintiff had the deed recorded, and paid the recording fee, with the knowledge of his wife, and that she accepted the deed, and that they both recognized the land as hers so long as they lived. *Held*, that in view of the many different statements made by plaintiff as to why he conveyed the land, and what the consideration was, and the length of time since the making of the deed, a dismissal of his action was not error.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 47.\*]

Appeal from Circuit Court, Floyd County. "Not to be officially reported."

Action by R. H. Newman against Elizabeth Newman and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

W. H. Holt and W. S. Harkins, for appellant. May & May and James Goble, for appellees.

**NUNN, C. J.** In the month of August, 1890, appellant owned about 600 acres of land on Beaver at the mouth of Clear creek. On the date above named he made a conveyance of this land to his wife, Juda Newman, and the deed appears to have been recorded in the month of August, 1891. It appears that from the date of the deed appellant and his wife both recognized the fact that she was the owner of the land. She listed it for taxation and paid the taxes thereon until her death in the year 1896. Some years after the death of his first wife he married again, and in the year 1899 instituted an action against the children of his first wife, Juda Newman, to set aside the deed he made to his first wife. In that action he alleged as ground for setting aside the deed that he made it for the purpose of evading the payment of a judgment which he supposed would be rendered against him. The court sustained a demurrer to that petition, and he amended by striking therefrom the allegation that he had made the deed for the pur-

pose of evading the payment of a judgment, and alleged that he made it in consideration of \$100, cash in hand paid, and the love and affection he had for her. A demurrer was sustained to the petition as amended, and his action dismissed without prejudice.

In the year 1904 he instituted this action for the same purpose (that is, to have the deed set aside), and alleged in his petition as a reason for setting it aside that it was procured from him by the fraud and misrepresentation of his first wife, Juda Newman, and her brother-in-law, W. H. Stewart. He did not allege in what the fraud and misrepresentation consisted. He gave his deposition in this action, but did not intimate that his wife or her brother-in-law, Stewart, induced him in any way to execute the deed, and gave as his reason for executing the deed that there was a state of lawlessness existing on Beaver creek at the date of the deed, and he wanted to leave that community and go to another state because he thought he was in danger, and he made the conveyance to her so that she might be able to sell and convey the land and go to him in another state when he had selected a home there.

Appellant's counsel contend that the deed was never delivered to his wife, Juda. There is much proof in the record showing that he had the deed recorded, and paid the recording fee, with the knowledge of his wife, and that she accepted the deed, and that they both recognized the land as hers so long as she lived. In view of the many different statements made by appellant as to why he conveyed this land, as to what the consideration was, and the length of time which has elapsed from the making of the deed, we are of the opinion that the lower court did not err in dismissing his action.

For these reasons, the judgment of the lower court is affirmed.

**MULLINS v. DEES.**

(Court of Appeals of Kentucky. Feb. 1, 1910.)

**1. MINES AND MINERALS (§ 63\*)—LEASES—TENANT FOR YEARS.**

An agreement by which plaintiff leased to defendant the coal on certain specified land and required defendant to pay plaintiff one cent royalty, and hold the lease for 10 years, unless he failed to work from his own negligence, for which the contract should be canceled, constituted defendant a tenant for years.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 172; Dec. Dig. § 63.\*]

**2. MINES AND MINERALS (§ 66\*)—LEASES—IMPROPER MINING—WASTE.**

Where defendant, a tenant for years under a mining lease, had taken out no coal except what he obtained by drawing the ribs or supports between the rooms of the mine, and to continue this would have rendered the mine useless, such mining constituted waste, for which the landlord could cancel the lease, under Ky. St. § 2328 (Russell's St. § 291), providing that if a tenant for years commits waste with-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

out special license in writing, he shall lose the thing wasted, and pay treble damages.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 185, 186; Dec. Dig. § 68.\*]

Appeal from Circuit Court, Rockcastle County.

"Not to be officially reported."

Action by P. M. Dees against Cal. Mullins. Judgment for plaintiff, and defendant appeals. Affirmed.

C. C. Williams, for appellant. L. W. Bethurum, for appellee.

HOBSON, J. P. M. Dees executed to Cal. Mullins the following lease: "December 3, 1907. Livingston, Kentucky. Article of agreement made and entered into between P. M. Dees, of the first part, and Cal Mullins, of the second part; P. M. Dees, of the first part, does this day lease the coal on the farm known as the Sambrook land that said Dees thought of the heirs. Said Mullins is to pay the said Dees one cent royalty for same and said Mullins is to go to work at once and this contract is to hold for ten years from date, unless said Mullins fails to work from his own negligence, for which this contract shall be annulled and void." On December 2, 1908, Dees brought this action against Mullins to cancel the lease, charging in effect that he had neglected to operate the mine continuously; that he had refused to pay the royalty, and that he was operating the mine in such a way as to destroy it; that he was pulling out the props which supported the roof, and drawing the ribs to such an extent as to render the mine useless. Mullins answered the petition, denying its allegations; proof was taken, and on final hearing the court granted the plaintiff the relief sought. Mullins appeals.

The proof in the case shows conclusively that Mullins was operating the mine in such a way as to ruin it. He had taken out no coal from the mine except that which he obtained by drawing the ribs or supports between the rooms of the mine. He had begun at the back of the mine, and was doing what is called taking out the stumps; that is, he was taking out the pillars that had been left between the rooms to hold the roof up; and when he had done this, there would be not enough to hold up the roof; the result being that the slate overhead would come down, rendering it impossible to work the mine any further, and also causing the surface of the ground above to settle and crack, thus injuring it. The work which Mullins had done is shown, not only by the witnesses introduced on behalf of the plaintiff, but there is little contradiction in the evidence. The testimony for Mullins, when read carefully, substantiates the testimony taken for the plaintiff. Section 2328, Ky. St. (Russell's

St. § 291), provides: "If any tenant for life or years shall commit waste during his estate or term, of anything belonging to the tenement so held, without special license, in writing, so to do, he shall be subject to an action of waste, shall lose the thing wasted, and pay treble the amount at which the waste shall be assessed." Mullins was a tenant for years; he had plainly committed waste. The thing wasted was the mine. The course he was pursuing would soon render it absolutely useless. He was not using the mine in the way contemplated by his lease, but was simply misusing and destroying the property.

Judgment affirmed.

## LIVINGSTON COUNTY BANK v. FIRST STATE BANK.

(Court of Appeals of Kentucky. Feb. 4, 1910.)

SALES (§ 68\*)—RIGHT OF BUYER.

A bank purchasing all the assets and property of another bank which might be on hand on a designated future date under a contract providing that the selling bank in addition to the price should have all its earnings up to the day before the designated future date and should continue the business to the designated future date was not entitled to any interest received by the selling bank before the date of the contract on notes or bills discounted by it before that date, no matter when such notes or bills matured.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 68.\*]

"To be officially reported."

On petition for rehearing. Overruled. For former opinion, see 121 S. W. 451.

CARROLL, J. In the opinion we said: "And giving to this contract such construction, our conclusion is that the State Bank was entitled to receive from the Livingston Bank on all notes and bills discounted by it after November 1, 1906, and that did not mature until after January 1, 1907, that proportionate part of the interest that was collected or received by the Livingston Bank for the time between January 1st and the maturity of the notes."

We thought this language made it clear that the State Bank was only entitled to interest on notes and bills discounted by the Livingston Bank after November 1st. But, that there may be no possible room for doubt, we now add that the State Bank is not entitled to any interest or discount collected or received by the Livingston Bank before November 1st on notes or bills discounted by it before November 1, 1906, no matter when such notes or bills matured. These bills and notes the State Bank knew the condition of when it made the purchase. Petition for rehearing overruled.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**CENTRAL KENTUCKY TRACTION CO. v. CHAPMAN.**

(Court of Appeals of Kentucky. Feb. 2, 1910.)

**1. CARRIERS (§ 321\*)—PASSENGERS—INSTRUCTIONS—ISSUES.**

In an action against a street car company for injuries by failing to give a passenger sufficient time to alight, an instruction that, if the employes knew plaintiff was attempting to alight, it was their duty to give her a reasonable time to do so, was properly given, where there was some evidence authorizing it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1332; Dec. Dig. § 321.\*]

**2. CARRIERS (§ 303\*)—PASSENGERS—CARE REQUIRED—ALIGHTING.**

Where it was customary for passengers to board and alight from a street car at a certain point, it was the duty of the street car employes to use ordinary care to protect passengers alighting there.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1224-1243; Dec. Dig. § 303.\*]

**3. CARRIERS (§ 303\*)—PASSENGERS—DUTY TO PASSENGERS—DUTY IN ALIGHTING.**

Where the gate on the left-hand side of a street car should have been closed at the point a passenger got off on that side to prevent passengers from getting off on that side, if the conductor negligently left the gate open, he was bound to exercise ordinary care to observe both sides of the car to protect passengers in alighting.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1224-1243; Dec. Dig. § 303.\*]

**4. CARRIERS (§ 317\*)—PASSENGERS—INJURIES—ACTIONS—ADMISSIONS OF EVIDENCE.**

In an action for injuries to a street car passenger by failure to give her sufficient time to alight, in which plaintiff claimed that it was usual for passengers to alight at the point at which she got off, evidence was admissible to show that it was usual for passengers to board and alight from cars at a point just across a railroad track from the point where plaintiff alighted as well as at that place, as tending to show knowledge by defendant's employes of the custom to get off where plaintiff did.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1303; Dec. Dig. § 317.\*]

**5. TRIAL (§ 252\*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE.**

An instruction should not be given where there is no evidence upon the issue presented by it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 506, 590-612; Dec. Dig. § 252.\*]

Appeal from Circuit Court, Woodford County.

"Not to be officially reported."

Action by Georgia Chapman against the Central Kentucky Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wallace & Harris, W. O. Davis, Stoll & Bush, and Morton, Webb & Wilson, for appellant. Field McLeod, H. A. Schoberth, and Robt. B. Franklin, for appellee.

CARROLL, J. On a former appeal a judgment in favor of the appellee was reversed. See Central Kentucky Traction Company v. Chapman, 113 S. W. 438. It is agreed that the facts on this appeal are substantially the

same as on the former, and so it will not be necessary to state them in this opinion as they are fully set out in the other.

In the former opinion it was said: "If Water street was a regular passenger stop, or if passengers were in the habit of entering or leaving appellant's cars at that point with its knowledge, then it must be held to have anticipated that appellee, or any other passenger, might elect to leave the car there on this occasion, and in that event must have used the utmost of care for their safety in alighting from the car. If, however, Water street was not a regular or accustomed passenger stop, appellant was not bound to anticipate that appellee would attempt to leave the car there, although she had been carried beyond her destination. As to whether Water street was a regular or accustomed passenger stop was disputed in the evidence. The primary questions for the jury then were, first, was Water street a regular stopping place for passengers, or where passengers, with knowledge of the company, were in the habit of entering or leaving the cars? If it was, then appellant's servants in charge of the car were charged with the duty of looking out for the safety of passengers attempting to alight there when the car stopped, and before stopped, and before starting should have ascertained whether passengers desiring to leave the car had done so. This phase of the question was fairly submitted to the jury in the first instruction given. The second question was: If Water street was not a regular or accustomed passenger stop, but was for purely precautionary purposes, then those in charge of the car had no reason to suppose that passengers would attempt to leave it at that point; and, unless they actually knew then that appellee was so attempting to do, they were not negligent in starting the car without ascertaining whether she had alighted.

In the second instruction, which was doubtless framed to present the second phase of the case, the idea just expressed was submitted, but with the addition that if those in charge of the car could, with ordinary care, have known of appellee's purpose, they were bound to a duty to look out for her safety as well as if they in fact knew of it. This we think was an erroneous conception of the carrier's duty. It placed it on substantially the same footing as to looking out for its passengers at places where they had not the right to leave its cars, and therefore were not expected to attempt to do so, as where they had such right." On this trial lost time as an element of damage was omitted, and the instructions conformed literally to the opinion of the court. It is said, however, that there was no evidence upon which to base instruction No. 2, which, in substance, told the jury that, if the employes in charge of the car knew that ap-

pellee was endeavoring to alight therefrom, it was their duty to afford her reasonable opportunity to do so in safety. The evidence upon this particular point is not very satisfactory, but, as there was some evidence authorizing this instruction, it was the duty of the court to have submitted this phase of the case to the jury. If the appellee's right to recover depended upon the proposition that the employes knew she intended to alight from the car, it might be seriously questioned if the evidence upon this issue would be sufficient to support the verdict, but the right of appellee to recover did not depend upon the evidence introduced upon this issue. The jury were also instructed in conformity with the former opinion that if at the place the car stopped "it was usual and customary for passengers to alight during such stop at that point, and defendant's employes in charge of such car knew or by the exercise of ordinary care could have known that passengers were alighting from such car, then it was the duty of said employes then in charge of the car to keep the car still until all passengers who desired to do so had reasonable time to alight therefrom." The evidence was practically uncontradicted that it was usual and customary for passengers to get on and off the cars at this stop. It was so testified by the employes themselves. This being so, it was their duty to exercise ordinary care to protect people getting off the car at this place, as appellee was. It is true the conductor says he would have seen her getting off if she had left the car on the right-hand side, as he was noticing that side of the car, but that he did not see her attempting to get off as she alighted on the left-hand side. On this occasion it appears that the steps on both sides of the car were open and unprotected, although the conductor testifies that the gate on the left-hand side should have been closed to prevent passengers from getting off on that side. It would therefore seem that if the conductor had closed this gate, as he should have done, the accident would probably not have happened, as it is likely he would have seen appellee as she alighted from the car on the right-hand side. But, as he negligently left the gate open, it was his duty to have exercised ordinary care to observe both sides of the car, and this he did not do.

It is also assigned as error that witnesses over the objection of appellant were permitted to say that it was usual for passengers to get on and off the cars when they made a safety stop on the other side of the railroad on the way to Versailles; and the argument is made that the fact that passengers got on and off the cars on the other side of the railroad did not tend to show it was usual and customary for them to get on and off at the place appellee was hurt. The two points

are immediately across the railroad tracks from each other—in going into Lexington the cars made a safety stop on one side of the track, and in going out from Lexington made a stop on the other side. We think evidence that passengers were in the habit of getting on and off at both stops was competent to illustrate the fact that the persons in charge of the car knew or must have known of this custom. It would be rather singular to say that the employes knew that passengers were in the habit of getting on and off on one side of the railroad, but not on the other, when the same character of stop was made at virtually the same place.

It is further insisted that the court erred in failing to instruct the jury "that the first and paramount duty of the operators of the car from which Mrs. Chapman fell was the protection of the passengers on the car and its crew, and, even if the operators could have discovered the peril of Mrs. Chapman, the company is not responsible if such peril could only have been discovered by the neglect or failure to observe the paramount duty to the passengers generally and the crew of the car." There was no evidence whatever authorizing this instruction. In some cases it might be proper to give an instruction on this subject, but there was no place for it under the facts shown by this record.

A careful examination of the record convinces us that the trial was free from error; and the judgment is affirmed.

#### COBB'S ADM'X v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Feb. 2, 1910.)

##### 1. RAILROADS (§ 377\*)—PERSONS ON TRACK—CARE REQUIRED.

Though trainmen saw a person on a track, they could assume that he would use ordinary care for his own safety, and get off in time to prevent injury, and owed him no duty until they had reason to believe from his conduct that he did not know his peril, after which they were bound to exercise all reasonable care to avoid injuring him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1280; Dec. Dig. § 377.\*]

##### 2. RAILROADS (§ 376\*)—INJURIES ON TRACK—NEGLIGENCE.

Decedent, who was slightly deaf, was struck by a passenger train while walking in the direction it was moving, in the center of the main track, on the outskirts of a small country village; the track at that point being straight and slightly downgrade. When the train, which was running from 12 to 20 miles an hour, was within 600 feet of decedent, the danger signal was blown loud enough to be heard by one paying attention, and almost immediately thereafter the emergency brake was vigorously applied, and the train came to a stop 60 feet after striking decedent. *Held*, that the trainmen were not negligent in operating the train after discovering decedent's peril, so as to make the company liable for his death.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275-1279; Dec. Dig. § 376.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Christian County.

"Not to be officially reported."

Action by West Cobb's Administratrix against the Louisville & Nashville Railroad Company. From a judgment for defendant upon a directed verdict, plaintiff appeals. Affirmed.

Hester & Allensworth and R. L. Smith, for appellant. Benjamin D. Warfield, Joe McCarroll, Chas. H. Bush, and S. Y. Trimble, for appellee.

LASSING, J. While walking along the main track of the Louisville & Nashville Railroad Company, within the limits of the town of Crofton, West Cobb was struck and injured by a north-bound passenger train. He died from the effects of these injuries in a few days. His wife qualified as administratrix, and brought suit against the railroad for damages. The negligence relied upon was the failure of those in charge of the engine to use all reasonable care to avoid injuring deceased after his peril was discovered, or by the exercise of ordinary care could have been discovered. The company denied liability, and pleaded contributory negligence.

Crofton is a country village of less than 300 inhabitants. Deceased was killed in the outskirts of the town. There are no crossings over the railroad near the place where he was killed. At the time he was injured, he was walking along the center of the track in the direction in which the train was going. The train had reduced its customary speed, so that, when it reached Crofton, its speed was estimated at from 12 to 20 miles per hour. The track there is perfectly straight and slightly downgrade. There is a path between the main track and the passing track, and also a wagonway along the bank parallel to the tracks. The people living in that end of town used the railroad, the path between the tracks, and the wagonway at pleasure in passing. A freight train was, at the time of the accident, standing on the passing track waiting for the passenger train to go by. It was making some noise by letting off steam. When within about 600 feet of deceased, the danger signal on the passenger train was blown, and almost immediately thereafter the emergency brake applied, though too late to avoid striking him. The train was brought to a full stop when the engine had passed some 60 feet beyond the point where he was struck. Deceased was slightly deaf in one ear. Upon this showing the trial judge gave a peremptory instruction to find for the defendant, and of this ruling the plaintiff complains.

The sole question in the case is, Did those in charge of the train see plaintiff's peril in time to avoid injuring him, or could they have seen it by the exercise of ordinary care? Deceased had no connection with the railroad, and no business on the track. He was

a trespasser. It is admitted that the train gave all the signals which the law required it to give in approaching the town, and it was running at a moderate rate of speed. Although those in charge of the train may have seen deceased upon the track, they owed him no duty until they discovered his peril. It is possible that they saw him for some distance before the danger signal was given, which, it is agreed, was blown about 600 feet before he was struck, and it is shown beyond question that, after the danger signal was given, and deceased gave no heed to its warning, the emergency brakes were applied in an effort to avoid injuring him. Even though those in charge of the train saw deceased upon the track, as it may be presumed they did, they had a right to expect that he would exercise some care for his own safety, and would get off in time to avoid being injured (*Johnson's Adm'r v. L. & N. R. R. Co.*, 91 Ky. 651, 25 S. W. 754); and, until they had some reason to believe from the conduct of deceased that he was unconscious of the peril in which he had placed himself, and would not leave the track, the company owed him no duty. But as soon as it became apparent that he was in danger of being injured, those in charge of the train were required to exercise all reasonable care to avoid injuring him. If they did this, the company's whole duty to deceased was discharged, and it is not responsible for his injury and consequent death.

Every witness who has testified to the conditions as they existed there states that the danger signal given by this train was a very loud signal—one that could readily be heard, by any one paying any attention, above the noise made by the freight engine on the passing track. The giving of this signal is the first evidence that those in charge of the train had discovered decedent's peril, and this warning was for the purpose of advising him of his danger. Immediately that it was discovered that he would not heed this warning, the emergency brake was applied, so hard that, as the passenger engine passed the freight on the passing track, sparks were flying from the wheels, caused by their contact with the brakes. About these facts there is no dispute. The witnesses differ slightly, however, in their testimony as to the rate of speed at which the passenger train was moving, their testimony varying from 12 to 20 miles an hour. This is the only evidence in the case upon which there is any conflict, and either rate is reasonable. Hence it may be said that there is no conflict in the testimony.

These facts, as brought out in the evidence, failed to show that those in charge of the train were guilty of any negligence whatever in the operation of the train after they discovered deceased's peril; and, this being so, the trial judge properly instructed the jury to find for the defendant.

Judgment affirmed.

## INDIANA TIE CO. v. PHELPS.

(Court of Appeals of Kentucky. Feb. 11, 1910.)

## 1. SALES (§ 200\*)—TRANSFER OF TITLE—IN-SECTION.

Where a buyer agreed to inspect and receive, at the market price at the time of delivery, all railroad cross-ties the seller would place upon the bank of a certain river, the property in the ties would not pass until the ties were inspected, received, and the market price agreed on.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 525-527; Dec. Dig. § 200.\*]

## 2. SALES (§ 340\*) — BREACH OF CONTRACT — REMEDY.

Where a buyer agreed to inspect and receive, at the market price at the time of delivery, all railroad cross-ties the seller would place upon the bank of a certain river, and the buyer refused to live up to its contract, and the property in the ties still remained in the seller, his remedy was an action for damages for breach of contract, and not for the market price of the ties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 933; Dec. Dig. § 340.\*]

## 3. SALES (§ 384\*) — BREACH OF CONTRACT — MEASURE OF DAMAGES.

In an action for breach of contract to inspect and receive at the market price at the time of delivery, all railroad cross-ties placed upon the bank of a certain river, where the property in the ties had not passed, the measure of damages was the difference in the market price of the ties at the time the buyer received notice that they had been delivered at the place specified and the market price the seller could have sold them for by the exercise of ordinary care.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098, 1099; Dec. Dig. § 384.\*]

Appeal from Circuit Court, Butler County.  
"Not to be officially reported."

Action by W. D. Phelps against the Indiana Tie Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

A. Thatcher and W. A. Helm, for appellant,  
N. T. Howard and G. V. Willis, for appellee.

NUNN, C. J. Appellee obtained a judgment against appellant for \$525 as damages for the alleged violation of a contract. He alleged the contract to be, in substance, that appellant in the spring of 1907 made and entered into a contract with him whereby it agreed to inspect and receive, at the market price at the time of delivery, all railroad cross-ties that he would place upon the bank of Green river at Threlkel Landing; that the contract was to continue during the year, or until appellant notified him to stop manufacturing ties for it; that he furnished appellant several thousand ties under this contract, which it paid him for; that during the month of October, 1907, appellant notified him to cease manufacturing ties under the contract, and to place all the ties he had prepared at the landing for the market, and it would inspect and receive them under the contract; that in compliance with this notice he ceased to make ties, and delivered the ones he had on hand, to wit, 1,680 beech wood and 153 white oak ties, all of which were 6x8; that

the market price of such ties at the time of delivery was 36 cents per tie for the beech wood and 47 cents per tie for the white oak; that appellant promised to inspect, receive, and pay for these ties, but failed to do so; that after about three weeks' delay it refused to receive the ties at all, and at that time all other tie companies had ceased to buy ties on that market, on account of the money panic, and that the ties could not be sold for any price. He asked judgment for \$647. Appellant controverted these allegations by answer, and alleged that appellee could have sold the ties, at the time it refused to receive them, at the price of 32 cents per tie, and also alleged that it had made a final settlement with appellee in the month of November, 1907, of all demands he had against it. The affirmative allegations of the answer were controverted of record.

Appellee established the alleged contract, and the failure and refusal of appellant to inspect and receive the ties, as alleged by him, by a preponderance of the evidence. He also introduced some evidence tending to show that the ties at the landing could not have been sold after appellant positively refused to receive them. It appears from the record that appellee testified that he did not sell, nor try to sell, the ties. One Ridgway, agent for appellant, testified that, after receiving notice from his employer to stop buying ties, he refused to receive from appellee the ties, for the market value of which this suit was instituted, and told him that one Lane, an agent for Joyce Watkins Company, would purchase them at about 32 cents a tie. Lane testified that he would have taken the ties at that price at any time until the 1st of January, 1908, if he had known that they were for sale. This evidence is uncontradicted. It appears that appellee bases his claim and the jury rendered its verdict upon the idea that the delivery of the ties at the landing and the notice to appellant of such delivery was a complete sale, and they recognized it as passing the property in the ties to appellant, and rendered a verdict in favor of appellee for their full value at the time of the refusal by appellant to accept them. This was error. According to the petition and appellee's evidence, the property in the ties had never passed to appellant. The sale was incomplete. There was something yet to be done by the seller and buyer before the title passed. The ties were to be inspected, received, and then the market price was to be determined and agreed on before the sale was complete. If the sale had been complete, appellee could have treated the property as appellant's, and recovered its value at the then market price; but, the sale not having been completed, the property had not passed to appellant, and appellee's remedy was to sue for damages for the failure of appellant to carry out its part of the contract.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The criterion for his recovery was the difference in the market price of the ties at the time appellant received notice that they had been placed at the landing on the river and the market price at the time when appellee could have sold them by the exercise of ordinary care and attention. The title was still in appellee, and he should not have permitted them to be destroyed, and then recover of appellant their full value, if by a reasonable effort he could have avoided the total loss. The court seems to have adopted, in part, this view in the instructions; but appellee and the jury seem to have adopted the contrary view. In view of these principles, and the uncontradicted evidence referred to, introduced by appellant, it is evident the verdict of the jury is far too much to be permitted to stand. On another trial the court will instruct the jury as above indicated, if the issues are the same.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

#### CROWN LUMBER CO. v. MCCOY.

(Court of Appeals of Kentucky. Feb. 11, 1910.)

**ADVERSE POSSESSION (§ 101\*)—POSSESSION UNDER PATENT—EXTENT OF POSSESSION.**

Where a person claiming title to a tract of land under a patent issued in 1849 lived on an adjoining tract, he was in possession to the extent of his boundary, and his possession of the lap was not broken by a settlement of others upon land outside his boundaries who claimed the land under a patent issued in 1853.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 575-589; Dec. Dig. § 101.\*]

Appeal from Circuit Court, Lawrence County.

"Not to be officially reported."

Suit by the Crown Lumber Company against Peter McCoy. Judgment for defendant, and plaintiff appeals. Affirmed.

Sullivan & Stewart, for appellant. M. C. Kirk, M. S. Burns, and W. T. Cain, for appellee.

**HOBSON, J.** The Crown Lumber Company brought this suit against Peter McCoy to recover damages for the cutting of certain timber by him on a tract of 25 acres of land in Lawrence county. He filed an answer controverting its title to the land, and pleading title in those under whom he claimed. The case was transferred to equity, and on final hearing the circuit court dismissed the plaintiff's petition, and it appeals.

The plaintiff's title to the land rests on these facts: A patent was issued to William Borders on the 26th day of May, 1853, on a survey made January 16, 1850, for 2,000 acres of land which includes the land in controversy. He sold his patent to his brother, Joseph Borders, who sold it to Robert Mont-

gomery on August 23, 1860; and he in 1861 placed an agent in possession for him of the boundary. The Crown Lumber Company holds under him, and it and those under whom it claims have since maintained such possession.

The defendant's title is this: A patent was issued to John Hinkle on April 9, 1849, on a survey made June 10, 1848, for the 25 acres in controversy. Hinkle at the time was living on a 50-acre tract which adjoined the 25-acre survey, and lived there for many years. He afterwards sold the 50-acre tract to Joseph Borders, and Joseph Borders then lived there, and the agents holding for Borders and his vendees also lived there. On July 2, 1881, Hinkle by an indorsement on the patent for a valuable consideration sold the land to J. S. Patton, but did not make him a deed. Patton took possession of the land, built a house on it, and put a tenant on it. After some years he sold it to J. M. Hinkle, who lived there for some years with his family. J. M. Hinkle died. His widow continued to live on the land for a while, and after a while married again, and with her second husband moved from the land. She put a tenant in the house, and kept possession through herself and tenants. After some years she returned to the land. In the meantime John Hinkle's heirs had made Patton a deed and Patton made a deed to his vendee. In the year 1891 Joseph Huffaker, under whom the plaintiff claims, brought a suit against the Hinkles to recover the land. They filed an answer in which they set up the patent to John Hinkle and the transfers above referred to. After the answer was filed that action was dismissed without prejudice, and no further legal steps were taken until November 12, 1906, when this suit was brought, although the vendees of Patton were in possession of the land and holding it. It is insisted for the plaintiff that no title was acquired by adverse possession by the defendant because there were breaks in the possession; that is, there were times when there was no tenant on the land. But, if this is true, the patent to John Hinkle is the older title. The patent is not only the older, but was made on an older survey. The older title must prevail, unless the Crown Lumber Company, or those under whom it claims, have acquired a title by adverse possession. We do not find anything in the record to warrant this conclusion. The evidence is clear that Hinkle claimed the land, but that Joseph Borders wanted to buy it from him as late as the year 1870. While there is some proof in the record on behalf of the plaintiff to the effect that John Hinkle sold the land to Borders, the great weight of the evidence is to the contrary. The evidence as to the existence of such a deed, and its being lost, is too vague to overcome the positive evidence by a number of witnesses showing that

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Hinkle refused to sell the land to Borders, and that they had a quarrel about it. The weight of the evidence shows that the agent who had charge of the land for the plaintiff and its vendors recognized the right of Hinkle and his vendees to the land, acquiesced in Patton's possession of it, and made no claim to it. Hinkle, having the older patent, and living on a tract which adjoined this 25 acres, was in possession to the extent of his boundary, and this possession by him was not broken by a settlement of those claiming under a junior patent outside of the lap. On the whole case we conclude that the chancellor's judgment is right. John Hinkle, Joseph Borders, J. S. Patton, and J. M. Hinkle are now all dead. Others have passed away who were concerned in these matters and knew the facts as to the title to the land. Under such circumstances, no little weight must be given the fact that Patton took possession of the land openly, and built upon it after his purchase, and this holding was continued for so many years without any steps being taken except the bringing of the suit in 1891, which was dismissed without prejudice when the defendant's title was exhibited. Equity aids the vigilant; not those who sleep upon their rights. It looks with suspicion upon claims asserted after many years when the parties to the transaction are dead and no reasonable excuse is shown for the delay. It will often refuse relief where the claim is not barred by limitation, if it is stale.

Judgment affirmed.

## HERNDON v. LOUISVILLE NAT. BANKING CO. et al.

(Court of Appeals of Kentucky. Feb. 10, 1910.)

### 1. EVIDENCE (§ 91\*)—BURDEN OF PROOF.

Where the allegations of an answer and counterclaim were denied by the reply, and no proof was offered to establish the defenses set up therein, judgment properly went against defendant as to such defenses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 113; Dec. Dig. § 91.\*]

### 2. APPEAL AND ERROR (§ 553\*)—RECORD—NECESSITY OF BILL OF EXCEPTIONS—MATTERS COPIED INTO RECORD.

The Supreme Court cannot consider error in refusing to permit an amended answer to be filed, where it was not made a part of the record by order of court or bill of exceptions, though it was copied into the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2461; Dec. Dig. § 553.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action by the Columbia Trust Company, as administrator, against Lamar Herndon, the Louisville National Banking Company, and another in which the last-named defendant filed a cross-petition against Herndon. From

a judgment for cross-petitioner, cross-defendant appeals. Affirmed.

Lawrence S. Leopold, for appellant. Tyler Barnett and Barnett & Barnett, for appellees.

OLAY, C. In July, 1908, Len G. Herndon, Sr., died, leaving a last will and testament, by which he devised to his wife, Lydia Herndon, for and during her natural life, all his property. Of the remainder after her death he devised \$7,000 to his son Len G. Herndon, Jr., and directed that the balance be equally divided between Len G. Herndon, Jr., and Lamar Herndon. The widow, Lydia Herndon, renounced the provisions of her husband's will and elected to take under the statute. Upon the probate of the will the Columbia Trust Company was appointed and qualified as administrator with the will annexed. The estate left by Len G. Herndon, Sr., consisted of personal property of the value of about \$18,000 and two small tracts of land worth about \$4,200.

In the year 1895 the Louisville National Banking Company obtained judgment against Lamar Herndon, one of the testator's sons, for the sum of \$850, with 6 per cent. interest thereon from July 25, 1893, and costs of \$16.80. Execution was issued thereon to the sheriff of Jefferson county and returned "No property found." In the year 1896 the Louisville National Banking Company instituted in the Jefferson circuit court an action to enforce the collection of said judgment. Therein certain property was sought to be subjected, but other claimants established a better title thereto. Upon the probate of the will of Len G. Herndon, Sr., and the qualification of his administrator with the will annexed, the Louisville National Banking Company had issued alias orders of attachment which were served on the Columbia Trust Company as administrator with the will annexed of Len G. Herndon, Sr., and others as garnishees. These orders of attachments were also levied upon two tracts of land which passed under the will of Len G. Herndon, Sr.

On January 30, 1909, the Columbia Trust Company, as administrator with the will annexed of Len G. Herndon, Sr., and Len G. Herndon, Jr., instituted this action against Lamar Herndon, Lydia Herndon, and the Louisville National Banking Company, for the purpose of settling the estate of Len G. Herndon, Sr. Among other matters set up in the petition, it was charged that the Louisville National Banking Company claimed a lien on the interest of Lamar Herndon in the estate devised to him. In this action Lamar Herndon was proceeded against as a nonresident of the state. On February 10, 1909, the Louisville National Banking Company filed its answer and counterclaim against the plaintiffs below, and made it a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cross-petition against Lamar Herndon, and set up the various proceedings by which it claimed a lien upon the interest of Lamar Herndon in the estate devised to him. On April 15, 1909, Lamar Herndon filed his answer and counterclaim against the Louisville National Banking Company, in which he pleaded that he was a person with a family resident in this commonwealth, and that he had none of the articles of personality specified in the statute, and therefore claimed exemptions to the amount of \$280, or \$40 for each member of his family, numbering seven in all. The Louisville National Banking Company filed a reply controverting each and every allegation of the answer and counterclaim of Lamar Herndon. No proof was taken by Lamar Herndon, and the court properly rejected his claim of exemptions. Thereafter the commissioner filed a report which showed that the personal property of the testator was exhausted by the payment of costs, the widow's share, and the portion devised to Len G. Herndon, Jr. Lamar Herndon then moved to be allowed exemptions out of the proceeds of the real estate. This motion was properly overruled, for Lamar Herndon did not then offer any proof tending to establish the allegations of his answer and counterclaim. When it appeared that the personal property had been exhausted as above set out, Lamar Herndon then tendered an amended answer setting up that he was a housekeeper with a family resident in this state, that he had no estate of any kind or homestead, that the real estate devised by the testator was not divisible, and that he claimed a homestead of \$1,000 in the proceeds resulting from the sale thereof. The chancellor refused to permit this amended answer to be filed. Judgment was then entered in favor of the Louisville National Banking Company. From this judgment Lamar Herndon has appealed.

While the amended answer is copied into the record, it was not made a part thereof either by order of court or bill of exceptions. That being the case, we cannot consider the amended answer, and we are therefore unable to pass upon its merits. It is a well-settled rule of practice, and adhered to in a long line of decisions, that this court will not consider a pleading tendered and refused, unless such pleading is made a part of the record by order of court or bill of exceptions. *Hortsman v. Covington & L. R. R. Co.*, 18 B. Mon. 223; *Young v. Bennett*, 7 Bush, 474; *Nolan v. Feltman*, 12 Bush, 119; *Johnson v. Miller*, 13 S. W. 879, 12 Ky. Law Rep. 82; *Dehoney v. Bell*, 30 S. W. 400, 17 Ky. Law Rep. 76.

Being unable to consider appellant's amended answer, for the reason that it does not constitute any part of the record in this court, it follows that the judgment must be affirmed; and it is so ordered.

# CHESAPEAKE & O. RY. CO. v. HAWKINS.

(Court of Appeals of Kentucky. Feb. 4, 1910.)

## 1. RAILROADS (§ 327\*)—INJURIES AT CROSSINGS—CARE REQUIRED.

The law does not require one to stop, look, and listen before crossing a railroad track, but only to exercise ordinary care.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.\*]

## 2. RAILROADS (§ 350\*)—INJURIES AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

In an action for injuries at a railroad crossing, where there was evidence that the statutory signals were not given by the approaching train, and that plaintiff looked and listened before attempting to cross the track, whether she exercised ordinary care was for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

## 3. TRIAL (§ 139\*)—QUESTIONS OF LAW OR OF FACT—WEIGHT OF EVIDENCE.

Whether the positive testimony of witnesses that signals were given at a railroad crossing outweighs negative testimony that witnesses did not hear the signals, but were in a position where they could have heard them had they been given, is a question of weight of evidence for the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332-341; Dec. Dig. § 139.\*]

## 4. DAMAGES (§ 216\*)—INJURIES AT CROSSINGS—INSTRUCTIONS.

In an action for injuries at a railroad crossing, where it appeared that plaintiff had suffered considerably up to the time of trial, and there was evidence that she would continue to do so for some time, and that her injury might be permanent, and the court instructed that she was entitled to recover for pain she had already suffered, and, if her injury was permanent, for pain and suffering she might have in the future, the charge was not erroneous for failure to charge that she was entitled to recover for such future suffering as it was reasonably certain she would endure.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 548-555; Dec. Dig. § 216.\*]

## 5. APPEAL AND ERROR (§ 1073\*)—HARMLESS ERROR—JUDGMENT.

In an action against two railroad companies, where the court instructed a finding in favor of one of them, and submitted the case to the jury as to the other, and the jury returned a verdict merely for plaintiff in a specified sum, the error, if any, of the court in entering judgment dismissing the petition as to the first company, and rendering judgment against the second company on the verdict, was harmless, since if the first company was still in the case so as to make the verdict applicable to both companies, and require judgment against both to conform thereto, the court was bound to set aside the verdict and judgment as to the first company, and thus would have left the judgment against the other as it stood.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.\*]

Appeal from Circuit Court, Shelby County.  
"Not to be officially reported."

Action by Elizabeth Hawkins against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John T. Shelby and Willis & Todd, for appellant. Scott & Hamilton and Ralph Gilbert, for appellee.

HOBSON, J. For some distance between Christiansburg and Shelbyville the pike between these places runs parallel with the railway, and near to it. About  $3\frac{1}{2}$  miles east of Shelbyville a pike crosses the railway from the south, and intersects the Christiansburg pike. As it approaches the railway this pike comes up a small hill or rise in the ground. On January 28, 1908, Elizabeth Hawkins and her husband were driving along this pike about 11 a. m. It was a cloudy, drizzly day, and they were in a top buggy with the side curtains up. Just as they reached the railway the horse jumped, and the west-bound Chesapeake & Ohio train shot by them, taking off the hind wheels of the buggy. Neither Mrs. Hawkins nor her husband were thrown from the buggy, but she was thrown violently against the side and front of the buggy, and was painfully bruised. She was under the treatment of a physician for four months, and suffered very greatly. She brought this suit to recover for her injuries. There was a verdict and judgment in her favor for \$1,500, and the railway company appeals.

There were but two witnesses introduced by her on the trial as to the collision. She testified that when they were about 45 feet from the track they stopped and listened and looked to ascertain if a train was coming, that, seeing and hearing nothing, they then drove onto the track, and that no signal was given by the train of its approach to the crossing. The track walker of the railway company was near the crossing at the time the train came up. It passed him not very far east of the crossing. He testified that there was one short blast of the whistle when the train was about one-half mile from the crossing, but that no crossing signals were given by the whistle, and he did not notice whether the bell was rung or not. When the engineer passed him he was looking out of the window at him. The defendant introduced several witnesses, who testified that the regular crossing signals were given. It also introduced proof to the effect that from the point where the plaintiff said they stopped the buggy there was a plain view of the railroad, so that an approaching train could be seen three-fourths of a mile, and that from that place up to the crossing the approaching train could be seen for one-half mile. It is earnestly insisted for the railway company that this proof as to the view of the train being uncontradicted, the jury should have been instructed to find for the defendant. It has often been held that the rule, stop, look, listen, does not obtain in this state, that the traveler must use ordinary care, and that whether he uses ordinary care is usually a question for the jury. It is evident from the

proof that if the plaintiff was as near the track as she thought when they stopped, the train must have been in sight. But they may have been further from the track than she judged, and, although they looked, they may not have looked as far up the track as one could have seen. When they stopped and listened they had a right to presume that the statutory signals of the approach of the train to the crossing would be given, and under the rule we have frequently laid down the question whether there was ordinary care on her part was for the jury. *L. & N. R. R. Co. v. Clark*, 105 Ky. 571, 49 S. W. 323, 20 Ky. Law Rep. 1375; *C. & O. R. R. Co. v. Vaughan*, 97 S. W. 774, 30 Ky. Law Rep. 215; *C. & O. R. R. Co. v. Wilson*, 102 S. W. 810, 31 Ky. Law Rep. 500.

In *L. & N. R. R. Co. v. Taylor*, 104 S. W. 776, 31 Ky. Law Rep. 1144, the court said: "This court has time and again declined to adopt the rule which imposes all the care on the traveler and none on the railroad company at highway crossings. If the traveler on the highway fails to use ordinary care for his own safety either from misapprehension, inadvertence, or mistake, he does not thereby become a trespasser, or forfeit that protection which the law throws around human life. In such a case he may not recover for his injury unless after his peril was discovered, or by ordinary care should have been discovered, by those in charge of the train, the injury to him might, by ordinary care, have been averted. The law requires that those in charge of the train shall give adequate notice of its approach to the crossing, and exercise ordinary care by maintaining a lookout for the safety of persons on the crossing. It requires of the traveler over the crossing to exercise ordinary care to learn of the coming of the train and keep out of its way. The sacredness of human life requires that the duty thus imposed upon both parties should not be relaxed, and that the railroad company should not be allowed with impunity to sacrifice human life by the dangerous instrumentalities used by it, when this might have been avoided had it exercised proper care. A rapidly moving train is a source of deadly peril to the travelers on the highway, and those who use a thing of so much danger to human life cannot be acquitted of responsibility, although the person injured failed to use ordinary care for his own safety, if notwithstanding this the injury might have been averted by proper care on their part. In the case at bar, if proper notice of the approach of the train had been given, or if the engineer had been maintaining a lookout, or if the wagon had had another second to clear the track, the death of the intestate might have been avoided."

It is insisted that the verdict is against the evidence, as the proof for the plaintiff is negative in character, while that for the

defendant is affirmative. We have steadily refused to disturb verdicts on this ground; for the reason that, after all, the question turns on the credibility of the witnesses, their means of knowledge, and, like other questions depending on a number of circumstances, should be left to the jury. *L. & N. R. R. Co. v. Brown*, 113 S. W. 466; *L. & N. R. R. Co. v. O'Nan*, 119 S. W. 1192.

There was evidence on behalf of the plaintiff to the effect that she was suffering from concussion of the spine, and that her sufferings had been acute from the time of the injury up to the trial, which was had a year afterward. Her physician testified that her condition might be permanent; that he could not say positively that it would be permanent, but his judgment was that it would be. The court in defining the measure of damages told the jury that if they found for the plaintiff, they should find for her "such sum in damages as will reasonably compensate her for the physical and mental pain suffered by her, if any proven, and if the jury believe from the evidence that the injury to the plaintiff, if any, is permanent, it should find for the plaintiff such sum in damages as will reasonably compensate her for any suffering she may hereafter endure as a result of said injury, if any proven, not to exceed in all \$10,000, the amount claimed in the petition." The defendant complains of the instruction because the court did not tell the jury that they might find for such future suffering as it was reasonably certain the plaintiff would endure. The plaintiff was entitled to recover for her future suffering, although her injury was not permanent. The court required the jury to believe that her injury was permanent before they were allowed to find anything for future suffering. If the concussion of the spine was permanent, then manifestly it was reasonably certain that she would suffer in future. She had suffered up to the trial, according to the evidence, and there was nothing in her condition then to indicate a change from what it had been for several months. We do not see, therefore, that if the court had used the words "any suffering it is reasonably certain she may hereafter endure," it would in any wise have affected the result.

At the conclusion of all the evidence the court instructed the jury peremptorily to find for the Louisville & Nashville Railway Company, and submitted the case to the jury as to the Chesapeake & Ohio Railway Company. The jury returned the following verdict: "We the jury find for the plaintiff the sum of \$1,500." On the verdict the court entered a judgment against the Chesapeake & Ohio Railway Company for \$1,500, and also entered a judgment dismissing the petition as to the Louisville & Nashville

Railway Company, with costs. Of this the Chesapeake & Ohio Railway Company complains on the ground that the judgment does not follow the verdict. The court evidently treated the case at an end as to the Louisville & Nashville Railway Company after he instructed the jury peremptorily to find for it, and considered that the case was only submitted to the jury as to the Chesapeake & Ohio Railway Company. But if he was in error in this, and should have entered a judgment against both of the defendants upon the verdict of the jury, still it would manifestly have been his duty to set aside the verdict and judgment as to the Louisville & Nashville Railway Company, and this would have left the judgment against the Chesapeake & Ohio Railway Company precisely as it stands now. We are therefore unable to see that it was in any wise prejudiced by the form of the proceedings.

Judgment affirmed.

#### COOK et al. v. DOWN.

(Court of Appeals of Kentucky. Feb. 2, 1910.)

EASEMENTS (§ 61\*) — PRESCRIPTION — SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a finding that the use of an easement in a passway from plaintiff's farm to a public road was adverse and not permissive.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 61.\*]

Appeal from Circuit Court, Owen County. "Not to be officially reported."

Action by W. N. Down against T. M. Cook and another. Judgment for plaintiff, and defendants appeal. Affirmed.

John W. Douglas, for appellants. H. W. Alexander and J. G. Vallandigham, for appellee.

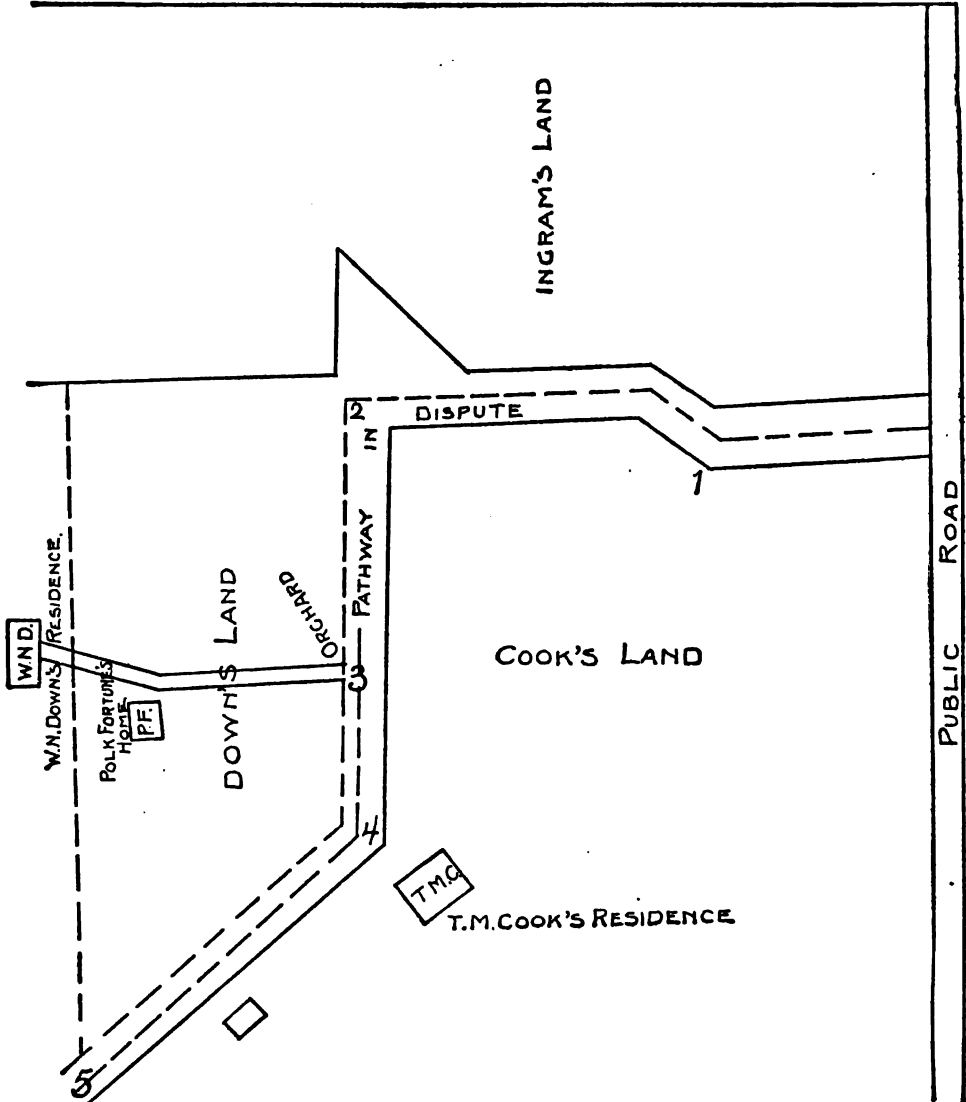
**BARKER, J.** The appellee, W. N. Down, owns a farm in Owen county, Ky. Between his place and the public road lie the farms of appellants, Cook and Ingram. The question for adjudication arising upon this record is whether a passway or lane leading from Down's property to the public road is or not a public easement; or, if it be not a public easement, whether appellee Down has a right of easement over the passway. That there is a passway, which has been used by the public, and especially by those persons owning farms back of the lands of Cook and Ingram for some 50 or 60 years, is not questioned; but appellants, Cook and Ingram, claiming that the right to use the passway in question is and has always been merely permissive, have obstructed it by cross-fencing, and thus prevented Down going from his farm to the public road over it. Claiming that this interference with his

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

right of easement was in contravention of his legal rights, Down instituted this action for a mandatory injunction against appellants, requiring them to move the fence they built across the passway, and for an order of injunction, prohibiting them from ever again interfering with his right of ingress and egress to his farm over the passway. The subjoined map shows the situation:

for more than 15 years last past, claim that this use was permissive and not adverse. Whether the use was permissive or adverse is the question for adjudication.

The testimony of a large number of witnesses was adduced upon the trial of the disputed question. It would serve no useful purpose to reproduce it, even in outline, here. Like the evidence in most questions



The passway in question, marked "Pathway in Dispute," is between figures 1 and 2 upon the plat, and lies along the line dividing the lands of Ingram and Cook, being partially upon both. Appellee, Down, claims a right of easement in the passway in himself and the public by adverse user under claim of right for more than 15 years next before the institution of this action. As said before, the appellants, while conceding the actual use of the passway by the public

of disputed passways, it is very conflicting; but certainly it cannot be successfully contended upon the part of appellants that there was not quite a number of witnesses whose testimony conducted to show that the passway has been used as a matter of right, and not by permission, for a very long time—some of the witnesses putting it at 50 years, and all at more than 15 years—next before the institution of the action. It may be conceded that there was much testimony in

behalf of the appellants (defendants below) showing that the use of the passway was permissive and not adverse; but, while it may be that the testimony of the witnesses on the disputed question was not overwhelmingly in favor of the appellee, there is one physical fact in connection with the case which constrains us to believe that the truth of the question in issue is with him. The farm of appellee would be nearly worthless, or certainly very greatly diminished in value, without the right to the easement in question; and it is hardly believable that any sensible man would have ever purchased the farm without one practical way to get to the public road.

In addition to this, the chancellor, who is familiar, doubtless, with the locus in quo, who knows, perhaps, the witnesses, and is better able to judge of the value of their testimony than are we, decided the question in favor of Down, and we see no good reason for violating our rule to give great weight to the decision of the trial court on disputed questions of fact. We are not willing to strain a point to enable the appellants to cut off appellee's right of ingress and egress to and from his farm; and, while it may be conceded that the question before us is not free from doubt, yet we believe that justice will more certainly be done by holding with the chancellor than by reversing his judgment.

Therefore the judgment is affirmed.

#### KENTUCKY LIGHT & POWER CO. v. JAMES H. WILLIAMS & CO.

(Court of Appeals of Kentucky. Feb. 4, 1910.)

#### 1. MUNICIPAL CORPORATIONS (§ 867\*) — INDEBTEDNESS—SUBMISSION TO VOTERS—CONSTRUCTION OF CONSTITUTION.

A two-thirds majority of those voting at an election is a sufficient compliance with Const. § 157, providing that no municipality shall become indebted in any year beyond the income for that year, without the assent of two-thirds of the voters thereof voting at an election for that purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1841; Dec. Dig. § 867.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 112\*)—TITLE—SINGLE SUBJECT EXPRESSED IN TITLE—CONSTRUCTION OF CONSTITUTION.

Const. § 51, providing that no law enacted by the General Assembly shall relate to more than one subject, which shall be expressed in the title, applies only to laws enacted by the General Assembly, and not to municipal ordinances.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 258-262; Dec. Dig. § 112.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 112\*)—CITIES OF FIFTH CLASS—ORDINANCES.

There is no provision in the charter of cities of the fifth class requiring ordinances to embrace but one subject to be expressed in the title.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 112.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 112\*) — INDEBTEDNESS—SUBMISSION TO VOTERS—SINGLE SUBJECT.

An ordinance providing for a submission to the voters of the question whether the city should issue \$12,600 worth of bonds for a sewerage system, and that any balance that might remain of the proceeds of the bonds after constructing the sewers should be used for macadamizing of streets, provided for the submission of but a single subject, viz., the issuance of city bonds to the amount of \$12,000 and the consequent incurring of an indebtedness by the city therefor; the use of any residue for paving being permissible without any provision therefor in the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 259; Dec. Dig. § 112.\*]

Appeal from Circuit Court, Ohio County.  
"Not to be officially reported."

Action by the Kentucky Light & Power Company against James H. Williams & Co. Judgment of dismissal, and plaintiff appeals. Affirmed.

Heavrin & Woodward, for appellant. Glenn & Simmerman, for appellee.

SETTLE, J. In this action the appellant, Kentucky Light & Power Company, a taxpayer of the city of Hartford, sought to enjoin the mayor and board of council of that city from issuing and putting on the market \$12,600 of bonds for the construction of a system of sewerage in that city. The circuit court refused to grant the injunction and dismissed the action, and from that judgment appellant prosecutes this appeal.

It appears from the record that the board of council by ordinance and after due notice caused to be held an election at which the sense of the voters of the municipality was taken as to whether the bonds in question should be issued and sold, and that the election resulted in the approval of the proposition; more than two-thirds of the votes cast favoring it. The grounds of objection to the issue of the bonds urged in the petition were: (1) That the proposition did not carry by the requisite two-thirds majority as provided by section 157, Const.; (2) that the ordinance submitting the question of the issue of the bonds and the calling of the election was passed at a called meeting of the city council (3); that the issue and sale of the bonds, together with the previously existing liabilities of the city of Hartford, would create an indebtedness exceeding 3 per cent. of the value of the taxable property of the city, in violation of section 158 of the Constitution, and require a rate of taxation, exclusive of the school tax, that will exceed 75 cents on each \$100 worth of taxable property in the city of Hartford; (4) that the ordinance providing for the issue of bonds for constructing sewers also provides that what shall be left of their proceeds after sewer construction shall be applied to macadamizing the streets

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the city, which makes it relate to more than one subject, and therefore violative of section 51 of the Constitution.

Counsel for appellant frankly admit that the first, second, and third objections to the ordinance and bond issue are without merit, because completely refuted by the answer, copies of the ordinance, and election returns filed therewith, and also the depositions taken in support of the averments of the answer as to the validity of the ordinance and election. Further reference in the opinion to these objections will therefore be unnecessary, except to say that, as to the first, this court, in *Belknap v. City of Louisville*, 99 Ky. 474, 36 S. W. 1118, 18 Ky. Law Rep. 313, 34 L. R. A. 256, 59 Am. St. Rep. 478, and *Montgomery Fiscal Court v. Trimble*, 104 Ky. 629, 47 S. W. 773, 20 Ky. Law Rep. 827, 42 L. R. A. 738, held that a two-thirds majority of those voting at such an election is a sufficient compliance with the provisions of section 157 of the Constitution.

The fourth objection cannot be sustained. Section 51 of the Constitution, which provides, in part, that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title," was, as is obvious from its language, intended to apply alone to laws enacted by the General Assembly, and such was the necessary construction given it by this court in the case of *Tuggles v. Commonwealth, for Use, etc.*, 100 S. W. 235, 30 Ky. Rep. Law 1071, in the opinion of which it is said: "This section (51) of the Constitution is by its terms confined to laws enacted by the General Assembly, and cannot be extended by implication or inference to embrace ordinances adopted by a city council. The Legislature might provide in the charter or acts of incorporation that the subject-matter of ordinances should be expressed in the title, as was done in the charter of first and second class cities (sections 2777 and 3059, Ky. St. [Russell's St. §§ 565, 1043]); but in the charter of cities of the fourth class we find no provision of this kind." We may add that no such provision is to be found in the charter of cities of the fifth class, to which the city of Hartford belongs.

Nor is it true that the validity of the ordinance in question is affected because it provides that any balance that may remain of the proceeds of the bonds, after constructing sewers for the city, shall be used for macadamizing its streets. It would be practically impossible for a city to determine, in advance of a bond election or issue for a legitimate public improvement, its exact cost, and, besides, the improvement of its streets is as essential to the prosperity of a city and the health and comfort of its inhabitants as are sewers. In the case of *City of*

*Louisville v. Board of Park Commissioners*, 112 Ky. 409, 65 S. W. 860, 24 Ky. Law Rep. 38, an ordinance submitted to the voters of Louisville the question whether bonds should be issued to a certain amount for park and sewer purposes. It was contended in that case that the ordinance was void by reason of a provision of the city charter of the same meaning and substantially the same language as that of section 51 of the state Constitution. But this court rejected the contention, holding that: "The subject of the ordinance was single. It was the issuance of the city bonds to the amount of \$500,000. The mere statement of the purposes for which the proceeds of the bonds were to be expended does not vitiate the submission of the single question whether the liability is to be incurred. As said by the chancellor, 'It is a protection to the voter rather than a danger.' \* \* \* It can hardly be doubted that if the question submitted had been whether the city should incur this liability, without any statement of the purpose, it would have been a proper submission, so far as the form of the question is concerned."

In the case at bar the ordinance of which appellant complains contains but a single subject, viz., the issuance of city bonds to the amount of \$12,600, and the consequent incurring of an indebtedness on the part of the city of Hartford therefor. While a part of the proceeds may be used for macadamizing the streets of the city, such use will, after all, be contingent upon there being a remnant or balance of such proceeds after the work of constructing the city's sewerage shall have been completed, and that use could as well have been made of it without an expression to that effect in the ordinance. This court has in numerous cases passed upon the general powers of cities to issue bonds as here attempted; the most recent being *Rees v. Kronth, etc.*, 120 S. W. 370, and *Frost v. Central City*, 120 S. W. 367. Tested by the principles announced in these several cases, we find that the steps taken by the city of Hartford in the matter of determining whether the bonds in question should be issued and in putting them upon the market for sale have been regular and in harmony with its charter and the Constitution of the state.

Wherefore the judgment is affirmed.

#### RUSSELL'S ADM'R v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Feb. 1, 1910.)

1. MASTER AND SERVANT (§ 235\*)—DEATH OF SERVANT—RAILROADS—CONTRIBUTORY NEGLIGENCE.

A railroad rule requiring car repairers to place a blue flag on each end of a cut of cars on which repairs were being made required both

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

inspectors and carpenters working on cars to protect their own safety, so that, where a car carpenter was killed by failure to put out flags, it was not material that the car inspector who was his superior was working with him at the time, and was chargeable with the same negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 235.\*]

## 2. EVIDENCE (§ 471\*)—ADMISSIBILITY—CONCLUSIONS.

In an action for the death of a car inspector while aiding in the repair of certain cars, evidence, that it was negligent operation for the trainmen to run the engine into the yards without ringing the bell or giving other adequate warning of the engine's approach, was inadmissible as calling for the opinion of the witness.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.\*]

Appeal from Circuit Court, Logan County.  
"Not to be officially reported."

Action by C. L. Russell's Administrator against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

R. W. Davis, B. F. Proctor, and Greene, Van Winkle & Schoofield, for appellants. Browder & Browder, Benjamin D. Warfield, and Chas. H. Moorman, for appellee.

O'REAR, J. C. L. Russell was a car carpenter in the service of appellee at its yards at Russellville, Ky., and had been so employed for 15 or 16 years, when he lost his life. His duties were to inspect cars in that yard, and more particularly to repair such as the inspection showed needed repairing, when it could be done without sending them to the shops. In addition to Russell there was another, Thornton, who was denominated an inspector. His duty seems to have been to inspect all freight cars in the yard to detect the necessity for repair, and if found defective to tag them accordingly and notify the agent of the fact. He also helped at repairing the cars when it could be done without taking them to the machine shops. Over these two men in authority was the master mechanic, Ryan. The testimony is that in his absence Russell acted in his place. On August 14, 1905, Thornton discovered a coal car on the house track in the Russellville yard that was out of repair. He tagged it and reported it. He then sent word to Russell to come up and examine it to see whether it could be there repaired. Russell came. He advised repairing it there. Thereupon Thornton went under the car to do the work. Russell said he would watch out for him. After a few minutes Thornton reported the work done, as well as could be done there, and that he thought it would do until the car got to the shops. Russell was then standing at the end of the car between the rails, and, as he stooped and looked under the car, evidently to confirm Thornton's opinion as to the efficiency of the repair, the cut of cars, of which that one formed a part, was struck

and moved forward by an incoming local freight train, Russell was knocked down by the impact, and killed. The cut of cars contained six or eight freight cars. A rule of the railroad company required car inspectors to place a blue flag on each end of a cut of cars on which they were working as notice to trainmen not to touch them while the flags were there. The rule was known to Thornton and Russell. But they did not observe it on this occasion. The train which struck their car was a regular local freight, which came in on or about the time it was due. In coming into the yard it went up to the house track, which was next to the freight station, to place cars and discharge freight. There was evidence that it was moving slowly—not over four miles an hour—yet its bell was not ringing. On the other hand the evidence for the company was that the bell was ringing. This suit by Russell's administrator to recover damages from the railroad company for the destruction of the intestate's power to earn money developed the foregoing facts.

The court instructed the jury that if those in charge of the engine of the local freight train negligently failed to ring its bell so as to give timely warning to laborers in the yards of the movements of the train, and that by reason of such failure Russell lost his life, the law was for the plaintiff. But that if Russell by his own negligence so contributed to his injury, notwithstanding the negligence of those in charge of the engine, that his injury would not have occurred, the law was for the defendant. The verdict was for the defendant railroad company.

Appellant's principal complaint on this appeal is that the court should have instructed also that Thornton was superior in authority to Russell, and that if Thornton negligently ordered Russell to do the work in a place of peril, without having taken the necessary precaution to flag the car, the law was for the plaintiff. The rules of the company which were known to Russell as well as to Thornton, and which were promulgated for the guidance of each, required car inspectors to place blue flags on each end of the car or cut of cars on which they were engaged at work. There was not evidence that Thornton ordered Russell to do any work on the car. As a matter of fact he did none. It was Russell's duty to protect himself by keeping in a place of safety, or if he went on or under the car to put out the flags for his protection. Whether Thornton was negligent in not placing the flags is wholly beside the case, as his negligence did not excuse Russell from that duty.

Appellant complains, too, that the circuit court erred in rejecting certain testimony offered on his behalf, to the effect that it was negligent operation for the trainmen to run the engine in the yards without ringing the bell or giving other adequate warning of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

engine's approach. But the court did better for appellant than if the testimony had been allowed. For he told the jury that as a matter of law it was actionable negligence to so operate the train. Nor was the opinion of the witnesses competent evidence. Whether the operation of the train was prudent or negligent was either a matter of law, or it was one of law and fact to be determined upon the whole case—not by the opinions of witnesses. We perceive no error in the record.

Judgment affirmed.

#### WIGGINS et al. v. BROWN.

(Court of Appeals of Kentucky. Feb. 10, 1910.)

#### APPEAL AND ERROR (§. 1009\*)—FINDINGS—CONCLUSIVENESS.

A chancellor's finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

Appeal from Circuit Court, Laurel County. "Not to be officially reported."

Action between Jack Wiggins and another and W. L. Brown. From a judgment for the latter, the former appeal. Affirmed.

D. K. Rawlings, for appellants. Geo. G. Brock, for appellee.

LASSING, J. The question involved in this appeal is one purely of fact. The evidence is so conflicting that the case is made to turn upon the weight that is given the testimony of the litigants themselves. The chancellor, doubtless familiar with the parties, has decided in favor of appellee; and under the oft-repeated rule applied in cases of this character, giving to his opinion some weight, the judgment is affirmed.

#### BANNON v. P. BANNON SEWER PIPE CO. et al.

#### SAME v. KENTUCKY VITRIFIED BRICK CO. et al.

(Court of Appeals of Kentucky. Feb. 4, 1910.)

#### WITNESSES (§ 159\*)—COMPETENCY—STATEMENTS OF DECEDENT.

In a suit after the grantor's death to set aside transfers of corporate stock on the ground of mental incapacity and undue influence, the heirs cannot testify as to conversations with the grantor and statements made by him to show either lack of capacity or undue influence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 664-682; Dec. Dig. § 159.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "To be officially reported."

On petition for modification of opinion. Opinion modified, and rehearing denied.

For former opinion, see 119 S. W. 1170.

Guy H. Briggs, Charles F. Taylor, and Kohn, Baird, Sloss & Kohn, for appellant. McDermott & Ray, O'Connor & O'Connor, O'Neal & O'Neal, J. W. S. Clements, and Dodd & Dodd, for appellees.

LASSING, J. In the petition for a modification of the opinion rendered herein, our attention is called to the conflict between this case and the case of Swinebroad v. Bright, 116 Ky. 514, 76 S. W. 365, 25 Ky. Law Rep. 742, on the question of the competency of the evidence of certain of the litigants relative to conversations had by them with their father and statements made by him in their presence. The opinions are irreconcilable on this point, and both cannot stand. After full consideration, we adhere to the rule announced in the Swinebroad Case, and now withdraw so much of the opinion as holds the testimony of those of the appellees who undertook to detail conversations with and statements made by their father competent. On another trial this testimony will be rejected, as it was in the lower court in the first trial.

Petition for rehearing overruled.

#### WOODALL v. SOUTH COVINGTON & C. ST. RY. CO.

(Court of Appeals of Kentucky. Feb. 1, 1910.)

#### STREET RAILROADS (§ 24\*)—ESTABLISHMENT AND MAINTENANCE—FRANCHISES—CONSTITUTIONAL PROVISIONS.

Where a street railroad company having a franchise to operate in a city was granted by the city, through its council, the right to lay its tracks and operate its cars on a street not before used by it, in consideration of which it gave up the use of two other streets, and conveyed to the city a piece of land abutting on the streets to which the tracks were moved for the purpose of widening it, this did not amount to the granting of a new franchise to the company which was required to be advertised and sold under Const. § 164, requiring cities to award franchises to the highest bidder.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 36; Dec. Dig. § 24.\*]

Nunn, C. J., and Carroll, J., dissenting, and O'Rear, J., dissenting in part.

Appeal from Circuit Court, Kenton County, Criminal, Common Law, and Equity Division. "To be officially reported."

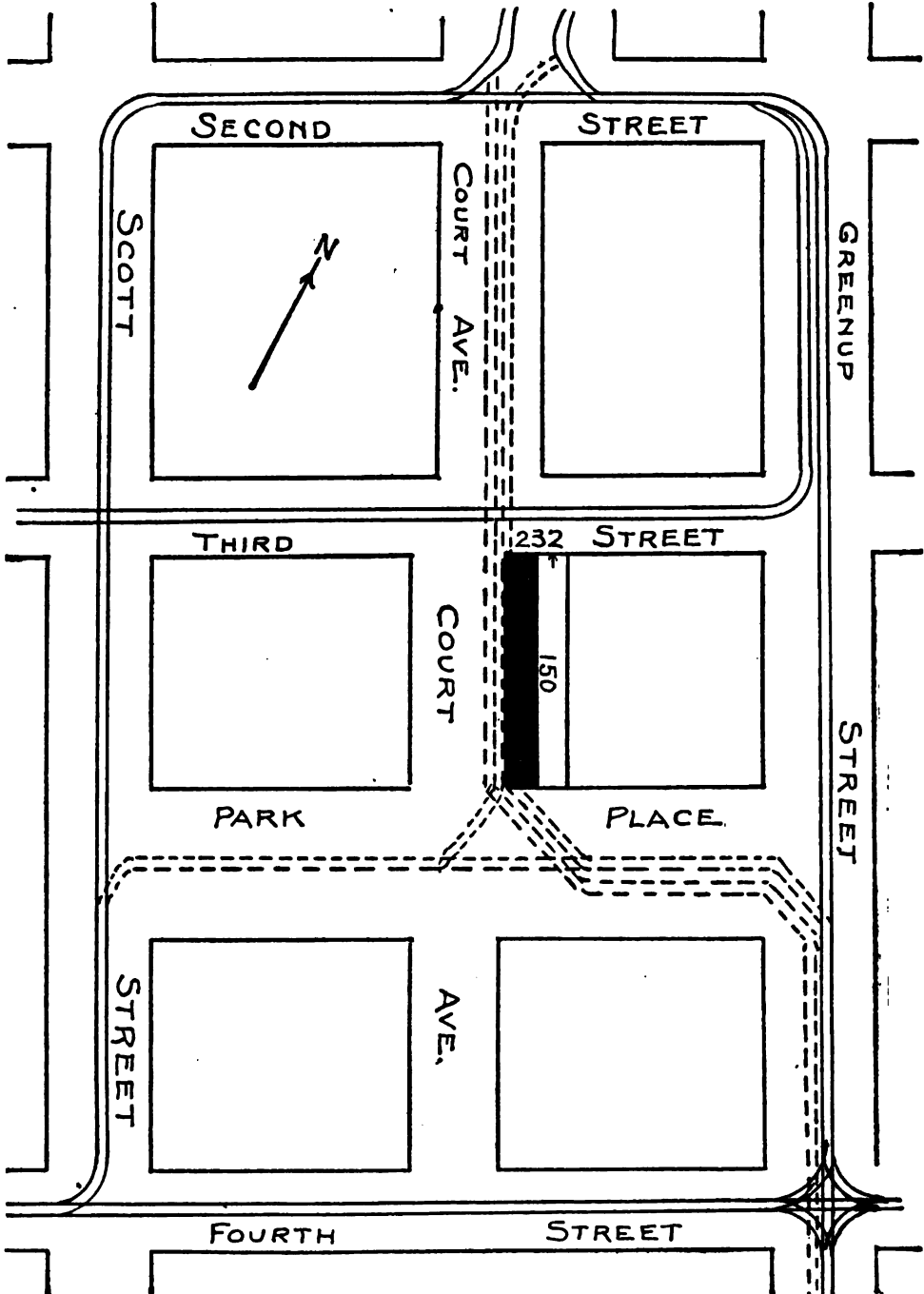
Suit by Frank Woodall against the South Covington & Cincinnati Street Railway Company for a mandatory injunction requiring defendant to remove its tracks, poles, etc., from a certain street. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

Walker C. Hall, for appellant. Ernest & Cassatt, for appellee.

HOBSON, J. Prior to July, 1901, the South Covington & Cincinnati Railway Company owned and operated a street car system in the city of Covington under valid franchises owned by it. The various routes on

which the cars were operated all converged at the suspension bridge over which the cars passed to and from Cincinnati. They reached the bridge by tracks which passed over Scott and Greenup streets to Second, and over Second to the bridge. In 1901 the city desired to widen Court avenue, which is a street running directly south from the bridge; and a part of the ground required for the additional widening of the street belonged to the railway company. An arrangement was then

made between the city and the street railway company by which the company agreed to take up its tracks on Greenup and Scott streets and to come to the bridge along Park place and then along Court avenue. In other words, the tracks which before ran along Second street were placed along Park place, and tracks were laid in Court avenue, and for these two squares Greenup street and Scott street were freed of the cars. The situation is shown on the following plot:



The preamble to the ordinance of the council under which the arrangement was consummated is as follows: "Whereas, the South Covington & Cincinnati Street Railway Company now occupies a portion of Second street, between Scott and Greenup Streets, and Greenup Street between Second street and Park place, and Scott Street between Second street and Park place, and operates thereon a street railway, its tracks on said streets connecting the tracks upon the suspension bridge with the various routes operated by said South Covington & Cincinnati Railway Company; and whereas, the city of Covington has requested that the said street railway company shall change its tracks and the operation of its street railway from said portion of said streets to Court street and Park place, all as more fully set forth herein; and whereas, said city of Covington desires to widen Court street on the east side thereof, between Third streets and Park place, and the said South Covington & Cincinnati Street Railway Company is willing to give to said city a strip of land twelve feet along said side of Court street, between Third street and Park place, from land owned by said South Covington & Cincinnati Street Railway Company; and whereas, in the opinion of the council, the said change of tracks from the streets first above specified to Court street and Park place will be for the benefit of said city and the convenience of its citizens and of the traveling public: Now, therefore, be it enacted by the general council of the city of Covington:" (Here follows grant as above stated.)

The land which the street car company gave up is shaded dark on the plot. The city widened and paved Court avenue. The company removed its tracks from the five blocks it had previously occupied on Greenup, Second, and Scott streets, placing them on three blocks on Park place and Court avenue. The heavy lines on the map represent the location of the street railway before the change, and the dotted lines the location of the tracks after the change. This action was brought by Frank F. Woodall, a citizen and taxpayer of Covington on July 24, 1908, against the street railway company asking a mandatory injunction requiring it to remove its tracks, poles, wires, etc., from Park place. The city was not made a party to the action, and the removal of the car tracks from Court avenue was not sought. The petition does not show that the plaintiff has sustained any special damage by reason of the tracks in Park place. The circuit court sustained a general demurrer to the petition, and the plaintiff appeals.

Section 164 of the Constitution is in these words: "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege

for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

The plaintiff insists that the ordinance above referred to grants a franchise to the street railway company, and that the council was without authority to do this without advertisement, and letting it to the highest and best bidder. He also insists that as a taxpayer of the city he may maintain an action to have the street car tracks and wires removed from Park place. When the ordinance was passed the street railway company had a franchise to operate its cars in the city of Covington. They then had the right to use for this purpose Scott, Greenup, and Second streets, as their tracks were then laid. The purpose of the arrangement between the city and the street railway company was not to grant an additional franchise but simply to relocate the tracks of the street car company so as to be better for the city and better for the traveling public. The city secured the widening of Court street and the freeing for two squares of Greenup and Scott streets, and the street railway company secured a better approach to the bridge. It gave up its rights in Greenup and Scott streets, and also surrendered to the city the piece of land which it owned. The city has taken possession of the land and enjoys all the fruits of the contract. This is not such a franchise as could be advertised and sold to the highest and best bidder; for no one would want a street railway franchise running two squares on Court street and one square on Park avenue. The purpose of the council was to get the tracks removed from Greenup and Scott streets, and to get the strip of ground so that Court street could be widened. This could not have been gotten from any bidder at a public sale. It could only be gotten by a contract with the street railway company. The title to the streets is in the city. The city has charge of its streets. It has authority to open, widen, and straighten, change, or otherwise improve its streets. Ky. St. § 8094 (Russell's St. § 1205). Under this power before the adoption of the Constitution, clearly the city had authority to straighten a street by selling a part of it to an abutting landowner, and getting from him other land, or to make any other trade by which the street would be made more uniform not preventing its free use by the public. 28 Cyc. 624. The city here was confronted with a condition which the interest of the city and the traveling public demanded should be changed. By the agreement made with the street railway company the location of the tracks was simply shifted from one position to another to advance the interest of the city. No franchise was granted; nothing was added to the powers of the street railway company. Only the route along

which the cars should run was slightly altered.

Section 164 of the Constitution was not intended to take away from the municipalities of the state power to make changes like this required by the increased population of the city or altered conditions. It was a mere modification in a detail of the execution of an existing franchise analogous to the removal of tracks from one side of a street to another. Section 164 of the Constitution relates to the granting of franchises. It was not intended to tie the hands of the city authorities as to the mere details of executing a franchise already granted. Both parties here acted in perfect good faith. There was no purpose to grant any new franchise to the street railway company. The only purpose was to adjust an old franchise to the present needs. Of course, section 164 of the Constitution must not be evaded. If it was made to appear that an arrangement like this had been made in evasion of the constitutional provision, or to accomplish by indirection the granting of a franchise, we should look through the mere form at the substance, and declare the transaction void; but, where nothing of this sort appears, the city council may obtain by contract a modification of existing franchises in the mere details of their execution when the interest of the city so requires. In such cases the validity of the transaction will depend on whether the real purpose of the parties was to grant a franchise or simply to obtain a modification in the exercise of an existing franchise. We think that the latter is clearly the case here. The tracks could not have been put on Court avenue and Park place before these streets were opened and widened. If the city had acquired only a strip of ground along the route now occupied by the street railway tracks and had by contract with the company had it to move its tracks to this strip, and thus relieve Greenup and Scott streets, by no sort of reasoning could it be maintained that this was the granting of a new or additional franchise to the street railway company. And, when instead of acquiring merely a strip, the city opened and widened the streets and thus brought about the same result, the real nature of the transaction was in substance the same.

Judgment affirmed.

CARROLL, J. (dissenting). I consider the question involved in this case of sufficient importance to justify me in stating the reasons why I do not concur in the opinion handed down by a majority of the court. I rest my dissent upon the following grounds:

(1) When a city or other municipality gives to a public service corporation, except a trunk railway, the right to permanently use and occupy a street, highway, or other public place, it is the granting of a franchise or privilege within the meaning of section 164 of the Constitution, reading: "No county, city, town, taxing district or other municipal-

palty shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

(2) It is wholly immaterial whether the franchise or privilege is of much or little value to the corporation, or whether the use and occupation under it extends over a small or a large portion of the street, highway, or public place, or whether the city or other municipality or its people suffer injury, loss, or disadvantage or derive benefit or gain from the granting of the franchise or privilege.

(3) When a franchise is granted to use and occupy a particular street, highway, or place, the grantee cannot under this grant use or occupy any other street, highway, or place in the city or municipality without first obtaining the right so to do in the manner provided in the Constitution.

(4) If a city or other municipality undertakes to grant a franchise or privilege except in the manner pointed out in the section of the Constitution mentioned, its action is void, and the corporation using and occupying the street, highway, or public place is a trespasser, and any citizen and taxpayer of the city or municipality has the right to directly bring an action to oust the trespasser from its unlawful use and occupancy.

(5) This constitutional provision is mandatory, and its provisions cannot be evaded or disregarded in any material particular.

These propositions have been sustained by this court in many cases. Thus in *Nicholasville Water Co. v. Board of Councilmen of the Town of Nicholasville*, 36 S. W. 549, 38 S. W. 430, 18 Ky. Law Rep. 592—and which is by the way the first case construing this section—the court said: "The grant of the franchise of the town of Nicholasville to the Kentucky Water, Heating & Illuminating Company, in June, 1892, may be treated as void, because of the failure of the municipality to receive bids publicly after due advertisement as provided in section 164 of the Constitution."

In *City of Somerset v. Smith*, 105 Ky. 678, 49 S. W. 456, the attempt was made in 1897 to grant a franchise to an electric light and power company for the period of 20 years beginning in 1900. The court said: "It is contended that this contract is void, because in conflict with this constitutional provision. In this we concur. The franchise or privilege is said to be for only twenty years from its beginning, and that it begins when the present contract expires or is terminated. The present contract expires in 1900, and al-

though it is provided that this privilege or franchise may begin before that date, and then extend only twenty years, yet the contract made is for more than twenty years, as it did not begin on the day of the ratification of the contract, but it is expressly postponed to some future date. Whatever may be said about the franchise, this is certainly a contract in reference to a franchise, and the term contracted for exceeds the constitutional limit."

In *City of Providence v. Providence Electric Light Co.*, 122 Ky. 237, 91 S. W. 664, it was said in speaking of section 164 of the Constitution: "This section is mandatory and no contract made in violation of its provisions can be enforced. Nor can any franchise or privilege be granted without a compliance with its requirements." To the same effect is *Monarch v. Owensboro City Ry. Co.*, 119 Ky. 939, 85 S. W. 193; *Keith v. Johnson*, 109 Ky. 421, 59 S. W. 487.

In *Merchants' Police & District Tel. Co. v. Citizens' Tel. Co.*, 123 Ky. 90, 93 S. W. 642, 29 Ky. Law Rep. 512, the facts were these: The appellee owned a legal franchise to operate a telephone plant in the city of Covington. The appellant, although using the streets of the city by permission of the council under an ordinance, did not obtain a franchise in the manner pointed out in the Constitution. The appellee brought a suit against the appellant to enjoin it from the use of the streets. The lower court granted the relief sought, and this court in affirming the judgment said: "Therefore any effort or act of the council in granting a franchise or privilege contrary to this section (164) of the Constitution is absolutely void, and confers no right whatever upon the party securing the grant. \* \* \* In our opinion appellant did operate its telephone without authority of law, and the attempted grant to it by the council is void and conferred no right whatever upon it. \* \* \* It is conceded that appellee is a citizen and taxpayer of the city, and in our opinion as such it should have the right by action to prevent the further continuance of the wrong perpetrated by the council of that city in granting illegally the franchise to appellee by stopping it from the further exercise of its pretended rights thereunder. The appellee is interested with all citizens in saving the city from loss of its revenues by the illegal gift of valuable franchises which if sold legally would increase the revenues and thereby lessen the taxes of appellee and all citizens in the city."

In *Hilliard v. Fetter Lighting & Heating Co.*, 127 Ky. 95, 105 S. W. 115, 31 Ky. Law Rep. 1330, it is said: "Municipal authorities cannot grant a franchise or privilege for a use intended to be permanent except in the manner pointed out in section 164 of the Constitution. Nor can this section be evaded or its purpose nullified by making

the grant for an indefinite period or for less than a term of years or by any other scheme or device."

In *Frankfort Telephone Company v. Board of Councilmen of Frankfort*, 125 Ky. 59, 100 S. W. 310, 30 Ky. Law Rep. 885, the telephone company was operating in the city under an ordinance giving it the right so to do, but not under a franchise obtained under section 164. It brought an action to enjoin the council from regulating its charges. The lower court dismissed its petition, and in affirming that judgment we said: "The framers of the Constitution intended by section 164 to take it out of the power of municipalities to give away franchises to do business within their boundaries." And in concluding the opinion, the court said: "It results that appellant has no franchise from the city of Frankfort and this being so it cannot be heard to complain that there has been established a rate of telephone charges which prohibited it from doing business therein."

In *East Tennessee Telephone Company v. Anderson County Telephone Company*, 115 Ky. 488, 74 S. W. 218, 24 Ky. Law Rep. 2358, the Anderson Telephone Company sued the East Tennessee Telephone Company upon an injunction bond to recover damages for its unsuccessful attempt to prevent it from exercising an alleged franchise it had obtained to do business in the city of Lawrenceburg; but the court held that, as the Anderson County Telephone Company had never obtained in the proper way the right to the use of the streets of the city, it was a mere trespasser and could not sue and recover damages for interference with its rights, as it had no rights. To the same effect is *Rough River Telephone Co. v. Cumberland Telephone Co.*, 119 Ky. 470, 84 S. W. 517, 27 Ky. Law Rep. 32; *Rural Home Telephone Co. v. Kentucky & Indiana Telephone Co.*, 128 Ky. 209, 107 S. W. 787, 32 Ky. Law Rep. 1068; *Maraman v. Ohio Valley Telephone Co.*, 76 S. W. 398, 25 Ky. Law Rep. 784. In these four last-named cases, section 164 of the Constitution was not involved. They are only cited for the purpose of illustrating that the occupation of a street by a public service corporation that has not obtained in a legal way the right to occupy them is a trespass. A citizen and taxpayer has the right to enjoin an unlawful exercise of power by municipal authorities where the attempt is made to grant rights, privileges, or franchises injurious to the taxpayer without authority so to do. *Dyer v. City of Newport*, 123 Ky. 203, 94 S. W. 25, 29 Ky. Law Rep. 656; *Keith v. Johnson*, 109 Ky. 421, 59 S. W. 487, 22 Ky. Law Rep. 947; *Hilliard v. Fetter Lighting & Heating Co.*, 127 Ky. 95, 105 S. W. 115, 31 Ky. Law Rep. 1330; *Roberts v. Louisville*, 92 Ky. 97, 17 S. W. 216, 13 Ky. Law Rep. 406, 844; *Dillon on Municipal Corporations*,

§ 914; City Item Printing Co. v. New Orleans, 51 La. Ann. 713, 25 South. 313; Collins v. Davis, 57 Iowa, 256, 10 N. W. 643; Adamson v. Union Ry. Co., 74 Hun (N. Y.) 3, 26 N. Y. Supp. 136; Mayor and City Council of Baltimore v. Gill, 31 Md. 375; 28 Cyc. p. 1734.

Keeping in mind these opinions of this court, and applying the principles so often declared to the facts of this case, it seems plain that when the city council by the mere enactment of an ordinance granted the street railway company a right to use and occupy Park place and Court avenue, its action was without authority, and the occupation of this street and public place by the company a trespass. There is no pretense of any sort or character in either brief or record that under any franchise previously granted in pursuance of the Constitution the railway company had the right to go upon or occupy any part of Park place or Court avenue.

It is said, however, in the opinion, that the purpose of the city in authorizing the railway company to occupy Park place and Court avenue was not the granting of a franchise but merely the right to relocate the tracks of the company for the benefit of the city and the public, and that the council had the power by ordinance to authorize this change. I do not know whether the city intended to grant a franchise or not when it authorized the occupation of these streets, but I do know that their occupation is a franchise within the meaning of the Constitution. The fact that the company paid to the council a consideration for permission to change its tracks from one street to another, or that the parties acted in good faith, is not entitled to any weight in disposing of the question presented. The suggestion in the opinion that a franchise for the use of Park place and Court avenue could not be sold to any other street railway company, I am not prepared to answer. There is nothing whatever in the record bearing upon the question. The record does not show how long Court avenue is, or how much of Park place the tracks of the railway company occupy, or whether or not this place or street is of much or little value for railway purposes, or whether or not a franchise may be sold for the use of either of them. But it does show that they are permanently occupied and used by the tracks of the company, and this is all that is necessary to constitute a franchise or privilege.

I do not controvert the proposition that if a franchise is purchased to use several or any number of streets, and all of them are not occupied immediately, that the grantee may change its tracks from one street to another upon which it has a franchise, but that question is not here as it is admitted that the railway company never had a franchise to

use or occupy Park place or Court avenue. Under the majority opinion, a public service corporation may obtain a franchise to use one street, and then for such consideration as the council will accept, get from it the right to use any other streets that it desires. Hereafter, when such a corporation—to illustrate—desires to obtain the right to use "A" street without buying it at a public sale made to the highest and best bidder after due advertisement, it may obtain under the Constitution a franchise to use "B" street and then trade its right to use "B" street with the council for the right to use "A" street. This is precisely what was done in this case. If the Constitution is to have the construction given to it by the opinion, then all we have written about the value of this section and its beneficial purposes, and all that we have said about its provisions being mandatory, count for nothing.

Chief Justice NUNN joins in this dissent.

Judge O'REAR concurs in the views expressed in this dissent, except the fourth proposition discussed. In his view the city council still has the right to expose the franchise to sale as provided in the Constitution, and ought to do so. In this way the occupancy of the street may be legalized. In this state the power to grant right of way in the streets of a city is wholly in the council. The owner of the abutting property, much less the taxpayer, has no right to interfere so long as he suffers no peculiar damage in the matter of location. The only thing the Constitution requires is that the city shall sell the right. Not having done so the remedy of the complaining taxpayer is a mandamus against the city council to compel it to comply with the provision of the Constitution. But he has not the right alone to sue to oust the street car company as a trespasser, any more than he would have the right to sue any other trespasser upon public property. If the council refused to sue, or was so complicated in its relation to the railway company as that it could not act impartially, then and then only the taxpayer could sue in his own name, but in behalf of the city.

In this view of the matter, Judge O'REAR thinks the judgment should be affirmed.

#### KREKEL v. GUENZLER'S ADM'R et al.

(Court of Appeals of Kentucky. Feb. 4, 1910.)  
PARTITION (§ 109\*)—SALE—TITLE OF PURCHASER.

Where the record in partition of a decedent's land made a prima facie showing that all the heirs of decedent were properly made parties, the purchaser at the sale may not refuse to take title on the ground that it does not conclusively appear from the record that all the heirs were parties to the suit, in the absence of some showing by him that there were other heirs not joined.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 380-390; Dec. Dig. § 109.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Partition between the heirs of George Guenzler, deceased. From an order overruling objections of the purchaser of the property, John E. Krekel, to the report of sale and confirming the sale, he appeals. Affirmed.

Thomas A. Barker, for appellant. A. M. Marret, for appellees.

NUNN, C. J. This action was instituted under section 490 of the Civil Code of Practice to sell a piece of real estate situated in the city of Louisville, Ky., on Market street, near where Twenty-First street crosses it. The piece of land has a 25-foot front and is 105 feet deep. The property was sold by an order of court, and appellant purchased it at the price of \$2,080. He afterwards concluded that he could not get a good title on account of some defects in the proceedings under which it was sold, and filed exceptions to the report of sale, which were overruled and the sale confirmed, from which order he appealed. The exceptions filed by appellant are as follows: "(1) The nonresident known and unknown defendants are not before the court by warning order, service of process, or answer. (2) No warning order attorney was ever appointed for the nonresident defendants. (3) There is no proof that the parties mentioned in the amended answer and cross-petition of Friedricke Kochendorffer et al. v. Alphonse Marrett et al., and in other pleadings are the only heirs of George Guenzler, deceased, or that the heirs of George Guenzler dying subsequent to his death died testate or intestate." It is conceded that the first two exceptions are without merit, as the record was found after the exceptions were filed which disclosed the fact that the nonresidents, known and unknown, were before the court by warning order, and a report was filed by the attorney appointed to defend for them. Therefore appellant's counsel asks for a reversal for the reason stated in the third exception, only. A sale of this property was sought upon the ground that the parties owned a vested interest therein, that they were in possession of it, that it could not be divided without materially impairing its value, and that the share of each owner was worth less than \$100.

One Geo. Guenzler died testate in the month of February, 1876, the owner of this property. By his will he devised all of his property to his wife, Johanna Guenzler, provided she remained his widow, and upon her death it should be equally divided among his and her heirs. Johanna Guenzler died in July, 1899, without having married. No children were ever born to George and Johanna Guenzler, and their parents died before they did; consequently, their brothers and sisters

and their descendants, if they had any, are heirs to the property. Some eight or ten years before the judgment was rendered in this action, this proceeding was instituted by a few of the alleged brothers and sisters and their descendants, against several others, who were alleged to be heirs of George and Johanna Guenzler. It was alleged in the petition that the plaintiffs and defendants were the only heirs, and a sale of the property was asked for the purpose mentioned. Some time after this an amended petition was filed which set up other heirs, and thus amendments and answers continued to be filed until finally Friedricke Kochendorffer and her husband filed an amended answer, counterclaim, and cross-petition, in which they gave the family history of the parents and descendants of George and Johanna Guenzler, and gave the names of over a hundred who were interested in the property sought to be sold. They alleged that this family history and pedigree were obtained from the Royal Evangelical Parochial office in Biberach near Heilbronn in the Kingdom of Wurttemberg, an office which keeps according to the law of Wurttemberg the register of births, marriages, and deaths, and issues abstracts therefrom in the form of pedigrees, which they file as a part of their pleading. All the parties in interest appear to have agreed that this record correctly stated the names of all the persons who owned interests in the property sought to be sold. Some of them resided in the city of Louisville, but most of them resided in Germany, Australia, and other countries.

Appellant's only contention is that there is no proof showing that the parties before the court are the only heirs of George and Johanna Guenzler. It would be almost impossible to introduce proof to show the heirship in a case like this any better than is done by the pleadings and exhibits in this case. The judgment entered was agreed to, and, although appellant contends that the original petition alleges that the testator left no other heirs than those therein named, every pleading filed subsequent thereto makes the allegation that he did leave other heirs, and these subsequent pleadings were not traversed, and must, therefore, be considered as confessed. While it is true that the abstract furnished by the office of the Royal Evangelical Parochial in Biberach near Heilbronn in the Kingdom of Wurttemberg is not conclusive of all marriages, births, and deaths of the Guenzler family, and could be rebutted, yet it was not done, and, as it was agreed to by all the parties in interest, something over 100 of them, it is reasonable to presume that it is true.

The case of *Faustre v. Commonwealth*, 92 Ky. 34, 17 S. W. 189, 13 Ky. Law Rep. 347, cited by appellant, was different from the case at bar; it was a criminal proceeding. In such a case as that, the evidence must show the guilt of the accused beyond a rea-

sonable doubt. In our opinion the pleadings and exhibits filed in this case make out a prima facie case and authorized the judgment of the lower court. See the case of *Hogue v. Yeager*, 107 Ky. 582, 54 S. W. 961, 21 Ky. Law Rep. 1299.

Appellant was not a party to this proceeding in the lower court until he filed his exceptions to the report of sale. He bought the property, and therefore has no interest in the proceeds, and should not be allowed to set the sale aside without proof of some kind showing that there are heirs of Guenzler and wife who were not made parties to the action. This duty devolved upon him, and, if there were any, he failed to make it known.

For these reasons, the judgment of the lower court is affirmed.

#### RELIANCE TEXTILE & DYE WORKS CO. v. WILLIAMS.

(Court of Appeals of Kentucky. Feb. 2, 1910.)

#### MASTER AND SERVANT (§ 265\*)—RES IPSA LOQUITUR—APPLICATION OF RULE.

The doctrine of *res ipsa loquitur* is only applicable where there is no evidence as to what put in motion the thing that caused the injury, and does not apply where the evidence shows that the fall of a bale of cotton, injuring plaintiff, was either caused by a fellow laborer pushing it over, or by being jarred out of place in the hurry and confusion of getting down and removing tiers of the bales.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 881; Dec. Dig. § 265.\*]

"To be officially reported."

On petition for rehearing. Petition overruled.

For former opinion, see 122 S. W. 207.

**BARKER, J.** It is insisted by counsel for appellee that the doctrine of *res ipsa loquitur* should be applied to this case. But this cannot be, as there is evidence showing why the bale fell, and the rule of *res ipsa loquitur* is only applicable when there is no evidence as to what put in motion the thing that produced the injury, and the cause that produced it is unexplained or unaccounted for. The appellee, who was the only witness in his own behalf as to what took place at the time of the accident, testified time and again that he did not know what caused the bale to fall, although he did say that a good many fellow laborers were at the time hurriedly engaged in taking down and removing these bales, and he did not know whether it fell on account of a jar, or some one pushed it on him.

It is said in the petition for rehearing that the statement in the opinion that the undisputed evidence was that Fox pushed the bale over that struck appellee is inaccurate, as appellee testified that Fox did not push it over. In his redirect examination appellee

was asked: "Will you please tell the jury if, just prior to the time you were injured, he [Fox] was standing upon a bale, and shoved one of the bales over, and in shoving it over he called out, 'Is it all right?' or some words like that? A. He did." In other parts of his redirect examination he said that on his way to the place where he was when the bale fell on him, and when about 25 feet from it, he passed Fox, and did not see him again until after the bale fell. He was asked: "You didn't know anything about what occurred, or what Fox did, after you passed him? A. I never seen Fox until after I was hurt—after I met him above me 20 or 25 feet. Q. After you passed him 20 or 25 feet from this bale, you never saw him again until after you were hurt, sitting on a keg? A. Yes, sir. Q. You don't know where he was during that time? A. That was the last time I seen him there. I noticed he was with a lot of men coming in and out. They were hurrying them on." But he stated in another part of his direct examination that Fox did not throw or push the bale over, and this question and answer were overlooked in writing the opinion. But, aside from this, it was not material whether the statement of Fox and others that Fox pushed the bale over was contradicted or not, as it is not denied that the bale was caused to fall either by Fox pushing it over, or being jarred out of place in the hurry and confusion of getting the bales out.

The petition for rehearing is overruled.

#### RICHARDS v. POTTER.

(Court of Appeals of Kentucky. Feb. 2, 1910.)

#### 1. MINES AND MINERALS (§ 54\*)—ESTATES CONVEYED—MINERALS.

Where a deed of land does not limit the estate conveyed, there being no reservation or exception in it, it embraces all minerals thereunder, as well as the surface.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 150; Dec. Dig. § 54.\*]

#### 2. VENDOR AND PURCHASER (§ 231\*)—BONA FIDE PURCHASERS—NOTICE—INSTRUMENTS NOT ENTITLED TO BE RECORDED.

Prior to the enactment in April, 1893, of Ky. St. § 500 (Russell's St. § 2070), providing that any contract for sale of land or any interest therein, when acknowledged or proved as deeds are required to be, may be recorded, and that the record of such contracts shall be notice thereof to all persons, bonds for title to land and other contracts with reference to interests therein were not authorized by law to be acknowledged and proved as deeds, and could not be recorded, and hence could not impart notice to subsequent purchasers.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 529; Dec. Dig. § 231.\*]

#### 3. VENDOR AND PURCHASER (§ 239\*)—BONA FIDE PURCHASER—PRIOR BOND FOR TITLE.

Under the rule that a bona fide purchaser of land without notice of any equity or title in favor of a third person is not affected thereby, a purchaser of land prior to the enactment of such statute, under a deed without reservations or exceptions, would take the coal and minerals

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thereunder in the absence of information or knowledge of the equitable claim of another holding a prior bond for title to the minerals on the land, before he parted with the purchase price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 586; Dec. Dig. § 239.\*]

**4. VENDOR AND PURCHASER (§ 244\*)—BONA FIDE PURCHASER—NOTICE OF RIGHTS OF THIRD PERSON—EVIDENCE.**

Evidence held not to show that a purchaser of land had notice of a prior sale by his grantor, by an unrecordable contract, of the coal and minerals under the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609-611; Dec. Dig. § 244.\*]

Appeal from Circuit Court, Letcher County.

"Not to be officially reported."

Action by Isaac Potter, Sr., against R. K. Richards. Judgment for plaintiff, and defendant appeals. Affirmed.

S. B. Dishman, Dishman & Dishman, and Geo. I. Neal, for appellant. Salyer & Baker, for appellee.

NUNN, C. J. Appellee instituted this action under section 11, Ky. St. (Russell's St. § 14), for the purpose of removing an alleged cloud from his title to a certain survey of land. He alleged that appellant was claiming to be the owner of the coal and other minerals under the land, and that his claim was without right thereto. Appellant contented himself in his first answer by controverting the affirmative allegations of the petition and alleging that he was the owner of the coal and other minerals under the land by purchase and conveyance. He afterwards filed an amended answer, in which he alleged that, although his conveyance was of later date than appellee's, it was executed in compliance with a title bond which their common vendor, James Yontz, had executed to one Horsely in the year 1887, which was prior to the conveyance made by Yontz to appellee. He further alleged that appellee, when he purchased the land in controversy, knew of the existence of this title bond executed by Yontz to Horsely. Appellee replied to this answer and denied specifically all the affirmative matter in it.

Appellee received his conveyance from James Yontz in the month of May, 1889, and immediately took possession of the land and held it from that date to the trial of the action. Appellee also alleged that the conveyance from James Yontz to appellant's immediate vendor, Bright, for the coal and other minerals under the land, was executed in June, 1889, a month after his conveyance, and at a time when appellee was in adverse possession of the land, claiming it as his own, and therefore the deeds from Yontz to Bright and from Bright to appellant were champertous and void. The lower court adjudged these deeds champertous, and that appellee had a good title by reason of his continuous,

adverse possession, and that the claim of appellant to the coal and other minerals under the land was not valid. The conveyance from Yontz to appellee did not limit the estate conveyed; there was no reservation or exception of any kind contained in it. It was such a deed as would, apparently, convey the minerals as well as the surface, and by it he took both, unless he had at that time information or knowledge of the equitable estate in Horsely or his assignee, in the coal and other minerals. As we understand the case, the questions of champerty and adverse possession are not involved. There is no pretense that appellee undertook to mine any of the minerals, or that he committed any specially overt act indicating that he owned the minerals.

In the case of Kincaid v. McGowan, 88 Ky. 91, 4 S. W. 802, 9 Ky. Law Rep. 987, 13 L. R. A. 289, this court said: "An estate in fee in land carries with it all metals and minerals thereunder, unless the metals and minerals are excepted in the conveyance, or 'have before been severed in ownership, and the right thereto vested in some other person.' The surface and the metals and minerals may be distinct property from each other by separate conveyances from individuals. Minerals in place are land. They are subject to conveyance. The surface right may be in one man and the mineral right in another. Both in such a case are landowners. They own separate and distinct corporeal hereditaments."

It appears from the record that Yontz had, prior to appellee's purchase, by some kind of a writing, conveyed to one Horsely the coal and other minerals under this land; but the writing for this purpose, under the law as it then existed, was not recordable, and the original was not filed as evidence, nor was there any proof introduced showing that it had been lost or destroyed. However, what was asserted to be a copy taken from the records in the county court clerk's office was filed, and it showed that Horsely paid only \$10 at the time it was executed, but agreed to pay the balance, 50 cents an acre. This writing also showed that the purchase included the coal and other minerals under 150 acres of land. The conveyances by Yontz to Bright and from Bright to appellant conveyed the coal and other minerals under only 42 acres of land owned by appellee. It was shown by Yontz that Bright paid him the purchase price at the time of the conveyance, which was after the conveyance to appellee.

Bonds for title to land, and other contracts with reference to interests therein, were not authorized by law to be acknowledged and proved as deeds prior to April, 1893, when section 500, Ky. St. (Russell's St. § 2070), was enacted. That section is as follows: "Any contract for the sale of land, or any interest

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

therein, when acknowledged or proven as deeds are required to be, may be recorded in the county in which such lands are situated, in the same office and books in which deeds are recorded, and the record of all such contracts shall, from the time of lodging the same for record, be notice of such contracts to all persons." Prior to the enactment of this section, and in the cases of *Lemmon v. Brown*, 4 Bibb, 308, *Moore v. Dodd*, 1 A. K. Marsh. 140, and *Owings v. Joutt*, 2 A. K. Marsh. 380, this court held that a bona fide purchaser of land without notice of any equity or title in favor of a third person was not affected thereby. Under these authorities, it results that appellee was entitled to recover in this action, unless he had information or knowledge of the equitable claim of Horsely or his assignee prior to the time he parted with the purchase price for the land. If he had no such notice, he was an innocent purchaser, and as such is favored by the law. There were only two witnesses on this question. Yontz testified that he informed appellee at the time he sold him the land that he had previously sold the coal and other minerals thereunder to Horsely. This was denied, positively, by appellee, who further testified that he had no information or knowledge of that matter from any source. This being the state of the evidence, Yontz failed to show, by a preponderance thereof, that appellee had notice of his prior sale of the coal and other minerals, and the court did not err in adjudging appellee entitled thereto.

For these reasons, the judgment of the lower court is affirmed.

#### KENTUCKY SHOE MFG. CO. v. CARRAWAY.

(Court of Appeals of Kentucky. Feb. 4, 1910.)

#### 1. JUDGMENT (§ 199\*)—JUDGMENT NOTWITHSTANDING VERDICT—ACTION FOR WRONGFUL DISCHARGE.

If a servant was wrongfully discharged, he could recover nominal damages at least, though his petition failed to allege that he had attempted to secure other employment after his discharge, and a motion for judgment, notwithstanding verdict, was properly denied, especially where the defect in the petition was cured by proof that he had made such effort, and by the verdict.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.\*]

#### 2. MASTER AND SERVANT (§ 40\*)—ACTION FOR WRONGFUL DISCHARGE—EVIDENCE.

In an action by a servant for wrongful discharge, evidence held to support a finding that plaintiff was employed by defendant, through its foreman, to work for it for one year at \$15 a week at least, but that, though competent, he was discharged before the expiration of the term without his consent, and made some effort to find other employment, which he was unable to secure.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 40.\*]

#### 3. PLEADING (§ 433\*)—ACTION FOR WRONGFUL DISCHARGE—PLEADING—DEFECTS CURED BY PROOF AND VERDICT.

In an action by a servant for a wrongful discharge, an averment of the petition, "but he has not been able to obtain employment after defendant's violation of its contract with him," while not technically sufficient as an averment that plaintiff made any effort to obtain other employment after his discharge, was but an imperfect allegation which the pleader upon motion to make more specific could have corrected, and where such motion was not made, and objection to testimony of plaintiff as to his efforts to secure employment, was not placed on the ground of the defective allegation, the admissibility of the evidence of such efforts was not error; the defect in the petition being cured by verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.\*]

#### 4. PLEADING (§ 433\*)—DEFECTS—CURE BY VERDICT.

A petition or answer will be good after verdict if it contain allegations from which every necessary fact may be clearly inferred.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.\*]

Appeal from Circuit Court, Lyon County.

"To be officially reported."

Action by D. W. Carraway against the Kentucky Shoe Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

M. P. Mallory and Edward H. James, for appellant. Newton W. Utley, for appellee.

SETTLE, J. Appellee sued in the court below to recover for the alleged violation of a contract, whereby, it is claimed, the latter, through its superintendent Goodhue Jones, employed him to work for it a year, beginning February 1, 1908, as foreman of the lasting department of its shoe manufactory at Eddyville, Ky., at the price of \$15 per week during the month of February, \$17.50 a week during the month of March, and \$20 per week the remainder of the year ending January 31, 1909. It is alleged in the petition that appellee, on February 1, 1908, entered in good faith upon the performance of the contract in accordance with its terms and continued in appellant's service as foreman of its lasting department until March 7, 1908, on which day it, without right, discharged him from its employment, only paid him for his work down to that time at the rate of \$15 per week, and refused to pay him any more; that in entering appellant's service under the contract mentioned "he declined offers of profitable employment elsewhere, but has not been able to obtain employment after defendant's said violation of the said contract with him." The appellant's answer contained a traverse of the averments of the petition and specifically alleged that Goodhue Jones had no authority from appellant to make the alleged contract relied on by appellee, and did not in fact do so, but only employed him for an indefinite time and with the right reserved

to discharge him at any time, with or without cause. All affirmative matter in the answer was controverted by reply. The trial resulted in a verdict and judgment in appellee's favor for \$200. Before entry of judgment appellant moved for judgment in its behalf notwithstanding the verdict, but the motion was overruled, and it then filed motion and grounds for a new trial which was likewise overruled. Exceptions were taken by appellant to these rulings and the judgment, and an appeal granted.

The motion for a judgment non obstante veredicto was based on the claim that the petition failed to allege that appellee made any effort to secure other employment after his discharge, and that such failure entitled appellant to a judgment on the pleadings. Manifestly, this contention is unsound, for, if it be conceded that the petition is defective in the particular claimed, appellant's alleged violation of the contract declared on in wrongfully discharging appellee from its service before the expiration of the period of his employment, all of which is sufficiently set out in the petition, entitled him to nominal damages in any event. So, in this view of the case, to say nothing of the rule that the defect in the petition should be regarded as cured by the proof and verdict, the action of the court in overruling the motion for a judgment non obstante was not error.

Though apparently more numerous, the grounds for a new trial contain but three complaints of error: (1) That the verdict is not supported by the evidence; (2) that incompetent evidence was admitted on the trial; (3) that the jury were not properly instructed. Our examination of the evidence found in the record compels us to reject the first ground of complaint. That of appellee strongly conduced to prove that appellant's superintendent, Goodhue Jones, had authority to contract with appellee as alleged in the petition, and that he did employ appellee as foreman of the lasting department of appellant's shoe manufactory for the time and upon the terms claimed in the petition. It is true that Jones in his deposition denied that appellee was employed for a specified time, and stated that he was to receive only \$15 per week while in appellant's service, and that he (Jones) had the right to discharge him at any time, yet he admitted that he employed appellee to begin work February 1, 1908, and that he had authority to do so. He also admitted that appellee was a competent man for the work he was employed to do, and that when he (Jones) quit appellant's service, which was some time in February, 1908, appellee was still at work for appellant as foreman of the lasting department under the contract of employment he had made with him. Jones was succeeded as superintendent by Lesser, who discharged appellee from appellant's service for no other reason than to give the position to another. Both Jones and Lesser repeatedly declared appel-

lee to be a competent and skilled man while he was at work in the shoe manufactory, which declarations were made to the witnesses Bruner, Glenn, and Freer. These witnesses were also told, in effect, by Jones, that he had employed appellee for a year. This was denied by Jones in his deposition when asked as to his statements to Bruner, Glenn, and Freer, in laying the foundation to contradict him by them; this testimony having been permitted to go to the jury to affect his credibility. In brief the evidence for both appellant and appellee was conclusive of the facts that Jones had authority to employ appellee even for a year and to agree with the latter as to the compensation he was to be paid for his work, and that appellee's dismissal from appellant's service was not because of incompetency, inefficiency, or other fault of his.

The evidence was conflicting only in respect to the terms of the contract between Jones and appellee as to the latter's employment. They being the only witnesses on that point, the jury had to accept the testimony of one of them, and the fact that Jones was largely discredited by the testimony of Bruner, Glenn, and Freer doubtless led to the jury's acceptance of appellee's version of the contract; hence they found that his employment was for a year's service to be rendered appellant, instead of for an indefinite period, to be terminated at the will of Jones or Lesser, his successor. Appellee also testified at length as to the efforts made by him to get other employment after his dismissal from appellant's service. Being skilled in the work of manufacturing shoes, and unskilled in any other occupation, it was but natural that appellee should first try to get employment in a shoe manufactory, and this, according to the evidence, he did by applying to such a manufactory at Kuttawa, but falling there he wrote several shoe manufacturers with a like result, and finally, at considerable expense, made a trip to a shoe manufactory in Missouri with the expectation of securing work, but without success. During these attempts to find employment appellee attempted, with his father-in-law, to raise a crop on a little farm owned or rented by the latter; but as the season was far advanced when he undertook this work, and he was inexperienced in farming, he made practically nothing. There was therefore evidence from which the jury were authorized to find that appellee was employed by appellant, through its foreman, to work for it a year, at least, at \$15 per week; that, though competent and efficient, he was discharged before the expiration of the term, indeed within a month and seven days of his employment, without his consent; and that he made some effort at least to find other employment, which he was unable to secure. These facts, it would seem, entitled appellee to recover the amount of the wages he would have earned under the contract with appel-

lant, from the time he was discharged to the end of the year for which he was employed, to be credited by any amount he earned at other employment, after such discharge and during the remainder of the year, or that he could have earned by the use of ordinary diligence to get other employment during the same time.

The instructions that were given by the trial court so aptly express the law on this and all other aspects of the case that we perceive no just grounds for the objections made to them by counsel for appellant. The alleged incompetent evidence of which appellant complains is that part of appellee's testimony as to his efforts to obtain other employment after his discharge by appellant. The complaint rests upon the theory that it is not alleged in the petition that appellee made any effort to obtain other employment. Therefore the introduction of evidence to prove such efforts were made was unauthorized. As previously stated, the averment of the petition on this subject is: "But he has not been able to obtain employment after defendant's violation of its said contract with him." Technically speaking, the averment does not measure up to the rules of correct pleading, yet it is more than a mere conclusion of the pleader as its language implies an effort, as well as inability on his part, to obtain employment. It is an imperfect or defective allegation, which the pleader upon a motion to make more specific could have corrected and made good, but as such motion was not made by appellant, and it does not appear from the record that its counsel, in objecting to the testimony introduced by appellee to show his efforts to procure employment, made it known that the objection was because of the defective allegation in question, we are unwilling to hold that the court erred in allowing the testimony in question to go to the jury. In other words, the defect in the petition was one that could be and was cured by proof and the verdict.

As said in *Drakesboro Coal, Coke & Mining Co. v. Jernigan*, 30 Ky. Law Rep. 477, 99 S. W. 235, quoting with approval Newman on Pleading & Practice: "The verdict will not only aid a defective allegation, but it extends sometimes even to cure an omission altogether to make a necessary allegation. Where there are defects or imperfections in the pleading, yet the issue joined is such as necessarily requires on the trial the proof of the facts defectively or imperfectly stated, or even omitted, and without which it is not reasonable to presume that a jury would have given a verdict for the party, such deficiency is cured by the verdict." The sensible and practical rule is that a petition will be good after verdict if it contain allegations from which every fact necessary to maintain the action may be fairly inferred. This rule, of course, is equally applicable to a case

where the answer does not state, or defectively states, the defense. *Rogers v. Felton*, 98 Ky. 150, 32 S. W. 405, 17 Ky. Law Rep. 724; *Wilson v. Hunt's Adm'r*, 6 B. Mon. 379; *Daniel v. Holland*, 4 J. J. Marsh. 18.

In view of the rule stated, we are of opinion that the verdict in this case should not be disturbed on account of the defective averment in the petition referred to, or because of the introduction of the evidence complained of. If entitled to recover at all, \$200, the amount awarded appellee by the verdict, was perhaps as little in the way of compensation as appellant could have expected.

Judgment affirmed.

#### LANCASTER'S EX'R v. O'BRIEN.

(Court of Appeals of Kentucky. Feb. 4, 1910.)

##### 1. EXECUTORS AND ADMINISTRATORS (§ 227\*)—ALLOWANCE AND PAYMENT OF CLAIMS—SERVICES RENDERED DECEDENT—EVIDENCE.

Under Ky. St. § 3870 (Russell's St. § 3901), providing that if a demand against the estate of a decedent be other than an obligation signed by him, or a judgment, it shall be verified by a person other than the claimant, who shall state in his affidavit that he believes the claim to be just and correct and give his reasons why he so believes, a claim against an estate for services performed at irregular times during several years, so that it was difficult to specify what they were or when they were performed, was sufficiently supported by affidavits stating that the persons making them knew that the claimant performed services for decedent, that they believe his claim was just and correct, giving their reasons, where there was ample evidence that the claimant did perform services for the decedent for which he had not been paid, and for which the decedent intended to pay him, since the claim was of such a nature that no one could positively swear that he knew various items were just and correct.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 811-818; Dec. Dig. § 227.\*]

##### 2. EXECUTORS AND ADMINISTRATORS (§ 221\*)—ALLOWANCE AND PAYMENT OF CLAIMS—AMOUNT OF CLAIM.

In a proceeding for the allowance of a claim against the estate of a decedent for services rendered, *held*, under the evidence, that the amount allowed the claimant was not excessive.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 221.\*]

Appeal from Circuit Court, Nelson County.

"To be officially reported."

Proceeding for the settlement of the estate of S. P. Lancaster, in which Charles P. O'Brien filed a claim. From a judgment allowing the claim, S. P. Lancaster's executor appeals. Affirmed.

Nat W. Halstead, McQuown & Beckham, John D. Wickliffe, and Morgan Yewell, for appellant. John A. Fulton and F. E. Daugherty, for appellee.

CARROLL, J. S. P. Lancaster died in May, 1902. After his death a suit was

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

brought to settle his estate, and the appellee presented a claim against his estate for \$2,322.90. To the commissioner's report allowing this claim, exceptions were filed, and upon final hearing the chancellor allowed appellee \$1,546.80. From that judgment this appeal is prosecuted; the contention of appellant being that appellee was not entitled to recover anything. The verified claim presented by appellee is as follows: "To labor and services rendered and performed by the claimant herein to Sam P. Lancaster, deceased, during his lifetime, and continuously from the 3d day of April, 1899, to May 8th, 1902, a period of 3 years, 1 month, and 5 days, all at the request of said Lancaster, and under an agreement or promise on his part to pay a reasonable compensation therefor; such services so rendered and performed were of the character of a general supervision and management of the business affairs of said Lancaster, keeping his books and account, and in a general way attending to, supervising and managing his business, and reasonably of the value of \$750 per annum, aggregating the amount now due and owing—\$2,322.90." This claim is supported by the affidavits of John C. Tolbott, who says, "That he believes the foregoing account of Charles P. O'Brien for \$2,322.90 against the estate of S. P. Lancaster is just and correct, for the reason that he knows S. P. Lancaster was a man of large affairs and estate, and that the claimant, Charles P. O'Brien, during the period set out in said claim was engaged in looking after and attending to the affairs and business of said Lancaster, and that said Lancaster was in frequent consultation with the claimant, and said Lancaster seemed to rely on said claimant in the transaction of his business, and these matters and facts he learned in a large part from said Lancaster himself;" of C. O. Brown, who said, "That he knows that the claimant Charles P. O'Brien rendered services for S. P. Lancaster during the period mentioned, and he believes that the charges therefor as set out in the account are reasonable;" and of R. B. Lancaster, who says, "That he has read the account of Charles P. O'Brien against S. P. Lancaster, and he knows that the said O'Brien performed services for said Lancaster during the period set out in said account, and he believes the charge therefor is reasonable and the account is just."

Section 3870 of the Kentucky Statutes (section 3901, Russell's St.), making provision for the proof of claims like this, provides in part that: "If the demand be other than an obligation signed by the decedent or a judgment, it shall also be verified by a person other than the claimant, who shall state in his affidavit that he believes the claim to be just and correct, and give the reasons why he so believes."

It will be observed that it is not sufficient

for the person, other than the claimant, to state that he believes the claim to be just and correct. He must in addition thereto give the reasons why he believes it to be just and correct. This is a very valuable statute, intended for the double purpose of protecting the estates of decedents, and to furnish the personal representative with evidence upon which he may safely pay debts presented against the estate with the reasonable assurance that they are just demands. In accordance with this statute, an account, if practicable to do so, should be itemized, and state with particularity what each charge is for, and the proving witness should give reasons sufficient in themselves to justify the personal representative in believing that the witness knows the claim and each part of it is just and correct. *Dewhurst v. Shepherd*, 102 Ky. 239, 43 S. W. 253, 19 Ky. Law Rep. 1260; *Leach v. Kendall*, 13 Bush, 424; *Crane & Breed Mfg. Co. v. Stagg*, 122 S. W. 225. But the statute should not be so construed as to put it beyond the reach of persons having meritorious claims to make proof of them. When, as in this case, the character of the claim renders it difficult if not impracticable to state with particularity the specific things charged for, the law will not require it. O'Brien rendered a variety of services, extending over quite a period of time, with no fixed agreement or understanding as to what he should do or when he should do it. What he did depended on when he was called upon by Mr. Lancaster. Under these circumstances we think the claim and the preliminary proof was sufficient.

A large amount of evidence was taken for and against the claim, and it seems unnecessary that we should give more than a general statement of the facts proven. The evidence conducted to show that O'Brien was a prudent, intelligent, good business man, as well as a capable accountant. He had in a large measure the confidence of Mr. Lancaster, and in 1896 was employed by him about his distillery, and continued in this employment until April 3, 1899, when the distillery was sold to the whisky trust and Lancaster quit the manufacture of whisky. Lancaster, after disposing of his distillery, devoted his attention to the management of his extensive farming interests, with which he combined the feeding and slopping of cattle at distilleries, and the breeding and training of race horses. He owned and operated three farms, containing about 1,800 acres—one where he lived known as the "Home Farm," another known as the "Nicholls Farm," and another known as the "Withrow Place." It was at the Withrow place that his distillery was located, and here that O'Brien lived. Lancaster was a man of fine business capacity, of large wealth, and very successful in his business ventures. Until about a year preceding his death, he enjoyed good health and gave active personal attention to his affairs, fre-

quently visiting the Withrow place, which was several miles from his home farm. He was not fond of writing, and was in the habit during the years covered by the claim, of getting O'Brien, in whose judgment and business capacity as well as integrity he relied, to attend to a large part of his correspondence. It was shown that O'Brien bought cattle for Lancaster and sold them; that he often took his passbook to the bank to have it balanced; that he made different trips for him to various places, looking after his interests, and that he exercised in a general way supervision over the cattle being slopped at the distillery, and frequently attended to the shipment of them, and was often consulted not only by Lancaster, but by his employes in reference to the race horses that Lancaster was breeding as well as racing. One witness said that he heard Lancaster, on three different occasions, say to O'Brien when he wanted him to write a letter: "I don't want you to do this work for nothing; I intend to pay you for everything you do for me." Another witness said he heard him say that "O'Brien would be well paid for what he had done for him." But it does not appear that O'Brien, during the life of Lancaster, ever presented any claim to him for services or demanded payment for his services or that he was paid anything. A number of witnesses who had opportunity of knowing the character and value of the services rendered by O'Brien testified that they were worth from \$600 to \$800 per year.

The evidence for the executor conduced to show that what service O'Brien rendered was done as a gratuity or accommodation to Mr. Lancaster for the kindnesses he had shown O'Brien, and not with any intention of charging for them; that Lancaster himself and a man named Hardie, who was the general manager of his farming interests, attended to all of his business except occasionally when he would get O'Brien to write letters or see some person or go some place for him. It is strongly pressed in argument that although O'Brien only received for his whole time when he was working for Lancaster at the distillery previous to April, 1899, \$75 per month when the distillery was running, and \$50 when it was not in operation, that his bill against Lancaster for the occasional services rendered him was much larger than he was being paid when he devoted his entire time to his services, and that from April 3, 1899, until the death of Lancaster, O'Brien was regularly employed at a salary of some thousand dollars a year to manage the distillery that Lancaster had sold to the trust. The evidence is very satisfactory that the farms of Lancaster were managed by himself and Hardie, and that O'Brien had little if anything to do with the conduct of the farms. But the

claim of O'Brien is not for attending to farms, but to other business matters in which Lancaster needed and had his assistance and services.

It is difficult to fix a fair value on the services rendered by O'Brien, as he was not regularly employed or engaged for any particular business. But that he did render services there can be no doubt, and that these services were of some value to Lancaster must be conceded. So that the case really comes down to the question of how much O'Brien's services were worth. The chancellor who considered the case and was doubtless personally acquainted with many of the witnesses allowed O'Brien in round numbers \$350 a year with interest from the time the claim was presented until the judgment, and we are not prepared to say, in opposition to his opinion, that the allowance is excessive. In considering this case we have not overlooked the fragmentary character of the evidence for O'Brien or the evidence of Willet as to what O'Brien said in April, 1902, or the fact that his failure to make out and present any bill during the life of Lancaster is a strong circumstance against the validity of his claim. On account of these circumstances and others, if it were not clearly shown that during these years O'Brien rendered service that ordinarily one would expect to be compensated for, we would say that his entire claim might properly have been rejected by the chancellor. But, taking into consideration the undisputed fact that O'Brien during the years mentioned in the claim did for Lancaster many things that were useful and helpful, and the further fact that he said he expected to reward him for his labor, we do not feel warranted in holding that the allowance made by the chancellor is excessive.

Wherefore the judgment of the lower court is affirmed.

#### DRUIN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 8, 1910.)

##### 1. RAPE (§ 54\*)—PROSECUTION AND PUNISHMENT—EVIDENCE—SUFFICIENCY.

In a prosecution for carnally knowing a female under the age of 16, the testimony of the prosecutrix alone, who testified unequivocally that defendant had sexual intercourse with her several times before she was 16 years old, was sufficient to sustain a verdict of guilty.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 83; Dec. Dig. § 54.\*]

##### 2. CRIMINAL LAW (§ 600\*)—DISCRETION OF COURT—GRANTING CONTINUANCE.

In a prosecution for rape, where defendant asked for a continuance on the ground of the absence of two witnesses, and filed an affidavit showing due diligence, that one of them would testify that prosecutrix told her that she had never had sexual intercourse with defendant, and that he was not the father of her child, but that her own father had ruined her, and the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

other that he saw prosecutrix and her father in the act of having sexual intercourse, the court did not abuse its discretion in denying a continuance, where it allowed the affidavit to be read as the deposition of the absent witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1342-1347; Dec. Dig. § 600.\*]

**3. CRIMINAL LAW (§ 1166\*)—APPEAL AND ERROR—REVIEW—HARMLESS ERROR—CONTINUANCE.**

The refusal of a continuance on the ground that certain witnesses were absent will not be interfered with on appeal where the affidavit stating what it was claimed the absent witnesses would testify to was read as their deposition, unless it appears that the substantial rights of the accused were prejudiced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3111; Dec. Dig. § 1166.\*]

**4. CRIMINAL LAW (§ 665\*)—DISCRETION OF COURT—CONDUCT OF TRIAL.**

In a prosecution for carnally knowing a female under the age of 16 years, it was proper to allow the father of the girl who testified as a witness to remain in the courtroom, and assist in the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1549-1568½; Dec. Dig. § 665.\*]

**5. CRIMINAL LAW (§ 1153\*)—APPEAL—DISCRETION OF COURT—PRESENCE OF WITNESSES.**

The discretion of the court in allowing a witness to stay in the courtroom, and assist in the trial, while others are excluded, is not ground for reversal, unless it clearly appears that this discretion was abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3066; Dec. Dig. § 1153.\*]

**6. RAPE (§ 43\*)—PROSECUTION—EVIDENCE.**

In a prosecution for rape, evidence that the prosecutrix gave birth to the child some nine months after she testified that she had intercourse with defendant was competent in corroboration of her statement that defendant had had sexual intercourse with her.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 65; Dec. Dig. § 43.\*]

**7. CRIMINAL LAW (§ 1156\*)—DISCRETION OF COURT—NEW TRIAL—STATUTES.**

Where motion for new trial in a criminal prosecution on the ground that one of the jurors had expressed an opinion before the trial that defendant was guilty was overruled, the question cannot be reviewed under Cr. Code Prac. § 281, providing that rulings of the court made upon motions for new trial will not be subject to exception.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.\*]

**8. CRIMINAL LAW (§ 730\*)—HARMLESS ERROR—ARGUMENT OF COUNSEL—ACTION OF COURT.**

In a prosecution for rape, where an affidavit for continuance on the ground of absence of witnesses stating what they would testify if present was admitted as the deposition of the absent witnesses, the error of the counsel for the prosecution in stating in his argument that the prosecution had admitted the affidavit for the purpose of getting a trial, but that the absent witnesses would not make the statements claimed if present, that attachments had issued for each of them, and that the officers were after them, was insufficient to warrant discharging the jury and ordering a new trial, where the court at once instructed the jury to disregard those statements of counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.\*]

Appeal from Circuit Court, Taylor County. "Not to be officially reported."

Henry A. Druin was convicted of carnally knowing a female under the age of 16 years, and he appeals. Affirmed.

W. A. Malone, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. The appellant under an indictment charging him with carnally knowing Nellie Gribbins, a female under the age of 16 years, was convicted, and his punishment fixed at confinement in the state penitentiary for 12 years. He asks a reversal of the judgment upon several grounds that will be noticed in the course of the opinion.

The prosecutrix, Nellie Gribbins, testified unequivocally that the appellant had sexual intercourse with her several times before she arrived at the age of 16 years. Her evidence alone authorized the jury to find him guilty, notwithstanding his denials. So that the evidence was sufficient to support the verdict.

The indictment was found at the September term, 1908, and a trial had in April, 1909. When the case was called for trial, the appellant asked for a continuance on account of the absence of Maggie Parrott and Hardin Shipp. The affidavit for continuance showed due diligence to obtain the presence of these witnesses, and set out that Maggie Parrott would testify that Nellie Gribbins told her that H. A. Druin, the appellant, never had sexual intercourse with her and was not the father of her child, but that her own father had ruined her; that Hardin Shipp would testify, if present, that he saw the prosecutrix and her own father in the act of having sexual intercourse with each other. The trial judge refused to continue the case, but permitted the affidavit to be read as the deposition of the absent witnesses. The action of the trial court in refusing a continuance, when the affidavit of what an absent witness will testify to is permitted to be read as a deposition, will not be interfered with by this court, unless it appears that the substantial rights of the accused are prejudiced by the failure to grant the continuance. The trial court has a large discretion in matters like this, and his decision is entitled to weighty consideration. The only effect of the evidence of the absent witnesses was to discredit the testimony of the prosecutrix, and, as the jurors had before them the statements these witnesses would have made if present, we are not prepared to say that it was error to refuse a continuance.

It is also complained that the court permitted Andy Gribbins, the father of the prosecutrix and a witness for the commonwealth, to remain in the courtroom and testify, although the witnesses had been by order of court excluded from the courtroom. It has

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

been often held by this court that the trial judge has a large discretion in permitting a witness to remain in the courtroom to assist in the trial, although witnesses under a rule are excluded; and that the fact that the trial court permits a witness to testify who has been allowed to remain will not be ground for reversal, unless it appears that this discretion was abused. *Baker v. Commonwealth*, 106 Ky. 212, 50 S. W. 54, 20 Ky. Law Rep. 1778; *Gilbert v. Commonwealth*, 111 Ky. 793, 64 S. W. 846, 23 Ky. Law Rep. 1094; *Matthews v. L. & N. R. Co.*, 113 S. W. 459; *Greer v. Commonwealth*, 85 S. W. 166, 27 Ky. Law Rep. 333. We do not think the trial judge committed an error in permitting the father of the prosecutrix to remain in the courtroom to assist in the prosecution. On the contrary, we are of the opinion that it was proper he should have been permitted to remain and assist in the prosecution of the man who had ruined his daughter.

It is also insisted that the court erred in permitting evidence that the prosecutrix gave birth to a child some nine months after she testified that appellant had intercourse with her. This evidence was competent in corroboration of her statement that appellant did have carnal knowledge of her person.

In the motion and grounds for a new trial it was disclosed for the first time that one of the jurors had expressed himself before the trial that appellant was guilty and should be punished. Under section 281 of the Criminal Code of Practice and the numerous cases construing it, we are not at liberty to review this question upon appeal.

It is further urged that an attorney employed to assist the commonwealth stated in his argument to the jury that "the prosecution had admitted the affidavit of Hardin Shipp and Maggie Parrott for the purpose of getting a trial, but they would not make such statements if present; that attachments had been issued for each of them, and the officers were then after them." This statement was at the time objected to by counsel for the accused, and the court promptly instructed the jury that they should disregard this statement of counsel, and overruled the motion of the attorney for the defense to discharge the jury. The statement made by counsel was highly improper. Similar objectionable statements have been condemned by this court in *Martin v. Commonwealth*, 121 Ky. 332, 89 S. W. 226, 28 Ky. Law Rep. 295, and many other cases; and, except for the admonition of the court, we would rule that it was such a flagrant violation of the rights of the accused as to entitle him to a new trial. But, as the court upon the objection of counsel immediately cautioned the jury to disregard the statement, we are of the opinion this improper argument did not justify the court in discharging the jury

and ordering a new trial. We might add, however, that when the prosecuting attorney, whether he be the attorney for the commonwealth or employed counsel, so far oversteps the bounds of legitimate argument as to comment in this manner upon the affidavits that are read as the depositions of absent witnesses, the court should not only admonish the jury to disregard the statement, but severely reprimand the counsel making it.

No other errors are pointed out, and the ones we have mentioned are not sufficient to authorize us to reverse the judgment.

Wherefore it is affirmed.

#### BATES v. BATES.

(Court of Appeals of Kentucky. Feb. 11, 1910.)  
BOUNDARIES (§ 37\*)—DESCRIPTION—EVIDENCE OF MISTAKE.

Evidence held to show that a course in the description of a boundary should read "S. 10° W. 20 poles," instead of "S. 10 W. 200 poles."

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 191; Dec. Dig. § 37.\*]

Appeal from Circuit Court, Knott County.  
"Not to be officially reported."

Action by T. G. Bates against W. J. Bates. Defendant had judgment, and plaintiff appeals. Affirmed.

Smith & Combs, for appellant. Baker & Craft, for appellee.

CLAY, C. Charging that he was the owner of and in actual possession of three tracts of land located in Knott county, Ky., appellant, T. G. Bates, instituted this action against W. J. Bates to quiet his title and to enjoin the latter from trespassing on said land. The tracts described in the petition are as follows:

"First tract: Lying in Knott county, Kentucky, on the Apple Tree branch of Right Beaver creek, and beginning at a black walnut, corner in the dower; thence S. 10° W. 20 poles to a stake; S. 85° E. 80 poles to opposite the two poplars and beech, old corner trees; thence S. 72° E. 46 poles to a stake; thence S. 70° E. 92 poles to a beech; thence N. 42 poles passing a rock on the field to a stake; thence back by parallel lines to opposite the beginning; thence S. 10° W. 22 poles to the beginning.

"Second tract: Beginning on a buckeye on a conditional line between H. M. Bates and Margaret Bates; thence southwest with the line of Robert Bates to the top of the ridge to H. D. King's line; thence with the top of the ridge to T. G. Bates' line; thence down the mountain with T. G. Bates' line N. E. to a dogwood; same course crossing the branch to a black walnut; same course to a white oak; same course to the top of the mountain; thence west with the top of the mountain to Sarah King's heirs' line; thence back down the mountain S. W. with

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Margaret Bates' line to a beech and white oak; thence back to the beginning, in Knott county, Ky.

"Third tract: Lying in Knott county, Kentucky, on Apple Tree branch of Right Beaver creek and beginning on a beech on the west side of said branch about 160 poles from the mouth and about 15 poles from the road; thence S. 80° E. 470 poles to a stake; thence S. 35° W. 110 poles to a stake; thence N. 80° W. 525 poles to a stake; thence a straight line northeast to the beginning."

The appellee in his answer admitted that appellant was the owner of and in actual possession of tracts 1 and 8 and of tract 2 except about 44 acres, to which he (appellee) asserted title and asked that it be quieted. Upon submission of the case, the chancellor dismissed appellant's petition and also the answer and counterclaim of appellee. From that judgment T. G. Bates appeals, but no cross-appeal was prosecuted by W. J. Bates.

It appears that prior to the year 1834 John W. Bates, the father of appellant and appellee, was the owner of a large body of land lying on Beaver creek, in Floyd county, Ky. This part of Floyd county afterwards became a part of Knott county. John W. Bates died in the year 1872. In the year 1882, a suit was filed for an allotment of dower and partition of the land among the heirs of John W. Bates. In the year 1886 a decree was entered partitioning the lands. In pursuance of this decree the commissioner of the court on the 14th day of August, 1889, executed to the appellant a deed conveying to him tract No. 1 set out above. In this deed the first course reads "S. 10° W. 200 poles to a stake," instead of "S. 10° W. 20 poles to a stake," as set out in the petition. Elizabeth Bates, widow of John W. Bates, died in the year 1901. Thereupon an action was instituted for the purpose of partitioning the dower land among the heirs of John W. Bates. Judgment was duly entered, and thereafter tract No. 2, above described, was conveyed to H. M. Bates as his part of the dower land. On October 28, 1906, H. M. Bates conveyed this tract of land to appellant. The appellant obtained title to the third tract of land above described by patent issued by the commonwealth of Kentucky based upon a survey made May 15, 1888.

It is the contention of appellant that the tract of land in controversy is embraced in the three tracts of land above described. He also asserts title by adverse possession. Appellee asserts title to the land in controversy by virtue of a survey made on April 4, 1905. Upon the trial of the case T. G. Bates testified that, upon the death of his father, all the lands owned by the latter were surveyed, and the commissioners then ran a base line up Apple Tree branch to the head; that, after that, they laid off the lots in strips across the branch extending to the

top of the ridge on each side. They did not survey the lots up and down the hill, but guessed at the number of poles it took to extend to the top of the ridge on each side. One of the commissioners and appellee testified that no such plan was adopted in making the survey; that only the lands for which John W. Bates had patents were allotted and partitioned among his heirs. It is manifest that appellant's title depends upon whether or not the land in controversy is embraced in his patent or either one of his deeds; or whether the two deeds together, with the patent, embrace the land.

We shall consider first tract No. 1. It will be observed from the description hereinbefore given that this tract begins at a black walnut, corner in the dower. The next course is S. 10° W. 200 poles, to a stake. It is perfectly apparent that if the figures "200," as incorporated in the deed, are correct, tract No. 1 will lie 180 poles further west than its true location. Should the first course go to the top of the ridge, it would also lie further west. In neither event would it be possible to close the survey. Furthermore, the result would be to give T. G. Bates a much larger body of land than was intended to be allotted to him in the division of his father's land. We think it perfectly plain, therefore, that the first course should read "S. 10° W. 20," instead of "S. 10° W. 200 poles." Indeed, the draftsman of the petition seems to have recognized this fact, for in describing the lands in the petition he uses the figures "20" instead of "200."

But it is insisted that the third course in the description of tract No. 2 runs with the top of the ridge to T. G. Bates' line, while the next course is down the mountain with T. G. Bates' line northeast to a dogwood, and thence by the same course to a black walnut, and that this tends to establish that the dower tract runs to T. G. Bates' line, as fixed in the commissioners' deed to T. G. Bates, or in the patent to the latter. It is perfectly plain, however, that it cannot run with the patent line, for that line runs in an entirely different direction, and by following it neither the dogwood nor the black walnut would be reached. Nor do we think it conclusively establishes the fact that the course in the commissioners' deed ran to the top of the ridge, for we have heretofore shown that that was impossible. It is evident that the surveyor proceeded upon the idea that the first course in the commissioners' deed was S. 10° W. 200, instead of S. 10° W. 20 poles. This accounts for the fact that the dower tract is described as running to T. G. Bates' line and thence down the mountain with his line to a dogwood, and thence the same course to a black walnut. In any event, the tract in controversy is not included in the second tract described in the petition. Nor is it included in the patent. It therefore follows that the

land in controversy is not included in either deed or the patent, and that appellant has no record title to the land.

Nor is any such adverse possession of the tract in controversy shown by appellant as will justify a decision in his favor on that ground. We therefore conclude that the chancellor properly dismissed his petition.

Judgment affirmed.

### DODD v. HEETER & SONS.

(Court of Appeals of Kentucky. Feb. 10, 1910.)

#### 1. MUNICIPAL CORPORATIONS (§ 301\*)—PUBLIC IMPROVEMENTS—AUTHORITY TO ORDER.

Under Ky. St. § 3094 (Russell's St. § 1205), which gives the exclusive control of streets, alleys, walks, and ways of cities of the second class to the general council, any street improvement, of whatever kind, that is desired, must be ordered by this body before it may be legally done.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 802; Dec. Dig. § 301.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 449\*)—STREET IMPROVEMENTS—ASSESSMENTS—ORDINANCES.

Ky. St. § 3096 (Russell's St. § 1207) provides that the council may by ordinance provide for the construction or reconstruction of streets, and directs how the cost shall be paid, and when a portion of the cost is to be borne both by the city and the property owners it directs what proportion is to be paid by each, which is to be assessed as the cost of the construction of streets, with a lien upon the abutting property to satisfy the assessment. *Held* that, since the council can only speak through an ordinance, the direction that the cost shall be assessed as the cost of construction means that when the cost is determined the general council shall by ordinance assess the cost against the abutting property, and in providing that the cost of reconstructing sidewalks shall be assessed as in the construction of streets, it means that an ordinance shall be passed assessing the cost, just as an ordinance is required assessing the cost for other street improvements.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1072; Dec. Dig. § 449.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 302\*)—STREET IMPROVEMENTS—ORDINANCE—VALIDITY.

Under Ky. St. § 3100 (Russell's St. § 1211) providing that no ordinance for any original street improvement shall pass both boards of the general council at the same meeting, and at least two weeks shall elapse between the passage of any such ordinance from one board to another, applies only to ordinances directing original construction; and hence an ordinance directing the reconstruction of a sidewalk, passed by the board of council and the board of aldermen and approved by the mayor within three days, was valid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 803; Dec. Dig. § 302.\*]

Appeal from Circuit Court, Kenton County, Criminal, Common Law, and Equity Division. "To be officially reported."

Action by Heeter & Sons against Evelyn Baker Dodd. Judgment for plaintiffs and defendant appeals. Affirmed.

Robert C. Simmons, for appellant. Orle S. Ware, for appellees.

LASSING, J. This appeal raises the question as to whether or not an ordinance ordering the reconstruction of a sidewalk in a city of the second class must lie over two weeks between its passage by the board of council and the board of aldermen, under the provisions of section 8100, Ky. St. (Russell's St. § 1211). The petition alleges that the board of council, on March 2, 1908, passed an ordinance directing the reconstruction of the sidewalk on Sixteenth street between certain points, and that on March 5th, or only three days thereafter, this same ordinance was passed by the board of aldermen and approved by the mayor. A demurrer was filed to this petition and overruled. Thereupon the defendant answered, setting forth, in substance, that the ordinance directing the reconstruction of this sidewalk was not passed as required by the statute, in that two weeks did not elapse between the dates of its passage by the respective boards, and the same allegations are made to apply to the ordinance assessing the cost. In an amended answer, defendant pleaded that a sidewalk of brick had theretofore existed for a long period, and that the new sidewalk was different in plan, material, and width, though it is not alleged, for the reason, presumably, that it could not be, that it was original construction. A demurrer was filed to the answer as amended, and, this being sustained, the defendant declined to plead further, and a judgment was entered directing a sale of the property to satisfy the cost of the improvement.

Under Section 3094 (Russell's St. § 1205), the entire management and control of the streets, alleys, walks, and ways of the city is lodged with the board of council and the board of aldermen. Any improvement, of whatever kind or nature, that is desired, must be ordered and directed by this body before it may legally be done. The procedure is regulated wholly by the provisions of the Kentucky Statutes, as found in sections 3094 to 8100, inclusive. It will be noted that the general council is given exclusive control and supervision over the sidewalks, etc., with the right to repave or reconstruct or otherwise improve same. Section 3096 directs how the cost of original construction, reconstruction, or other improvements shall be paid, and when a portion of the said cost is to be borne by the city and a portion by the property owners it specifically directs what proportion thereof shall be paid by each. Following this provision, there is an explicit direction that the cost shall be assessed as the cost of the construction of streets, with a lien upon the abutting property to satisfy the assessment. As council can only speak through an ordinance, the direction that the cost shall

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be assessed as the cost of construction of streets means that, when the cost is determined, the general council shall pass an ordinance assessing the cost against the abutting property. Section 3100 provides that, in the event mistakes shall be made in the ordinance fixing the cost, same may be corrected, that no injustice may be done; and when section 3096 provides that the cost of reconstructing sidewalks shall be levied and assessed as in the construction of streets, it merely means that an ordinance shall be passed levying and assessing the cost, just as an ordinance is required levying and assessing the cost for other improvements in the streets and ways of the city. It is only in cases of original construction that the Legislature has seen fit to require that a period of two weeks shall elapse between the passage of an ordinance by one body before it may be legally passed by the other. Of course, the Legislature, in the exercise of its discretion, might have directed that all public improvements in the streets or ways or walks of the city should be so passed; but, not having seen fit to do so, the council was under no duty to appellant to permit this lapse of time between the passage of the ordinance in question by its respective boards any more than it would have been required to pass an ordinance calling for the original construction of the streets or ways not to be made with brick, granite, asphalt, concrete, or other improved material or paving, by a two-thirds vote. In all cases, where not controlled by statutory provisions, the council is left free to proceed in the usual and customary way. So, likewise, where provision is made that these two weeks shall elapse between the passage of the ordinance by the respective boards which calls for original construction, only those ordinances dealing with the subject of original construction need be made to conform to this requirement of the statute.

It is common knowledge that in original construction there are many items of expense which do not have to be reckoned with in reconstruction. The Legislature evidently had this in mind, and therefore directed that the two weeks elapse between the passage of an ordinance directing original construction by the respective boards, in order that those interested might have an opportunity to appear before the board and be heard. If this was not the purpose, we can see no good reason for requiring this lapse of time. But, whatever the purpose was, the legislative will is clearly expressed upon this point, and, in the absence of this prohibition, the respective boards composing the general council could pass ordinances with any degree of rapidity which their sense of propriety and fairness would permit. It is only the ordinance directing original construction that is required to be passed by the respective boards with this lapse of time. The ordinance fixing the

assessment in cases of original construction does not have to be so passed, and when section 3096 directs that the cost of constructing or reconstructing sidewalks shall be levied and assessed as the cost of the construction of streets, it does not refer to the improvement ordinance, but merely to the assessing ordinance; and, it not being contended here that the improvement in question is original construction, we are of opinion that the court did not err in holding the ordinance in question valid.

Judgment affirmed.

#### CHESAPEAKE & O. RY. CO. v. CONLEY.

(Court of Appeals of Kentucky. Feb. 9, 1910.)

##### 1. PLEADING (§ 245\*)—AMENDMENT—COMPLAINT.

Under Civ. Code Prac. § 134, authorizing the amendment of a pleading at any time in furtherance of justice, by correcting a mistake or inserting other allegations material to the case, even after the case has been partially tried, if it does not substantially change the claim or defense, and requiring the court at every stage of the action to disregard any defect in the proceedings which does not affect substantial rights of the adverse party, there was no abuse of discretion in an action for injuries to plaintiff, while working on a flat car on defendant's side track, in allowing, after issue joined, an amendment to the complaint, which had been drawn on the theory that plaintiff was employed by the railroad company, and alleging that he was ordered onto the car by the defendant's conductor, so as to allege that he was a licensee in the employ of a shipper, where it was not contended that defendant was surprised by the amendment so that it could not present its real defense, and it did not ask for any continuance or postponement to obtain witnesses or evidence, or to investigate the new case made by the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 655; Dec. Dig. § 245.\*]

##### 2. RAILROADS (§ 282\*)—INJURIES TO LICENSEES—ACTIONS—INSTRUCTIONS.

In an action for injuries to plaintiff while working on a flat car on defendant's side track, alleged to have been caused by defendant's employes allowing three loaded cars to run down the track and collide with the car he was working on, allowing the cars to run down the track being negligence, and the evidence being in conflict as to whether or not there was any one on them at the time, it was not error to fail to limit the jury in determining defendant's negligence to the consideration of the acts of the persons on the loaded cars alone.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 951; Dec. Dig. § 282.\*]

##### 3. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTIONS AS TO FACTS.

In an action for injuries to plaintiff while loading a flat car on defendant's side track, an instruction that if the jury believe from the evidence that defendant placed one of its cars on its side track to be loaded by W. and workmen under him, and that, when plaintiff was on the car as one of the workmen, it was, through the negligence of the defendant, struck by other cars of defendant so that the plaintiff was injured, was not erroneous as assuming that plaintiff was on the car as an employe of W., since the words "that if the jury believe from the evi-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

dence" had reference to each of the propositions indicated.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-430; Dec. Dig. § 191.\*]

**4. TRIAL (§ 256\*)—INSTRUCTIONS—REQUESTS—FURTHER AND MORE SPECIFIC INSTRUCTIONS.**

In an action for personal injuries, where the court charged that, if certain facts were established by the evidence, the verdict should be for plaintiff, it was not error, in the absence of request therefor, to fail to give the converse of this instruction that, if any essential one of these facts was not shown, the verdict should be for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

**5. NEGLIGENCE (§ 141\*)—ACTIONS—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.**

In an action for personal injuries, it was not necessary that the instruction relating to contributory negligence be a separate instruction.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-392; Dec. Dig. § 141.\*]

**6. NEGLIGENCE (§ 141\*)—ACTIONS—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.**

In an action for personal injuries, a charge that, if the jury found so and so, the verdict should be for the plaintiff, unless they further found that the plaintiff was so negligent for his own safety that, but for this negligence, he would not have been injured, is not erroneous, as allowing plaintiff to recover, unless his own negligence wholly caused his injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-392; Dec. Dig. § 141.\*]

**7. NEGLIGENCE (§ 82\*)—CONTRIBUTORY NEGLIGENCE.**

Where the negligence of a person injured so far contributes to the happening of the event that, if he had not been negligent, the other's negligence would have been harmless to him, he cannot recover.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 112; Dec. Dig. § 82.\*]

**8. RAILROADS (§ 282\*)—INJURIES TO LICENSEES—ACTIONS—DAMAGES.**

Acts of defendant's employees in turning loose three loaded cars with no one on them, on a siding, which was downgrade, without any notice or warning to persons working on other cars standing on the siding, when the employees knew of their presence, showed a reckless disregard of life, and justified the recovery of exemplary damages by one at work on one of the standing cars and injured in the resulting collision.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 916; Dec. Dig. § 282.\*]

**9. DAMAGES (§ 215\*)—PUNITIVE DAMAGES—INSTRUCTIONS.**

An instruction as to punitive damages should tell the jury that the giving of punitive damages is a matter of discretion.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 543-547; Dec. Dig. § 215.\*]

**10. APPEAL AND ERROR (§ 1068\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

Reversal will not be granted for error in an instruction as to punitive damages, where the court is reasonably convinced that the jury awarded no punitive damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. § 1068.\*]

**11. APPEAL AND ERROR (§ 1170\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

Under Civ. Code Prac. §§ 184, 338, 750, providing that reversal shall not be granted for any errors not appearing from the record to

have prejudiced some substantial right of the party complaining, where upon a survey of the whole record the appellate court cannot perceive that anything technically an error has influenced the result, it is their duty to affirm.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.\*]

**12. TRIAL (§ 130\*)—TAKING CASE FROM JURY—SUFFICIENCY OF EVIDENCE.**

A peremptory instruction for defendant cannot be granted unless there is total failure of proof to sustain plaintiff's case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. § 139.\*]

Appeal from Circuit Court, Carter County.

"To be officially reported."

Action by Elliott Conley against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Shelby & Shelby, E. B. Wilhoit, and H. L. Woods, for appellant. H. R. Dysard, for appellee.

O'REAR, J. Appellee was employed by a shipper in loading railroad cross-ties at Soldier Station on cars of appellant's railroad. A flat car had been set in on the side track to be loaded with the ties. A local freight train in shifting cars in the siding had moved the one on which appellee was to work. The cars were started back to their proper position, and as they came to a stop, or as they were coming to a stop at the place, appellee mounted the car to begin his work. His first effort was to set the brake so as to hold the car in position; the track being on an incline grade. The crew of the freight train had in the meantime turned into that siding three flat cars loaded with steel T-rails. These latter cars were started into the downgrade siding without any one on them to set the brakes, and without any control over the cars. They ran against the flat car on which appellee had climbed, striking it with such force as to throw him with great violence against the end of the car, fracturing his ribs and otherwise injuring him, as he claims. He was unaware of the fact that the loaded cars were turned into the siding, and no notice of their movement was given to him. He did not see them coming in time to get out of the way. He brought this suit to recover damages for his injury. The verdict and judgment were for \$900 in his favor.

Appellant assigns as errors of the trial court (1) its action in allowing an amended petition to be filed after the issue had been joined; (2) that the instructions were erroneous in several particulars; and (3) that the verdict is flagrantly against the evidence and is excessive.

The petition charged that appellee was ordered to get upon the car by the conductor of the freight train. The amendment withdrew that charge, claiming that it had been

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

made by counsel who drew the pleading before a conference with the plaintiff, but that the true state of the case was that appellee was engaged as a laborer for a shipper in loading the car when injured. The petition seems to have been framed upon the theory that appellee was an employé of the railroad company at the time he received his injury, and the amendment upon the idea that he was a licensee. The subject of the action was the alleged negligent injury of the plaintiff by the defendant's agents in the operation of their train. The capacity in which the plaintiff was related to the situation was an incident merely. It is true, it was a material incident. But amendment of pleading is favored by our Code of Practice. The office of all pleading is to arrive at an issue on the real matter in dispute. It is not the policy of the practice in this state to encourage the trapping of the unwary or unskillful in the art of pleading. On the contrary, it is to present for the court or jury the true issue in dispute, the question of merit about which the parties disagree. Section 134, Civ. Code Prac., authorizes the trial court to "at any time," "in furtherance of justice, and on such terms as may be proper, allow or cause a pleading to be amended" by correcting a mistake in any respect or "by inserting other allegations material to the case." In addition, even after the case has been partially heard on the trial, the court may, "if the amendment does not change substantially the claim or defense," allow an amendment conforming the pleading to the facts proved. The distinction made between allowing the amendment to be filed before and after trial has begun is evidently rested upon the notion that, before the trial has begun, the court by putting the pleader on terms may protect the opposite party, although the nature of the claim or defense may be changed by the amendment; but after the trial has begun, or perchance after the proof is in, to allow such an amendment—that is, one that would change the claim or defense even to conform to the facts proved—might, and frequently would, operate to the surprise of the opposing party, presenting a new issue of fact, one of which he had not before been apprised by his adversary, and to meet which he had not prepared himself. It would also tend to encourage speculative trials, relieving them of all danger from loose practice. But before the trial has begun, if the amendment even change the nature of the claim or defense, the opposite party may be fully protected, and should be, by the trial court's putting the pleader on such terms as to costs and continuance as will be just. But the law is more concerned with bringing the real dispute to final issue and trial, in which justice may be meted out to the parties as the law is, than with the matter of mere convenience, or even neglectful or artful preparation of a cause, or in determining it oth-

erwise than upon its merits. Hence the liberal provision of that section of the Code, made positively manifest by its concluding clause that "the court must, in every stage of an action, disregard any error or defect in the proceeding which does not affect the substantial rights of the adverse party."

Our Codes of Practice, adopted the 1st day of August, 1851, and changed but little since 1854 (although revised in 1877), were fashioned after the New York Code. Kentucky was among the first of the states to adopt the code system of practice, which was promulgated about 1848 in this country. It was brought about largely, it is supposed, upon the spirited and heroic writings of Jeremy Bentham, challenging the common-law practice as archaic, disproportioned to the growing body of substantive law, and as tending to hinder and embarrass the administration of justice, rather than promote it. Under the common-law system, the forms of procedure took precedence often times of the substance of the controversy. Both common-law and equity judges had attempted, and had in a manner accomplished, something in the way of relief from the ancient iron rules by judicial legislation in the form of rules of court, by the adoption of expedients, some of which were subterfuges, called fictions, which but emphasized the necessity for legislation that would bring the adjective law abreast with the development of substantive law. Section 134 of our Civil Code is yet looked upon askance by some lawyers, particularly by skilled pleaders, as something unscientific and inharmonious, as a breach in the edifice of exact and finished forms erected by the learned pleaders of the day of Chitty and Stephens. But it is not. In its exact language it is found in the Codes of all but two or three of the states of the American Union which have adopted the code system, and is substantially the same as the English rules, under the judicature act. "Both seek to give effect to the principle that courts exist not for the sake of discipline, but for the sake of deciding matters in controversy." *Cropper v. Smith*, C. A. 26 Ch. D. 700-710; *Becker v. Walworth*, 45 Ohio St. 169, 12 N. E. 1; *Bohlen v. Metropolitan Ry.*, 121 N. Y. 546, 24 N. E. 932; *Cook v. Croisan*, 25 Or. 475, 36 Pac. 532. It was first charged and is yet occasionally echoed that the section gives the trial judge the authority of the "Autocrat of Russia." *Nash. Pl. & Pr.* 109. But it has not been found to be so. For more than half a century this liberal departure has been applied by the judges in its right spirit, and to the "furtherance of justice"—the end of all pleading. Rarely has it been abused, and, when it has been, more instances are found in which it was too rigorously interpreted than too freely allowed. It is the most elastic provision of the Code, the one that most enables the law of the remedy to encompass and to secure the constantly growing body of the law of right. In this instance appellant does not claim that it was sur-

prised by the amendment, so that it could not and did not present its real defense to the issue which was tried. Nor did appellant ask a continuance, or even a postponement, to allow it to summon witnesses upon, or to investigate, the new state of case presented by the pleadings. The employer of appellee was present at the court and testified as a witness. Indeed, he had some time before given his deposition in the case in which he had set out the plaintiff's relation to the work. Appellant's conductor was also present, as was every other eyewitness to the occurrence, so far as is disclosed. The court did not abuse a sound judicial discretion in allowing the amendment. On the contrary, he would had he refused it.

The court gave the jury the following instructions:

"(1) If they believe from the evidence that the defendant, the Chesapeake & Ohio Railway Company, placed one of its cars on one of its side tracks to be loaded with ties by one Chas. Waltz and workmen under him, and that when the plaintiff, Elliott Conley, was on said car, or getting onto it to do said work, as one of said workmen, it was through the negligence of the defendant, or its agent or employes, in operating same, struck by another car or cars of the defendant, in consequence of which the plaintiff was knocked down and injured, then the law is for the plaintiff, and the jury will so find, unless they further believe from the evidence that at the time of the alleged injury the plaintiff was so negligent of his own safety that but for such negligence it would not have happened, in which event they will find for the defendant.

"(2) If the jury find for the plaintiff, the measure of damages is a fair and just compensation for any mental and bodily pain he suffered as a direct result of his injury, if any, and any permanent reduction of his power to earn money as the direct result of the injury, if any, and if the jury believe from the evidence the injury, if any, was caused by the gross negligence of the defendant, they may also award the plaintiff such sum in punitive damages as they deem proper, not exceeding in all, however, \$2,000, the amount claimed in the petition."

The other instructions defined correctly negligence and gross negligence.

It is insisted for appellant that the court should have confined the jury to the consideration of the acts of those who were on the shunted cars (the conductor had testified that two brakemen were on those cars when they were turned loose). The allegation of the petition was that the negligence was in defendant's "agents, servants, and employes in the management and operation of its trains and cars." Appellee and others testified that there was no one on the loaded cars. It was negligence of itself to turn loose on a down-grade three heavily loaded cars, so that they would collide with other cars placed on the

siding to be loaded and about which men were engaged at work loading them, or preparing to do so; and it was the negligence of the servants and agents of the defendant in the management of appellant's train and cars.

It is also urged for appellant that the first instruction is faulty, in that it assumes as a fact what was denied by the defendant, that the plaintiff was getting on the car in the capacity of an employe under Waltz, when it says: "And that when the plaintiff, Elliott Conley, was on said car, or getting onto it to do said work, as one of said workmen." The court meant to say, and did say, by the instruction that the plaintiff's right to recover was based upon these propositions, or facts, which had to be established by the evidence: (1) That the railway company had placed on one of its side tracks to be loaded with ties by Waltz and workmen under him (for, if it had not been so placed, then Waltz's workmen had not the right to be on the car, and the defendant owed them no duty to watch out for their safety); (2) that plaintiff was on the car or getting onto it to do said work (for, if the plaintiff was not on the car, or, if on it, was there for some other purpose, such as volunteering to brake it for the railroad men, he would be without the protection he was seeking); (3) that it was through the negligence of the railroad employes struck by another car of the defendant; (4) that the plaintiff was thereby knocked down and injured. The opening sentence, "if they believe from the evidence," had reference to each of the propositions indicated, as did the one "the court tells the jury that." It is not assumed that the plaintiff was on the car as a workman any more than that he was knocked down and injured. The jury could not have misunderstood the grammatical connections of the instruction, as counsel for appellant on the trial evidently did not, as he did not offer one in another form conveying the idea being discussed.

It is next insisted that the converse of the first instruction should have been given to the jury. It would have been proper to do, and doubtless would have been had the defendant requested it. Of course, when the jury were told that in order to find for the plaintiff, they must believe so and so as being established by the evidence, they will understand that if those facts, or any essential one of them, is not so established, they must find for the defendant. Jury trials are so common and constantly occurring that it is scarcely probable that a jury entirely without experience and knowledge of their functions would be impaneled in this country. Appellant, if it had doubt on the subject, should have requested the trial court to have so instructed. Not having done so, it will not be heard to complain for the first time on appeal that the court should have instructed so.

It is seriously urged that the instruction

defining contributory negligence should have been given as a separate instruction, and should have told the jury that although they should believe the plaintiff's injury resulted from the defendant's negligence, as defined in the instructions, yet if they further believed that the plaintiff was at the time also guilty of negligence, which contributed to his injury, and but for which the injury would not have occurred, the law was for the defendant. The practice is generally to follow the form indicated by appellant. But frequently trial judges use the form adopted by the circuit court in this case. When the jury were told that they should find for the plaintiff if they believed so and so as defined in the instruction, "unless they further believe," etc., they must have understood that, if they further believed as set out in the instruction, they could not find for the plaintiff, although they believed all the facts to have been established as was required by that instruction. The principal criticism urged against this part of the instruction is that it relieves the plaintiff unless his own negligence wholly caused his injury, whereas the law requires only that the plaintiff's negligence should have contributed to his injury, and that but for it the injury would not have happened. It is true the law of contributory negligence takes cognizance of the negligence of each of the actors. It does not measure or weigh the degree of negligence in each as by comparison. It merely holds that when the plaintiff's own negligence so far contributed to the happening of the event that, if he had not been negligent, the other's negligence would have been harmless to him, then he ought not to recover. In *L. & N. R. R. Co. v. Clark's Adm'r*, 105 Ky. 584, 49 S. W. 326, 20 Ky. Law Rep. 1379, the instruction to the jury was, "unless they believe from the evidence that the deceased was guilty of such contributory negligence as caused his own death." It was said of it: "By these words the jury were told that the contributory negligence of deceased must have been such as to wholly cause his own death." The language of the instruction now under consideration is: "Unless they further believe from the evidence that at the time of the alleged injury the plaintiff was so negligent of his own safety that but for such negligence it would not have happened." We do not understand this to mean that the cause of the injury must have been wholly the plaintiff's own negligence before the company was excused. But if the jury believed from the evidence that the company's employees were negligent as alleged, and plaintiff was thereby injured as claimed, the jury should find for him unless his own negligence was such that it became the efficient, though not the sole, cause of the injury; that otherwise the injury would not have happened. It presented to the jury the negligence of each party. We think the instruction on this subject offered by appellant was

in better form of expression, and the one given was in this respect dangerously near the line condemned in *L. & N. v. Clark*, supra. The evidence of contributory negligence is very slight, and consists wholly in the plaintiff's own testimony. He is shown to be an ignorant man, and was partially deaf at the time of the trial. The testimony shows that he was confused, and did not understand many of the questions, especially if any wise complicated in form. There are points in his testimony where he seems to admit that he got upon the car to stop it at somebody's call to him to do so. But we are satisfied, just as the jury seems to have been, that he got on the car to commence his work, and that his first act in attempting to set the brake was to hold the car in place. He did not see the other cars coming. No one of the others there did until plaintiff was on the car, except Waltz, and he saw them too late to do more than jump on the car and grab a brake. If plaintiff did not know that the other cars were coming, then his act in setting the brake the first thing he did when he got up was not contributory negligence, because his injury was not the result of his handling the brake. Some one told him to get upon the car. Whether his employer or a fellow laborer is not known. No one was there except the laborers and the employer so far as the evidence discloses. Whether plaintiff was prompted by his own eagerness or somebody's admonition to hurry and get on the car is not material. His getting on the car was the proper thing for him to have done at that moment, unless he was aware of the movement of the other cars upon the track. There is not evidence that he was aware of anything to put him in peril even though others were. We are not satisfied that appellant was prejudiced in any substantial right by the form of the instruction.

It is also urged against the instructions that it was error to allow a recovery of exemplary damages. We think that to turn loose on a downgrade three heavily loaded freight cars to run into other cars placed on a siding to be loaded and which were in the act of being loaded by a number of workmen, all with the knowledge of the trainmen, yet without any one on the cars to stop them, or without any warning being given of their movement, is a reckless disregard of life. The fact that the place was in a village, or near its edge, or even in the country, is not material. There were workmen, some half dozen, about that track and those cars, licensees, whose presence and safety the railroad company was obliged to look out for. An utter disregard of their known presence justifies the infliction of punitive damages.

Appellant insists that the form of the instruction allowing punitive damages is erroneous. The jury were told that, if the injury "was caused by the gross negligence of

the defendants, they may award the plaintiff such sum in punitive damages as they may deem proper, not exceeding," etc. In *I. C. R. R. Co. v. Houchins*, 121 Ky. 535, 89 S. W. 530, 1 L. R. A. (N. S.) 375, 123 Am. St. Rep. 205, this instruction was condemned on the ground that it should have clearly indicated that the jury had the discretion to allow, or not to allow, punitive damages, even though they believed the negligence was gross. But that case was reversed for other and grave reasons. It is not clear that the court would have reversed upon that ground alone, especially if the amount of the verdict did not indicate that probably punitive damages were inflicted. We adhere to the rule laid down in *I. C. R. R. Co. v. Houchins*, supra. But we are so firmly convinced that the jury did not give punitive damages in this case that it seems to us it would be trifling with justice to set aside the judgment and verdict upon that ground alone. While we have doubts about this case, arising altogether, however, upon matters of practice, we cannot reverse merely upon doubt. The grounds of doubt have been set forth in this opinion. The Legislature has been at pains to emphasize the duty of this court not to reverse for any error not appearing from the record to have prejudiced some substantial right of the party complaining. Sections 134, 338, 756, Civ. Code Prac. By that we understand not that we are substituted for the jury as triers of the fact, or even in the assessment of the amount of recovery, but that we must be satisfied that the error of practice complained of misled the jury, and caused them to reach a conclusion which otherwise they would not have reached. If the result indicates that it is so irrational, or is not consistent with the evidence, although not flagrantly so, is, in short, strained, we may look to other parts of the proceedings to ascertain the probable cause, and when found to consist of erroneous rulings of the trial judge to hold that they, if they logically tend so, were the cause. But, when upon a survey of the whole record we cannot perceive that anything that transpired, technically an error, has influenced the result, our duty is to pass it by as it passed over the heads of the jury. On this record we cannot say that the error assigned by appellant perceptibly affected the result.

Whether the peremptory instruction asked for by appellant should have been given depends on whether there was total failure of proof to sustain plaintiff's cause. There was not such failure. And whether the verdict is flagrantly against the evidence, as argued by appellant, depends on whether isolated statements of the plaintiff in his testimony tending to show that he jumped on the car as a volunteer brakeman to stop it should be accepted as true, to the exclusion of his other statements that he got on the car preparatory to doing his work. Manifestly it was for the

jury to harmonize the seeming conflict in this witness' testimony, and to give it such credit as it reasonably appeared entitled to. They had the benefit of seeing the witness depose, of judging of his capacity of understanding and expression, and from the whole of his testimony to gauge the truth of the matter. We cannot say from the record that their verdict is flagrantly contrary to the evidence. The fact that the learned trial judge, a lawyer of wide experience, a judge of extensive and notable service, refused to set the verdict aside as being even against the weight of the evidence, confirms our view as to the jury's conclusion being sustained by the whole of the evidence.

Judgment affirmed.

#### BAKER v. BAKER.

(Court of Appeals of Kentucky. Feb. 9, 1910.)

##### 1. DIVORCE (§ 129\*)—ADULTERY—EVIDENCE.

In a divorce action by a wife, evidence held sufficient to show adultery by defendant.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 411-441; Dec. Dig. § 129.\*]

##### 2. DIVORCE (§ 129\*)—ADULTERY—EVIDENCE.

To entitle a wife to a divorce on the ground of her husband's adultery, it is not necessary to prove him guilty beyond a reasonable doubt, but only to establish his adulterous relations by the weight of the evidence and to the satisfaction of the chancellor.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 411-441; Dec. Dig. § 129.\*]

##### 3. DIVORCE (§ 26\*)—"ADULTERY"—EVIDENCE—STATUTORY PROVISIONS.

While under Ky. St. § 2117 (Russell's St. § 67), to entitle a wife to divorce for the husband's adulterous conduct, it must be proved by two witnesses, or by one and strong corroborating circumstances, that he is living in adultery with another woman, and there must be more than a single act to constitute living together in adultery, there need not be a living together continuously or for a given time, nor is it necessary for the man to abide in the same house with the woman; but, if he at stated periods or frequently spend the day or night with the woman, having carnal knowledge of her at will, it constitutes adultery.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 52-60; Dec. Dig. § 26.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 212-214.]

Appeal from Circuit Court, Fayette County.

"To be officially reported."

Action by Mary Baker against Jameson Baker. From the judgment, plaintiff appeals. Reversed and remanded, with directions.

W. C. G. Hobbs, for appellant.

SETTLE, J. This is an appeal from a judgment of the Fayette circuit court dismissing an action brought by the appellant, Mary Baker, to obtain a divorce a vinculo and alimony from her husband, Jameson Baker, upon the grounds (1) of cruel and inhuman treatment of her by him for six

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

months prior to the institution of the action; (2) that he had been and was living in adultery with another woman. Though duly summoned, appellee did not answer the petition, take any proof to refute its averments, or attend in person or by attorney the taking of depositions in appellant's behalf, of which he was legally notified.

We are of opinion that appellee's extreme neglect of appellant, his adulterous relations with other women, and the fact that his failure to support her compelled her to go to her father's home, all of which is shown by the evidence, fairly sustains the charge of cruel and inhuman treatment made in the petition, particularly as such treatment is further shown by the evidence to have continued for as much as six months before the institution of appellant's action.

We are further of opinion that the second ground of divorce is also sufficiently established by the evidence which shows appellee was actually living in adultery with a woman or women of notoriously lewd character, residing in bawdyhouses in the city of Lexington. This was made to appear by the testimony of two witnesses, both of whom were certified to be worthy of credit by the officer who took their depositions. One of these witnesses testified, in substance, that shortly before the action was instituted he saw appellee more than once publicly driving on the streets of Lexington with a common prostitute and inmate of a Megowan street bawdyhouse; that appellee frequently visited this woman and maintained illicit relations with her; and that he had loaned him money to pay his bills with her. The other witness testified that he had seen appellee on several occasions in a Megowan street bawdyhouse, and at such times saw him take the same prostitute or another to an upstairs room and remain with her. These two witnesses further testified that Megowan street was known as a street of prostitution, and that the house in which appellee so frequently took a room with the prostitute was a house of ill fame. It is true that neither of these witnesses saw appellee commit the act of adultery, but a man so lost to all sense of decency as to openly consort with harlots on the streets of a populous city and to be frequently seen with them in a house of ill fame, and there availing himself of the usual means and opportunities for sexual intercourse with them, will be presumed to have given free rein to his lustful propensities, and to have committed the act of adultery with each opportunity. In other words, facts and circumstances, such as are furnished by the record before us, are sufficient to warrant the inference or conclusion that appellee was, as charged in the petition, living in adultery with the woman, or women, with whom he thus associated.

It should be borne in mind that, in order to entitle appellant to a divorce upon the

ground of appellee's living in adultery with another woman, it was not necessary to prove him guilty beyond a reasonable doubt, but only to establish his adulterous relations with the other woman or women by the weight of the evidence and to the satisfaction of the chancellor. Persons intending to commit adultery do not, in advance, proclaim it from the house tops, or call in witnesses to the act. On the contrary, they court seclusion and secrecy in its commission, and hence it must usually be proved by the circumstances that generally attend its commission. While the statute (section 2117, Ky. St. [Russell's St. § 67]) will allow the husband a divorce upon proof by two witnesses, or one and strong corroborating circumstances, of a single act of adultery on the part of the wife, or such lewd, lascivious behavior on her part as proves her to be unchaste, without actual proof of adultery, to entitle the wife to a divorce on the ground of the husband's adulterous conduct it must be proved by two witnesses, or one and strong corroborating circumstances, that he is living in adultery with another woman. Why this distinction is made, if, indeed, any sound reason for it exists, we need not stop to inquire, but in view of the statute it must be recognized; hence, we can but admit that a single act of adultery on appellee's part would not entitle appellant to the divorce asked. To authorize it there must be proof that he was "living in adultery with another woman." As previously indicated, this was made apparent by the evidence introduced in appellant's behalf, which, as a whole, we regard convincing. While to constitute a living together in adultery there must be more than a single act, there need not be a living together continuously, or for a given time, nor is it necessary for the man to abide in the same house with the woman; but if he at stated periods, or frequently, spend the day or night, or any considerable part of his time with a woman, not his wife, at such times having carnal knowledge of her at will, though at other times he be domiciled with his wife, it constitutes the offense against the wife's marital rights which the statute declares a ground for divorce. Clark's Crim. Law, 318; Bodifield v. State, 86 Ala. 67, 5 South. 559, 11 Am. St. Rep. 20; Hall v. State, 53 Ala. 463. In our opinion the substance of the issue here is the adultery. The time and place of its commission are mere inconsequential incidents. As well said by Mr. Bishop in his work on Marriage, Divorce, and Separation (volume 2, § 1353): "It is not necessary to prove that the adultery with which a party is charged should have occurred at any particular time and place. The court must be satisfied that a criminal attachment subsisted between the parties, and that opportunities occurred when the intercourse in which it is satisfied the parties intended to indulge might with ordinary facili-

ty have taken place." It seems to us that in view of the authorities and under a fair common-sense construction of the statute the proof in this case is amply sufficient to sustain the charge that appellee was "living in adultery with another woman." Therefore the chancellor should have so held.

The proof clearly showed the residence of the parties to be in Fayette county for the statutory period, and that appellant was without fault with respect to the matters complained of in the petition. For the reasons indicated, the judgment is reversed and cause remanded, with directions to the circuit court to set aside the decree rendered, and, in lieu thereof, enter another granting appellant a divorce a vinculo, and alimony.

**PARKS et al. v. O. K. JELICO COAL CO.**  
et al.

(Court of Appeals of Kentucky. Feb. 10, 1910.)

**EXECUTION (§ 371\*)—SUPPLEMENTARY PROCEEDINGS—JURISDICTION—COUNTY IN WHICH JUDGMENT WAS RENDERED.**

Since, under Civ. Code Prac. § 70, requiring an action upon a return of "no property found," pursuant to section 439, to be brought in the county in which the judgment is rendered, or in which defendant resides or is summoned, such action may be brought in the county where the judgment was rendered, an action may be brought, under section 439, permitting plaintiff, upon return of execution unsatisfied, to institute an equitable action for a discovery of any money, etc., to which defendant is entitled, and make persons indebted to him defendants therein, in the county in which the judgment was rendered, and a debtor of the judgment debtor made a party thereto, though both he and the judgment debtor reside in another county.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1068; Dec. Dig. § 371.\*]

Appeal from Circuit Court, Laurel County.  
"To be officially reported."

Action by L. L. Parks and another against the O. K. Jellico Coal Company and another. From a judgment dismissing the petition, plaintiffs appeal. Reversed and remanded for further proceedings.

L. L. Parks, Sam C. Hardin, and Geo. G. Brock, for appellants. W. L. Brown, for appellee Norton.

LASSING, J. L. L. and L. M. Parks recovered a judgment in the Laurel circuit court against the O. K. Jellico Coal Company for \$4,500. Upon this judgment execution was issued and placed in the hands of the sheriff, who returned it indorsed "No property found." Thereupon said L. L. and L. M. Parks filed suit in the Laurel circuit court against the O. K. Jellico Coal Company and George C. Norton, residents of the city of Louisville. Summons was issued by the clerk of the Laurel circuit court, directed to the sheriff of Jefferson county, and was executed by him on George C. Norton, and on

W. E. Grant as president of the O. K. Jellico Coal Company. Norton was proceeded against on the theory that he was indebted to his co-defendant, and plaintiffs sought, in this proceeding, to require him to pay them the money which was due said company by him as a balance on stock which he had taken in the company. The defendants first moved to quash the summons and return thereon. This motion being overruled, demurrers were filed to the jurisdiction of the court, and, these being overruled, they pleaded to the jurisdiction and to the merits. Upon final submission, the court held that the defendants were not before the court, sustained the special demurrer to the jurisdiction, and dismissed the petition. From this ruling the plaintiffs appeal.

The only question is whether or not this action might be instituted in the Laurel circuit court when both of the parties proceeded against live in Jefferson county. In the case of McDormant v. L. C. & L. R. R. Co., 11 Bush, 386, this court said: "The provisions of section 474 show that actions to enforce the satisfaction of judgments were not intended to be governed by the rules by which the jurisdiction of actions in general is to be determined. Such actions are local to the extent that they may be instituted in the court from which the execution issued or in the court of the county in which the defendant may reside, and they are transitory to the extent that they may be instituted in any county in which the defendant can be served with process." Section 474 of the Code in force when that opinion was written is the same as section 70 of the present Code, although in section 70 of the present Code the words "county in which the judgment is rendered" are substituted for the words "in the court from which the execution issued" in the Code of 1854. These expressions, however, are one and the same, for the execution could not issue from any county other than that in which the judgment was rendered.

It will be observed that, under section 70, the plaintiff has the right to bring his action in any one of three places, either in the county where the judgment is rendered, or in the county where the defendant resides or may be summoned. The election is his, not that of the defendant. In the case at bar, the judgment was rendered in Laurel county, and plaintiff had an unquestioned right to proceed in that county. Being given the right to proceed in Laurel county, it was proper that summons should issue to the county of defendant's residence, as was done. Being fully justified and authorized by section 70 to proceed against the O. K. Jellico Coal Company in Laurel county, although summoned in Jefferson county, section 439 authorized plaintiff to make party defendant to such suit any one indebted to the defendant, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

hence Norton may not complain that he is made party defendant to the suit in Laurel county any more than he could if the defendant coal company had been a resident of and summoned in Laurel rather than Jefferson county. The court erred in holding that the Laurel circuit court did not have jurisdiction.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

#### CAPE et al. v. CAPE et al.

(Court of Appeals of Kentucky. Feb. 10, 1910.)

#### 1. COSTS (§ 110\*)—SECURITY FOR PAYMENT—NONRESIDENTS—WILL CONTESTS.

Civ. Code Prac. § 616, requiring nonresident plaintiffs before commencing an action to file a bond for costs, applies to all actions to recover money or property, and hence extends to a suit to have a probated will declared void so as to permit testator's property to pass by descent to plaintiffs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 437; Dec. Dig. § 110.\*]

#### 2. COSTS (§ 110\*)—SECURITY—NONRESIDENTS—"ACTION"—ACTION OF SPECIAL PROCEEDING.

Plaintiffs' proceeding was an "action" within the meaning of the statute; that term including all the formal proceedings in a court pertaining to the demand of a right made by one party of another.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 437; Dec. Dig. § 110.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 128-140; vol. 8, p. 7563.]

Appeal from Circuit Court, Russell County.  
"To be officially reported."

Action by R. T. Cape and others against Claudius C. Cape and others. From an order dismissing the action, plaintiffs appeal. Affirmed.

Stone & Aaron and J. H. Stone, for appellants. Bertram & Phelps, for appellees.

NUNN, C. J. In the year 1908 one Thomas Cape died in Russell county, Ky., and left a will by which he devised to his wife, Mary C. Cape, and his son, Claudius C. Cape, all his property, except some minor devises made to his other children and grandchildren, appellants. His executor had the will probated in the county court. Appellants filed this action in the circuit court and took the necessary steps to appeal from the order of the county court probating the will. They alleged in their petition that Thomas Cape was mentally incapacitated to execute a will, and that appellees used and exercised undue influence over him in the execution thereof. It was stated in the petition that all the appellants were nonresidents of the state; and appellees moved the court to require them to give bond for cost, which motion the court sustained and gave appellants until the next term of the circuit court to execute it, which they failed to do, and the

court dismissed their action, from which order they have appealed.

They contend that the court erred in requiring them to give bond for cost, and cite the cases of Pryor v. Mizner, etc., 79 Ky. 232, and Garnett v. Foston, etc., 122 Ky. 197, 91 S. W. 668, 121 Am. St. Rep. 456, as authorities for their position. It was decided in these cases that the Code provisions regulating appeals in ordinary cases did not apply to appeals in will cases, and that no appeal bond was required in will cases. There is nothing in the statutes under the title of "Wills" with reference to the execution of bonds for cost on appeals. It is silent upon the subject. Under the title of "Miscellaneous Proceedings" in the Civil Code of Practice, the General Assembly incorporated section 616, which is as follows: "A plaintiff who is nonresident of this state, or a corporation other than a bank created by the laws of this state, before commencing an action, shall file in the clerk's office a bond of a sufficient surety, to be approved by the clerk, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the court." This section seems to apply to all nonresidents who come into this state and attempt by an action or proceeding to recover money or property, and call upon the officers of this state to aid them. The bond is to be executed for the benefit of the defendant and the officers of the court. Appellants in this case seek to have the will of Thomas Cape declared void so that they may receive their portion of his property under the laws of descent. They have made his widow and one of his sons defendants, and have called upon the officers of the state to issue and execute summonses and subpoenas, and we see no reason why the above provision of the Code should not apply to them as well as any nonresident who sees proper to institute any kind of an action in this state. Appellants contend that they have not brought an "action," but took only the necessary steps to appeal from the judgment of the county court, and therefore the provision of the Code does not apply to them. The word "action" is defined by Bouvier to be "the formal demand of one's right from another person or party, made and insisted on in a court of justice. An action includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person or party of another in such court." And such is the nature of appellants' action or proceeding in this case. We are therefore of the opinion that the lower court did not err in requiring appellants to execute the bond for cost.

For these reasons, the judgment of the lower court is affirmed.

## TERRY et al. v. CORNETT.

(Court of Appeals of Kentucky. Feb. 10, 1910.)

## SCHOOLS AND SCHOOL DISTRICTS (§ 53\*)—OFFICERS—APPOINTMENT—POWER TO MAKE.

On grounds of public policy, an official, charged with the responsibility of administering the affairs of his office, should have the right, in the absence of a statute to the contrary, to select persons to fill vacancies, occurring during his term, that the law authorized him to make appointments for, and a superintendent of schools had authority on June 29th to appoint a school trustee to fill a vacancy to occur on July 1st in the same year, where his term extended beyond that date, and he had power to make the appointment when the vacancy occurred.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 132; Dec. Dig. § 53.\*]

Appeal from Circuit Court, Breathitt County.

"To be officially reported."

Proceedings by Nellie Cornett against Ellen Terry and others, to restrain Ellen Terry from teaching a certain school. From a decree granting an injunction, defendants appeal. Reversed, with directions.

H. V. McChesney and A. H. Patton, for appellants. Martin T. Kelly, for appellee.

CARROLL, J. The purpose of this litigation is to determine whether the appellant Ellen Terry or the appellee Nellie Cornett was entitled to teach the public school in district No. 11 in Breathitt county for the school year of 1908-1909.

On July 1, 1908, Samuel Combs and Elisha Gross, who claimed to be acting as trustees of the district, entered into a contract with Ellen Terry, by which they employed her to teach the school. Under this contract she commenced the school on July 6th, and continued to teach until September 21st, on which date she was restrained from further teaching by an order obtained by Nellie Cornett in this action, brought by her on September 19th. In her petition she averred that on July 1st, as well as on the 7th of the same month, the trustees were Henry Spencer, Granville Spencer, and Samuel Combs, and that on the 7th two of the trustees, Henry Spencer and Granville Spencer, entered into a contract with her to teach the school for the school year. She further averred that Elisha Gross, one of the persons who as trustee made the contract with Ellen Terry on July 1st, was not on that date a trustee, and therefore the contract made with Ellen Terry by Elisha Gross and Samuel Combs was a nullity, and did not entitle her to teach the school, or to receive any of the school fund. She asked that she be adjudged the legally employed teacher for the year, and entitled to the whole of the school fund. Ellen Terry in her answer, after averring that Gross and Combs were trustees, and

setting up her contract with them, denied that Granville Spencer, one of the persons who made the contract with Nellie Cornett on July 7th, was a trustee. She made her answer a counterclaim, and asked that she be adjudged the legally employed teacher of the school for the year, and entitled to the whole of the school fund. The question as to which one of these teachers had a legal contract to teach the school depends on whether Granville Spencer or Elisha Gross was the legal trustee on July 1st. If Gross was the trustee, then the contract with Ellen Terry was a valid contract, if he was not the trustee, then the contract made by the two Spencers with Nellie Cornett was a legal contract.

The superintendent of schools of Breathitt county in his evidence said that Granville Spencer was appointed on June 28, 1907, to serve from July 1, 1907, until the 1st day of July, 1908, that on June 29, 1908, he appointed Elisha Gross as trustee in place of Granville Spencer, to take his office on July 1st, and hold until July 1, 1909, and that on the day of his appointment he qualified by taking the oath of office; that he recognized Sam Combs, Henry Spencer, and Elisha Gross as the trustees of the school on July 1, 1908. The evidence further shows that both Henry Spencer and Granville Spencer were present when the contract was made with Ellen Terry on July 1st, and knew that Elisha Gross, who had been appointed trustee to succeed Granville Spencer, was acting as such trustee when the contract was made with her, and that she commenced her school on July 6, 1908. Upon hearing the case the court sustained the injunction, and adjudged that Nellie Cornett was entitled to \$183.62 of the school money set apart for that school in 1908, and Ellen Terry was entitled to \$155.47. In short, the school fund was divided between the contestants in proportion to the time each taught.

It being conceded that Granville Spencer was the duly appointed and acting trustee on June 29th, as well as June 30th, and that his term did not expire until the beginning of July 1, 1908, the argument is made in behalf of appellee that the appointment and qualification of Elisha Gross, on the 29th of June, to take his office as trustee on July 1st, was a nullity—and this upon the ground that, as Granville Spencer's term did not expire until July 1st, no appointment of his successor could be made until his term actually expired. On the other hand, it is insisted by counsel for appellant that an appointment may be made to take effect at a future date, and therefore although the appointment of Elisha Gross was made on June 29th to become effective on July 1st, the appointment was valid, and Gross became, by virtue of it, entitled to the office on July 1st. It seems, therefore, that the only question in the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

case is the validity of Gross' appointment, or, in other words, whether an appointment can be made to fill a vacancy before the vacancy occurs.

In support of the proposition that an appointment made to fill a vacancy before the vacancy actually exists is void counsel for appellee calls our attention to *McGlone v. Zornes*, 107 S. W. 329, 32 Ky. Law Rep. 965. In that case the only point decided was that an appointment to presently fill a vacancy when there was no vacancy was a nullity. Of course, if an office is not vacant, no person can be appointed to fill it. But that is not the case we are dealing with. And to the case of *Shepherd v. Gambill*, 75 S. W. 223, 25 Ky. Law Rep. 333. There the question to be determined was whether Lewis Turner or Sam Spicer was trustee on July 1, 1902, when the contract with Gambill was made. It appears that the term of Lewis Turner as trustee expired on June 30, 1902, and the superintendent of schools, whose term expired on January 5, 1902, appointed Lewis Turner on January 2, 1902, to fill the vacancy in his office, which would occur on July 1, 1902, as there had been no election held in the October previous to elect a successor to Turner. The succeeding superintendent on July 1st appointed Sam Spicer to fill the vacancy caused by the expiration of the term of Lewis Turner on June 30th. Turner claimed that his appointment on January 2d, and his qualification thereunder, continued him in office for the year succeeding June 30, 1902, and that Sam Spicer's appointment on July 1st was a nullity, but the court refused to accept this contention as correct, and held that the appointment of Turner under the circumstances was void. It will be noticed that, in holding invalid the appointment of Turner, the court was dealing with an appointment made on January 2d, to take effect on July 1st, by a superintendent whose term of office expired three days after he made the appointment. The material difference between that case and this is apparent. We entirely agree with the conclusion reached, but it does not sustain appellee's contention. Here the superintendent who appointed Gross knew that the vacancy he appointed him to fill would occur within two days, and that on the day the vacancy occurred he would be in office and have the right of appointment. We know of no objection, upon the ground of public policy or otherwise, that can be urged against a practice like this. If it was necessary in all cases to delay making an appointment to fill a vacancy until the office was actually vacant, much confusion and disorder in the public service might be occasioned, and so we think that an appointment may be made within a reasonable time before the vacancy actually exists, to take effect when it occurs, if it be made by the authority that would have the right to make

the appointment when the vacancy does occur. A person cannot be appointed presently to fill a vacancy when there is no vacancy, but he can be appointed to fill a vacancy that will shortly occur; his appointment to take effect when it does. This view of the law applicable to cases like this is generally accepted as correct. *Mechem on Public Officers*, § 133; *Whitney v. Van Buskirk*, 40 N. J. Law, 463; *State v. O'Leary*, 64 Minn. 207, 66 N. W. 264; *State v. Catlin*, 84 Tex. 48, 19 S. W. 302; *People v. Ward*, 107 Cal. 236, 40 Pac. 538; *Ivy v. Lusk*, 11 La. Ann. 486; *Clarke v. Irwin*, 5 Nev. 113. We can well understand that there might be good reasons presented against the practice of making an appointment to fill a vacancy that would occur at a distant date, and have no doubt that it would be very objectionable to allow an official to make an appointment to take effect in the future when the vacancy to fill which the appointment was made would occur in the term of a succeeding official. To uphold the validity of such an appointment would oftentimes enable an official to take from his successor a part of the rightful powers and emoluments of his office and surround him with offensive appointees not in harmony with his methods, or in sympathy with his purposes. Upon grounds of public policy an official charged with the responsibility of administering the affairs of his office should have the right, in the absence of a statute to the contrary, to select persons to fill vacancies occurring during his term that the law authorized him to make appointments for.

It follows from these views that the appointment of Gross was legal, and consequently the contract made with Ellen Terry by the two trustees gave her the authority to teach the school for the term and the right to receive the public money.

Wherefore the judgment is reversed, with directions to dissolve the injunction and order the payment to Ellen Terry of the money adjudged to Nellie Cornett.

#### MAIN JELlico MOUNTAIN COAL CO. v. PARKER.

(Court of Appeals of Kentucky. Feb. 11, 1910.)

#### 1. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—EVIDENCE—NEGLIGENCE OF MASTER.

In an action by a coal miner for a personal injury, evidence held sufficient to sustain a verdict for plaintiff based on negligence either in not furnishing him a safe place to work or a reasonably safe car to work with.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 964; Dec. Dig. § 278.\*]

#### 2. MASTER AND SERVANT (§ 265\*)—INJURY TO SERVANT—CAUSE OF INJURY—BURDEN OF PROOF.

Where the circumstances of an injury to a miner show that either the place was not reasonably safe for the work by reason of a post being set too near the track on which he was assisting to move a car, or that the car wobbled

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to such an extent from being old and worn that it would not pass the post, plaintiff was not required to prove the particular defect which caused the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 879; Dec. Dig. § 263.\*]

### 3. MASTER AND SERVANT (§ 118\*)—SAFE PLACE TO WORK—ENTRY TO MINE.

A post supporting the roof over an entry to a room in a coal mine through which cars are moved should not be set so near the track as to endanger the safety of the men handling the cars, using ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 200; Dec. Dig. § 118.\*]

### 4. MASTER AND SERVANT (§ 241\*)—INJURIES TO MINER—CONTRIBUTORY NEGLIGENCE.

Where cars in a mine were both pushed and pulled, and under ordinary conditions there was no reason to anticipate danger in going in front to hold a car back, it was not contributory negligence for a miner to go in front of a car to hold it back instead of using a sprag, and such act did not preclude recovery for injuries to the miner's hand by being mashed between the car and a post negligently placed too near the track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 757; Dec. Dig. § 241.\*]

### 5. MASTER AND SERVANT (§ 264\*)—INJURIES TO SERVANT—PLEADING AND PROOF.

Where a petition by a miner for an injury alleged that he was compelled to pull the loaded cars from the room where he loaded them to the entry, and while he was so pushing and moving them he was injured, proof that plaintiff was in front of the car did not amount to a variance, as it was immaterial whether he was pushing the car from behind or pushing from in front to check its speed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 873; Dec. Dig. § 264.\*]

### 6. MASTER AND SERVANT (§ 293\*)—SUIT FOR INJURIES—INSTRUCTIONS.

In an action for injury to a miner whose thumb was mashed between a post near the track and the car which he was assisting to move in an entry. The entry was dark and there were no lights excepting those in the miners' caps. The proof showed that the car was old and wobbly, and that the post was set too near the track. The court charged that it was defendant's duty to use ordinary care to furnish a reasonably safe place to work, and a car to transfer coal reasonably safe to carry it along the track, and directed the jury to find for plaintiff if he did not know of the unsafe condition of the track and car, and defendant knew it, or by ordinary care could have known it, and by reason of the place not being reasonably safe or by reason of the car's unsound condition plaintiff was injured, he was entitled to recover. *Held*, that there was no practical objection to the instructions under the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1150, 1154; Dec. Dig. § 293.\*]

### 7. APPEAL AND ERROR (§ 1039\*)—HARMLESS ERROR—ALLOWING DAMAGES NOT PLEADED.

In an action for personal injury, wherein the petition did not allege loss of time, evidence as to such loss was given without objection, and in conformity to the evidence the court instructed the jury to allow compensation therefor, his attention not being called by defendant to the averments of the petition, and defendant not having objected to the amount of the verdict, substantial justice would not allow a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4066; Dec. Dig. § 1039.\*]

### 8. APPEAL AND ERROR (§ 1067\*)—HARMLESS ERROR—INSTRUCTIONS—REQUESTS.

No error can be predicated on the refusal of an instruction which is practically the same as an instruction given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

### 9. MASTER AND SERVANT (§ 295\*)—SUIT FOR INJURIES—INSTRUCTIONS—ASSUMPTION OF RISK.

In an action for injuries to a miner based on negligence in not furnishing plaintiff a safe place to work or a reasonably safe car to work with, the evidence supporting his claim of negligence in either respect, and showing that he had worked for two weeks in the room in the entry to which the accident occurred, sufficiently presented the law as to assumption of risk by an instruction that if plaintiff continued without complaint to work, knowing any appliance then being used by him was defective, or that the place where he worked was not reasonably safe, he assumed the risk, and could not recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.\*]

Appeal from Circuit Court, Whitley County. "Not to be officially reported."

Action by John Parker against the Main Jellico Mountain Coal Company for a personal injury. From a judgment for plaintiff, defendant appeals. Affirmed.

Tye & Siler, for appellant. H. C. Faulkner, R. S. Rose, and J. K. Watkins, for appellee.

HOBSON, J. John Parker was a miner in the service of the Main Jellico Mountain Coal Company. He and his brother mined coal in a room in the mine. It was a part of their duty to load the coal on a car after they mined it, and to push the car out on a track to the entry where a teamster hitched to it, and took the car to the mouth of the mine. The track leading from the room to the entry was on a slight downgrade, and to prevent the car from going down too fast, and thus getting away from them, one of them went in front and pulled while the other one pushed from behind, and, if the car began to go too fast, the one in front would put his hand against it and push back while the one behind would take hold of the car and pull it back. They were moving the car out in this way, when John Parker, finding the car was going too fast, put his hands against the end of the car to check its speed, his thumb coming out near the edge. The track was on a curve, and, as the car came along, his thumb was caught between the car and a post placed beside the track to hold up the roof. The end of his thumb was mashed off. He had to undergo two surgical operations. At the second operation the thumb was taken off at the second joint. He brought this action to recover for his injury, and, a verdict and judgment having been rendered in his favor for \$250, the company appeals.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The charge in the petition was, in substance, that the defendant was negligent in not furnishing him a reasonably safe place to work or a reasonably safe car to work with. It is earnestly insisted that the evidence on the trial does not show what was the cause of the accident, and that the verdict should not be sustained. There was proof that the car was old and wobbled. There was also proof that the post was set too near the track, but it is insisted that the proof does not show what really caused the accident. The entry was dark. There was no light there, except such as the miners had in their caps. The fact was that as the car went around the curve the man's thumb on the front of the car was mashed off by the post. It necessarily follows from this either that the place was not reasonably safe for the work to be done by reason of the post being set too near the track, or that the car wobbled to such an extent from being old and worn that it would not pass the post. In either case the defendant was guilty of negligence, and it is not material to which cause the action was due. In a place like this the post should not have been set so near the track as to endanger the safety of the men handling the cars, and using ordinary care in the discharge of their duties. It is said that Parker should have used a sprag, and should not have gone in front of the car, but the cars were moved in both ways, and there was, under ordinary conditions, no reason to anticipate danger in going in front of the car so as to hold it back. It was simply a more careful way of moving the car.

It is alleged in the petition that the plaintiff was compelled to pull with his hands the loaded cars from the room where he loaded the coal to the entry, and that, while he was so pushing and moving the cars, he was injured. It is earnestly insisted that the defendant was in this misled, when the proof showed that the plaintiff was not behind the car, but in front of it. But we do not see that it is material whether the plaintiff was pushing the car from behind or from the front. He was moving the car, and in his petition he uses the words "pull, push, and move." Its allegations were sufficient to apprise the defendant of his claim, and we cannot see how it could have been misled.

By its instructions the court told the jury that it was the duty of the defendant to use ordinary care to furnish its servant a reasonably safe place to work, and a car in which to transfer the coal which was reasonably safe for the carrying of the coal along the track referred to, and that if the plaintiff did not know of the unsafe condition of the track and car, and the defendant knew it, or by the exercise of ordinary care could have known it, and that, by reason of the place not being reasonably safe or by reason of the unsound condition of the car, he re-

ceived the injury complained of, they should find for him. We see no practical objection to this instruction under the evidence. It is said that the court erred in allowing the plaintiff to recover compensation for his loss of time, as no loss of time was alleged in the petition, but the evidence as to loss of time had been given without objection; and it is evident that the court wrote the instruction to conform to the evidence, his attention not being called by the defendant to the averments of the petition. In view of the fact that the defendant did not object to the evidence as to the loss of time, and size of the verdict, the ends of substantial justice will not allow a reversal here for this cause. We see no other error in the record. Instruction 3, which the court gave, is practically instruction B which the defendant asked. Instruction A, which the plaintiff asked, was properly refused, for some judgment must necessarily be allowed the workman in doing work of this sort, and he was not deprived of a right to recover simply because it was not necessary for him to get in front of the car. By instruction 2 the court defined ordinary care. By instruction 3 the court told the jury that if the plaintiff continued without complaint to work, knowing that any appliance then being used by him was defective or that the place where he worked was not reasonably safe, he assumed the risk and could not recover. Instructions 1, 2, and 3 under the evidence presented to the jury the law of the case. The fact that Parker had changed rooms with Frank Reed was immaterial. He had worked in this room two weeks. On the whole case the defendant has had a fair trial on the merits.

Judgment affirmed.

#### MARTIN v. BENTLEY et al.

(Court of Appeals of Kentucky. Feb. 9, 1910.)

##### 1. ESTOPPEL (§ 29\*)—BY DEED—PERSONS ESTOPPED—GRANTEES.

Where one party claimed land under a warranty deed, and the other parties claimed under a patent issued upon a survey made under a land warrant issued to the same grantor, both parties claimed under the same grantor, and could not dispute his title.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 69-71; Dec. Dig. § 29.\*]

##### 2. ESTOPPEL (§ 45\*)—BY DEED—INTERESTS SUBSEQUENTLY ACQUIRED—PERSONS ESTOPPED.

A subsequent patent issued to the grantor covering land conveyed under a general warranty deed would inure to the benefit of the grantee, and where the patent was issued to others under an assignment of the land warrant to them by the grantor to perfect title to other land given them, the assignees took title under the land warrant, subject to such grantee's prior title.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 112; Dec. Dig. § 45.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Letcher County.  
"Not to be officially reported."

Consolidated actions by Allen Martin against Irvine Bentley and others and by Irvine Bentley and others against Allen Martin. From a judgment for Bentley and others, Martin appeals. Reversed and remanded, with directions to quiet appellant's title.

R. O. Brashear, for appellant. Greene, Van Winkle & Schoolfield, S. B. Dishman, and R. Monroe Fields, for appellees.

HOBSON, J. In 1867 James Hall, who held a large body of land on Rockhouse creek and Indian branch, in Letcher county, sold to Allen Martin 200 acres on Indian branch; and on April 30, 1868, he executed to Martin a general warranty deed for the land, who settled upon it and had his deed recorded the following year. The 200 acres is described in the deed as lying between the top of the ridge on either side of Indian branch, and running from a conditional line made between Alexander Hall and James Hall down to another line which crossed the ford of the branch above Rice Bentley's house. Rice Bentley was a son-in-law of James Hall, and was then living in the house where his father-in-law had settled him. The line of Martin's tract running not far from his house, when Martin went to fence his land, Bentley claimed that he was over on him; and thereupon James Hall was sent for, who went along and pointed out to both of them the line, and there appears to have been no further controversy between Martin and Bentley. The line was well marked, and there was no uncertainty about the location, although the fence was not built the full length of the line. James Hall had another son-in-law, named John Hall, whom he had settled on another part of his tract adjoining the piece of land occupied by Bentley. At the April term, 1870, James Hall took out a land warrant for 100 acres of land, and on January 12, 1872, he assigned the land warrant to Rice Bentley and John Hall. On January 13, 1872, they had a survey made, which was so laid off as to include the lands which had been given to them by James Hall, and they divided the survey between them according to the line which he had established as the division line between them. On September 1, 1872, James Hall executed to John Hall, as a gift, a deed for the tract of land which he had given him, and he at the same time prepared a deed to Bentley for his tract; but Bentley refused to accept it on the ground that James Hall was not giving him as much of the land as he had given to the other children. In this condition of things, and before any patent was issued, Rice Bentley died. After his death, on October 1, 1875, a patent was issued to Rice Bentley and John Hall, as assignees of James Hall, for this survey. The survey and patent laps over upon the boundary of land

which James Hall had sold to Allen Martin, there being perhaps two or three acres in the lap, and this end of the patent fell to Rice Bentley in the division which was made between him and John Hall. The children of Bentley brought an action against Allen Martin to recover the land embraced in the lap. Martin brought a suit against them, setting up his deed from James Hall, and praying that his title be quieted. The two cases were consolidated, and on final hearing the circuit court entered a judgment in favor of the Bentleys. From this judgment, Martin appeals.

It is clear from the record that Martin has the older title from James Hall. It is true that the Bentleys claim under the patent issued by the commonwealth in 1875, and that Martin does not show any title in James Hall to the land from the commonwealth. But Irvine Bentley settled on the land under James Hall. The only title which his children now show to the land is by virtue of the patent, and this was obtained upon a survey made under a land warrant which was assigned to him and John Hall by James Hall. The patent on its face is to them as assignees of James Hall. Both parties, therefore, claim under James Hall, and neither can dispute his title. If the patent had been issued to James Hall, it would have inured to the benefit of Allen Martin under his warranty deed. When his two sons-in-law, whom he had previously settled on the land, took an assignment of the land warrant from him and had the patent issued to them, it is manifest that all of this was simply to perfect the title in them to the land which Martin had given them. They held the land under James Hall, no less than Allen Martin, and Allen Martin, having the older title, has the better right. As long as James Hall lived, he always recognized the line which he had established to Martin, and as late as 1877 he made a deed calling for it. There seems to have been no trouble about the title to the land in his lifetime.

About ten years ago Allen Martin had sold some timber off his tract of land, and the children of Bentley set up a claim that the purchaser had cut over on them. Thereupon they got a surveyor, who ran out their patent. When the line of that patent was run, it appeared that no cutting had been done over the line; and this ended the dispute. There is some testimony for the Bentleys in the record that Allen Martin then agreed to recognize the line run by the surveyor as the division line between them; but the weight of the evidence is to the effect that the line was simply run to see whether any cutting had been done on the land claimed by the Bentleys. In addition to this, the uncontroverted facts are that the surveyor simply ran the call of the patent under which the Bentleys claim. There was no attempt to agree upon a disputed line, or to make a

compromise line. All the parties well knew the line that Martin claimed. It was a plainly marked old line, and there was no consideration for an agreement on his part to accept the line of their survey as the division line. There was no confusion of boundaries, and there was no uncertainty as to the location of the line that Martin claimed. The only thing they did not know then was how far the patent conflicted with his boundary. They all knew there was a conflict. There was nothing in this to affect Martin's right to the land.

Judgment reversed, and cause remanded to the circuit court, with directions to quiet Martin's title to the land in controversy.

#### GILL'S TRUSTEE et al. v. GILL et al.

(Court of Appeals of Kentucky. Feb. 9, 1910.)

##### 1. TRUSTS (§ 44\*)—FRAUD AND UNDUE INFLUENCE—EVIDENCE.

Evidence held to show a deed of trust was obtained from the grantor by fraud and undue influence.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 44.\*]

##### 2. TRUSTS (§ 50\*)—INVALIDITY—EXECUTION UNDER COMPELSION OR DURESS.

If, after legal proceedings are begun to declare one incompetent, she acquiesces in an arrangement previously designed by others, by executing a deed of trust of her property, rather than submit to the mortification of going into court to contest, the deed is procured by duress, and is invalid.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 50.\*]

Appeal from Circuit Court, Harrison County.

"Not to be officially reported."

Action by Daniel Dowd, as trustee of Elizabeth Gill, and others, against Alvin T. Gill and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Chester M. Jewett and J. J. Osborne, for appellants. M. C. Swinford and B. D. Berry, for appellees.

CLAY, C. James Gill died, intestate, in Harrison county, Ky., on May 24, 1906. He left surviving him his widow, Elizabeth Gill, the appellee herein, who was then about 84 years of age, and six children, five of whom are appellants on this appeal, and one an appellee. Upon the death of James Gill, Elizabeth Gill waived her rights under the law to qualify as administrator of the personal estate of her husband. Thereupon E. R. Blackburn qualified as administrator of the personal estate of James Gill. The latter, at the time of his death, owned about 260 acres of land. Blackburn, as his administrator, collected about \$6,700. On July 8, 1907, Elizabeth Gill appointed Blackburn as her agent to attend to her business. At about the time of Blackburn's appointment as Elizabeth Gill's agent, the children of James Gill

agreed with Blackburn, as the representative of Elizabeth Gill, on a partition and division among them of the 260 acres of land owned by James Gill at the time of his death. On March 2, 1908, Elizabeth Gill executed, acknowledged, and delivered to Daniel Dowd, of Harrison county, a deed of trust by which she sold, bargained, and conveyed to said Dowd all of her property, and vested in him the absolute control and management of the same. This deed of trust contained a provision to the effect that Dowd should provide for Elizabeth Gill a comfortable home, board, lodging, and clothing consistent with her station in life. In the event all of her estate was not expended prior to her death, he was directed to pay it over to her personal representative.

On June 2, 1908, Elizabeth Gill executed and delivered to John D. Berry a power of attorney by which she authorized him to act as her agent and attend to her business. This power of attorney recited the fact that she had theretofore executed a deed of trust to Dowd because of certain fraudulent representations to her at the time, and that she therefore revoked said deed of trust. Dowd, and those children of Elizabeth Gill who were instrumental in securing the deed of trust to him, demanded that Blackburn turn over the funds he held as agent of Elizabeth Gill, amounting to about \$2,600. This Blackburn declined to do, on the ground that Mrs. Gill claimed the deed of trust was obtained from her by fraud and undue influence. When John D. Berry was appointed, Blackburn turned over the money to him.

This action was instituted by Daniel Dowd, as trustee of Elizabeth Gill, and by Josephine Godman, Cordy Nelson, Alice Nelson, Martha Cloe, and A. J. Gill, against Alvin T. Gill, a son of Elizabeth Gill, E. R. Blackburn, as administrator of James Gill, E. R. Blackburn, personally, and John D. Berry, to recover whatever sum E. R. Blackburn had in his hands at the time of the execution of the deed of trust to Daniel Dowd. To this petition each of the defendants below interposed a plea to the effect that the deed of trust in question was obtained from Elizabeth Gill by fraud and undue influence. Proof was taken, and the cause submitted to the chancellor, who sustained the contention of the defendants and entered judgment dismissing the petition, but relieving Dowd, himself, from the payment of any costs. From that judgment, Dowd and the five children who united with him in the suit prosecute this appeal.

While the evidence took a wide range and many matters not involved in this controversy were referred to and discussed by the witnesses, it is manifest that the only issue in the case was whether or not the deed of trust in question was obtained by fraud and

undue influence; for upon the validity of that instrument depends the right of appellants to sue at all. The evidence upon this question is as follows: In February, 1908, A. J. Gill, a son of Elizabeth Gill, conceiving that his mother was incapable of managing her estate, caused an affidavit to this effect to be prepared by counsel, swore to it, and had the same filed in the Harrison circuit court. Thereupon a day was set for an inquest under the statute. He then sought to obtain from physicians the necessary affidavit to dispense with the presence of his mother at the trial for her incompetency. Prepared with the necessary affidavit for the physicians to execute, together with the deed of trust executed to Dowd, he conferred with Dr. Gillispie, a physician of Harrison county, and requested him to get another physician to go with him to his mother's. Dr. Gillispie failed to get another physician. The physician whom he approached on the subject declined to go, for the reason that he regarded it as a family quarrel and did not care to take any part in it. Thereupon Dr. Gillispie visited Elizabeth Gill. He found that she was able to go to court, and therefore did not make an affidavit to the effect that she was not able. During this visit he informed her of the proceedings that had been instituted by her son in the Harrison circuit court, and told her that unless she executed a deed of trust to some one the court would appoint a trustee for her. Mrs. Gill claims that he told her at the time that the deed of trust could be revoked in a year. This, however, Dr. Gillispie denies. Mrs. Gill told Dr. Gillispie that she did not want a trustee, and, according to her evidence, she protested against the appointment all the time. This visit of Dr. Gillispie was made on Wednesday, and on the following Friday A. J. Gill and two others were present at the home of his mother urging her to appoint a trustee.

It is insisted by them that Dowd was one of four who were suggested to her, and that she voluntarily selected Dowd out of the number, because he was a neighbor and a man in whom she had confidence. Dr. Gillispie himself testified as to the principal facts of his first visit to Mrs. Gill, and his and her statements agree in the main. To say that Mrs. Gill's execution of the deed of trust was her voluntary act would be a travesty upon justice. She was apprised of the proceedings that had been instituted against her. She believed that, if she did not appoint a trustee, the court would appoint one for her. Rather than submit to the humiliation and mortification of going into court and contesting the proceedings, she acquiesced in the arrangement which had been previously designed by others. A careful reading of the record convinces us that she would not have signed the deed of trust, had

it not been for the pressure that was brought to bear upon her. She was the victim of a species of compulsion or duress. The law will not give sanction to an instrument obtained under such circumstances. In justice to appellant Dowd, however, we deem it necessary to say that he had nothing to do with the procurement of the deed of trust.

In view of the conclusion reached by the court, it is not necessary that we should consider the other questions raised by counsel in their briefs.

Judgment affirmed.

# MATHIS v. BANK OF TAYLORSVILLE.

(Court of Appeals of Kentucky. Feb. 8, 1910.)

## 1. VENUE (§ 45\*) — CHANGE OF VENUE — GROUNDS.

In an action against a bank by a well-known physician in the same county, a showing that the bank has a large number of depositors and borrowers, many stockholders, is the leading financial institution of the community, and has considerable influence in the county, is insufficient to establish undue influence, warranting a change of venue.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 74; Dec. Dig. § 45.\*]

## 2. PLEADING (§ 380\*)—VARIANCE—EVIDENCE—ADMISSIBILITY.

The evidence in a case should be confined to the issue made by the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1237; Dec. Dig. § 380.\*]

## 3. TRIAL (§ 251\*)—INSTRUCTIONS TO JURY—ISSUES OF CASE.

Instructions should relate only to issues made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

## 4. APPEAL AND ERROR (§ 1066\*)—REVIEW—HARMLESS ERROR — SUBMITTING ISSUE TO JURY.

In an action by a bank on notes, executed by defendant's son, in defendant's name, to satisfy overdrafts of the son's account, where the issue of the existence of a partnership between the defendant and his son was not raised by the pleadings, but the court on a prior appeal stated that if they were partners in the venture in which the money drawn out on overdrafts was invested, and the account was opened up in the name of the son with the father's knowledge and consent and for the benefit of the firm, and he ratified the notes given, he should be held on them, so that upon the return of the case to the trial court the only real question between the parties was one of partnership and on the retrial the evidence was directed to this issue, and the question submitted to the jury by instructions authorized by the appellate court, the error, if any, in submitting this issue, not made by the pleadings, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

## 5. PARTNERSHIP (§ 218\*) — LIABILITY AS TO THIRD PERSONS—ACTIONS—QUESTIONS FOR JURY.

In an action on notes executed by defendant's son in defendant's name, evidence held to make it a jury question whether defendant and his son were partners in the venture in which

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the money for which the notes were given was expended.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 427; Dec. Dig. § 218.\*]

**6. PARTNERSHIP (§ 55\*) — LIABILITY AS TO THIRD PERSONS—EVIDENCE—SUFFICIENCY.**

In an action on notes executed by defendant's son in defendant's name, evidence held sufficient to sustain the finding that the defendant and his son were partners in the venture in which the money for the payment of which the notes were given was expended.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 78; Dec. Dig. § 55.\*]

**7. WITNESSES (§ 379\*)—PARTNERSHIP (§ 49\*) — LIABILITY AS TO THIRD PERSONS — EVIDENCE.**

In an action by a bank on notes executed by defendant's son in defendant's name to cover overdrafts on the son's account, where the principal issue was whether the defendant and son were partners in the enterprise in which the money drawn out on overdrafts was expended, testimony of the bank's president that the son had stated to him that he and his father were in partnership, where the son denied making this statement, was admissible as affecting the son's credibility, but incompetent as substantive testimony to prove partnership.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1209; Dec. Dig. § 379; Partnership, Cent. Dig. §§ 67-73; Dec. Dig. § 49.\*]

**8. APPEAL AND ERROR (§ 1051\*)—REVIEW—HARMLESS ERROR—EVIDENCE.**

In an action by a bank on notes executed by defendant's son in defendant's name to cover overdrafts on the son's account, defendant was not prejudiced by allowing the bank's president to state that the overdrafts were good only in case the defendant was bound, where the fact that the son was insolvent was abundantly established.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

Appeal from Circuit Court, Spencer County.  
"To be officially reported."

Action by the Bank of Taylorsville against H. C. Mathis. From a judgment for plaintiff, defendant appeals. Affirmed.

John S. Kelley and Reason & Crume, for appellant. Willis & Todd and L. W. Ross, for appellee.

CLAY, C. This is the second appeal of this case. The opinion on the first appeal may be found in 105 S. W. 157, 32 Ky. Law Rep. 200. The facts of the case are fully set out therein, and it will be unnecessary to detail them again. After that opinion was handed down, the Bank of Taylorsville filed a petition for rehearing. To the petition for rehearing the court, through Judge Carroll, filed the following response, which may be found in 106 S. W. 1174, 32 Ky. Law Rep. 807: "On the trial of this case, counsel for the contending parties directed their chief efforts to the issue whether or not the power of attorney was a limited or unlimited one. This seems to have been regarded as the pivotal point in the case. That it was so considered by the trial judge is apparent from the fact that he only submitted to the

jury one instruction; that being directed to this issue. It is pointed out in the petition for rehearing, filed by counsel for appellee, that it can be shown on another trial that H. C. Mathis was interested as a partner with C. G. Mathis in the ventures or business enterprises in which the money drawn from the bank by C. G. Mathis and that constituted his overdrafts was invested, and that the overdrafts were made with his approval and consent, and the notes executed in satisfaction of them were ratified by him. Although in our opinion C. G. Mathis was not directly authorized to sign H. C. Mathis' name to the notes executed by him for overdrafts in his (C. G. Mathis') account, nevertheless, if H. C. Mathis was a partner of C. G. Mathis in the ventures or business enterprises in which the money drawn out on overdrafts was invested, and if the account was opened up in the name of his son with his (H. C. Mathis') knowledge and consent, and for the benefit of the firm, and he ratified and approved the notes given to satisfy the overdrafts, he should account to the bank for such sums. So that, in addition to the instruction given on the former trial, the court should rather instruct the jury that to the extent that the notes, or any of them, are made up in whole or in part of overdrafts in the account of C. G. Mathis, H. C. Mathis is not responsible on them, unless the jury believe from the evidence that H. C. Mathis and his son were engaged in business as partners, and the money represented by the overdrafts was borrowed for the firm in the name of the son, with the knowledge and consent of H. C. Mathis, to be used in the firm business, or that H. C. Mathis knew, or the facts known to him were such as to put a reasonable man on notice, that his son was borrowing the money on his (H. C. Mathis') credit for the business in which he was interested with his son, and H. C. Mathis, after he knew that his son had executed the notes sued on, or any of them, agreed to pay the same, or approved the act of his son in signing his name. (2) If they so believe, they should find against H. C. Mathis to the extent that the notes represent money advanced to the firm in the name of his son, with H. C. Mathis' knowledge and consent, to be used in the firm business, and to the extent of the money advanced on his credit, and with his knowledge for the use of their joint business that is included in notes that he agreed to pay or approve the act of his son in signing. "The converse of these instructions should be given for appellant if requested. We are asked by counsel for appellee to strike from the opinion certain language deemed to reflect on the business management of the bank in its dealings with the Mathises. The expressions complained of were used by the writer of the opinion solely as an argument, or illus-

tration to show why H. C. Mathis should not be held responsible for overdrafts in the account of C. G. Mathis. Unless in this respect they may be considered a criticism on the bank officials, they were not so intended. The petition for rehearing is overruled."

Upon the return of the case a trial was had and the jury again returned a verdict in favor of the Bank of Taylorsville. From the judgment based thereon, H. C. Mathis is here on appeal.

The first error assigned is the failure and refusal of the court to sustain appellant's petition for a change of venue. The application for a change of venue was based upon the alleged undue influence of appellee in Spencer county. The evidence heard upon this application in behalf of appellant was to the effect that the Bank of Taylorsville was the principal financial institution of Spencer county; that the county had about 1,800 voters, of whom about 1,000 or 1,200 were eligible to jury service; that the bank's depositors numbered about 700 of 800; that, in addition to this, it had 30 stockholders. Besides these, there was a considerable number of people who borrowed from the bank. Such persons lived in every section of the county. While appellant's witnesses testified to the influence of the bank in the county, the majority of them on cross-examination were of opinion that appellant could obtain a fair trial in the county. The statute authorizes a change of venue where undue influence is shown. The evidence in this case fails to disclose any influence other than that growing out of the successful operation of the bank and the following secured by reason of a well-earned reputation. Although such following is shown to be large, this fact alone is not sufficient to show undue influence. The mere showing that a bank has a large number of depositors and borrowers will not justify the conclusion that a well-known physician of the same county cannot secure a fair trial when litigating with the bank. We therefore conclude that the court did not err in refusing to grant appellant a change of venue.

It is next insisted that the court erred in submitting to the jury the issue of partnership, as such issue was not made in any pleading in the case. While it is true that the evidence in a case should be confined to the issues made by the pleadings, and that the instructions should relate only to the issues so made, a peculiar state of facts is presented in this case. In its response to the petition for rehearing this court said that, although in its opinion C. G. Mathis was not directly authorized to sign H. C. Mathis' name to the notes executed by him for overdrafts in his (C. G. Mathis') account, nevertheless, if H. C. Mathis was a partner of C. G. Mathis in the ventures or business enterprises in which the money drawn out on overdrafts was invested, and if the account

was opened up in the name of his son with his (H. C. Mathis') knowledge and consent, and for the benefit of the firm, and he ratified and approved the notes given to satisfy the overdrafts, he should account to the bank for such sums. This response did not direct that appellee amend its pleadings. Upon the return of the case, the only real question between the parties was one of partnership. Upon the trial of the case, the evidence was directed to this issue. The case was fought out along that line. This question was submitted to the jury by instructions authorized by this court. Under these circumstances, we conclude that it would be highly technical to set aside the verdict of the jury on the ground that the issue of partnership was not presented by proper pleadings. Such error, if any, could not have prejudiced the substantial rights of the appellant.

Upon the question of partnership, the evidence of appellant and his son, C. G. Mathis, was to the effect that no partnership existed. It was shown that on January 1, 1903, appellant leased his farm to his son, C. G. Mathis, and his son-in-law, C. W. Muir. The arrangement between C. G. Mathis and C. W. Muir was abandoned. Some time in February the interest of Muir in the partnership venture and in the property that had been bought to carry on the business was sold and paid for by appellant's check for the sum of \$50. The evidence for appellant further tended to show that, after the interest of Muir was purchased, C. G. Mathis remained the sole lessee of the farm. At the time of the leasing to Muir and C. G. Mathis, they executed a note for the rent. The name of C. W. Muir was erased from this note. When appellant advanced certain sums to his son, it was merely a case of borrowing and lending, and not because of any interest appellant had in the conduct of the farm or in property on the farm. On the other hand, the evidence for appellee is to the effect that prior to January 1, 1903, appellant and C. G. Mathis were partners in the operation of the farm. The son furnished the labor, the father the capital and the farm, and the son was to have one-third of the profits. When Muir was released from his rent, appellant stated that this threw the farm back on his hands. After Muir retired, appellant paid some of the hands on the farm. In the year 1903 appellant listed all the property on the farm in his own name. Appellant undertakes to explain this by saying that he was listing the property of his son. When appellant came into the bank to examine his personal account, he said: "I want to see our farm account." Whenever he came into the bank he insisted on seeing the farm account. In reply to the proposal of one witness to sell appellant some cattle, appellant replied that he did not think they could handle them—they were full up. To another witness he stated

that he was in the cattle trade. To still another witness, who offered to sell him cattle, he said: "Well, we would like to have those cattle, but you are a little high on them." Other circumstances tending to show a partnership were related by various witnesses, but we deem it unnecessary to set them out.

While there is a sharp conflict in the testimony, and much to sustain the contention of appellant that no partnership existed, the question was one for the jury, and we cannot say that their verdict is flagrantly against the evidence.

The court did not err in permitting the bank's president (Mr. Bourne) to testify to a conversation had with C. G. Mathis, in which the latter stated that Charley Muir had declined to go into partnership with him, and that his father had taken his place. C. G. Mathis, on cross-examination, was asked if he had made such a statement, and he denied that he had. The evidence in question was incompetent as substantive testimony to prove partnership, but was admissible as affecting the credibility of C. G. Mathis, and the court so told the jury. Indeed, throughout the case the court did not permit any statements of C. G. Mathis, to the effect that he and his father were in partnership, to go to the jury for the purpose of establishing that a partnership existed.

Nor are we able to see how appellant was prejudiced by the statement of the president of the bank that the overdrafts in the account of C. G. Mathis in the bank were good if H. C. Mathis was bound, and were not worth anything if he was not bound. The fact that C. G. Mathis was insolvent is abundantly established in the record, and there was not a man upon the jury who did not know this fact, regardless of Mr. Bourne's statement.

The instructions given by the court are very long, and it will be unnecessary to set them out at length. Suffice it to say that in every substantial respect they conform to the instructions directed to be given by this court in the opinion and extended opinion on the former appeal.

Perceiving no error in the record prejudicial to the substantial rights of appellant, the judgment is affirmed.

**ATKINS et al. v. GLOBE BANK & TRUST CO. et al.**

**ATKINS' TRUSTEE et al. v. SAME.**

(Court of Appeals of Kentucky. Feb. 8, 1910.)

**1. BANKRUPTCY (§ 156\*)—PROPERTY OF ESTATE—TITLE OF TRUSTEE—RIGHT TO SUE THEREFOR.**

As the bankruptcy act (Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) gives the trustee title to the bankrupt's property, with the right to sue for its recovery either in the bankruptcy or a state court, he has a right, when permitted by the

bankruptcy court, to be substituted as plaintiff in suits by creditors in a state court to recover property fraudulently conveyed, to which, or its proceeds, he is entitled.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 243; Dec. Dig. § 156.\*]

**2. APPEAL AND ERROR (§ 1036\*)—HARMLESS ERROR—RULINGS AS TO PARTIES.**

Where the judgment in a creditor's action held a conveyance fraudulent as to antecedent creditors only, and left the disposition of the proceeds of a sale of the property open for future determination, failure to grant the request of grantor's trustee in bankruptcy to be substituted as plaintiff was harmless, if error, since it must be assumed that the court will order the proceeds of the sale paid to him for administration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4074; Dec. Dig. § 1036.\*]

**3. APPEAL AND ERROR (§ 1046\*)—HARMLESS ERROR—PREMATURE SUBMISSION OF ISSUES.**

Where parties filed new pleadings at the submission term, their rights were not prejudiced by the submission where the new issues raised thereby were found in their favor, so that they cannot complain that the submission was premature.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4129; Dec. Dig. § 1046.\*]

**4. DEEDS (§ 59\*)—DELIVERY—FILING FOR RECORD.**

The lodging of a deed for record in the proper office by the grantor is sufficient to constitute a delivery as of that date.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 186-189; Dec. Dig. § 59.\*]

**5. DEEDS (§ 54\*)—WHEN DEED BECOMES OPERATIVE.**

The general rule is that a deed does not become operative till delivered and accepted, or the grantor does some act equivalent to acceptance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 116; Dec. Dig. § 54.\*]

**6. DEEDS (§ 194\*)—DELIVERY—WHEN DEEDS TO INFANTS BECOME OPERATIVE—PRESUMPTIONS.**

If the grantees in a deed are infants, and the deed is beneficial to them, their assent to it and acceptance thereof will be presumed as of the time it is delivered to the clerk for record or placed in the hands of a third person to be delivered or recorded.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 579; Dec. Dig. § 194.\*]

**7. FRAUDULENT CONVEYANCES (§ 74\*)—CONVEYANCES CONSTRUCTIVELY FRAUDULENT.**

Under Ky. St. § 1907 (Russell's St. 2100), providing that every gift, conveyance, assignment, transfer, or charge made by a debtor of, or on, any of his estate without valuable consideration therefor, shall be void as to all existing liabilities, every voluntary conveyance is constructively fraudulent as to existing debts, whether fixed or contingent, or incurred as principal, surety, indorser, or guarantor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 186; Dec. Dig. § 74.\*]

**8. FRAUDULENT CONVEYANCES (§ 74\*)—CONVEYANCES CONSTRUCTIVELY FRAUDULENT.**

Under such section, no person can give away property which would be subject to his debts to the prejudice of existing creditors, and that he may at the time own and retain largely more than he gives will not defeat its operation, and, if what he gives away is needed to pay

debts, the property in the grantee's hands can be subjected for this purpose.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 186; Dec. Dig. § 74.\*]

**9. FRAUDULENT CONVEYANCES (§ 74\*)—CONVEYANCES CONSTRUCTIVELY FRAUDULENT—EVIDENCE.**

The very best evidence that a voluntary conveyance is constructively fraudulent as to antecedent debts is that it becomes necessary to subject the property thus conveyed to pay grantor's debts.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 186; Dec. Dig. § 74.\*]

**Appeals from Circuit Court, McCracken County.**

"Not to be officially reported."

Consolidated suits by the Globe Bank & Trust Company and others against T. J. Atkins and others. From a judgment for plaintiffs, defendants and Atkins' trustee in bankruptcy, whom the court refused to substitute as plaintiff, appeal. Affirmed on the appeal of the trustee, and reversed on the appeal of defendants.

Bradshaw & Bradshaw, Hendrick & Corbett, and J. D. Mocquot, for appellants. D. G. Park, for appellees.

**CARROLL, J.** In August, 1908, the Globe Bank & Trust Company filed its petition in the McCracken circuit court, assailing a voluntary conveyance made by T. J. Atkins, Sr., to his son, T. J. Atkins, and the children of his son, upon the ground that at the time he made the conveyance he was largely in debt to it, and therefore the conveyance was constructively fraudulent as to it and other antecedent creditors. It obtained an attachment, which was levied upon the real estate conveyed by the deed. Afterwards other creditors of Atkins filed separate suits seeking like relief, and obtained attachments which were levied upon the same property, and finally all of these suits were consolidated. Within four months after the suit of the Globe Bank & Trust Company was filed, Atkins upon the petition of some of his creditors was adjudged a bankrupt, and under proceedings taken and had in the bankrupt court A. Y. Martin was appointed trustee in bankruptcy. Thereupon Martin filed his petition in the McCracken circuit court, setting up that the conveyance made by Atkins was fraudulent, and asked that it be set aside and the property adjudged to belong to the trustee of the bankrupt for the benefit of his creditors. He further asked that as trustee he be sustained as plaintiff in the various suits seeking to set aside this conveyance, and that the case proceed to judgment in his name as trustee, and the proceeds of the sale of the property if the conveyance was adjudged fraudulent be paid over to him for distribution in the bankrupt court among the creditors of Atkins. To these

various suits the grantees in the deed filed an answer, in which they denied that the conveyance was constructively fraudulent, or fraudulent at all, and averred that at the time it was made Atkins, the grantor, was not primarily indebted to any person and had a large estate in addition to that voluntarily given by him to his child and grandchildren. After this, the creditors by amended pleadings set up that the deed made by Atkins, although dated December 3, 1906, was not in fact delivered to or accepted by the grantees until April 20, 1907. To this the grantees answered that the deed was in fact delivered to and accepted by them on December 4, 1906. Upon final hearing the court adjudged that the deed although dated December 3, 1906, was not delivered to or accepted by the grantee until April 20, 1907, and further adjudged that the deed was without valuable consideration, and constructively fraudulent as to antecedent creditors, and the attachments obtained by them were sustained and the property levied on ordered to be sold. It was further adjudged that, as the conveyance was not actually fraudulent, creditors whose debts were created after its execution were not entitled to have it set aside for their benefit, but these creditors are not complaining of the judgment refusing to award them any interest in the attached property. The trustee in bankruptcy was appointed special commissioner to sell so much of the property as might be necessary, and he was directed to hold the proceeds "subject to the final orders of this court in the further and final disposition of such proceeds or subject to the District Court of the United States for the Western District of Kentucky in the matter of T. J. Atkins, bankrupt, now pending in such court under its final distribution of the entire assets of the estate of such bankrupt in the final adjustment and settlement of all of its affairs before such court in such proceedings now pending therein in bankruptcy and the rights of all creditors in such bankrupt proceedings in the distribution or disposition of such proceeds by the bankrupt court are hereby reserved and not determined, but left open for final adjudications among them in such proceedings in bankruptcy." Of this judgment the trustee in bankruptcy complains because the court refused to substitute him as plaintiff, instead of the attaching creditors in the actions for the recovery of the property, and in failing to adjudge that the consolidated action should proceed in his name as trustee to recover the property for the benefit of the bankrupt's estate, and also in not expressly adjudging the trustee entitled to the proceeds of the sale of the property for distribution among the creditors of the estate through the trustee.

The grantees in the deed complain, first,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

because the action was prematurely submitted; second, because the lower court treated the deed as not delivered or accepted until April 20, 1907, when it should have been treated as delivered on December 4, 1906; and, third, because the court erred in holding the conveyance constructively fraudulent as to antecedent creditors.

Taking up first the questions raised by the trustee in bankruptcy, it seems to us that neither the failure of the court to allow the action to be prosecuted in his name, nor the judgment entered, prejudiced substantially or at all his rights as trustee for the benefit of the creditors. The bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) in section 70 invests the trustee with the title of the bankrupt as of the date he was adjudged a bankrupt to all of his estate not exempt, including property transferred by him in fraud of his creditors, and gives him the right to recover property so disposed of. As the statute gives to the trustee the title to the property of the bankrupt and the right to institute proceedings either in the bankrupt court or the state court for its recovery, he has also the right when authorized or permitted so to do by the bankrupt court to be substituted as plaintiff in any suits brought by creditors of the bankrupt in the state court for the purpose of recovering property fraudulently conveyed by the bankrupt and to which or the proceeds thereof the trustee in bankruptcy is entitled. *Anderson v. Anderson*, 80 Ky. 638; *Martin v. Smith*, 104 S. W. 310, 31 Ky. Law Rep. 882; *Moyer v. Dewey*, 103 U. S. 301, 26 L. Ed. 394; *Clarke v. Larremore*, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 558. In this case, however, there is serious question as to whether the trustee pursued in the manner pointed out in the order of the bankrupt court the course necessary to have himself substituted as plaintiff in the actions pending in the state court. But, however this may be, it is manifest that the failure of the state court to grant the request of the trustee did not in any manner prejudice his rights as the judgment rendered in the action accomplished all that the trustee could have secured if the action had been prosecuted in his name. It is true the trustee asked that the conveyance be declared fraudulent as to all creditors both subsequent and antecedent, while the court only adjudged that the conveyance was fraudulent as to antecedent creditors, but we do not understand that the trustee in bankruptcy is complaining of the judgment in so far as it refused to adjudge the conveyance actually fraudulent. The judgment does not undertake to dispose of the proceeds that may be realized from the sale of the property, but leaves this question open for future determination, and we do not doubt that, when the court comes to make an order concerning the disposition of the

proceeds in the hands of the trustee as special commissioner, it will direct that the proceeds be paid over to the trustee in bankruptcy to be administered as a part of the estate of the bankrupt in the bankruptcy court. In anticipation of what we assume the court will do, we may with propriety in this opinion direct that it make such orders. If the court in the judgment had undertaken to divest the trustee of the control of this fund, we would upon this point reverse the judgment with directions to proceed as indicated, but, as the court did not make such an order, we are of the opinion that on the appeal of the trustee the judgment of the lower court should be affirmed.

On the appeal of the grantees in the conveyance, the first error assigned is that the action was prematurely submitted for judgment. Some new pleadings were filed at the submission term by the persons attacking the conveyance; but, as the issues raised by these pleadings were adjudged in favor of the grantees in the deed, their rights were not prejudiced by the submission so far as these new issues were concerned; hence they are not in any position to complain that the submission was premature. The issues as to the date the deed was delivered should have been made up long before the June term, and, failing to do so, the grantees in the deed were in default. But this is not a matter of any consequence, as we are of the opinion that the deed was delivered on December 4, 1906. The evidence upon this point is that on December 3, 1906, the grantor made, signed, and acknowledged the deed, and gave it to the attorney who wrote it to deliver to the clerk for record. On the following day the deed was lodged in the clerk's office and the tax paid, but for some unexplained reason it was not recorded until April 20, 1907. There is no suggestion that any of the parties to the deed had anything to do with the failure of the clerk to record it at the time it was lodged for record, or in seasonable time thereafter. This was due to oversight or negligence on the part of the clerk. It is also true that the grantees, all of whom were infants except Ed Atkins, to whom a life estate was given, did not know that the deed had been executed or lodged for record until the day following its record. But we are of the opinion that the lodging of the deed for record in the proper office by the grantor was sufficient to constitute a delivery as of that date. The general rule is that a deed does not become operative until it has been delivered and accepted, or the grantee does some act equivalent to an acceptance of it. But if the grantees, or any of them, are infants, and the deed is beneficial to them, it will be presumed they assented to it and its acceptance by them will date from the time it is delivered to the clerk for record or placed in the hands of a third person to be

delivered or recorded. *Akers v. Shoemaker*, 102 S. W. 842, 31 Ky. Law Rep. 482; *Mullins v. Mullins*, 120 Ky. 643, 87 S. W. 764, 27 Ky. Law Rep. 1048; *Morrison v. Fletcher*, 119 Ky. 488, 84 S. W. 548, 27 Ky. Law Rep. 124; *Bunnell v. Bunnell*, 111 Ky. 566, 64 S. W. 420, 23 Ky. Law Rep. 800; *Id.*, 111 Ky. 566, 65 S. W. 607, 23 Ky. Law Rep. 1101.

On behalf of the grantees it is further argued that as Atkins at the time the deed was made was not liable except as surety or indorser in any amount or for any debts, and owned a large estate besides that voluntarily conveyed, the conveyance was not constructively fraudulent. Although the evidence shows that the indebtedness of Atkins in December, 1906, as principal was trifling, it is nevertheless a fact that as indorser, surety, and guarantor he had then assumed heavy obligations. Section 1907 of the Kentucky Statutes (Russell's St. § 2100) reads in part: "Every gift, conveyance, assignment, transfer or charge, made by a debtor, of or upon any of his estate without valuable consideration therefor shall be void as to all his then existing liabilities." Under this statute, every voluntary conveyance made by a person who is at the time liable for any debts is constructively fraudulent as to such obligations, no matter whether they are fixed or contingent or have been incurred as principal, or surety or indorser or guarantor. Under the statute, no person can give away property subject to his debts to the prejudice of his then existing creditors. The fact that he may at the time own and retain largely more than he gives will not be allowed to defeat the operation of the statute. If what he has given away is needed to pay his debts, the property in the hands of the grantees can be subjected for this purpose. The very best evidence of the fact that a voluntary conveyance is constructively fraudulent as to antecedent debts is the fact that it becomes necessary to subject the property thus conveyed to pay the debts of the grantor. *Crooke v. Hume*, 109 S. W. 364, 33 Ky. Law Rep. 162; *Trimble v. Ratcliff*, 9 B. Mon. 511.

Upon the appeal of Ed L. Atkins and others, grantees, the judgment must be reversed for the error in fixing the delivery and acceptance of the deed as of April 20, 1907, instead of December 4, 1906. To what extent this will affect the judgment creditors we are not advised; but only those creditors whose debts were created previous to December 4, 1906, are entitled to participate in the proceeds realized from the sale of the property. If the proceeds amount to more than sufficient to pay such debts, the surplus should be paid to the grantees in the deed.

Wherefore the judgment on the appeal of the trustee in bankruptcy is affirmed, and the judgment on the appeal of Atkins and others is reversed.

### FRITTS v. KIROHDORFER.

(Court of Appeals of Kentucky. Feb. 9, 1910.)

#### 1. TRIAL (§ 11\*)—DOCKETS—TRANSFER TO LAW DOCKET—TIME OF MOTION.

In an action on a note against two sureties, in which one against whom judgment was recovered, after satisfying it, filed an answer and cross-petition against the other surety for contribution, it was not error to overrule a motion, made by the latter before filing his answer to the creditor's petition and before the filing of the cross-petition, to transfer the case to the law docket; Civ. Code Prac. § 10, requiring such motion to be made when defendant answers.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 30; Dec. Dig. § 11.\*]

#### 2. APPEAL AND ERROR (§ 875\*)—QUESTIONS CONSIDERED—QUESTIONS ARISING IN PARTICULAR ACTION—APPEAL IN CROSS-ACTION.

On an appeal by a surety from the judgment against him upon the cross-petition of his co-surety for contribution after judgment was rendered against the latter in favor of the creditor and satisfied, any ruling made upon questions arising in the original action by the creditor cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3541, 3542; Dec. Dig. § 875.\*]

#### 3. PRINCIPAL AND SURETY (§ 200\*)—SUITS FOR CONTRIBUTION—EQUITABLE JURISDICTION.

Since the statute permits a suit at law between sureties for contribution without excluding the jurisdiction of equity, and Civ. Code Prac. § 661, permits a surety to maintain an equitable action against a co-surety for contribution, a co-surety may sue for contribution in equity as well as at law.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 641; Dec. Dig. § 200.\*]

#### 4. JUDGMENT (§ 617\*)—RES JUDICATA—PERSONS CONCLUDED—CO-SURETY—ACTION BY CREDITOR.

In an action against two sureties on a note, in which one surety against whom judgment went for the whole amount, after satisfying it, filed a cross-petition against his co-surety for contribution, the judgment overruling the demurrer of the cross-defendant to the creditor's petition on the ground of want of presentment and demand, and of protest for nonpayment and notice, and because of an alleged agreement by the creditor extending the time of payment after maturity, precluded the cross-defendant from setting up those defenses in the suit for contribution.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1136; Dec. Dig. § 617.\*]

#### 5. PRINCIPAL AND SURETY (§ 86\*)—NECESSITY OF PRESENTMENT AND DEMAND.

A surety on a note executed since the enactment of the negotiable instruments law is primarily liable thereon, and hence presentment, demand, protest for nonpayment, and notice thereof are not necessary as to him.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 307; Dec. Dig. § 86.\*]

#### 6. PLEADING (§ 149\*)—CROSS-PETITION—AGAINST THIRD PERSON.

In an action on a note against two sureties, in which one surety, against whom judgment went, after satisfying it, filed a cross-petition against his co-surety for contribution, the cross-defendant's answer to the cross-petition could not be made a cross-petition against another so as to set up an agreement by the latter to assume cross-defendant's liability upon

the note; such agreement not affecting the original cause of action, Civ. Code Prac. § 90, subsec. 3, not allowing a cross-petition to a defendant except upon a cause of action which affects or is affected by the original action, and section 111 providing that no pleading except an answer to the original petition, or plaintiff's reply to such answer, shall be made a cross-petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 301; Dec. Dig. § 149.\*]

**7. APPEAL AND ERROR (§ 1039\*)—HARMLESS ERROR—ACTION FOR CONTRIBUTION—PLEADING—CROSS-PETITION.**

Since under Civ. Code Prac. § 444, judgment may be had on motion by a surety against his co-surety for money paid, and by section 449 the motion may be determined upon or without written pleadings, a proceeding by cross-petition against a co-surety for contribution after judgment went against cross-petitioner for the creditor, if improper, was at most a mere irregularity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4078-4080; Dec. Dig. § 1039.\*]

**8. PLEADING (§ 411\*)—OBJECTIONS—WAIVER.**

Where a cross-defendant, on a cross-petition by his co-surety for contribution, consented that the answer and cross-petition against him be filed for record after a motion to strike the pleading was entered, he thereby waived any irregularity in proceeding by cross-petition for contribution.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1384, 1385; Dec. Dig. § 411.\*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by the German Bank of the City of Louisville against J. C. Kirchdorfer, W. H. Fritts, and others, in which defendant first named filed a cross-petition against the second-named defendant for contribution. From a judgment for cross-petitioner, cross-defendant appeals. Affirmed.

Huston Quin and Chas. A. Wickliffe, for appellant. Barnett & Barnett, for appellee.

SETTLE, J. On March 19, 1908, the German Bank of the City of Louisville brought suit in the court below against the Kirchdorfer Automobile Company, J. C. Kirchdorfer, W. H. Fritts, and H. T. Gratz, upon two promissory notes—the first being for \$1,150, bearing date August 21, 1907, due 30 days thereafter and credited by interest paid to January 23, 1908; the second for \$550, of date September 13, 1907, and due in 30 days, with the following credits indorsed thereon: Interest paid to January 23, 1908: \$100 paid October 26, 1907; \$100, December 23, 1907; \$100, February 8, 1908. The Kirchdorfer Automobile Company was the principal and J. C. Kirchdorfer, W. H. Fritts, and H. T. Gratz sureties, in each of the notes. The notes were payable to J. C. Kirchdorfer or order, negotiable and payable in the German Bank, and were, following their indorsement by Kirchdorfer and before maturity, discounted by the bank and the proceeds placed

to the credit of the Kirchdorfer Automobile Company on the books thereof. The parties to the notes owned stock in the Kirchdorfer Automobile Company. J. C. Kirchdorfer was the president, and Fritts and Gratz also officers thereof.

At the appearance term of the court, J. C. Kirchdorfer filed a demurrer to the petition, which was overruled. He then filed an answer to which the German Bank interposed a demurrer, and this demurrer the court sustained. Fritts, before answering, moved a transfer of the case to one of the divisions of the common pleas branch of the Jefferson circuit court. The motion was overruled and an exception reserved. Fritts thereafter filed an answer to the petition, in which, as later amended, he pleaded: (1) His suretyship on the notes; (2) that neither presentment nor demand of payment was made of him by the bank when the notes, or either of them, matured, nor was there any protest of either on account of nonpayment, or notice of such protest given him; (3) that upon, or following, the maturity of the notes, the German Bank, by agreement with J. C. Kirchdorfer, based upon a valuable consideration, viz., the payment by the latter of interest upon the notes in advance and his undertaking to make other payments which followed later, extended the time of their payment; all which was, as alleged, without notice to him (Fritts) and without his consent, and that by reason of the foregoing acts of the bank he had been and was released from all liability upon the notes. The court sustained a demurrer to Fritts' answer as amended, to which an exception was taken. In the meantime, on motion of the German Bank, the case had been submitted as to the Kirchdorfer Automobile Company and J. C. Kirchdorfer, and judgment rendered against them for the amounts, respectively, claimed to be due on the notes. Fritts made a motion to set aside this judgment, which motion was overruled, and to this ruling he excepted. A forthwith execution, which was issued upon the judgment, J. C. Kirchdorfer replevied, and later paid the replevin bond in full. After executing the replevin bond, J. C. Kirchdorfer filed in the action brought by the German Bank, which was still pending as to Fritts and Gratz, against whom judgment had not gone, a pleading entitled an amended answer and cross-petition, making Fritts a defendant, and in which was, in substance, set up the rendition of the judgment against the Kirchdorfer Automobile Company and J. C. Kirchdorfer, the insolvency of the company, and the satisfaction of the judgment by J. C. Kirchdorfer; also the insolvency of H. T. Gratz, and that W. H. Fritts, as co-surety with J. C. Kirchdorfer upon the notes merged in the judgment and equally liable with him thereon, should be made to contribute to the loss sus-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tained by Kirchdorfer in being compelled to satisfy the judgment in favor of the German Bank, which it was alleged amounted to \$1,378.46, for one-half of which, with interest and costs, judgment was prayed against Fritts. Fritts filed an answer thereto, containing the same matters of defense set up in his answer to the petition of the German Bank, and, in addition, that he had sold and on the books of the Kirchdorfer Automobile Company transferred, to Dr. J. H. Ward, his stock in that company, in consideration of which sale and transfer Ward agreed and undertook to assume and pay whatever liability he (Fritts) had incurred and was owing as a stockholder in or surety for the Kirchdorfer Automobile Company, including the two notes held by the German Bank, and that by reason of the sale of his stock to Ward and the assumption by the latter of his indebtedness he was released from liability upon the notes in question, and they would have been paid by Ward, but for the alleged laches and wrongful act of the bank in extending the time for their payment, under the alleged agreement with J. C. Kirchdorfer. The answer of Fritts was made a cross-petition against J. H. Ward.

By sustaining a demurrer to parts of Fritts' answer and cross-petition and a motion to strike out other parts thereof, both interposed by Kirchdorfer, practically all the matters of defense contained therein, except the averments as to the alleged act of the German Bank in improperly extending the time for the payment of the notes, were eliminated by the chancellor, and these averments were traversed by the reply of J. C. Kirchdorfer. J. H. Ward offered to file an answer to the cross-petition of Fritts, but the court refused to permit it to be filed. Upon the issue made by the pleadings, Kirchdorfer and Fritts took proof by deposition, and following the submission of the case judgment was rendered by the circuit court against Fritts and in Kirchdorfer's favor for one-half the amount paid by the latter in satisfaction of the German Bank's judgment, viz., \$699.33, with interest from October 1, 1908, until paid, and costs, and giving the latter the right to enforce its payment by execution or rule. From that judgment and a subsequent ruling of the court refusing to set it aside, this appeal is prosecuted.

Numerous grounds are urged by the appellant Fritts for a reversal. His first contention is that the trial court erred in overruling his motion to transfer the action to the law docket, which, it is claimed, would have carried it to one of the divisions of the common pleas branch of the Jefferson circuit court, and entitled appellant to a jury trial if demanded. It is needless to consider this objection, as it comes too late. The motion to transfer was not made after the filing of appellee Kirchdorfer's answer and cross-peti-

tion, but was directed solely to the transfer of the original action as brought by the German Bank, and was entered before appellant filed his answer to the bank's petition. Section 10, Civ. Code Prac., required that the motion be made when appellant filed his answer to the petition. No ruling made by the circuit court upon any issue or question as between the German Bank and appellant is involved or can be considered on this appeal. The only judgment appealed from is that found on page 38 of the record, which dealt with no question that arose between the German Bank and the appellant Fritts, but exclusively with such as arose between the latter and the appellee J. C. Kirchdorfer. If, however, the motion to transfer had been made after the filing of appellee's answer and cross-petition, it should have been overruled. A suit for contribution by sureties against their principal and against each other was, by the ancient law, of exclusively equitable cognizance; but the statute having given a remedy at law, without excluding the jurisdiction in equity, the jurisdiction has become concurrent, and the plaintiff may sue at law or in equity. Newman on Pleading & Practice, § 94. Besides, section 661, Civ. Code Prac., allows the surety to proceed by an equitable action against his principal or co-surety in such a state of case.

With equal propriety we might also say that two other grounds of defense set up in appellant's answer to appellee's cross-petition, viz., the alleged want of presentment and demand by the bank of the payment of the notes at maturity and of protest and notice thereof for nonpayment, and the alleged agreement whereby the bank, after their maturity, extended the time for their payment, could not be relied on as against appellee's claim because determined adversely to appellant by the court below in sustaining the demurrer to his answer to the bank's petition. If these defenses could not be made against the notes in the hands of the German Bank, they could not, it would seem, be relied on to defeat appellee's claim for contribution; so, as to these two grounds of defense, appellant is, we think, concluded by that judgment, whether erroneous or otherwise, which, as previously stated, is not before us for review on this appeal.

However, as to the alleged failure of the bank to demand of appellant payment of the notes at maturity, and failure to protect them for nonpayment, it may be said that, as surety upon the notes held by the bank, appellant was primarily liable to the holder, and neither presentment, demand, protest, nor notice of protest was required as to him or his co-obligors. The notes in question were executed since the enactment by the Legislature of the present negotiable instruments law, which excludes such a defense on the part of a surety.

As to the alleged extension of time, claimed to have been granted by the German Bank,

it may be observed that no such agreement was proved. The testimony of appellant failed to establish it, and that of appellee wholly disproved it.

The final defense of appellant, which rests upon an alleged contract whereby Ward took his place as a stockholder in the Kirchdorfer Automobile Company and assumed his liability upon the indebtedness of the company, is not available as against the claim of appellee for contribution.

Appellant's answer to appellee's cross-petition could not be made a cross-petition against Ward, because his transaction with Ward did not affect, and was not affected by, the original cause of action, viz., the German Bank's right to recover upon the notes. Section 96, subsec. 3, Civ. Code Prac. Moreover, section 111, Civ. Code Prac., provides: "No pleading except an answer to an original petition, or the plaintiff's reply to such answer, shall be made a cross-petition." If appellant has a cause of action against Ward or appellee, or Ward a cause of action against appellee growing out of the alleged transaction between appellant and Ward, it may yet be litigated by the parties concerned in another action.

It is insisted for appellant that the circuit court erred in permitting appellee's answer and cross-petition to be filed after judgment had gone against him in favor of the German Bank for the amount of the notes sued on. In response to this contention it is sufficient to say that appellee might have proceeded against appellant upon his claim for contribution by a mere motion for judgment, after notice, as allowed a surety by section 444, Civ. Code Prac. If he had proceeded in that way, no written pleadings would have been required. Section 449, Civ. Code Prac. So, at most, the proceeding by a cross-petition, if it could be said to be improper at all, was a mere irregularity. In any event, appellant cannot now complain of it, as it appears from the record (page 25) that he consented that the answer and cross-petition of appellee, which had been filed in the clerk's office, be filed for record; such consent having been given after his motion to strike the pleading from the files was entered. This, we think, was a waiver of the motion and of any irregularity in the form of the pleading.

The record disclosing no substantial reason for disturbing the judgment, the same is hereby affirmed.

PITTSBURG, C., C. & ST. L. RY. CO. et al. v. SCHAUB.

(Court of Appeals of Kentucky. Feb. 11, 1910.)

1. MASTER AND SERVANT (§ 231\*)—SAFE PLACE TO WORK—DANGER OF INJURY—JUDGMENT OF FOREMAN—RIGHT TO RELY THEREON.

Employés have a right to rely on the judgment of their foreman as to the danger of in-

jury in work he orders them to do, unless so manifestly dangerous that a person of ordinary prudence would not undertake it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 675; Dec. Dig. § 231.\*]

2. MASTER AND SERVANT (§ 236\*) — SAFE PLACE TO WORK—PRECAUTIONS FOR SAFETY —RIGHT TO PRESUME.

Two employés, acting under the immediate orders of their foreman, went under a loaded car on a private switch track connected with the plant to stop a hole in the floor through which grain was leaking; the foreman having gone to the office. It was unusual for the railroad company to put cars in on the switch till notified so to do, but without such notice a railroad crew pushed two other cars on the switch track without notice to such employés, and one whose back was towards the approaching cars was injured before he could get out. Held, that the employés had a right to presume the foreman had taken, or would take, sufficient precautions for their safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 724; Dec. Dig. § 236.\*]

3. MASTER AND SERVANT (§§ 286, 289\*)—SAFE PLACE TO WORK—ASSUMPTION OF RISK—PRECAUTIONS FOR SAFETY—QUESTIONS OF LAW.

The situation was not so manifestly dangerous that it could be said, as a matter of law, either that a person of ordinary prudence would not have undertaken the work, or that some precautions should not have been taken for their safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1043, 1089-1132; Dec. Dig. §§ 286, 289.\*]

4. NEGLIGENCE (§ 111\*)—PLEADING.

Negligence may be alleged generally, and the facts constituting it need not be set out, as this matter is evidential.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 182; Dec. Dig. § 111.\*]

5. RAILROADS (§ 282\*) — PERSONS WORKING ABOUT CARS—ACTION FOR INJURIES—PLEADING NEGLIGENCE.

When, in a suit against a railway company for injury to a person at work under a box car on a private switch track when other cars were pushed thereon, plaintiff alleged defendant knew, or by ordinary care could have known, he was under the car, and with this knowledge by gross negligence backed the car on him, he sufficiently stated his case for negligence against it, and he may show the circumstances making out its negligence, without setting them out in the pleading.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 910; Dec. Dig. § 282.\*]

6. RAILROADS (§ 275\*) — PERSONS WORKING ABOUT CARS—PRECAUTIONS TO AVOID INJURY.

A railroad crew must anticipate the presence of persons about a car on a private siding, not ready to be moved, in charge of the shipper, and should not bump against it without notice.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 873; Dec. Dig. § 275.\*]

7. MASTER AND SERVANT (§ 258\*)—SUIT FOR INJURIES—PLEADING—CONCURRING NEGLIGENCE—SAFE PLACE TO WORK.

In a suit against a manufacturing company for injury to an employé, plaintiff alleged that he was instructed by defendant to go under a car on a switch track to do certain work thereon, and that in obedience to orders he located himself thereunder, and proceeded to repair the same as directed; that defendant with gross

negligence failed to provide reasonably sufficient warning or protection, and, notwithstanding its knowledge of his peril, negligently allowed an engine to bump into the car; that the premises were at the time and place under the joint control of defendant and its codefendant railway company, and that each of them participated in the negligent acts set out, and with joint and gross negligence inflicted, and caused to be inflicted, on plaintiff his injuries complained of. *Held*, that the facts alleged showed a cause of action against the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.\*]

**8. MASTER AND SERVANT (§ 293\*)—ACTION FOR INJURIES—INSTRUCTIONS—SAFE PLACE TO WORK.**

The facts so alleged warranted an instruction that it was its duty to exercise ordinary care to furnish plaintiff a reasonably safe place to work, and to keep it safe, and that when it directed him to go under the car to work, it was its duty to exercise ordinary care to protect him from injury by a movement of any car on the siding while he was so engaged; and, if it failed to do so, and by reason thereof he was hurt, the jury should find in his favor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.\*]

**9. MASTER AND SERVANT (§ 296\*)—SUIT FOR INJURIES—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.**

An employé was injured by the bumping of a car against another under which he was at work with a co-employé on a private siding belonging to his employer. In a suit therefor, he and his co-employé were the only persons testifying as to notice of the danger. Plaintiff said that the notice and bump came practically at the same time. His co-employé's evidence was so uncertain as not to contradict him as to whether he could by ordinary care have avoided danger after his co-employé gave him warning. There was no other evidence of his want of care. The court instructed that it was his duty to use ordinary care for his own safety, and that, if he failed to do so, and but for such failure would not have been injured, the jury should find for defendants, his employer and the railway company. *Held*, that defendants were not substantially prejudiced by the form of the instruction; that, while it would not have been improper to have instructed them that, if he was notified of the danger, and after such notice failed to exercise ordinary care for his own safety, and but for this would not have been injured, the jury should find for defendants, the instruction given carried with it this idea.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

**10. APPEAL AND ERROR (§ 1004\*)—REVIEW—CONFLICTING EVIDENCE—AMOUNT OF DAMAGES FOR PERSONAL INJURY.**

A finding on conflicting evidence as to the amount of damages in a personal injury case will not be disturbed on appeal, where it cannot be said on the whole case that the verdict is palpably against the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.  
"To be officially reported."

Suit by John Schaub against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and another, for personal injury. From a judgment for plaintiff, defendants appeal. Affirmed.

Chas. H. Gibson, Bennett H. Young, M. A. Rippey, and E. C. Walde, for appellants. Popham & Webster and Kohn, Baird, Sloss & Kohn, for appellee.

**HOBSON, J.** The Kentucky Malt & Grain Company operates a plant at Thirteenth and Maple streets in Louisville, and owns in connection with its plant a railway switch track connecting with the tracks of the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. This switch track is short, holding only about four cars. John Schaub was an employé of the grain company, and on March 10, 1908, was directed by his foreman to go under a car standing on the switch track with a fellow workman named Linert, to stop a hole which had been discovered in the floor of the car through which the grain was leaking. The car had been placed on the switch the day before to be loaded, and after it was loaded this leak was discovered, and it was necessary to stop the leak before the car was sent out on the road. While Schaub and Linert were under the car engaged in this work, the foreman of the grain company, who had put them to work there, went to the office to make out a waybill for the car, and while he was gone to the office, a crew on the railroad pushed in two other cars on the switch track without notice to Schaub and Linert. These cars ran against the cars on the track, and pushed the car that they were working under so that the axle struck Schaub a blow on the arm. Linert, who was looking in that direction, perceived the danger in time to get out, and he called to Schaub, who was farther under the car and had his back turned to the approaching cars, but Schaub did not get the notice in time to avoid the injury. Schaub brought this suit against both companies to recover damages; a trial was had which resulted in a verdict and judgment against each for \$1,000, and they appeal.

The court by its instructions told the jury in substance that it was the duty of the grain company to exercise ordinary care to furnish Schaub a reasonably safe place to work, and to exercise ordinary care to keep it safe, and that when it directed him to go under the car to work, it was its duty to exercise ordinary care for his protection from injury by a movement of any car on the siding while he was so engaged; and, if it failed to do this, and by reason of such failure he was hurt, they should find for him as to it. He also told the jury that it was the duty of the railroad company, in moving the cars on the siding of the grain company, to exercise ordinary care for the safety of its

employees, and to that end to give the usual signals of the movement of any engine on the siding by ringing the bell; and, if the crew in charge of the engine knew, or by the exercise of ordinary care could have known, that the plaintiff was under the car at the time they moved the engine, or if they failed to give the usual signals of the movement of the engine, and thus backed against the car and injured him while at work under it, they should find for him against it. He further instructed the jury that it was the duty of Schaub to use ordinary care for his own safety, and that if he failed to do this, and but for such failure would not have been injured, they should find for the defendants.

The grain company insists that it is not liable; for Schaub knew, as is shown by the evidence, that nobody was on the lookout, and that therefore he took the risk, as between him and it, when he remained under the car at work after the superintendent went away to the office to make out the way-bill. Schaub and Linert were acting under the immediate orders of their superior, and they had a right to rely upon his judgment, unless the work was so manifestly dangerous that a person of ordinary prudence would not have undertaken it. They had a right to presume that he had taken, or would take, sufficient precautions for their safety, as he could have done by giving the railway company notice of what was going on, or otherwise protecting them. It was not usual for the railway company to put cars in on this switch until notified by the grain company. It was the private switch of the grain company, and the situation was not so manifestly dangerous that it can be said, as a matter of law, that a person of ordinary prudence would not have undertaken the work. Nor can it be said, as a matter of law, that some precautions should not have been taken to secure these men in their perilous position under the car.

As to the railway company, it is insisted that the instructions of the court submitted to the jury a matter which was not put in issue by the petition. It is said that the plaintiff had set out the negligence on which he relied, and that the court by its instructions submitted to the jury the question whether there was negligence in moving the engine in on the siding without any signals, when this was not alleged. This is too narrow a construction of the pleading. The original petition, among other things, contains the following: "He states that defendants, and each of them, well knew that it was customary for persons to, and they frequently did, crawl under said cars, for the purpose of making repairs and other purposes incident to the facilitation of said business, and well knew that a person thereunder was in great peril and danger to his life and limb unless great care was by them exercised for his protection. He states that notwithstanding said custom, instructions,

peril, and danger, the defendant Pittsburg, Cincinnati, Chicago & St. Louis Railway Company did then and there, with gross negligence and carelessness, run and cause to be run a certain switch engine in on said track and violently onto and against said car, putting the same in motion, thereby inflicting upon plaintiff the injuries hereinafter set out." The court sustained the demurrer of the railway company to the petition, and he then filed an amended petition, in which he made this further averment: "That at the time and place he was injured said defendant knew, or could by the exercise of ordinary care have known, of his peril under his box car where he was working."

This court has held in a long line of cases that negligence may be alleged generally, and that the facts constituting the negligence need not be set out, as this matter is evidential. When the plaintiff alleged that the defendant knew, or by ordinary care could have known, that he was under the car, and with this knowledge by gross negligence backed the car upon him, he sufficiently stated his case under the rulings of this court, and he may show the circumstances making out the negligence of the defendant without setting them out in his pleading, for the reason that the want of ordinary care is often a matter depending upon a number of facts, and to set them all out in the pleading would be unnecessarily to incumber it. In *Chiles v. Drake*, 2 Metc. 149, 74 Am. Dec. 406, the court thus stated the rule: "In actions for personal injuries resulting from negligence, it has always been regarded as sufficient for the plaintiff to allege in general terms that the injury complained of was occasioned by the carelessness and negligence of the defendant. He has not been required to state the circumstances with which the infliction of the injury was accompanied, in order to show that it had been occasioned by negligence. An allegation of the extent of the injury and of the manner in which it was inflicted has been always regarded as sufficient. \* \* \* The injury complained of was the killing of the plaintiff's intestate. The manner of its infliction was by shooting. The shooting and killing were occasioned, as alleged, by the 'willful neglect' of the defendant. These facts were all set forth in the petition, and nothing more was necessary." In *Louisville, C. & L. R. R. Co. v. Case*, 9 Bush, 732, the court, following the above, said: "The averment of the essential facts—viz., the death of the intestate—that his life was destroyed by the act of the railroad company in running its cars over him, and the carelessness and negligence through or by which this was done, made out for appellee a cause of action, under the first section of the act of 1854." The same rule has been followed in personal injury cases where death did not result. *L. & N. R. R. Co. v. Wolfe*, 80 Ky. 84; *Ky. Central R. R. Co. v. McMurtry*, 3

Ky. Law Rep. 625; Depp v. L. & N. R. R. Co., 14 S. W. 363, 12 Ky. Law Rep. 367; Connell v. C. & O. R. R. Co., 58 S. W. 374, 22 Ky. Law Rep. 501. This car had been set on the side track to be loaded. The preparation of the car for delivery to the railway company had not been completed; it was not ready to be moved, and was still in charge of the grain company. The railway crew were required to anticipate the presence of persons about that car, and should not have bumped against it without notice. In the recent case of Louisville & Nashville R. R. Co. v. Hurst, 116 S. W. 291, we said: "The rule is well settled that where the railroad company places a freight car upon a side track for the purpose of its being unloaded by the owners of the freight or their servants, the servants are rightly upon the car, and the railroad company has no right in such a case to back other cars against it without warning, so as to injure them."

For the reason we have given the petition is not insufficient as to the grain company. Among other things it contained as to it these allegations: "He states that on or about March 10, 1908, the plaintiff was in the employ of defendant Kentucky Malt & Grain Company at and upon said premises, and as such employé was instructed by defendant, its superior officers and agents over plaintiff, to get under a certain car upon said switch track at and near said scales, as aforesaid, and to do certain work thereunder for the prevention of grain leakage; that in obedience to said orders plaintiff located himself under said car, and proceeded to repair the same as directed. \* \* \* He states that defendant Kentucky Malt & Grain Company did then and there with gross negligence and carelessness fail to provide suitable or reasonably sufficient warning or protection to plaintiff, and notwithstanding its knowledge of his peril and danger negligently allowed said engine to bump into and violently knock said car. He states that said premises were at said time and place under the joint control of defendants, and that they and each of them participated and concurred in the wrongful and negligent acts hereinbefore set out, and with joint gross negligence inflicted, and caused to be inflicted, upon plaintiff his injuries herein complained of."

The facts thus alleged showed a cause of action against the grain company, and fully warranted the instruction given by the court. There was no substantial prejudice done the defendants by the form of the instruction on contributory negligence. While it might not have been improper to have given an instruction to the effect that if Schaub was notified of the danger, and after such notice failed to exercise ordinary care for his own safety, and but for this would not have been injured, the jury should find for the defend-

ants, the instruction which the court gave carried with it this idea, and if the instruction in the other form had been given, we are satisfied it would have had no effect on the result, for the reason that Schaub and Linert are the only witnesses testifying on the subject. Schaub says the notice of the danger and the bump of the car came practically at the same time, and Linert's evidence is so uncertain as not to amount to a contradiction of Schaub as to whether Schaub could by ordinary care have avoided the danger after Linert gave him warning. There was no other evidence of want of care on the part of Schaub, and it is not to be readily believed that a man in Schaub's position would quietly stay under the car when he had notice that an engine was backing down against it.

As to the extent of the injury three doctors testified; the arm was exhibited to the jury, and was examined by the doctors in their presence. If the evidence of Schaub and his doctor alone were taken, he has not recovered nearly enough. If the evidence for the defendant alone is taken, he has recovered far too much. But the jury had the witnesses before them, and we cannot say on the whole case that their verdict is palpably against the evidence.

Judgment affirmed.

CITY OF GEORGETOWN v. GROFF et al.  
(Court of Appeals of Kentucky. Feb. 4, 1910.)

1. INDEMNITY (§ 13\*)—JOINT WRONGDOERS.

There can be no indemnity as between joint tort-feasors, unless the one seeking indemnity did not join in the unlawful act, though exposed to liability therefor, and he has been made to suffer therefor in damages.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 31; Dec. Dig. § 13.\*]

2. INDEMNITY (§ 13\*)—JOINT WRONGDOERS.

Until a judgment against a city for injuries to a traveler on a defective street has been paid by it, it may not proceed against a third person actually liable for the defect for indemnity.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 31; Dec. Dig. § 13.\*]

3. WITNESSES (§ 240\*)—EXAMINATION—LEADING QUESTIONS.

Where leading questions are objected to, the court should require counsel to so frame his questions as not to suggest the answers desired.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 837-851; Dec. Dig. § 240.\*]

4. EVIDENCE (§ 528\*)—OPINION EVIDENCE—ADMISSIBILITY.

The testimony of a physician in a personal injury action that he thought the injury would produce a certain result, and that in his judgment it did produce such result, was equivalent to a statement that the injury would and did produce the result and was competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335-2337; Dec. Dig. § 528.\*]

5. MUNICIPAL CORPORATIONS (§ 790\*)—OBSTRUCTIONS IN STREETS — PRECAUTIONS AGAINST INJURIES.

A city must keep its streets in a reasonably safe condition, and where, in making im-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

provements, it becomes necessary to place obstructions therein, it must use reasonable care to protect persons using the street at night from injury by giving notice, by the use of lights or other means, reasonably sufficient to warn the traveling public of the presence of the obstructions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1639; Dec. Dig. § 799.\*]

**6. MUNICIPAL CORPORATIONS (§ 803\*)—OBLIGATION OF TRAVELERS ON STREETS.**

A traveler on a street at night must use ordinary care in driving thereon.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1673, 1682; Dec. Dig. § 803.\*]

**7. DAMAGES (§ 30\*)—PERSONAL INJURIES—DOUBLE DAMAGES.**

A person permanently injured is entitled to recover for his diminished earning power because of such injury, but he is not also entitled to a recovery for the permanent impairment of his health, for such a recovery will permit double damages for the permanent injury.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 30.\*]

**8. DAMAGES (§ 95\*)—PERSONAL INJURIES.**

A person sustaining a physical injury is entitled to such damages as will fairly compensate him for any suffering which he has endured and which it is reasonably certain he will endure in the future as the direct and proximate result of the injury, and for any loss of time occasioned by the injury, and for any reduction of his power to earn money.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. § 95.\*]

Appeal from Circuit Court, Scott County.  
"To be officially reported."

Action by Carrie D. Groff against the City of Georgetown in which the city filed a cross-petition against James P. Donovan and another. From a judgment for plaintiff against the city and denying relief on the cross-petition the city appeals. Reversed and remanded.

B. M. Lee, for appellant. Ford & Ford, for appellee Groff. J. N. Elliott and Stoll & Bush, for appellee Cantrill.

LASSING, J. While driving in a buggy on Chambers avenue in the city of Georgetown, on the night of September 14, 1908, Mrs. Carrie D. Groff drove against or over a pile of locust posts which had been put in said street and left there while certain repairs were being made by James P. Donovan, under contract with the city of Georgetown. When her buggy came in contact with the posts it was overturned and she was injured. Thereafter she brought suit against the city, in which she claimed damages in the sum of \$10,000 because of the injuries thus received, and charged that the city had been negligent in failing to keep its street in safe condition for public travel. The city answered, and, in addition to denying the material allegations of the petition, pleaded contributory negligence. It made its answer a cross-petition against Donovan, the contractor, and Mrs. Mary C. Cantrill. Sum-

mons were issued on this cross-petition, and Donovan and Mrs. Cantrill brought before the court. General demurrers were filed to the cross-petition by Donovan and Mrs. Cantrill, and, upon consideration, the demurrer filed by Mrs. Cantrill was sustained, and the cross-petition was dismissed as to her. Donovan answered, in two paragraphs. In the first he pleaded that Mrs. Cantrill was the real owner of the logs; that he cut down the trees and she directed him to leave them where they were in the street; and that in obedience to her order he did so. In the second paragraph he admits that he is an independent contractor, but pleads that if there was any negligence it was the negligence of joint tort-feasors, and he denied the right of the city to recover anything from him. A general demurrer to the answer of Donovan was filed, but no disposition was made of it, and the city answered. On the issues thus joined the cause went to trial, and at the conclusion of the evidence a peremptory instruction was given the jury to find for defendant Donovan, and the cross-petition was dismissed as to him. The trial proceeded against the city alone, with the result that a verdict of \$5,000 was returned in favor of the plaintiff. Judgment was entered thereon, and, the motion and grounds for a new trial having been overruled, the city appeals.

We will consider the grounds upon which a reversal is asked in the order in which they were made. The first and second complaints of the city may be considered together. The first is that the court erred in sustaining a demurrer to its cross-petition and dismissing same as to Mrs. Cantrill; and the second is that the court erred in instructing the jury at the conclusion of the evidence to find for the defendant Donovan and in dismissing the case as to him on its cross-petition.

It is the contention of the city that its cross-petition stated a cause of action against both Donovan and Mrs. Cantrill. Section 96, subsec. 3, of the Civil Code of Practice, defines a cross-petition as follows: "A cross-petition is the commencement of an action by a defendant against a codefendant or a person who is not a party to the action, or against both; or by a plaintiff against a co-plaintiff, or a person who is not a party to the action, or against both." It is clear, from this definition, that in order for the defendant to successfully maintain its position, it must set up in its cross-petition a cause of action against its codefendant or against the parties whom it sought to have made codefendants. Has it done so? We think not. They were joint tort-feasors, and it is a well-established rule that, as among themselves, there can be no indemnity, unless it be made to appear that the one seeking indemnity did not join in the commission

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

of the unlawful act and he has been made to suffer thereby, i. e., to respond in damages therefor. This principle was recognized by this court in the case of *Blocker v. City of Owensboro*, 129 Ky. 75, 110 S. W. 369, in which it was held: "It is well settled that, although a person injured by an obstruction in the street may sue the city alone, or both the city and the person who placed the obstruction in the street, and recover damages against both, and look to either or both for satisfaction of the judgment, yet as between the wrongdoers the city may, if it is required to satisfy the judgment, recover the amount thereof from the person who placed the obstruction in the street." And, in dealing with the same subject, we find the following in 22 Cyc. 99: "It is a well-established rule of law that there can be no indemnity among tort-feasors. But this rule does not apply to a person seeking indemnity who did not join in the unlawful act, although he may thereby be exposed to liability or to one who did not know and was not presumed to know that his act was unlawful; it must appear that the parties are in pari delicto as to each other before plaintiff's recovery will be barred." The circumstances under which one joint tort-feasor is permitted to recover from another are clearly stated in the case of *Geneva v. Brush Electric Co.*, 50 Hun, 581, 3 N. Y. Supp. 595: "The cases in which recovery over is permitted in favor of one who has been compelled to respond to the party injured are exceptions to the general rule and are based upon principles of equity. Such exceptions obtain in two classes of cases: First, where the party claiming indemnity has not been guilty of any fault except technically or constructively, as where an innocent master was held to respond for the tort of his servant acting within the scope of his employment; or, second, where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury." Thus, it will be seen that, even in that class of cases which are looked upon and treated as exceptions to the rule, and wherein a recovery is permitted by one joint tort-feasor against another, it is held that the right to such recovery is based upon two propositions: First, that the one seeking indemnity has been compelled to respond in damages for the wrong; and, second, that he was not in equal fault with the joint tort-feasor against whom he is proceeding.

For the purposes of the question at hand, the case must be decided adversely to the contention of the city, for, at the time it was seeking to proceed by cross-petition against Donovan and Mrs. Cantrill, it had not been compelled to respond in damages for the wrong. It had paid nothing; it had suffered no loss; and hence, under the authority of the *Blocker Case* and the *Geneva Case*,

*supra*, the city was not entitled to maintain its cross-petition against either Mrs. Cantrill or Donovan; and the trial court correctly held that it stated no cause of action against Mrs. Cantrill, and should have sustained the demurrer of Donovan to the cross-petition as well.

We expressly refrain from passing upon the right of the city to proceed against either Donovan or Mrs. Cantrill, or both, in the event plaintiff shall finally recover and collect a judgment against it; but simply hold that, until a judgment has been recovered against it and such judgment been paid by the city, it may not proceed against either for indemnity.

The next ground for reversal relied upon is that the court erred in admitting certain evidence. During the progress of the trial the witness Sam Yung was permitted to testify that, while he was working for Donovan, the contractor, and had charge of the men who cut down the trees and piled the logs in the street, he placed lights on the logs at night each night up to the Saturday night before the accident, which happened on Monday night, and that on several occasions he had conversations with Donovan about the danger or probability of an accident happening in the event the lights were not kept on the logs. This testimony, of course, was permitted to go to the jury for the purpose of showing knowledge on the part of Donovan that the logs, as placed in the street, if left unguarded, were liable to cause some one to be injured, and had the court not given a peremptory instruction to find for Donovan as against the city, the instruction would have, no doubt, confined this evidence towards establishing or fixing the liability of Donovan as between him and the city. But, inasmuch as the cross-petition was dismissed as to him, this evidence became unimportant, and will not be given at all upon another trial; hence, a further consideration of the ruling of the trial judge in permitting this evidence to go to the jury need not be entered into.

The other evidence complained of as incompetent and prejudicial is the testimony of Dr. Pack, the witness who attended Mrs. Groff and treated her for her injuries. The objection, it seems, goes more to the form of the question than to the competency of the evidence. The questions complained of were undoubtedly leading, and the court should have required counsel to so frame his questions as not to suggest the answers desired. But we do not think that defendant's case was prejudiced by reason of the form in which these questions were put. The contention of counsel for defendant that the answers to the several questions propounded to Dr. Pack were incompetent is, we think, without merit, for while it is true the doctor's testimony was not positive, still it must be remembered that the testimony of physicians as to whether or not a given effect is produced, or has been

produced or brought about, by certain acts is always matter more or less speculative, and when the doctor, in answer to the question as to whether or not the given acts—i. e., the injury—produced a certain result, answered, "I would think it would," or, "In my judgment it did," his answer is as well understood by the jury as though he had answered "It would" or "It did," for in the end he means that such is his judgment, based upon his experience as a practitioner. We think this evidence was competent.

The next ground relied upon for reversal is that the court did not properly instruct the jury. Complaint is made especially of instructions 1 and 3. Instruction No. 1 is objectionable upon two grounds: First, in it the jury is told that it is the duty of the city to protect persons using the street at night from injury, thus making the city an absolute guarantor of the safety of the traveling public while passing over its streets at a time when improvements are being made thereon, when the instruction should have been to the effect that it was the duty of the city to use reasonable means to protect the traveling public from injury, etc.

The complaint of appellant that the court erred in telling the jury that it was the duty of the city to maintain upon or near the obstruction lights at night is not well taken, for it is immaterial whether the lights used are upon or near the obstruction, so long as they afford or give to the traveling public such warning as is reasonably necessary to advise them of the presence of the obstruction in the street. As said by this court in the case of *Grider v. Jefferson Realty Co.*, 116 S. W. 691, it is the duty of the city, when the obstructions are placed in the street, to use such means as are reasonably necessary to warn those using the street of the presence of the obstruction, and it is a question for the jury, under the particular facts in each case, to determine whether or not the means used for this purpose were reasonably sufficient. Guard rails, lights, or watchmen, any or all, might be required, according to the local conditions. In some instances guard rails might be amply sufficient, in others, lights, while in still others additional means might be required. No hard and fast rule can be laid down fixing the means that shall be employed in each particular case, further than to say that they shall be such as are reasonably sufficient to warn the traveling public of the presence of the obstruction. Instruction No. 1 was not as explicit upon this point as it should have been, and for this reason, in addition to that above given, it was faulty, and upon another trial, in lieu thereof, the court will give the following: "The court instructs the jury that it was the duty of the plaintiff Carrie D. Groff, in driving upon and over the streets of the defendant, the city of Georgetown, to use ordinary care for her own safety; and it was the duty of the defendant, the city of Georgetown, to

keep its streets in a reasonably safe condition for public travel, and if, in making improvements thereon, it became necessary to place logs or other obstructions in the streets, then it was the duty of said city to use reasonable care to protect persons using the said street at night from injury by giving such notice, by the use of lights or other means, as was reasonably sufficient to warn the traveling public of the presence of such obstructions in the street; and if the jury believe from the evidence that the defendant, the city of Georgetown, its agents, servants, or employes, placed in and upon Chambers avenue, a public street in said city, the pile of logs with which the plaintiff Carrie D. Groff came in contact, or that said city, its agents and servants or employes, suffered and permitted said logs to remain in said street after notice of their presence therein, and the plaintiff Carrie D. Groff came in contact with them and was by reason thereof injured, and that the defendant, the city of Georgetown, failed to use reasonable care to protect persons using said street at night from injury, by giving such notice of the presence of said obstruction in said street, by the use of lights or other means reasonably sufficient to warn them of the presence of such obstruction, when using the street in a reasonably careful and prudent manner, and by reason of such failure on the part of the defendant, if it did so fail, the plaintiff drove her buggy upon or against said logs, causing it to be overturned and producing the injuries of which she complains, and she did not, by her own negligence, help to cause or bring about her injury, then the jury should find for the plaintiff; and, unless you so believe, you should find for the defendant."

Appellant also complains of instruction No. 3, which is as follows: "If the jury find for the plaintiff Carrie D. Groff under instruction No. 1, they ought to award her such a sum of money as they believe from the evidence will fairly and reasonably compensate her for the pain and suffering, mental and physical, sustained by her as a result of the injuries complained of, and for the permanent impairment of her health and power to earn money, if any, not exceeding the sum of \$10,000, the amount claimed in the petition." This instruction authorized the jury to award double damages if they believed from the evidence that the injury was permanent. Plaintiff, if her injury is permanent, is entitled to recover for her diminished power to earn money because of such injury. This is the full measure of her recovery for her permanent injury, and she is entitled to no instruction authorizing any recovery for the permanent impairment of her health. The permanent impairment of her power to earn money is the result of the permanent impairment of her health, and to permit a recovery for the latter as well as the former would be to authorize the jury to award her double damages for her permanent injury. This the

law does not contemplate. The evidence tending to show that plaintiff's injury is permanent is quite meager, still there is some slight evidence authorizing the court to give an instruction upon this point. But the instruction given was erroneous and highly prejudicial to the defendant. If, upon the next trial, the evidence shows that the plaintiff has fully recovered, then, in lieu of instruction No. 3, as given upon the last trial, the court will give the following: "If you find for the plaintiff Carrie D. Groff under instruction No. 1, you should award her such sum as will fairly compensate her for any suffering, mental or physical, which she has endured by reason of the injury complained of, and for any loss of time occasioned by said injury, not exceeding in all \$——." Although the plaintiff has not entirely recovered and is yet suffering because of said injury, if there is no evidence tending to show that her injury is permanent, the court will give the following instruction: "If you find for the plaintiff Carrie D. Groff under instruction No. 1, you should award her such sum as will fairly compensate her for any suffering, mental or physical, which she has endured, and which it is reasonably certain from the evidence she will yet endure as the direct and proximate result of her injury, and for any loss of time occasioned by said injury, not exceeding in all \$——." If there is evidence tending to show that the injury is permanent, then the court should give the following instruction: "If you find for the plaintiff Carrie D. Groff under instruction No. 1, you should award her such sum as will fairly compensate her for any suffering, mental or physical, which she has endured by reason of the injury complained of, and for any loss of time occasioned by said injury, and for any reduction of her power to earn money."

For the reasons indicated, the judgment is reversed and cause remanded for a new trial and further proceedings consistent herewith.

**MCCABE'S ADM'X v. MAYSVILLE & B. S. R. CO. et al.**

(Court of Appeals of Kentucky. Feb. 10, 1910.)

**1. JUDGMENT (§ 829\*)—JUDGMENT OF UNITED STATES COURT—EFFECT IN STATE COURT.**

Where the federal circuit court assumed jurisdiction of a case removed from a state court, and dismissed the action on plaintiff's default, from which judgment no appeal was taken, such judgment was conclusive of the question whether the cause was removable, though plaintiff during the pendency of the action in the federal court prosecuted an appeal to the state Court of Appeals, and secured a reversal of the order of the trial court removing the case to the federal court, and plaintiff could not, after the judgment of the Court of Appeals was reversed by the United States Supreme Court, and the cause remanded to the state trial court, interpose a demurrer to an answer then filed by defendant, pleading the judgment of the

federal circuit court in bar of the further prosecution of the suit on the ground that the federal removal act was unconstitutional, since the question raised by such demurrer should have been interposed either in the state court when the motion to remove was made or in the federal circuit court at the time it assumed jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1510-1515; Dec. Dig. § 829.\*]

**2. CONSTITUTIONAL LAW (§ 46\*)—STATUTE—NECESSITY OF PLEADING INVALIDITY.**

If a defense is based upon a statute, it is not necessary that it be specifically raised by pleading if the court's attention is directed to the fact that its validity is questioned, and the determination of the question is necessary to the decision of the case.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 42; Dec. Dig. § 46.\*]

**3. JUDGMENT (§ 829\*)—JUDGMENT OF UNITED STATES COURT—EFFECT IN STATE COURT—MATTERS CONCLUDED—QUESTIONS NECESSARILY DECIDED.**

A decision of the United States Supreme Court that a federal circuit court had acquired jurisdiction when judgment was rendered in the state court, and that the circuit court's judgment was conclusive until reversed, necessarily decided that the statute under which the cause was removed to the federal court was valid, where its alleged invalidity was called to its attention though it was not pleaded, so that its validity cannot be raised on remand to the state court for retrial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1510-1515; Dec. Dig. § 829.\*]

Appeal from Circuit Court, Mason County.

"To be officially reported."

Action by Peter McCabe's administratrix against the Maysville & Big Sandy Railroad Company and others. From an order sustaining a demurrer to the reply, plaintiff appeals. Affirmed.

Allen D. Cole, for appellant. Worthington, Cochran & Browning, for appellees.

**CARROLL, J.** This case has heretofore been three times in this court on as many appeals, 112 Ky. 861, 66 S. W. 1054, 23 Ky. Law Rep. 2328; 89 S. W. 633, 28 Ky. Law Rep. 536; 100 S. W. 219, 30 Ky. Law Rep. 1009; and once in the Supreme Court of the United States, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765. On the last appeal to this court, we affirmed a judgment rendered in the Mason circuit court in favor of appellant for \$2,500. From the judgment of this court an appeal was prosecuted by the appellees to the United States Supreme Court. That court reversed us upon the ground that the Mason circuit court at the time the trial was had and the judgment rendered was without jurisdiction to hear or dispose of the case for the following reasons: When the suit was first brought in the Mason circuit court, that court upon motion of appellees entered an order removing it to the federal court. From this order the appellant prosecuted an appeal to this court. Pending the appeal from the order of removal the appellees filed a transcript of the record in the Circuit Court of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes.

the United States for the Eastern District of Kentucky, and the case was duly docketed. After this court had reversed the order of the Mason circuit court removing the case to the federal court the appellant filed in the federal court a motion to remand the case to the state court, which motion was overruled. Thereupon the appellees filed an answer in the federal court, and on their motion the case was set for trial and a judgment by default entered dismissing the appellant's petition. Afterwards, when the case came on for trial in the Mason circuit court, the appellees offered an answer which set up all the proceedings taken and had in the federal court. The motion to file this answer was denied, but it was made a part of the record. Thereupon the trial proceeded in the state court with the final result that a judgment was obtained for the amount before stated.

On the appeal to the Supreme Court of the United States from this court that court held that the judgment of the federal court, dismissing the case after refusing to remand it to the state court, was a bar to a further prosecution of the action in the state court as the judgment of the federal court stood unreversed and unmodified, the court saying: "It is not necessary to determine whether the case was removable or not. The federal court was given jurisdiction to determine that question; it did determine it, and its judgment was conclusive upon the parties before it until reversed by proper proceeding in this court. Instead of bringing the case here, the plaintiff proceeded in the state court, and that court denied effect to the federal judgment. The plaintiff in error lost no right when thus compelled to remain in the state court, notwithstanding the federal judgment in its favor, and brought the suit here by writ of error to the final judgment of the state court, denying its right secured by the federal judgment. It was open to the plaintiff to bring the adverse decision of the federal court on the question of jurisdiction to this court for review. This course was not pursued, but the action proceeded in the state court evidently upon the theory that the judgment of the federal court was a nullity if it had erred in taking jurisdiction. For the reasons stated we think this hypothesis is not maintainable."

When the mandate of the Supreme Court of the United States was filed in this court, we set aside the former judgment affirming the Mason circuit court and issued a mandate directing the Mason circuit court to set aside the judgment appealed from and proceed in accordance with the opinion of the Supreme Court of the United States. Thereupon the Mason circuit court, pursuant to the mandate, set aside its former judgment and its order refusing to allow to be filed the answer therefore tendered pleading in bar the judgment of the United States Circuit Court, and entered an order filing the same. Appellant then filed a general demurrer to the answer, which the court overruled, following it by a

reply to which a demurrer was sustained. It is from the order sustaining a demurrer to the reply that this appeal is prosecuted. The material part of the reply, and the only part we are concerned with, assails the constitutionality of the Removal Act (Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 507]) in the following terms: "Plaintiff therefore states that sections 3 and 5 of the act of Congress known as the removal act, and any other such parts thereof as undertake to confer or did undertake to confer upon the United States Circuit Court for the Eastern District of Kentucky the right of jurisdiction to hear and determine the controversy herein, which is not and never has been a controversy wholly between citizens of different states, or in conflict with article 3, section 2, of the United States Constitution and the 9th and 10th amendments thereto. Plaintiff therefore states that said act of Congress in so far as it was intended to apply to controversies not wholly between citizens of different states is unconstitutional, null and void, and she pleads and relies upon such provisions of the federal Constitution in estoppel of defendants' plea in bar of the jurisdiction of this court and its right to proceed in this case."

It seems to us that this attack on the validity of this statute comes too late. If, as argued by counsel, it was necessary to raise the question of its validity by a pleading, then it should have been made by appropriate pleading in the state court when the motion to remove to the federal court was made, or it should have been made in the federal court when the case was there pending. If we should now hold that the reply presented a good defense, it would be in effect ruling that the United States statute under consideration was violative of the federal Constitution and hence void. The further effect of this would be to vacate not only the judgment of the Supreme Court of the United States but the mandate of this court issued in pursuance thereof, and to open up the case for a new trial in the state court as if no judgment had ever been rendered. Neither of these things are we prepared to do. But, aside from this, we are unable to agree with counsel that it is necessary to raise by pleading the question that a statute upon which a right or remedy is rested is unconstitutional. In our opinion, when a cause of action or defense is based on a statute, it is not necessary that the validity of the statute should be attacked in a pleading setting forth specifically its invalidity. If the attention of the court is directed to the fact that the validity of the statute is drawn in question, and the determination of its validity is necessary to a correct decision of the case, it will take judicial notice of the legal question presented. In such a case, if the right of action or defense depended on the validity of the statute, the court would necessarily be obliged

to uphold the statute if it sustained the plea rested upon it. As the question was called to the attention of the Supreme Court of the United States, we cannot escape the conviction that the validity of the statute must have been considered by that court. The question decided by that court was that, as the federal court had assumed jurisdiction, its judgment was conclusive of this question. To reach this conclusion the Supreme Court of the United States must first have determined that the act conferring jurisdiction upon the federal court was valid. If the act under which the federal court acted, and by virtue of which it assumed jurisdiction, was unconstitutional, it seems manifest that the decision of the federal court taking jurisdiction under this act could not stand. It is true that the Supreme Court of the United States does not in the opinion discuss the validity of this act, but it does not follow from this fact that its validity was not considered by the court. It not infrequently happens that questions that are esteemed important by counsel are not alluded to in the opinion. Looking at the matter from either of the view points in which it presents itself, we are of the opinion that the validity of the statute in this particular case is a closed incident.

Wherefore the judgment is affirmed.

**MOSELEY et al. v. HAMILTON et al.**  
(Court of Appeals of Kentucky. Feb. 9, 1910.)

**1. TAXATION (§ 764\*)—TAX DEED—DESCRIPTION.**

Ky. St. § 4056 (Russell's St. § 5948), declares that no error or informality in the description or location of property assessed for taxation shall invalidate the assessment if the property can with reasonable certainty be located from the description given, and Gen. St. 1883, c. 92, art. 8, § 17, provides that on a sale of land for taxes to the state the sheriff shall return a report in writing to the county clerk showing when the sale was made, to whom, the price, and giving a description of the land sold as fully as he is able to do. *Held* that, where land was sold to the state for taxes because there was no other bidder, a description in the deed following the description in the assessment and in the sheriff's report, to wit: "One tract of land situated and being in said county in Herbert voting district, No. 31, and bounded as follows: 120 acres of land adjoining Al. May. Valuation \$1,028.00. 31st precinct. Assessed as the property of Martin L. Hamilton. Less one acre out of the northeast corner thereof"—was not fatally defective for indefiniteness.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1519-1522; Dec. Dig. § 764.\*]

**2. TAXATION (§ 789\*)—TAX SALES—DEED—PRIMA FACIE VALIDITY.**

Ky. St. § 4080 (Russell's St. § 5922), provides that in all suits involving tax titles the deed shall be prima facie evidence of the regularity of the sale and of all prior proceedings and title in the person to whom the deed has been executed; section 4162 (Russell's St. § 6022) declares that when a sale is made to the state the sheriff shall file a report thereof, which shall vest the title of all persons sui juris in

the state; and section 3760 (Russell's St. § 4862) declares that except in a direct proceeding no fact officially stated by an officer shall be called in question except on the allegation of fraud in the party benefited thereby or mistake on the part of the officer. *Held*, that such statute changed the rule previously in force that a person claiming under a tax deed must show compliance with all the requisites of the law, and that thereunder he establishes a prima facie case of the validity of his title by introducing his deed, the recitals of which can be impeached only on allegation of fraud in the party benefited or mistake on the part of the officer.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1556-1569; Dec. Dig. § 789.\*]

Appeal from Circuit Court, Ohio County.

"To be officially reported."

Action by Y. L. Moseley and others against M. L. Hamilton and another. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

W. H. Barnes, for appellants. Ringo & Clements and W. F. Shaw, for appellees.

**HOBSON, J.** Y. L. Moseley and S. A. Anderson brought this action against M. S. Hamilton and M. W. Moseley to recover possession of a tract of land described in the petition by metes and bounds. It was alleged in the petition that the land was assessed for county and state revenue for the year 1905 as the property of M. L. Hamilton; that the taxes were unpaid; that the land was bought in by the state on December 4, 1905, and was sold by the auditor's agent on December 7, 1908, and bought by them for the taxes, \$35.53; and that the auditor had made them a deed for the land on February 13, 1909; that they paid the taxes on the land for 1908 amounting to \$16.50; and that the defendants were wrongfully in possession of it. The deed was filed with the petition and as part of it. The plaintiffs prayed judgment for the land and \$150 damages for its detention, or, if they were not entitled to the land, to a lien on it for the sums they had paid with interest and cost. The defendants filed a demurrer to the petition and with the demurrer an answer, which controverted the allegations of the petition, and pleaded certain affirmative matter. The plaintiffs demurred to the affirmative matter in the answer, and moved to strike it out. The court sustained the motion to strike out the affirmative matter. A reply was then filed putting in issue an allegation in the answer that the auditor was without authority to make the deed under which plaintiffs claim. The case was then submitted without any proof, and the court adjudged that the plaintiffs were not entitled to the land, but were entitled to a lien on it for the sums they had paid. From this judgment the plaintiffs appeal.

While the court did not in form rule upon the defendant's demurrer to the plaintiffs' petition, it is manifest from his judgment that he sustained the demurrer to so much

of the petition as claimed the land, holding that the deed did not pass title to it, and overruled the demurrer to so much of the petition as sought a lien on the land for the money. The ruling of the court in holding the petition bad seems to have been based upon the ground that the description in the deed was not sufficient to pass title. The description is in these words: "One tract of land situated and being in said county in Herbert voting district, No. 81, and bounded as follows: 120 acres of land adjoining Al. May. Valuation \$1,028.00. 81st precinct. Assessed as the property of Martin L. Hamilton. Less one acre out of the northeast corner thereof."

We had a similar question before us in *Husbands v. Polivick*, 128 Ky. 662, 663, 96 S. W. 829, 29 Ky. Law Rep. 895. In that case we said: "It is contended that this assessment is invalid because it is not a sufficient description of the property to identify it. From the nature of the case, description of lands on the assessors' books in this state where the sectional system of surveys and descriptions are not and have never been in use, except in a small portion of the state, cannot be as full as is generally given in deeds. Nor is it necessary that it should be. It is certainly competent for the Legislature to prescribe the form of assessors' books. If it does, it is not for the court to say that assessments made in such form are not adequate. The assessment in this case was in strict conformity to the statute, and was a sufficient description of the land. The question then arises whether the sheriff's sale, and the certificate he is required to give of the land, when sold for delinquent taxes, should give a more extended description of the property levied on and sold. It is to be remembered that in this case the land was not sold to a stranger by the sheriff, but was struck off to the state because there was no other bidder. The statute regulating the sheriff's duties in that respect is not very explicit. It was section 14, art. 8, c. 92, Gen. St., and reads, on this point: 'And if no one will bid for and purchase such land at the price of the taxes due and the cost of the sale, it shall be the duty of the sheriff or collector to purchase same for the state, bidding therefor the taxes due and the costs of the sale.' Section 17, same chapter and article, requires the sheriff to return and report in writing to the county clerk, showing when the sale was made, to whom, and at what price, 'and giving a description of the land sold as fully as he is able to do.' In this case the sheriff's report was filed as required; the description of the land being the same as is shown in the assessor's books. We are of the opinion that the description is sufficient."

The description of the land sold here, as given in the deed, follows the sheriff's certificate, and it follows the assessment which in the form prescribed in the statute. It was

alleged in the petition and not denied that this is the only tract of land owned by Hamilton in that precinct, and so the case falls within the rule that that is certain which may be made certain. The particular piece of property which was assessed, levied on, and sold was identified beyond doubt by the undisputed facts stated in the record. It is undoubtedly within the power of the Legislature to prescribe the forms in this matter, and when the statute is complied with the title will pass unless facts should be shown rendering it impossible to tell what piece of land was sold. Ky. St. § 4056 (Russell's St. § 5948), provides: "But no error or informality in the description or in the location of the property, or in the name of the owner or party assessed, shall invalidate the assessment if the property can with reasonable certainty be located from the description given; and in case of such error and informality, the collector may receive the taxes and by his receipt correct such error or informality."

We are referred to *Gooch v. Bengé*, 90 Ky. 394, 14 S. W. 375, 12 Ky. Law Rep. 868, as laying down a different rule; but the statute under which that case was decided was materially different from the statute now in force. The provisions of that statute requiring the land to be described by the auditor and the auditor's agent have been omitted from the act now in force. On the facts shown the court should have overruled the demurrer to the petition and should have held the description of the land sufficient to sustain the sale. When the demurrer to the petition is overruled, the defendant should have leave to amend his answer; as it is manifest from the record that the judgment of the circuit court is based on the ground that he held the plaintiff's petition insufficient on demurrer.

Previous to the late statutes, it was held by this court in a long line of decisions that a tax sale was not valid unless all the requisites of the law are complied with, that nothing was presumed in their favor, and that he who claims under a tax sale must show that the officer complied with all the requisites of the statute. Thus in *Terry in Bleight*, 3 T. B. Mon. 271, 16 Am. Dec. 101, the court said: "As to the sales for direct taxes, there is no evidence filed in the cause, whereby it can be seen whether they were duly and properly made. The Supreme Court of the United States have held such sales to great strictness. The onus probandi lies on him who relies on them. Nothing is presumed in favor of organs of the law who have conducted them; but, to sustain them, it must be shown that all the requisites of the law have been complied with, or the sale passes no title."

This ruling was followed uniformly by the court under the statutes then in force. *Craig v. Johnson*, 3 T. B. Mon. 323; *Bishop v. Lovan*, 4 B. Mon. 116; *Durrett v. Stewart*, 83

Ky. 685, 11 S. W. 773, 11 Ky. Law Rep. 172; *Smith v. Ryan*, 88 Ky. 636, 11 S. W. 647, 11 Ky. Law Rep. 128; *Whipple v. Earick*, 93 Ky. 121, 19 S. W. 237, 14 Ky. Law Rep. 85; *Jones v. Miracle*, 93 Ky. 639, 21 S. W. 241, 14 Ky. Law Rep. 639; *Commonwealth v. Three Forks Coal Co.*, 95 Ky. 273, 25 S. W. 3, 15 Ky. Law Rep. 633; *Pryor v. Hardwick*, 22 S. W. 545, 15 Ky. Law Rep. 166; *Hundley v. Taylor*, 25 S. W. 887, 15 Ky. Law Rep. 808; *Rice v. West*, 42 S. W. 116, 19 Ky. Law Rep. 832; *Carlisle v. Cassidy*, 46 S. W. 490, 20 Ky. Law Rep. 562. Under this rule tax titles were practically valueless, for the older they became the less possible it was for the purchaser to show that all the requisites of the statute had been complied with; and so, to remedy the evil, it was provided by section 4030, Ky. St. (Russell's St. § 5922): "In all suits and controversies involving the titles of lands claimed or held under the deed executed by the sheriff in pursuance of the sale for taxes, the deed shall be prima facie evidence of the regularity of the sale and of all prior proceedings and title in the person to whom the deed has been executed." It was also provided that, where the land was bought by the state, the sheriff should file with the county clerk a report of the sale. The effect to be given this report is thus prescribed by the statute: "Said report when recorded, shall operate as a conveyance and vest the title to the property of all persons sui juris in the state, county or district, or either, and shall be constructive notice to the world of the claim existing in favor of the purchaser, whether the state or county or district or an individual against the lands of persons laboring under no legal disability." Ky. St. 4162 (Russell's St. § 6022). Section 3760, Ky. St. (Russell's St. § 4862), further provides: "Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement, in writing, either in the form of a certificate, return or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer."

The effect of these provisions has been to change the rule heretofore in force. The presumption now is that the officer has complied with all the requisites of the statute. The taxpayer may show that he did not do so, but the officer's deed makes out for the purchaser a prima facie case; and no fact officially stated by the officer in his certificate or deed in respect to a matter about which he is required to make a statement in writing can be called in question except upon an allegation of fraud in the party benefited or mistake on the part of the officer. Except so far as the statutes have changed the rule as to the burden of proof, the decisions here-

tofore made by the court as to what is essential to a valid sale are still the law of the state as to matters where the statute has not been changed. To illustrate, it was held under the former statutes that a tax sale for more than was due was a sale without jurisdiction and void. *Smith v. Ryan*, 88 Ky. 636, 11 S. W. 647, 11 Ky. Law Rep. 128; *Carlisle v. Cassidy*, 46 S. W. 490, 20 Ky. Law Rep. 562. In *Alexander v. Aud*, 121 Ky. 105, 88 S. W. 1103, 28 Ky. Law Rep. 69, certain taxpayers of Daviess county brought a suit enjoining the auditor's agent from selling their lands which had been bought in by the state for back taxes. One of the grounds relied on for the injunction was that the taxpayer had personal property out of which the taxes could have been made. It was held that the petition was not sufficient, in that it did not disclose the character and value of the personal property. In other words, it did not show what personal property the taxpayer had. The answer in this case has the same defect. In that case it was held that the fact that the taxpayer had personal property would not render void the sheriff's sale of the property to the state, as the state had a lien on all the taxpayer's property, and the sale by the auditor's agent was simply a means of enforcing that lien. The taxpayer could stop the sale by tendering the tax due, and this had not been done.

In the recent case of *James, Auditor, v. Blanton*, 123 S. W. 328, we laid down the rule as to how the interest should be counted on these back taxes, where the land has been bought in by the state. It appears from the record that the land was assessed here at \$1,020, and we do not well see how the taxes on that assessment, with interest and penalties and cost, could amount to as much as \$35.53. From the record we are inclined to think that the judgment of the circuit court does justice between the parties, and that the plaintiffs should have acquiesced in it; but, as the facts have not been pleaded, we cannot now so determine.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

#### COMMONWEALTH v. PETER, Judge.

(Court of Appeals of Kentucky. Feb. 8, 1910.)

1. MANDAMUS (§ 60\*)—SUBJECTS OF RELIEF—SETTLEMENT OF DECEDENT'S ESTATE—"WRIT OF MANDAMUS."

Ky. St. § 3855 (Russell's St. § 3885), requires a personal representative of a decedent's estate to return an inventory within a certain time after qualifying. Section 3857 provides that any personal representative failing to return an inventory within six months after qualifying shall be fined by the county court, and be required to make such inventory upon a day fixed by it, and, upon failure to do so, shall be fined for each subsequent delinquency, and section 3858 requires every personal representa-

tive to have his accounts settled, and all settlements and vouchers returned to the county court within a certain time, and as often thereafter as the court requires. Civ. Code Prac. § 477, defines the "writ of mandamus" as an order of a court commanding an executive or ministerial officer to perform or omit an act, the performance or omission of which is enjoined by law, which shall be granted on the motion of the party aggrieved or of the commonwealth when the public interest is affected. *Held*, that the duty of a county judge to require executors and administrators to file inventories and make settlements was mandatory, and not a matter of judicial discretion which could not be enforced by mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 71; Dec. Dig. § 60.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4323-4330; vol. 8, pp. 7714, 7715.]

## 2. MANDAMUS (§ 23\*)—PERSONS ENTITLED TO RELIEF—SETTLEMENT OF DECEDENTS' ESTATES.

The commonwealth could maintain mandamus to compel such inventory and settlement, though its sole object in obtaining the relief was to secure evidence for the enforcement of the inheritance taxes.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 55; Dec. Dig. § 23.\*]

## 3. COURTS (§ 207\*)—APPELLATE JURISDICTION—ISSUANCE OF PREROGATIVE WRITS—MANDAMUS.

Even if the Court of Appeals has authority to issue mandamus to control the action of inferior tribunals, such as the county courts, it will not do so; petitioner having an adequate remedy by applying to the circuit court for the writ.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 602; Dec. Dig. § 207.\*]

"To be officially reported."

Petition for mandamus by the Commonwealth by Arthur E. Hopkins and another against Arthur Peter, Judge. Writ denied, and petition dismissed.

M. J. Holt, Joseph Selligman, and C. H. Searcy, for plaintiff. Wm. Marshall Bullitt, Alvin T. Shapinsky, and Bullitt & Bullitt, for defendant.

NUNN, C. J. The record in this case was misplaced for some time, hence the delay in writing the opinion.

The county attorney of Jefferson county, Arthur E. Hopkins, and Holland L. Anderson, revenue agents for the state at large, filed in this court their petition, asking a writ of mandamus to compel the defendant, Arthur Peter, as county judge of Jefferson county, to require the Fidelity Trust Company of Louisville, Ky., to file, as executor of the estates of Underwood, Hart, Walsh, Mackey, Barth, Bonnie, Parr, Leeds, and Bodine, with the county court clerk of Jefferson county, an inventory of the estate of each of the persons named, and to compel it as such executor to make settlements of its accounts, and return same to the county court, of the estates of Underwood, Walsh, Parr, and Leeds, it having been executor

of these estates for more than two years without ever filing an inventory or making a settlement of any or either of these estates. It appears from the petition that the revenue agents named in connection with the county attorney had previously brought actions in the county court to compel the listing of omitted property on the part of some of the estates named, under section 4241, Ky. St. (Russell's St. § 6170), and against the others, that the state might collect the inheritance tax under the act of 1906 (Laws 1906, c. 22).

It is contended that the defendant under the law exercises judicial discretion with reference to requiring inventories and settlements of estates of deceased persons to be filed, and therefore the court has no right to compel him by mandamus to act in the matter. The defendant's position is correct, if right in the assumption that his duties with reference to this matter are judicial. Section 477, Civ. Code Prac., defines a mandamus as follows: "The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law; and is granted on the motion of the party aggrieved, or of the commonwealth when the public interest is affected." In the case of *Board of Trustees of Firemen's Pension Fund v. McCroy*, 116 S. W. 326, 21 L. R. A. (N. S.) 583 (to be officially reported), this court said: "The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose, but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them—that is, a service which they are bound to perform without further question—then, if they refuse, a mandamus may be issued to compel them." It will be observed from the section of the Code and the authority last cited that when an official has a ministerial duty to perform, one fixed by law, and he fails to perform it, a mandamus may be issued to compel him to do so. This court has in at least two cases decided that the requirements of sections 3855, 3857, 3858, Ky. St. (Russell's St. §§ 3885, 3887, 3888), and of the act of 1906, imposing an inheritance tax, are mandatory in so far as they impose duties upon the county judge to require administrators and other officials to file inventories and make settlements of the estates in their hands, which are matters of public interest. See the cases of *Commonwealth v. Gaulbert's Adm'r*, 119 S. W. 779 (to be of-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ficially reported), and Dants, Executor, v. Cooper, County Judge, 123 Ky. 359, 96 S. W. 454, 29 Ky. Law Rep. 778. In the last case cited this court said: "Administrators and executors of decedents' estates represent not only the creditors thereof, and those whom the statutes have designated to take by inheritance or devise, but they are representatives also of the state in administering such estates. In the execution of their duties they discharge to a certain extent functions affecting the public; for it is deemed a matter of public concern that their administration of decedent's estates shall be made matters of public record. Their failure to comply with the requirements of the law in the execution of their duties is of course a matter that may be subject of complaint by any one directly concerned, whether a creditor or inheritor. But their failure is also a matter of public concern. The language of the statute above quoted is mandatory. No discretion is vested in the county court to waive the exactions of the statutes, nor is it material whether some of the devisees were infants, or whether their trustee named in the will, he being of contractual age, and not under disability, could act solely for them in the matter, for, although all were adults, they could not dispense with the law. The county judge was, therefore, under the duty to require the inventory to be filed, and the settlement to be made as directed by the sections of the statutes supra."

Defendant contends that the purpose of plaintiffs' counsel was to have these inventories placed on record to enable them to obtain evidence as to what property they had

omitted to list for taxation and to also furnish the state evidence of the amount of inheritance tax due it; that the proceeding, in its nature, is inquisitorial, and therefore the defendant was right in refusing to sustain plaintiffs' motion. This was a matter the county judge had no right to consider. It mattered not, so far as his duties were concerned, for what reason they desired to have this record made, or for what reason the trust company had failed to comply with its duty by filing inventories and settlements of the estates referred to. The statutes referred to are explicit and mandatory. All parties in interest and the public were entitled to have the plain mandate of the law complied with. The defendant, by his refusal to sustain the motion, made himself amenable to the writ of mandamus.

The only question left for determination is: Should this court, if it has the authority, issue the writ? This question was before this court in the case of *Montgomery v. Viers*, 130 Ky. 694, 114 S. W. 251, and the court said: "Although section 110 of the Constitution may confer ample authority upon this court to issue the writ in such a case, the rule here is that, if the applicant has an adequate remedy elsewhere, we refrain from acting under our original jurisdiction." The effect of this is that the circuit court, a court of general jurisdiction, should have been applied to for the writ; that this court would not act in the matter, even if it had the power, when the applicant had other adequate means for relief.

For these reasons, the writ is denied, and the petition dismissed.

## WINGO et al. v. RUDDER et al.

(Supreme Court of Texas. Feb. 9, 1910.)

## 1. HUSBAND AND WIFE (§ 274\*)—COMMUNITY ESTATE—NATURE OF ESTATE.

Where the survivor holds the community estate, and does no act in repudiation of the interests of the heirs of the deceased spouse, the holding is as a tenant in common.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1026; Dec. Dig. § 274.\*]

## 2. TENANCY IN COMMON (§ 15\*)—ADVERSE POSSESSION—CHARACTER OF POSSESSION.

The statute of limitations does not run in favor of a tenant in common holding the community property until some act is done repudiating the relation with the co-tenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.\*]

## 3. LIMITATION OF ACTIONS (§ 49\*)—WHEN ACTION ACCRUES.

Where the surviving husband sold the community property and appropriated the entire proceeds to his own use, the right of action by the heirs of the deceased wife for their share in the property at once accrued, and the statute of limitation began to run.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 266; Dec. Dig. § 49.\*]

Certified Question from Court of Civil Appeals of Third Supreme Judicial District.

Action by Joe Rudder and others against J. F. Wingo and others. Plaintiffs had judgment, and defendants appealed to the Court of Civil Appeals, which court certifies a question to the Supreme Court. Question answered.

See 120 S. W. 1073.

Henderson & Lockett, for appellants. W. A. Morrison and J. K. Freeman, for appellees.

**GAINES, C. J.** This is a certified question from the Court of Civil Appeals of the Third Supreme Judicial District. A brief statement of the case and of the question is as follows:

Nancy Mitchell, the mother of the plaintiffs, then being 12 or 13 years old, in April, 1869, ran away from her father's home in Montgomery county, Ala., and was clandestinely married to one Hale Windham. They lived together two or three days, when she returned to her father's home and never lived with him again, nor is there any evidence that he ever attempted to get her to come back and to live with him. She was sent to school in La Grange, Ga., and in that state some time in 1872 she was married to Sam D. Rudder, who is one of the defendants in this suit. Sam D. and Nancy some time after their marriage went to Alabama, where they lived a few months, and then in the year 1873 or 1874 came to Milam county, Tex., where they purchased a tract of land of 70¼ acres. In 1876 Hale Windham procured a decree of divorce annulling the bonds of matrimony between himself and Nancy Windham. Nancy died September 9, 1887. During all the time Sam D. and Nancy Rudder lived together they were reputed to be husband

and wife, and they believed themselves to be lawfully married. They left six children surviving them, one of whom has died since the death of his mother.

After the death of his reputed wife, Sam D. Rudder made application to the county court of Milam county for authority as survivor to administer the community estate of himself and of his deceased wife, and gave bond as required by law in the sum of \$1,000, with J. F. Wingo, H. F. Inglehart, and W. J. Brewer as his sureties. Subsequently to his acquiring the right to administer the community estate of himself and of his deceased wife, to wit, on the 14th day of October, 1887, he sold the land above mentioned to W. A. Wingo for \$1,000 in cash. The trial court estimated that the plaintiffs were entitled to a judgment for \$458.34, with interest from the date of the sale to April 11, 1892, at 8 per cent. per annum, and from the latter date to the date of the trial at 6 per cent. per annum, but that since the suit was but for \$1,000, and since the bond was for that sum only, judgment was actually given for \$1,000 only.

The question certified is: Was appellees' demand barred by the statute of limitation?

If this were a question as to the recovery of their interest in the land which was sold, we think we would have a difficult case. As long as the survivor holds the community estate and does no act in repudiation of the interests of the heirs of the deceased spouse, he or she holds as tenant in common, and the rule is that the statute of limitation does not run in favor of a tenant in common holding the common property until he has done some act repudiating his relation with his co-tenants. Such is the case of Taylor v. Taylor (Tex. Civ. App.) 26 S. W. 889. Miller v. Miller, 34 Tex. Civ. App. 367, 78 S. W. 1085, is one very much like the present case. There a father of the plaintiffs owned a 200-acre tract of land, which was conceded to be community property between the father and their deceased mother. Their right to an interest in that tract was not contested and they had judgment therefor. But there was testimony tending to show that at the time of Mrs. Miller's death there was a considerable sum of money and other personal property on hand and in possession of the father, which in a few years after the death of his wife he converted to his own use. As to a recovery for this it was held that the plaintiffs were barred by the statute of limitations, and a writ of error was refused by this court.

In this case the father, as survivor of the community estate, sold the land for \$1,000, not, so far as the evidence discloses, to pay debts. There was no reason why he should not have paid one-half of it to his wife's heirs. He had no defense for an action for a recovery of that half. Why the wife's heirs should not have sued him we do not see, and

therefore we see no good reason why the statute of limitations did not apply.

We answer that in our opinion the action was barred by the statute of limitation.

### MURPHY et al. v. WILLIAMS.

(Supreme Court of Texas. Feb. 9, 1910.)

#### 1. APPEAL AND ERROR (§§ 361, 392\*)—WRIT OF ERROR TO INTERMEDIATE COURT—IRREGULARITIES.

That the petition and bond given for a writ of error from the district court to the Court of Civil Appeals misdescribed the judgment by giving its date as April 4th, instead of April 1, 1908, was a mere irregularity which was waived by failure to move to dismiss the writ in the Court of Civil Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1958, 2090, 2091; Dec. Dig. §§ 361, 392.\*]

#### 2. APPEAL AND ERROR (§§ 361, 384\*)—WRIT OF ERROR—MISDESCRIPTION OF JUDGMENT—EFFECT.

Where a petition and bond for a writ of error correctly gave the style and number of the case, the parties, and set out the judgment verbatim, a misstatement of the date as April 4th, instead of April 1, 1908, was not a material defect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1945, 2050; Dec. Dig. §§ 361, 384.\*]

#### 3. CONTRACTS (§ 319\*)—NONPERFORMANCE—QUANTUM MERUIT.

Where a building contractor agreed to build a house for a specified price, and abandoned the work before it was substantially completed, he could not maintain an action on the contract, though he might under some circumstances recover on a quantum meruit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1493-1507; Dec. Dig. § 319.\*]

#### 4. MECHANICS' LIENS (§ 93\*)—HOMESTEAD—CONTRACTS—NONPERFORMANCE.

Since a mechanic's lien on a homestead for improvements cannot exist except through a contract therefor, joined in by husband and wife, a contractor for the construction of a building on the homestead for a specified sum, having abandoned the contract before substantial performance, could not have a lien for the work done, and hence his assignee of notes given by the owners for the price of the work was entitled to no lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 124; Dec. Dig. § 93.\*]

#### 5. CONTRACTS (§ 319\*)—BUILDING CONTRACT—BREACH—COMPLETION BY OWNER.

The rule that where a building contract stipulates for the owner's right, on the contractor's default, to complete the work and deduct the cost from the contract price, and the owner elects to proceed after the contractor's default, the owner becomes liable to the defaulting contractor for the balance of the contract price, if any, after deducting the cost of completion and any damages sustained by the owner from the default, does not apply in the absence of a contract stipulation for the owner's completion of the building, where the owner completes the building after the contractor's default, not under the contract but in opposition thereto.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1493-1507; Dec. Dig. § 319.\*]

#### 6. HOMESTEAD (§ 97\*)—LIABILITIES ENFORCEABLE—LIENS—"IMPROVEMENTS THEREON AS HEREINBEFORE PROVIDED."

The statute giving a mechanic's lien for improvements on a homestead, gives such lien for work and material used in constructing improvements thereon, and then only when contracted for in writing with the consent of the wife; the lien to secure such debt being declared to be for "improvements thereon as hereinbefore provided." *Held*, that the clause quoted means improvements actually made by the use of the work and material; both the contract and the employment of the work and material on the homestead in compliance therewith being essential to the lien.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 154; Dec. Dig. § 97.\*]

#### 7. MECHANICS' LIENS (§ 204\*)—HOMESTEAD—NOTES FOR PRICE—ASSIGNMENTS.

Where the owners of a homestead gave notes to a building contractor for improvements to be erected thereon, which he immediately assigned to plaintiff to obtain working capital for the job, though plaintiff was entitled to a mechanic's lien by such assignment, his right thereto was limited to the right of the contractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 379; Dec. Dig. § 204.\*]

Error from Court of Civil Appeals of Fourth Supreme Judicial District.

Suit by Charles B. Williams against John H. Murphy and others. A decree for complainant was affirmed by the Court of Civil Appeals (116 S. W. 412), and defendants bring error. Affirmed in part, and reversed and rendered in part.

Seymour Thurmond and W. S. Smallwood, for plaintiffs in error. Turney & Burgess, S. P. Welsiger, and Jones & Jones, for defendant in error.

WILLIAMS, J. This writ of error was granted to bring up for review a judgment of the Court of Civil Appeals affirming a judgment of the district court establishing and foreclosing in favor of defendant in error a lien upon the homestead of the plaintiffs in error. A motion to dismiss the writ of error has been filed in this court on the ground that the petition and bond given for the writ of error from the district court to the Court of Civil Appeals misdescribe the judgment in giving its date as April 4th, when its true date, as shown by the record, is April 1, 1908. All such objections to irregularities in the proceedings which do not render them void and entirely defeat the jurisdiction of the appellate court are waived by the failure to move to dismiss the appeal or writ of error in the Court of Civil Appeals. Williams v. Wiley, 96 Tex. 153, 71 S. W. 12; Logan v. Gay, 99 Tex. 605, 90 S. W. 861, 92 S. W. 255. It may be further said that the objection, if made in time, would not have been good. The petition and bond give the style and number of the case, the parties to it, and set out the judgment in *hæc verba*, leaving no question that the one intended is that found in the record. Southern Pacific Ry. Co. v. Stanley, 76 Tex. 419, 13 S. W. 490.

The facts of the case will be found fully stated in the opinion of the Court of Civil Appeals. *Murphy v. Williams*, 116 S. W. 412. Those which are to control our decision may be condensed.

The plaintiffs in error made a contract with one Arend by which the latter, for the stipulated price of \$3,200, agreed to build a house upon a lot which was the homestead of the Murphys, who agreed to, and did, execute to Arend their three promissory notes to cover such price. At the same time it was understood that Arend, in order to get money to enable him to build the house, should assign the notes to Williams, and a stipulation to that effect was inserted in the contract which further provided that the lien, which it gave upon the homestead and upon three other lots as security, could only be released by Williams. This contract was properly executed by Murphy and wife in accordance with the constitutional provision. The notes were at once assigned to Williams who paid Arend \$2,300 upon them. Arend entered upon and did a large part of the construction, expending for labor and material more than \$2,100, but, without any reason or excuse stated, abandoned the work before it was completed, so that there was no substantial performance of his undertaking. Murphy thereupon demanded of Williams that he complete the building, and, after his refusal to do so, caused the work to be done at a cost of \$1,550. Williams sought by this action a judgment for the full amount of the notes, and for a foreclosure of the lien for that amount upon the homestead as well as upon the other lots, for all of which the judgment before us was rendered except that it allows a lien upon the homestead for only the sum of \$1,850, the difference between the contract price and the cost to Murphy of completing the building left unfinished by Arend. It is this last feature of the judgment that is attacked as erroneous in the specifications in the application for writ of error upon which it was granted.

The Court of Civil Appeals conceded, upon the authority of *Paschall v. Pioneer Savings & Loan Co.*, 19 Tex. Civ. App. 102, 47 S. W. 98, that Arend's unexcused abandonment of the contract would have precluded him from recovering any judgment upon it. The principle applied in that case, which is clearly sustained by the authorities, is that one who has not substantially performed his part of a contract cannot maintain an action for its enforcement although he may sometimes be allowed to recover upon quantum meruit. *Childress v. Smith*, 90 Tex. 610, 38 S. W. 518, 40 S. W. 389. From that principle the Court of Civil Appeals, in *Paschall v. Pioneer Savings & Loan Co.*, deduced the further proposition that, since no lien can exist in this state upon the homestead for improvements upon it except through a contract therefor joined in by the husband and wife, no lien can be enforced upon such property in favor

of a party to such a contract, who, on account of his failure to perform, is disentitled to have it enforced. That proposition was recognized as correct by this court in the refusal of a writ of error, and it is in accord with most authorities elsewhere. The facts in the case referred to differed from those in this case in some respects. There a house was completed by the contractor but it differed substantially in character, as well as in value, from that contracted for. The owners had contracted for one thing, and another had been furnished. Here the work and material, so far as done and supplied, were in compliance with the contract. The work was merely left unfinished, and when Murphy voluntarily completed the building that which had been contracted for was obtained. From this it seems to have been held by the trial court that the lien attached *pari passu* with the doing of such work and the putting in of such material as the contract called for to secure the payment for the value thereof, and to that extent was enforceable inasmuch as the owners received the benefit thereof in the completed building. But whatever might be the force of these facts in establishing the right to recover the value of the work and material so appropriated against one capable of thus making himself liable, it is not in harmony with the provision of the Constitution governing the fixing of liens on homesteads and the principle of contracts which we have stated, which is: That a contract entire in its character, as is one for the building of a house for a stipulated price, cannot be split up so as to allow a recovery upon it of a part of the price when the house has not been built. The Murphys did not agree to pay for the value of any work and material that should be put into the house, but agreed to pay the lump sum of \$3,200 for the completed building. That Arend failed to furnish, and as he cannot because of such failure recover that price, he cannot recover upon the contract at all; and, as a lien can exist upon the homestead only by force of such a contract, none can be enforced when the contract cannot be enforced.

There is a class of cases in which building contracts have stipulated for the right of owners, upon default of contractors to complete the work and deduct the cost of completion from the contract price, in which it is held that, where the owners have elected to enforce the contracts by so proceeding under them, they become responsible to defaulting contractors, who have done part of the work, for the balance of the contract price remaining after deducting the cost of completion and any damages sustained by the owner from the default. *Van Cleef v. Van Vechten*, 130 N. Y. 579, 29 N. E. 1017; *Ogden v. Alexander*, 140 N. Y. 356, 35 N. E. 638; *Weeks v. O'Brien*, 141 N. Y. 199, 36 N. E. 185; *Ringle v. Wallis Iron Works*, 149 N. Y. 444, 445, 44 N. E. 175; *McGrath v. Horgan*, 72 App. Div. 152, 76 N. Y. Supp. 412; *Edison Electric Il-*

luminating Co. v. Guavastino, etc., Co., 16 App. Div. 358, 44 N. Y. Supp. 1022. But an examination of those decisions will make it clear that the reasoning upon which they are founded is inapplicable where there is no such stipulation, since the owner in completing the work does not then proceed upon the contract, but ignores it as he has the right to do after the default of the other party. An illustration of the application of that doctrine by the same court that rendered the decision in the Paschall Case will be found in the case of Roane v. Murphy, 96 S. W. 782. Whether or not this is consistent with the rule of the Constitution concerning such liens on homesteads we need not consider.

We therefore agree with the Court of Civil Appeals that Arend had no lien upon the homestead to secure the value of the labor and material which he put into the building. That court thought the case was different as to Williams, but we are unable to concur in that opinion. Williams may be an innocent purchaser of the notes, so that no defense against them can be made available by Murphy, the only person liable upon them. As such purchaser he would be entitled to the benefit of any lien that might exist on the homestead to secure them, but whether or not such a lien exists must depend upon the effect which the law gives to the contract for the improvement and what was done under it. No such lien can exist on the homestead without compliance with the constitutional provision. The debts of this kind to which that provision allows the homestead to be subjected are, "for work and material used in constructing improvements thereon," and for them only when "contracted for in writing with the consent of the wife," etc. And the lien to secure such debt is declared to be for " \* \* \* Improvements thereon as hereinbefore provided," which plainly means improvements actually made by the use of the work and material. Both the contract and the employment of the work and material upon the homestead in compliance with it are thus made essential to the lien. It is evident, therefore, that an assignment of notes, given for the price to be paid for an improvement yet to be made and of the rights of the contractor under his contract therefor, passes no existing lien, but only the right to such as may be perfected by the subsequent performance of the contract. The coming into existence of the lien still depends upon the doing of that which the contractor is to do under the contract. No agreement can change this, because the lien thus provided for is the only one which the parties are allowed to impose upon the homestead, and it can be imposed in no other way than by the concurrence of the prescribed conditions. Although the contract

had been made when Williams bought the notes, and he acquired the right to look for security to such lien as might arise from the making of the improvement in future, it was still essential to the perfecting of that lien that Arend's contract be performed, and hence it could not vest in Williams any more than it could vest in Arend without such performance. To fall back upon the agreement that Williams should buy the notes and have the lien merely begs the question. No agreement with Williams or for his benefit could give rise to a lien upon the homestead without a contract for the work and material and the performance thereof. The requirement that the work and material to be put into an improvement be first contracted for necessarily implies that it is that which is contracted for that is to be done in order to give the lien, and that the doing of that which is substantially less than or different from the thing so contracted for does not meet the requirement. The Constitution does not prescribe the form or substance of the contract further than stated, but when it says that a contract must be made for the work and material, and that the lien is to be for an improvement thereon, it plainly contemplates that the improvement, or the work and material, as the case may be, that is furnished, must be in substance that which has previously been agreed upon; and it follows that this is not met by an agreement for a house of a specified construction, and the furnishing of only part of the work and material entering into such construction. Williams bought the notes before the contract was performed, and his lien depended upon the performance either by Arend or himself of that which Arend had undertaken to do to create or perfect it. With respect to it his position is no better than Arend's would be.

This case is not like those cited by the Court of Civil Appeals. Downard v. National Loan Co., 22 Tex. Civ. App. 570, 55 S. W. 981; Bayless v. Ass'n, 39 Tex. Civ. App. 353, 87 S. W. 872. There was no question in those cases as to the effect of an abandonment of the work by a contractor before completion. The houses were built in accordance with the contracts and the questions were entirely different from that here involved. Nor do those cases hold, or involve a holding, that less than a contract for the improvement and also the finishing of the improvement contracted for are essential to the lien. The judgment will be reversed and reformed so as to deny plaintiff's claim of lien on the homestead. In other respects it will be affirmed.

Affirmed in part; reversed and rendered in part.

# RECEIVERS OF KIRBY LUMBER CO. v. LLOYD.

(Supreme Court of Texas. Feb. 9, 1910.)

## RAILROADS (§ 22\*)—ACTION FOR INJURIES—VENUE—STATUTES.

Laws 1901, c. 27, declares that all suits against railroad corporations or any receiver operating any railway in the state for personal injuries resulting in death or otherwise, shall be brought either in the county in which the injury occurred or in the county in which the plaintiff resided at the time of the injury. *Held*, that the word "railroad" in such act, was not limited to a commercial railroad, but included a tram road operated as appurtenant to a sawmill by receivers of the sawmill corporation, so that an action for injuries to a brakeman thereon was triable in the county where plaintiff resided and where the injury occurred, though the principal office of the receivers and corporation was in another county.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 50; Dec. Dig. § 22.\*

For other definitions, see Words and Phrases, vol. 7, pp. 5899-5908; vol. 8, pp. 7777, 7778.]

Certified Questions from Court of Civil Appeals of First Supreme Judicial District.

Action by William Lloyd against the receivers of the Kirby Lumber Company. On certified questions from the Court of Civil Appeals.

Baker, Botts, Parker & Garwood and Andrews, Ball & Streetman, for appellants. Tom C. Davis, E. P. Padgett, and Hamilton & Minton, for appellee.

**GAINES, C. J.** In 1901 the Kirby Lumber Company was chartered under the laws of Texas, and was authorized to erect and operate sawmills, planing mills, dry kilns, tram railroads, and all other necessary incidents to their business; and on the 17th day of March, 1904, Joseph S. Rice and Cecil A. Lyon were appointed by the Circuit Court of the United States for the Southern District of Texas receivers of said corporation, vesting them with authority to conduct the business of said corporation. Among other properties of said corporation was a tram railroad about four miles long, constructed with cross-ties and steel rails, with a sawmill to which it was appurtenant, which were situated in Sabine county, Tex. The railroad was run with locomotives, engines, and cars and other rolling stock. While this tram road was operated by the receivers, the plaintiff, a brakeman on one of its trains, was, as found by the jury, injured through the negligence of the servants operating the train, and for this he brought his suit against the corporation and its receivers in Sabine county. The plaintiff was a resident of Sabine county. The receivers filed in due time a plea of privilege, alleging that the cause of action was triable in Harris county, Tex., where the principal office of the company was situated, and could not be maintained in

Sabine county, where neither of the defendants resided. The court sustained a demurrer to this plea, and defendants excepted.

The question certified for our determination is: "Did the trial court err in overruling the plea of the defendant receivers?"

The laws of 1901 contain the following provision: "That all suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in the state of Texas, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury," etc. Laws 1901, p. 31, c. 27. Since the Kirby Lumber Company was not a railway corporation in a strict sense, if this suit was against the company alone, it would be difficult to hold that it applied to such a case, though it might be plausibly argued that by "railway corporation" was meant any railroad that was operated by virtue of corporate powers. But the succeeding words, "against any assignee, trustee or receiver operating any railway in the state of Texas," bring the present case literally within the terms of the statute. The defendants, the receivers, were operating a railway in the state of Texas.

In *Cunningham v. Neal*, 101 Tex. 338, 107 S. W. 539, 15 L. R. A. (N. S.) 539, the question whether a railroad operated, not publicly, but for the private purpose of carrying on a plantation business, was a railroad within the meaning of section 1 of the act approved June 18, 1897 (Laws 1897 [Sp. Sess.] c. 6), entitled: "An act to prescribe and define the liability of persons, receivers or corporations operating railroads or street railways, for injuries to their servants and employes; and to define who are fellow servants," was presented, and it was held that it was, and that, although the railroad was used exclusively in private business, it made no difference, and that it was a railroad operated by a corporation. In the elaborate opinion by Mr. Justice Brown in that case it is pointed out that no differences, in so far as the employes were concerned as to the dangers of the service, etc., were recognized, and that therefore it was no answer to say that the injury was inflicted by the negligence of a fellow servant. In this opinion we all concurred. It is to be noted that the language of the statute then considered and of that now being discussed is practically the same. We therefore conclude that the word "railroads" should have the same construction in each act.

The plaintiff had a right to sue in Sabine county, both because he lived in that county and the injury was inflicted there. We answer that the trial court did not err in overruling the plea of the defendant receivers.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**PEACH RIVER LUMBER CO. v. MONTGOMERY, Tax Collector.**

(Supreme Court of Texas. Feb. 9, 1910.)

**COURTS (§ 247\*)—COURTS OF APPELLATE JURISDICTION—TAXES.**

Where a writ of error to review the decision of the Court of Appeals in an action to enjoin the collection of taxes on timber standing on county school lands was based wholly on the contention that plaintiff merely possessed a right to cut it, and thereby to acquire title, plaintiff, not being the owner, could not be liable for taxes thereon, so that the case does not involve the question of whether the timber was exempt from taxation under Const. art. 11, § 9, exempting property of counties owned and held for public purposes only, so as to give the Supreme Court jurisdiction under Rev. St. 1893, art. 941, giving it jurisdiction of writs of error in cases involving the construction of the Constitution of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 753; Dec. Dig. § 247.\*]

Error from Court of Civil Appeals of First Supreme Judicial District.

Suit by the Peach River Lumber Company against B. E. Montgomery, tax collector. Decree for plaintiff reversed and remanded by the Court of Civil Appeals (117 S. W. 1061), and plaintiff brings error. Dismissed.

Stewarts, Llewellyn & Kayser and Geo. T. Burgess, for plaintiff in error. W. M. Williams, for defendant in error.

**WILLIAMS, J.** The plaintiff in error brought this action to restrain the tax collector of Montgomery county from enforcing against it an assessment of taxes made against it in that county as the owner of certain timber standing upon the leagues of school land belonging to Walker county. As construed by the Court of Civil Appeals (117 S. W. 1061), the petition alleged facts showing that plaintiff had become invested by purchase with the title to the timber, but claimed that it was exempt from taxation in its hands because it was upon the school lands of Walker county from which its title was derived, and had been exempt while belonging to the county. But the facts admitted by the parties in the trial court, as well as the findings of that court, were held by the Court of Civil Appeals to show that plaintiff had never acquired the title to the timber, but had only a right to enter and cut it within a given time, and that, under such facts so admitted and found, it would not be subject to the tax enjoined. The Court of Civil Appeals, however, reversed the judgment of the district court granting the injunction, and remanded the cause on the ground that the petition, not only failed to show a cause of action, but, if the facts stated in it were true, showed affirmatively that plaintiff was not entitled to the relief sought; the opinion holding that if plaintiff was the owner of the timber, as the petition was thought to show, it would not be entitled to the exemp-

tion asserted merely because the land was exempted to the county. The amount of the tax in controversy is more than \$500 and less than \$1,000, and the case is one which has been remanded by the judgment of the Court of Civil Appeals. Several questions therefore arise as to the jurisdiction of this court to grant the writ of error. In the first place, the case is probably one of which the county court would have had original jurisdiction; but, if this is true, the case may come within an exception to the general rule prescribed by article 993, Rev. St. 1895, in that it probably involves the revenue laws of the state. But the further rule which denies jurisdiction to this court over judgments of the Courts of Civil Appeals reversing and remanding causes is insuperable. Rev. St. 1895, art. 941. The only one of the prescribed exceptions to that rule which suggests itself as at all favoring our jurisdiction is the second which applies to "cases involving the construction and application of the Constitution of the United States, or of the state of Texas, or of an act of Congress."

The plaintiff in its petition in the district court relied on the exemption from taxation of property of counties given by section 9, art. 11, Const.; but it is obvious that if it is not the owner of the timber, as it stands upon the land, but is merely possessed of a right to cut and thereby acquire title to it, no claim of exemption is necessary for its protection, since in that case it would not be taxable in respect of the property because it is not the owner thereof. The petition for writ of error is based wholly upon the contention that such is the case, which contention does not involve any question as to the construction and application of the constitutional provision referred to. The writ of error was improvidently granted, and must therefore be dismissed.

Dismissed for want of jurisdiction.

**TUCKER v. STATE.**

(Court of Criminal Appeals of Texas. Jan. 12, 1910. Rehearing Denied Feb. 9, 1910.)

**1. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—ACCOMPLICES—EVIDENCE REQUIRING.**

In a prosecution for burglary of a saloon, from which some liquor was taken, testimony that witness drank whisky with accused and others on a certain night, and that next morning accused offered her a drink out of a bottle and told her he had stolen it from a saloon the night before, and that she told him to pour out some of it for her, because she did not want to drink it then, but would do so afterwards, did not necessarily connect witness with the crime, as receiving stolen property, so as to require a charge that she was an accomplice; it not appearing that she drank any of the whisky after knowing that it was stolen.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1860; Dec. Dig. § 814.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

## 2. CRIMINAL LAW (§ 780\*)—INSTRUCTIONS—ACCOMPLICES.

In a burglary prosecution, the court instructed that a conviction could not be had upon an accomplice's testimony, unless it was corroborated by other testimony tending to connect accused with the offense, and the corroboration was not sufficient if it merely showed the commission of the offense, and that one accomplice could not corroborate another accomplice's testimony, but there must be other evidence tending to prove the commission of the offense and to connect accused therewith, in order to be a sufficient corroboration; that an accomplice was one who was connected with the crime by some unlawful act happening before, at the time of, or after the commission of the offense; that before the jury could convict upon the accomplice's testimony they must believe that it was true; and that the corroboration tended to show that accused committed the offense charged, and they should acquit if they had a reasonable doubt thereof. *Held*, that the charge sufficiently presented the issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.\*]

## 3. CRIMINAL LAW (§ 822\*)—INSTRUCTIONS—CONSTRUING AS A WHOLE.

Instructions should be construed as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1990; Dec. Dig. § 822.\*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

George Tucker was convicted of burglary, and he appeals. Affirmed.

Horace Williams, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

**RAMSEY, J.** This appeal is prosecuted from a conviction had in the criminal district court of Dallas county, where, on February 13th of last year a penalty of two years' confinement in the penitentiary was assessed against appellant on a charge of burglary. The evidence showed that the saloon of one J. J. Petsch had been entered in the nighttime and some whisky taken therefrom. A knife was found in the saloon, which was identified as the property of appellant. In addition to that the state proved by one Bessie Dean that on the morning after the burglary appellant stated to her that he had stolen whisky out of a saloon. Jim Williams testified that on the night of the burglary he was at home, and that about half past 1 o'clock in the morning appellant came to him, and called him out doors, and said he had some whisky, and wanted him to help carry it.

There are a number of questions raised on the appeal, none of which we believe are meritorious. The only matter which we desire to discuss is that portion of the motion for new trial which complains of the charge of the court in respect to the matter of accomplice testimony. On this issue and question the court thus instructed the jury:

"Gentlemen of the jury, you are instructed that a conviction for the crime cannot be had upon the testimony of an accomplice, and the

same cannot be done unless the evidence of said accomplice is corroborated by other testimony tending to connect the defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of the offense. An accomplice is any person who is connected with the crime by unlawful act or commission on his part, transpiring either before, at the time of, or after the commission of the offense, and whether or not he was or was not present and participated in the commission of the offense committed. Before you can convict the defendant upon the testimony of an accomplice, you must find and believe from the evidence that the same is true, and that the corroboration shows, or tends to show, that he committed the offense charged; but if you have a reasonable doubt thereof, find him not guilty.

"As to whether or not one is an accomplice is a question for you to determine from the facts and circumstances in the case. Should you determine a witness is an accomplice, you will not consider the evidence of such person, unless the same is corroborated as herein instructed. However, I will instruct you that the witness, Jim Williams must be corroborated as an accomplice witness under this charge. As to the other witnesses, Bessie Dean, Jim Tucker, John Dean, Marshall Dean, and Lee Dean, I instruct you that, unless you believe beyond a reasonable doubt that they are not accomplices as the same is defined to you in this charge, you will decide they are accomplice witnesses, and in that event they must be corroborated in the manner above stated to you. You are instructed that one accomplice cannot corroborate another accomplice in such a way as to satisfy the demands of the law; nor will any number of accomplice witnesses be sufficient to support each other. There must be evidence outside of the testimony of the accomplice witnesses tending to prove the crime was committed and tending to connect the defendant therewith before the same would be considered sufficient corroboration."

Among other things it is complained that the court did not instruct the jury in terms and directly that the witness Bessie Dean was in law, under the admitted facts, an accomplice. We do not think the court would have been justified in assuming as a matter of fact, or as a matter of law, that the witness was an accomplice. After testifying that she, with a number of other parties at the house where she was staying, sat up and drank whisky, she then states: "The next morning George Tucker offered me a drink out of a bottle, and told me that he had stolen it out of a saloon the night before. I asked him to pour some of it out for me, because I did not want to drink it then, but would drink it after breakfast." This does not connect her, of necessity, as a receiver of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stolen property knowing same to be stolen. Her prior participation in drinking it had been without knowledge that it was stolen, and on being informed that it was stolen, in connection with an offer of a drink, she merely asked appellant to pour it out for her; that she did not want to drink it then, but would after breakfast. There is no showing that, as a matter of fact, she did drink any portion of the whisky after receiving the knowledge of its being stolen.

While isolated and separated clauses of the charge of the court may be subject to verbal criticism, we think, when tested as a whole, as all charges should be considered, that it sufficiently presents this issue to the jury. As we read the record, there is no doubt of appellant's guilt, nor do we believe there was any error committed on the trial for which we would be justified in reversing the judgment of conviction.

The judgment is affirmed.

#### Ex parte STRITTMATTER.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### 1. VAGRANCY (§ 1\*)—NATURE OF OFFENSE—POWER TO DEFINE—"VAGRANTS."

Under Const. art. 3, § 46, declaring that the Legislature at its first session shall enact effective vagrant laws, the Legislature had ample power to pass Gen. Laws 31st Leg. c. 59, § 1, par. "d," declaring that all able-bodied persons, who habitually loaf, loiter, and idle in any city, town, village, railroad station, or other public place within the state for the larger portion of their time, without any regular employment, and without any visible means of support, are "vagrants."

[Ed. Note.—For other cases, see Vagrancy, Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7267-7269.]

#### 2. VAGRANCY (§ 1\*)—COMMON-LAW DEFINITION—SUPERSESSON.

The statutes of the United States and England having so frequently dealt with the subject of vagrancy, the common law on the subject has become largely superseded.

[Ed. Note.—For other cases, see Vagrancy, Dec. Dig. § 1.\*]

#### 3. VAGRANCY (§ 1\*)—DEFINITION—STATUTES.

Gen. Laws 31st Leg. c. 59, § 1, par. "d," declaring that all able-bodied persons, who habitually loaf, loiter, and idle in any city, town, village, railroad station, or other public place within the state for the larger portion of their time, without any regular employment, and without any visible means of support, shall be deemed vagrants, is constitutional.

[Ed. Note.—For other cases, see Vagrancy, Dec. Dig. § 1.\*]

#### 4. VAGRANCY (§ 1\*)—VAGRANTS—"LOITER, LOAF, AND IDLE."

Gen. Laws 31st Leg. c. 59, § 1, par. "d," defines as vagrants all able-bodied persons, who habitually loaf, loiter, and idle in any public place, etc., for the greater part of their time, without any regular employment or visible means of support, and declares that one is not relieved from a charge of vagrancy, who habitually loafs, loiters, and idles, if he is without

visible means of support, by the fact that only occasionally he has employment at odd jobs, being for the most part without employment. *Held*, that the terms "loiter, loaf, and idle," when construed with the words "larger portion of their time," require proof, to sustain a conviction of vagrancy, that the person charged was able to work, and, being so able, habitually loafed, loitered, and idled in the city for the greater part of his time, without employment or visible means of support.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 1; Dec. Dig. § 1.\*]

#### 5. VAGRANCY (§ 1\*)—STATUTES—"LARGER PORTION OF THEIR TIME."

Gen. Laws 31st Leg. c. 59, § 1, par. "d," defines vagrants as all able-bodied persons, who habitually loaf, loiter, and idle in any city, town, village, railroad station, or other public place for the larger portion of their time, without any regular employment or visible means of support. *Held*, that the term "larger portion of their time," as used in such section, when construed with the balance of the provision, was not so vague as to render the law invalid.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 1; Dec. Dig. § 1.\*]

Appeal from District Court, Bexar County; Edward Dwyer, Judge.

Habeas corpus on relation of Will C. Strittmatter. From a judgment dismissing the writ, petitioner appeals. Affirmed.

Ed Haltom, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. Relator was convicted in the justice court, precinct No. 1, of Bexar county, in November of last year, upon a complaint charging him with vagrancy under paragraph "d" of section 1 of the General Laws of the 31st Legislature (chapter 59, p. 111). Some time thereafter he presented his petition for writ of habeas corpus to Hon. Edward Dwyer, judge of the Thirty-Seventh judicial district, and upon hearing relator was remanded to the custody of the sheriff of Bexar county.

The sole question here presented is as to the constitutionality of paragraph "d" of the act named above. This paragraph of the act in question is claimed to be invalid:

First, because in contravention of the thirteenth amendment to the federal Constitution which provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

It is also urged that the act in question is contrary to the spirit, if not the tenor, of sections 18 and 19 of the Bill of Rights of Texas. These sections are as follows:

"Sec. 13. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All the courts shall be open, and every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law."

"Sec. 19. No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

Said act is also claimed to be invalid, in that it is uncertain, and must fail of its intent, for that, as provided by article 6 of the Penal Code of 1895: "Whenever it appears that a provision of the penal law is so indefinitely framed or of such doubtful construction that it cannot be understood, either from the language in which it is expressed, or from some other written law of the state, such penal law shall be regarded as wholly inoperative."

Fourth. The act in question is claimed to be invalid, in that it is against common right and reason.

In support of his contention counsel for appellant has filed a learned and well-considered brief. His contentions, we think, however, are not sound, and our conclusion is that there is no such infirmity in the law as would entitle relator to his discharge. If the power of the Legislature, in the absence of constitutional mandate, could be made a matter of serious contention, the issue is placed beyond dispute by the terms of our Constitution, which, in section 46 of article 3, thus provides: "The Legislature shall at its first session after the adoption of this Constitution enact effective vagrant laws." Much attention is directed in the brief of counsel to the common-law definitions of vagrancy. However interesting as a mere matter of learning these views may be, it has not infrequently been held by many courts, that the statutes, both in England and America, have so much and so frequently dealt with the subject of vagrancy, that the common law on the subject has become unimportant. *American & Eng. Enc. of Law*, vol. 29, p. 568; *People v. Forbes*, 4 Parker, Cr. R. (N. Y.) 611.

That it is within the power of the Legislature in this state to define, subject to certain broad limitations, what is a vagrant, can admit of no sort of doubt, and statutes which have classed prostitutes, professional gamblers, and others of that class as such, have always been upheld. With the growth of the state and the congestion in our large cities, where the idle, the vicious, and the depraved congregate around many public places, it was essential to the peace of the state and the protection of society that some further extensions of this definition should be made. It is not to be denied that the act in question, in some of its definitions, goes very far, and we are not called on now to decide whether in their entirety these definitions are so limited and framed as to be free from criticism or condemnation by the courts. The only question we have for consideration is the validity of paragraph "d" of this section.

It will be noted that by this article all

able-bodied persons, who habitually loaf, loiter, and idle in any city, town, or village, or railroad station, or any other public place in this state, for the larger portion of their time without any regular employment, and without any visible means of support, are classed and defined as vagrants. The want of visible means of support is usually made an essential element of the offense of vagrancy, and, when it is so made an ingredient of the offense, it must be shown. *Welborn v. State*, 119 Ga. 429, 46 S. E. 645; *State v. Cummins*, 78 Ind. 251. What is meant by the term "able-bodied" and ability to work has been the subject-matter of judicial review not infrequently, but are not words, as we believe, difficult of definition or construction, nor are they so general as to invalidate the statute. The following cases illustrate and involve the construction of this term: *Price v. State*, 67 Ga. 723; *Commonwealth v. Carter*, 108 Mass. 17. In the case of *McHenry v. State*, 42 Tex. Cr. R. 469, 60 S. W. 880, it was in effect held that it became a question of fact, under such a charge and allegation, as to whether one was in fact a vagrant within contemplation of the laws and statutes of the state.

To the objection that the second sentence of the paragraph in question undertakes to establish a rule of evidence that would prevent the court from making inquiry or ascertaining whether the lack of employment was purposeful, or the result of viciousness and indolence, we cannot accede. We think the true intent of this sentence is to be gathered only when read in connection, not only with the preceding sentences, but with the entire act of which it is a part. Therefore, before a conviction could be had under this section, we think it would have to appear and be shown that the person charged was able to work, and that, being so able, he habitually loafed, loitered, and idled in the city, town or village or at a railroad station or other public place for the larger part of his time, without any regular employment, and without any visible means of support. We think the terms "loiter, loaf, and idle" are wholly at variance with the occasional or even frequent presence at such public places by deserving persons who may be for the time being unemployed. It is difficult in matters of this sort by any language which the Legislature could have employed to have laid down a rule so definite and precise as not to be the subject-matter of criticism. In constructive legislation of this sort, along new lines, some difficulty will be found in so framing the definition as not by a strained construction, or even, perhaps, by a literal construction, to place improper and grievous burdens on deserving persons.

We think the term "larger portion of their time," as used in this section, is not so vague as to render the law invalid, when read in connection with what follows; that is to say, that one is not relieved from a charge

of vagrancy who habitually loafs, loiters, and idles, if he is without visible means of support, by the mere fact that only occasionally he has employment at odd jobs. We think, indeed, that the law is a wholesome one, well within the power of the Legislature, and that none of the objections are tenable. That in its practical administration cases of imposition or hardship may arise may be true, but under the liberal rule laid down by this court in the case of *McHenry v. State*, supra, it is unlikely, if not in truth inconceivable, that any good and deserving man or woman should suffer punishment under this act, who is not in fact guilty under its terms.

Finding no error in the proceedings of the court below, it is ordered that the judgment be, and the same is, hereby affirmed.

### SCHUH v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### 1. JURY (§ 70\*)—SELECTION—VALIDITY.

Under Code Cr. Proc. 1895, art. 695, providing that, when there are no regular jurors for the week from whom to select a jury, the court shall order the sheriff to summon forthwith such number of qualified persons as it may deem sufficient, and from those summoned a jury shall be formed to try the case, and Rev. St. 1895, art. 3150, providing that the court, whenever it may deem it necessary, shall appoint jury commissioners, where they have not been appointed in time to select the jurymen, and that these jury commissioners may draw for the term of court then in session, as well as the terms following, the action of the court in appointing jury commissioners to draw the jury for the trial of a criminal prosecution at the term of court then in session was not error.

[Ed. Note.—For other cases, see *Jury*, Dec. Dig. § 70.\*]

#### 2. WEAPONS (§ 6\*)—CARRYING UNLAWFULLY—EVIDENCE—SUFFICIENCY.

Where defendant went into a saloon, took a pistol from the saloon keeper, walked a distance of 80 or 90 feet to the back door of the saloon, and fired it off, and returned and handed it to the saloon keeper, he was guilty of carrying a pistol.

[Ed. Note.—For other cases, see *Weapons*, Dec. Dig. § 6.\*]

#### 3. WEAPONS (§ 17\*)—CRIMINAL PROSECUTIONS—EVIDENCE—ADMISSIBILITY.

In a prosecution for unlawfully carrying a pistol, where it was claimed by both defendant and the city marshal in their testimony that the city marshal went to defendant and informed him there was a show coming to town, and that he wanted defendant to get his pistol and go with him to meet the train, to protect the town from thugs that accompanied the show, and that thereupon defendant procured a pistol, walked to the back door of the saloon, and fired it off, evidence that defendant and the marshal proceeded to get drunk, and went upon the streets, and whooped and hallooed, knocked one or two men down, and proceeded to make considerable noise, was admissible as tending to impeach and contradict the defendant and the city marshal, and as bearing on the intent of the defendant.

[Ed. Note.—For other cases, see *Weapons*, Dec. Dig. § 17.\*]

#### 4. CRIMINAL LAW (§ 1172\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In a prosecution for unlawfully carrying a pistol, in which it was claimed that the city marshal requested defendant to secure a pistol and assist him in maintaining order, where the court charged the law more favorably than defendant could have asked on the issue of the authority of the city marshal to deputize him, he cannot complain.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.\*]

Appeal from Falls County Court; W. E. Hunnicutt, Judge.

Charles Schuh was convicted of unlawfully carrying a pistol, and appeals. Affirmed.

Nat Lewellyn, for appellant. F. J. McCord, Asst. Atty. Gen., and Frank Oltorf, Asst. Co. Atty., for the State.

RAMSEY, J. Appellant was convicted in the county court of Falls county at the April term, 1909, for unlawfully carrying on and about his person a pistol, and a fine of \$100 assessed against him. From this conviction, after motion for new trial was overruled, he has appealed to this court, and asked for a reversal upon several grounds set up in his motion.

1. The first ground of his motion is to the action of the court in compelling appellant to go to trial before a jury not impaneled according to law. This ground of the motion is supported by bill of exceptions in the record, in which bill appellant complains that the court below erred in forcing him to go to trial before a jury illegally summoned and impaneled; that the court had failed to appoint jury commissioners at the previous term of the court, and no jury had been summoned for the term of the court at which the defendant was to be tried; that the court, on the week before the week of the trial of appellant, appointed jury commissioners to draw the jury for the week at which the defendant was to be tried; that the court erred in forcing the defendant to trial before the jury that had been summoned by the jury commissioners appointed at the same term of the court at which the trial occurred; and that the court erred in not having the sheriff to summon the jury, and in having appointed jury commissioners to draw a jury. To this bill of exceptions the trial judge appended the following explanation: "That when court convened on June 19, 1909, the court stated that it would continue all criminal cases until next term, when the bar agreed that the court appoint a jury commission, and they draw jurors for this term of court, as well as for the terms of court following; that the attorney for the defendant in this case was among the attorneys agreeing to this, and agreed to the setting down of this and other cases for trial."

The question here presented is this: Was

the court bound to follow article 695 of the Code of Criminal Procedure of 1895, which provides that when, from any cause, there are no regular jurors for the week from whom to select a jury, the court shall order the sheriff to summon forthwith such number of qualified persons as it may deem sufficient, and from those summoned a jury shall be formed to try the case? Or whether the court had a right to pursue the provisions of article 3150 of the Revised Statutes of 1895, which provides that the court, whenever it may deem it necessary, shall appoint jury commissioners, where they have not been appointed in time to select jurymen, and that these jury commissioners may draw for the term of the court then in session as well as the terms following? This question came before this court for review in the case of *Green v. State*, 53 Tex. Cr. R. 490, 110 S. W. 920, 22 L. R. A. (N. S.) 706, and this court held that the court below might proceed either way, following the provisions either of the civil statutes or the Code of Criminal Procedure, and, as said by Judge Brooks in *Lenert v. State*, 63 S. W. 563: "As contended by appellants, the proper practice would have been for the court to have had the sheriff summon the jurors; but appellants have shown no injury by the means and manner resorted to for the selection of the jury in this case, and we do not think such error was committed by the court as requires a reversal." Without reference to the qualification to the bill of exceptions that counsel for appellant agreed to the drawing of the jury by the commissioners, we are of opinion that the action of the court in appointing jury commissioners to draw the jury for the term of court then in session would not be reversible error, and that the court might have proceeded either way and have followed the law, and that there is really no conflict between the civil and criminal statutes. See *Hurt v. State*, 51 Tex. Cr. R. 338, 101 S. W. 806; *White v. State*, 45 Tex. Cr. R. 602, 79 S. W. 523; *Williams v. State*, 24 Tex. App. 32, 5 S. W. 658.

2. In the fourth ground of the motion for new trial the appellant complains that the court erred in refusing to charge the jury that if the defendant took a pistol from the hands of the witness Walter Stuart, and fired same off, and handed it back to the witness, he would not be guilty of unlawfully carrying a pistol; the appellant having specially requested the court to so charge the jury, which was refused by the court below. The facts of the case will show that on the night of the 13th of April, 1908, at about 8 o'clock at night, the appellant went in the saloon of one Walter Stuart, and took a pistol out of the hand of said Stuart, and walked back to the back door of the saloon, and fired the pistol off, and returned and handed it back to the witness Stuart. The distance was some 80 or 90 feet from the place where appellant secured the pistol to the back door,

where he fired same off. Appellant contends that this did not constitute unlawfully carrying a pistol, and he cites the court in support of this proposition to the case of *Lann v. State*, 25 Tex. App. 495, 8 S. W. 650, 8 Am. St. Rep. 445.

We do not think that the facts of this case support appellant's contention. The question in that case was whether a soldier in the United States army was amenable to the statutes of the state prohibiting the carrying of a pistol. He also refers us to the case of *Sanderson v. State*, 23 Tex. App. 520, 5 S. W. 138. That was a case where the defendant, Sanderson, and witness were riding along the road, going after wood, and a rabbit jumped up, and the witness handed defendant his (witness') pistol and asked defendant to shoot the rabbit. Defendant took the pistol, walked a step or two, and shot the rabbit, and handed it back to the witness. We do not think that any of the cases cited by counsel for appellant will support the contention of appellant. In these cases the possession of the weapon was momentary and for an innocent purpose, and the dominion and control of the owner and person carrying same was not lost. Here the weapon was rudely displayed in a public place, twice fired, and carried to a distance wholly beyond the control and away from the possession of the city marshal. If one may under these circumstances, by warrant of law, carry a pistol 90 feet, may he not carry it 90 yards or 900 yards? We think the rule has been carried far enough, and that as presented in this record there is no justification or excuse for appellant's possession of the pistol, and that he has not brought himself within the letter or the spirit of the statute or decisions existing in this state. For the same reason we think this case easily distinguishable from the decision in *Fretwell v. State*, 52 Tex. Cr. R. 499, 107 S. W. 837.

We are also of opinion that the facts of this case make out a case of unlawfully carrying a pistol. On the trial of the case, the appellant took the stand and testified that Frank Stallworth, the city marshal, went to the appellant and informed him that there was a show coming to town that night, and that the show train would arrive about 11 o'clock, and that he wanted the appellant to get his pistol and go with him to meet the train, to protect the town from the thugs that accompanied the show; that this summons was given about 8 o'clock, while the appellant was in the saloon of Stuart; and that after he (the witness) gave the message the appellant procured the pistol, walked back, and fired it off. This was sworn to both by the appellant and Stallworth, the city marshal. The state, over the objection of the defendant, to which he reserved exception, proved that the appellant and the city marshal proceeded to get drunk, and went out upon the streets, and whooped and hallooed, knocked one or two men down, and

proceeded to make quite a noise. This testimony was all objected to as being irrelevant and immaterial. We are of opinion that this testimony was admissible. As said by this court in the case of *Lann v. State*, 25 Tex. App. 495, 8 S. W. 650, 8 Am. St. Rep. 445: "Intent is an essential element to constitute the offense of unlawfully carrying a pistol on the person; and in all cases wherein the intent is an element of the offense charged it is competent for the accused to prove his general reputation."

We think that this testimony was admissible upon two grounds: First, as tending to impeach and contradict the appellant and the city marshal that he had been asked to assist in preserving the peace and order of the town and had been authorized to carry the pistol. If, as soon as he procured the pistol, he acted in a disorderly manner, and his conduct was supported by the city marshal, then it would appear that their purpose in arming themselves or procuring a pistol and loading up on bad whisky was rather to "paint the town" than to keep down the thugs. Second, this testimony was admissible to develop the intent of the party and to show that his purpose was not lawful but rather unlawful. As was said by this court in the case of *McKinney v. State*, 8 Tex. App. 626: "When the scienter or quo animo is a constituent of an offense and necessary to be proved, it is competent to introduce testimony of acts, conduct, or declarations of the accused which tend to establish the knowledge or intent, though they in themselves constitute in law distinct crimes, and are apparently collateral and foreign to the main issue." See *Brown v. State*, 51 Tex. Cr. R. 423, 102 S. W. 406; *Colson v. State*, 52 Tex. Cr. R. 138, 105 S. W. 507; *McCallister v. State*, 55 Tex. Cr. R. 392, 116 S. W. 1154; *Baker v. State*, 53 Tex. Cr. R. 27, 108 S. W. 684.

Under our view of the law we deem it unnecessary to pass upon the question as to whether the city marshal could have deputized the appellant, in the manner he did, to carry a pistol; but, as the court below charged the law more favorably to the appellant on this issue than he could have asked, appellant is in no position to complain.

Believing that the court below committed no errors, the judgment is in all things affirmed.

McCord, J., not sitting.

#### MELTON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### 1. GAMING (§ 94\*)—PROSECUTION—INDICTMENT—VARIANCE.

While it would have been sufficient for the information to allege that accused bet at a

game of cards, without alleging that he bet money, where it specifically alleged that he bet money, it was necessary to prove such fact in order to avoid a variance.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 279; Dec. Dig. § 94.\*]

#### 2. CRIMINAL LAW (§ 656\*)—TRIAL—REMARKS OF JUDGE—COMMENTS ON EVIDENCE—WEIGHT OF EVIDENCE.

A remark by the court, in ruling upon an objection to a question, that he did not think it was material, but would permit it, was improper, as a comment by the judge on the effect of the evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.\*]

#### 3. CRIMINAL LAW (§ 338\*)—ADMISSION OF EVIDENCE.

In a prosecution for betting on a card game, a question to a witness as to why M. was not present as a witness was excluded, the answer to which would have been that he was not in court because of the anticipated confinement of his wife. An application for continuance was made because of M.'s absence, stating such grounds. *Held*, that the question was properly excluded; the answer only bearing on the application for continuance, with which the jury was not concerned.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 752-757; Dec. Dig. § 338.\*]

#### 4. GAMING (§ 97\*)—PROSECUTION—ADMISSION OF EVIDENCE.

In a prosecution for gaming, the answer to a question as to the value of the poker chips used in the game, asked to show their market value, and not their value as representing money in the particular game, which gave the market value of the chips, was not admissible.

[Ed. Note.—For other cases, see *Gaming*, Dec. Dig. § 97.\*]

#### 5. CRIMINAL LAW (§ 417\*)—ADMISSION OF EVIDENCE—DECLARATIONS OF THIRD PARTIES.

In a prosecution for gaming, a question to accused's witness whether another did not ask certain persons in witness' presence and accused's absence, on the day before the offense was alleged to have been committed, where their poker players were, and the persons questioned stated they did not know, was not admissible; the answer not binding accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 950-967; Dec. Dig. § 417.\*]

Appeal from Montague County Court; A. W. Ritchie, Judge.

H. W. Melton was convicted of unlawfully wagering money at a card game, and he appeals. Reversed and remanded.

Speer & Weldon, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The information charged that appellant "did then and there unlawfully bet and wager money on and at a game of cards at the private residence of Bill Neece, where people had resorted and assembled for the purpose of gaming, against the peace and dignity of the state." The evidence discloses that appellant and a number of others were at the residence of Neece playing cards, and about 2 or 3 o'clock in the morning the officers went into the room where the game was in progress, watched the game a while, and went away without making any

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

arrest. It is shown by the evidence for both sides that what are commonly called "poker chips" were in evidence on the table around which the players sat, and that one of the parties in the game had about \$5 in silver in front of him, and that another one of the parties requested the loan of \$1 from one of the officers. The officers stated they did not see any money bet. All the other witnesses stated that there was no money or any other thing of value bet during the game, that they were playing for amusement, and used chips to show the standing of the parties in the game, which was poker. It is further shown that Neece, the owner of the house, had bought these chips some time before the present gaming law went into effect, and that he had them at his residence, and that since the present law went into effect they were practically valueless.

1. Under this state of case the court charged the jury, if they should find beyond a reasonable doubt that appellant bet at a game of cards on or about the time alleged in the information, they would find him guilty and assess his punishment at not less than \$10 nor more than \$50, and further charged the law of circumstantial evidence. At the request of the county attorney the court gave the following charge: "You are charged that if the defendant bet poker chips on the game in question, and that said chips represented money, then the defendant would be guilty of betting money, the same as if the money was put up or bet." Exception was reserved to these charges, and countercharges were asked to the effect that, unless the jury believe beyond a reasonable doubt that defendant did bet money on a game of cards at the time and place charged, they should acquit; that it was not sufficient, to warrant a conviction, that the defendant bet any other article than money. Another charge was asked by appellant, as follows: "The legal definition of the term 'bet' is the mutual agreement and tender of a gift of something valuable which is to belong to one or the other of the contending parties according to the result of the trial of skill or chance, or both combined; and in this connection I charge you that the defendant in this case stands charged with having bet money at a game of cards, and unless you find and believe from the evidence, beyond a reasonable doubt, that he bet money at a game of cards, as the term is herein defined, you will acquit the defendant." This was refused, and exception taken to the refusal of both charges. We are of opinion that the charge asked by the county attorney was error, and those requested by appellant should have been given. It was not necessary to charge in the information that money was bet. It would have been sufficient to have charged generally that appellant bet at a game of cards, and this is the usual way in which such averments are made. But the pleader saw proper to charge specifically that

money was bet. This was a descriptive averment, and necessary to be proved. This was the state's case averred in the pleadings. Wherever descriptive averments are set forth in an indictment or information, although they may be unnecessary, yet being descriptive, the evidence must correspond with such averments; otherwise, there is a variance. We are of opinion, therefore, that these instructions of appellant are correct.

2. While the witness Neece was testifying in behalf of appellant, he was asked to explain the difference between the games of pitch and poker played with cards; there being some testimony that the parties present engaged in the game had played pitch with cards. The county attorney objected, and the court remarked in the presence of the jury that he did not think it was material, but would permit the question to be asked and answered, to which remark by the court appellant objected, and upon objection being made the court further remarked, in the presence of the jury, that if defendant's counsel was not satisfied with his ruling he would sustain the state's objection and not permit the question to be asked, nor the answer given. Several grounds of objection were stated. Had the witness been permitted to answer, his testimony would have been that the game called "pitch" is one played with cards, and one which is commonly indulged in at social gatherings, and that the game of pitch, as well as poker, was played at different times during the evening at his house. In view of another trial, we would call attention of the trial court to the statute which prohibits the court commenting upon the evidence in his rulings, under the circumstances stated; that the court, under such circumstances, has been required by the Legislature simply to make his rulings, without comment as to what the effect of the testimony would be, or as to his belief or opinion as to what it would be. Such questions and matters of this sort should not be permitted to occur upon the trial of a case, in the face of statutory inhibition.

3. While the witness Van Horn was testifying in behalf of defendant, appellant's counsel asked him why the witness John Mershon was not present as a witness. An objection by the county attorney to this question was sustained. The witness would have answered, had he been permitted to do so, that he was intimately acquainted with John Mershon, and that he (Mershon) was present and witnessed the game in which the defendant is charged to have bet, and the reason that said John Mershon was not present in court was because of the anticipated sickness of his (Mershon's) wife. The court excluded this on the objection of state's counsel. In this there was no error. It may be stated in this connection that in another bill of exceptions it was shown that application for continuance was made on account of the absence of

Mershon, which application is also embodied in the record. In the bill of exceptions and in application for continuance it is stated that Mrs. Mershon was sick and expecting hourly to be confined. The absence of Mershon under the circumstances as stated in the bill of exceptions was not a matter to go before the jury. It was a matter entirely for the action of the court in sustaining or overruling the application for continuance, with which the jury had no concern. This is the general rule, and there are no facts shown that would authorize the introduction of the matter set forth in the bill of exceptions. It was not brought into trial, so far as the bill of exceptions shows, in a manner that would require the defendant, or authorize him, to explain the absence of Mershon. Therefore there was no error in this ruling of the court. This question has been before the court in previous cases.

4. The witness Neece, testifying for defendant, on cross-examination, was asked by the county attorney, and was compelled to answer, as to the value of the chips which were used in the game in which appellant is charged with having bet, and his answer was the whole sack of chips was one he had had for several years, and was worth several dollars when he purchased them, but was worth very little at the time of the game. Without going further into the bill of exceptions, we are of opinion that, as this matter is presented, it was irrelevant. The object of the question was to prove, not the value of the chips in the particular game to the players, but what they were worth in the market, and what their original cost was. Witness stated what he paid for them when he purchased the same, but that they had ceased to be valuable on account of the present gaming laws. Had the testimony been directed to the value of the chips as used in the game, and their value in the game to the players, we would have had an entirely different proposition; but the evidence elicited from the witness was not directed to this particular point, but to their market value.

5. Another bill of exceptions recites that, while the witness Ezra Williamson was testifying in behalf of the defendant, the county attorney, on cross-examination, asked him if one Van Horn did not ask certain parties in Bowie, in witness' presence, on the day before the offense is alleged to have been committed, the following question: "Where are your poker players?" and that the parties of whom the question was asked answered they did not know. Objection was urged to this, because it was a matter occurring between third parties in the absence of the defendant, and not in any way binding upon him, and that appellant knew nothing about it and could not be bound by the question and answer occurring between these parties in his

absence. This point, we think, is also well taken.

Appellant's application for a continuance was overruled. As the case is disposed of in the opinion, it is unnecessary to notice or discuss the application for continuance, and it may not occur upon another trial; in fact, the witness may be present, or his attendance may be secured.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

### DECKER v. STATE.

(Court of Criminal Appeals of Texas. Oct. 20, 1906. On Motion for Rehearing, Jan. 26, 1910.)

#### 1. CRIMINAL LAW (§ 170\*)—PRIOR CONVICTION—COMPLAINT.

A conviction for affray, prior to the filing of a complaint or warrant of arrest, was not jeopardy, so as to bar a subsequent prosecution for aggravated assault, based on the same transaction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 312; Dec. Dig. § 170.\*]

#### 2. ASSAULT AND BATTERY (§ 88\*)—AGGRAVATED ASSAULT—EVIDENCE—PRIOR THREATS.

In a prosecution for aggravated assault, complainant was entitled to testify that, two months before the difficulty, defendant told him that if he did not get out of the road for him when he met him the next time he would kill him, to show the state of defendant's feeling, and to support testimony indicating an unprovoked assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 123, 131, 132; Dec. Dig. § 88.\*]

#### 3. CRIMINAL LAW (§ 1169\*)—APPEAL—RULINGS ON EVIDENCE—PREJUDICE.

In a prosecution for aggravated assault, there was no substantial or reasonable error in permitting complainant to testify, though not an expert, that he was apprehensive that blood poisoning might result from his wounds.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. § 1169.\*]

#### 4. CRIMINAL LAW (§ 351\*)—EVIDENCE—INCrimINATING CIRCUMSTANCES.

Evidence that on the night of the difficulty accused and his companion came to witness' house, some eight or ten miles from where they resided, and stayed all night, though they were both married men, was admissible to show conduct inconsistent with innocence; their explanation being a desire to reach a justice of the peace, before whom accused pleaded guilty to a lesser offense than that with which he was subsequently charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 776; Dec. Dig. § 351.\*]

#### 5. ASSAULT AND BATTERY (§ 86\*)—AGGRAVATED ASSAULT—EVIDENCE.

Where, in a prosecution for aggravated assault, whether accused or complainant was the aggressor was a sharply contested issue, and defendant had testified that he wanted to settle the matters in controversy with complainant and had offered to do so, evidence in rebuttal that witness, prior to the difficulty, went to see accused with reference to the matters in dispute between complainant and accused and tried

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to induce him to settle the difference, was admissible.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 131; Dec. Dig. § 88.\*]

**6. ASSAULT AND BATTERY (§ 92\*)—AGGRAVATED ASSAULT—WEAPON—EVIDENCE.**

Evidence held to justify a finding that accused, when he assaulted complainant, used a dangerous weapon.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137–139; Dec. Dig. § 92.\*]

**7. CRIMINAL LAW (§ 823\*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.**

Accused was not prejudiced by an instruction that it is not enough that the assaulting party believed himself in danger, unless the circumstances are such that the jury can say he had a reasonable ground for such belief, where the court further charged in the same connection that the law guarantees the right to act on apparent danger, and that in judging thereof the law requires the jury to view the danger from defendant's standpoint, and to consider all the circumstances surrounding defendant at the time of the difficulty, though the jury may believe that in fact no real danger existed, and if, at that time, it reasonably appeared to defendant that the prosecutor was about to attack him, defendant would be guilty of no offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1993, 3158; Dec. Dig. § 823.\*]

**8. CRIMINAL LAW (§ 1137\*)—APPEAL—INVITED ERROR.**

Accused cannot complain on appeal of an instruction he himself requested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3009; Dec. Dig. § 1137.\*]

On Motion for Rehearing.

**9. ASSAULT AND BATTERY (§ 96\*)—INSTRUCTIONS—INTENT.**

An instruction that if defendant, on or about the date specified, and within two years prior to the filing of the information, did commit an assault on prosecutor with premeditated design, that is, preconceived in his mind prior to such assault, and the assault was committed by means calculated to inflict great bodily injury on prosecutor, the jury should find him guilty of aggravated assault, was erroneous, for failure to require that the premeditation must have existed in the mind of accused at the time of the assault, especially in view of evidence that an unfriendly state of feeling had existed between the parties for a considerable time.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 148, 149; Dec. Dig. § 96.\*]

Appeal from Denton County Court; Lee Zumwalt, Judge.

Eff Decker was convicted of aggravated assault, and he appeals. Reversed and remanded.

Hopkins & Milliken, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged by information filed in the county court of Denton county with an aggravated assault upon one G. W. Farrington. There were a number of counts in the information, and among other bases of the offense was an assault with the handle of a knife, which was alleged to be a deadly weapon; an assault by

a deadly weapon, alleged to be a hard instrument, a better description of which, it is stated, could not be given; an assault with premeditated design and by the use of means calculated to inflict great bodily injury; an assault with knuckles; and an assault upon said Farrington by striking him with his fist. The case was very stoutly contested in the court below, and many exceptions taken, and many questions now presented to us as grounds for reversal.

In addition to his plea of not guilty, appellant interposed a special plea to the effect, in substance, that he had theretofore been convicted of the offense of an affray, which was the same transaction as herein charged, said conviction being had in the justice court of precinct No. 7 in Denton county, and that said judgment had never been appealed from, set aside, or reversed, but was still in full force and effect. On the trial appellant offered proof of his special plea, and same was excluded, on the ground that the judgment of conviction bore date on 6th day of April, 1907, while the affidavit, the basis of said prosecution, as well as the warrant of arrest, was dated on 7th day of April, 1908. An inspection of the instruments offered, which are embodied in the record, confirm the correctness of the objection made by the county attorney. It is obvious that, in the state of record, the judgment, there being then no complaint filed, placed the appellant in no jeopardy, and same constituted no bar to this prosecution for aggravated assault, and the court did not err in excluding the evidence offered in support of appellant's plea. *Watson v. State*, 5 Tex. App. 271; *Warriner v. State*, 3 Tex. App. 104, 30 Am. Rep. 124.

The evidence in the case shows, briefly, that on Sunday evening, April 5, 1908, while driving along the public road, Farrington was set upon by appellant, while another person was near by and in front of him, and while Farrington was in his buggy doing nothing, who assaulted him with a knife or some hard substance and inflicted serious wounds upon him. That during this time Farrington was doing nothing except seeking to protect himself, and that the assault was wholly unprovoked. Appellant denied the substance of these facts, and testified that he believed at the time that Farrington had a pistol, and at the time he struck him was in the act of making preparation to shoot him. The evidence showed that there had been a bad state of feeling between the parties for some little while.

1. There was no error in permitting Farrington to testify that in February before this difficulty the appellant told him on one occasion that if he did not get out of the road for him when he met him the next time he would kill him. This was admissible to show the state of feeling on the part of ap-

pellant, and as lending support to the testimony of the unprovoked assault on Farrington. Nor do we believe there was any substantial or reasonable error in permitting this witness to testify that, in connection with the nature of his wounds, he was under the apprehension that blood poisoning might result. While not an expert, this is part of the statement of the wounds inflicted upon him, and the apprehension resulting therefrom; and the fear or apprehension felt, even if erroneously admitted, was not calculated to injure appellant. Nor do we believe that there was error in the action of the court in admitting the testimony of John Slater to the effect that on the night of the difficulty, about 10:30 o'clock, appellant and his companion, Bratton, came to his house and spent the night. Slater's house was some eight or ten miles from where appellant and Bratton resided. They were both married men, and this testimony tended to show conduct inconsistent with the action of an innocent man. Appellant's and Bratton's explanation, that the purpose of their visit was to enable them to reach the justice of the peace, made an issue on this question, and, of course, this was a matter for the jury.

2. On the trial the state was permitted to prove by one Higgins that a little while before the difficulty he went to see appellant with reference to the matters in dispute between himself and Farrington, and tried to get him to settle the difference between them. In view of the explanation of the court that appellant had testified that he wanted to settle the matters in controversy with prosecuting witness, and had offered to settle same with him, we think, in rebuttal, that this testimony was admissible. It was, under the testimony, a sharply controverted issue as to who was the aggressor in the difficulty, and the state of mind of appellant was a matter of prime importance.

3. We do not believe that the complaint of appellant that there was no evidence or semblance of evidence that appellant made use of a dangerous weapon can be sustained. While the weapon was not so distinctly seen by Farrington as to be described, his testimony strongly indicates that appellant did use some sort of weapon, and this evidence, taken in connection with the character of injuries received, would tend to impress the jury, we believe, that he did have such weapon; at least, it cannot be said that there was no evidence raising this issue.

4. The eleventh ground of appellant's motion is that the court erred in that portion of his charge wherein he instructed the jury as follows: "It is not enough that the party believed himself in danger, unless the facts and circumstances were such as that the jury can say he had reasonable grounds for his belief." The complaint of this charge is that a party has a right to act on the mere

appearance of danger and is not required to stop and consider whether the facts and circumstances constitute a reasonable ground for said belief or not. In connection with the portion of the charge complained of, the court had instructed the jury as follows: "Our law guarantees to all persons the right to act on apparent danger, and in judging of the apparent danger the law requires the jury to review the same from the defendant's standpoint, and to take into consideration all of the facts and circumstances surrounding the defendant at the time of the difficulty, and to view the same from his (defendant's) standpoint at that time; and although the jury may believe from the evidence that in fact no real danger existed at the time of the difficulty, still if at that time it reasonably appeared to the defendant from his standpoint that the prosecuting witness was about to attack him, defendant would be guilty of no offense, and you will find him not guilty." And the language complained of immediately follows the portion of the charge above quoted. We do not think, taken in connection with the court's entire charge, that, if lacking in technical accuracy or completeness, this could in the nature of things have injured appellant. The paragraph immediately preceding the language complained of had been requested by counsel for appellant, and was given by the court, with the addition of the language against which complaint is leveled.

5. The twelfth ground of the motion complains that the court erred in that portion of his charge wherein he attempts to define an aggravated assault committed upon premeditated design, in that the same changes the definition of an aggravated assault committed upon premeditated design as defined by our Penal Code of 1895 (section 601, par. 9), and erroneously defines the term "premeditated design," and also makes the assault aggravated if defendant at any time prior to the difficulty had a preconceived intention to assault the prosecuting witness, whether in fact it existed at the time of the assault or not. We note, in passing, that the charge complained of, as shown by the record, appears to have been given at the request of appellant. On page 50 of the record we find the following: "State of Texas v. Eff Decker. Defendant requests the following special charge"—and then, with nothing intervening, there follows two pages of instructions, signed by the county judge, and indorsed, "Court's charge to the jury." Clearly, if this instruction was requested by counsel for appellant, if there was any error in it, it would be invited error, and, therefore, a matter of which appellant could not complain. As the record comes to us, this seems to be the case, and we need not, therefore, inquire into the correctness of this charge. However, we may say, in passing, that, considering the charge altogether, it

does not seem to us to be particularly objectionable.

6. Complaint is also made of the sufficiency of the evidence to sustain the verdict and judgment. While the proof was conflicting, we cannot say, in the light of the entire record, that there was no evidence upon which the jury might have based their conclusion.

Finding no error in the record, the judgment of conviction is affirmed.

BROOKS, J., absent.

On Motion for Rehearing.

RAMSEY, J. When this cause was submitted it seemed to appear from the record that the charge complained of and treated in the fifth paragraph of the opinion had been requested by counsel for appellant. On motion to correct the record, the original charge of the court below has been transmitted to this court, and in the light of such corrected record it is evident that this charge was not only not requested by appellant, but it appears that the same was excepted to at the time, and that special charges were requested by him seeking to correct what was believed to be an erroneous charge given by the court. The entire charge complained of is as follows: "If you find and believe from the evidence beyond a reasonable doubt that the defendant, Eff Decker, in Denton county, Tex., on or about the 5th day of April, 1908, and within two years prior to the filing of the information herein, did commit an assault on G. W. Farrington, and that said assault was committed with premeditated design, that is, preconcerted in his mind prior to such assault, if you find one was committed by him, and that such assault was committed by means calculated to inflict great bodily injury upon the person of said Farrington, you will find the defendant guilty of aggravated assault, and punish him as above set forth for aggravated assault." On this subject appellant requested, among others, the following special charge: "I charge you that, before you can convict the defendant of an aggravated assault on the count of the information charging an assault committed upon premeditated design: (1) You must believe from the evidence beyond a reasonable doubt that the defendant, Eff Decker, entered into a conspiracy with J. R. Bratton to assault the said G. W. Farrington, and that the assault committed, if any, was in furtherance of their common design and purpose; and (2) that the assault committed, if any was committed by the use of means calculated to inflict great bodily injury." And also the following special charge was requested: "An assault and

battery may become aggravated when committed with premeditated design and by the use of means calculated to inflict great bodily injury. If you believe from the evidence beyond a reasonable doubt that defendant, Eff Decker, about the time charged in the information, in Denton county, Tex., with premeditated design did commit an assault upon G. W. Farrington, and that such assault was committed by the use of means calculated to inflict great bodily injury, you will find the defendant guilty of an aggravated assault; but if you have a reasonable doubt if said assault, if any, was committed with premeditated design, you will acquit the defendant of an aggravated assault. If you believe from the evidence beyond a reasonable doubt that said assault, if any, was committed with premeditated design, but have a reasonable doubt that the means used were calculated to inflict great bodily injury, you will acquit the defendant of an aggravated assault."

In the light of the record, and in view of the fact that an unfriendly state of feeling had existed between the parties for some time, it is urged that the charge of the court, which permitted a conviction as the result of a preconceived design at any time, however long before the assault was in fact committed, is erroneous, and that where premeditation is an element of the crime it must not only exist prior to the commission of the offense, but the same must exist in the mind of the party committing the offense at the time of the commission thereof; that it must not only have been preconceived prior to the time when the offense was committed, but must be an actual existing design in the mind of the party committing the offense when the offense is committed, and must be proven by the same degree of proof required to prove any other essential to an offense against the laws of this state. *Atkinson v. State*, 20 Tex. 522; *McCoy v. State*, 25 Tex. 39, 78 Am. Dec. 520; *Sanders v. State*, 41 Tex. 300. The facts of this case barely raise the issue of an assault by premeditated design. It does contain many references to previous difficulties, and under the terms given it was easily possible for the jury to have concluded that if, at any time within two years next before the institution of the prosecution, appellant had conceived the idea of assaulting Farrington, and did thereafter assault him, whether in pursuance of such preconceived design or not, and whether growing out of such preconceived design, the offense would be complete.

For the reason pointed out, the motion for rehearing is granted, the judgment reversed, and the cause remanded.

McCORD, J., not sitting.

**WILLIAMS v. STATE.**

(Court of Criminal Appeals of Texas. Jan. 19, 1910. Rehearing Denied Feb. 9, 1910.)

**1. HOMICIDE (§ 257\*)—EVIDENCE—SUFFICIENCY—ASSAULT WITH INTENT TO MURDER.**

Evidence held to sustain a conviction for assault with intent to murder.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 257.\*]

**2. CRIMINAL LAW (§ 939\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.**

Accused is not entitled to a new trial for newly discovered evidence, consisting of his statements to one who could have been produced at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.\*]

**3. CRIMINAL LAW (§ 1160\*)—APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT—RULINGS ON MOTION FOR NEW TRIAL.**

The denial of a motion for a new trial for the jury's misconduct will not be disturbed on appeal, where the testimony on which the ruling is based is conflicting.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

Appeal from District Court, Rusk County; W. C. Buford, Judge.

Walker Williams was convicted of assault with intent to murder, and he appeals. Affirmed.

J. W. McDavid and T. J. Arnold, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

**McCORD, J.** This is an appeal from a conviction for assault with intent to murder, with a punishment of seven years. The fairness of the trial in the court below is assailed in this court upon three grounds: First, the insufficiency of the testimony; second, upon the ground of newly discovered evidence; and, third, the misconduct of the jury.

As to the first ground, it is sufficient to say that the testimony amply supports the verdict. The proof shows that the appellant and the prosecuting witness, Joe Hall, were at a social gathering on the 19th of June last year. As the prosecuting witness, Joe Hall, approached the crowd, appellant, one of the crowd, made some insulting remark about Hall, when Hall asked him what he was cursing him about. Appellant denied cursing the witness Hall. Hall turned off, and the appellant reached in a grip, drew a pistol, and fired, striking Hall in the arm. Appellant's contention was that at the time he fired Hall was advancing on him and attempted to draw a razor. The issue of self-defense was submitted to the jury. We are of opinion that the testimony amply supports the verdict.

2. Appellant, in his motion for a new trial, alleged as one of the grounds thereof that he had discovered, since the trial of the case, that he could prove by one Montgomery that on the 18th day of June, the day be-

fore the difficulty, he (Montgomery) tried to hire appellant to work on that day, but that he was going up yonder to get drunk (meaning Greenville, the place where the difficulty occurred). In the trial of the case the state placed a witness on the stand by the name of Windom, who testified that on the 18th day of June he was in the town of Rusk, when he heard Mr. Montgomery, who ran a planer down close to the depot, ask the appellant if he was going to work for him tomorrow, the 19th, when appellant replied that he was going to get drunk, and going over to Greenville and get him a negro; the purpose of the motion for new trial being to prove by the said Montgomery that he did not say anything about going to get him a negro. How appellant could claim to be surprised by this testimony, and how he could say that he was not acquainted with the fact as to what Montgomery would swear until after the trial, we are not advised from the record. The record discloses that the witness Windom testified that was the statement that appellant made to Montgomery. Montgomery resided in the town where the trial occurred, and could have been procured in a half hour. Hence this testimony cannot be regarded either as newly discovered or as coming to the knowledge of appellant after the trial. Diligence would have suggested, since this matter was disclosed by the witness Windom, that process be issued and the witness Montgomery be brought into court. We therefore hold that appellant was not entitled to a new trial upon the ground of newly discovered evidence.

3. As to the misconduct of the jury: In the motion for new trial appellant complains that, after the jury had retired to consider of their verdict, one Bill Vice, who was a member of the jury, stated before the verdict had been decided upon that he knew the defendant; that he was a mean negro; that he had three or four years ago shot a negro on his place; that he had a quarter of a dollar sewed up in his head to protect a fractured skull, caused by a lick on the head in a fight; and that he (Vice) would like to send the defendant for a longer term if he thought he had good sense. This issue was tried in the court below, and testimony offered by the appellant and the state on said issues. Some of the jurors stated that there was something said about the negro being a mean negro and having fights, and that this occurred before the jury had reached a verdict. Others of the jury testified that nothing of this sort occurred until after the verdict was reached.

Jeff Allen, who was a member of the jury, testified that he was a member of the jury that returned the verdict against appellant awarding him seven years in the penitentiary; that Mr. Vice was selected as foreman, and he then asked the jury as to their

opinion of the case. "Some of us spoke up and says, 'Give him 10 years.' Don't remember who that was that spoke up; but they was all willing to give him 10 years, and up to that time I don't think anything was said with reference to giving him 15 years. Mr. Hamm joined in this 10-year proposition (Mr. Hamm being the juror making the affidavit as to the misconduct of the jury), and voted with the crowd on the 10 years, and he voted to give him 10 years, and up to this time Mr. Vice had made no statement before the jury. Then Mr. Vice spoke up and says, 'I think 7 years is long enough for the negro; that he had his head bursted, and had a dollar sewed in it;' and I said that I thought 7 years was enough for a boy like he was; and then we took that vote, and we all voted for 7 years, but Mr. Cohaden, and he sat in the window and didn't get up; and then Mr. Cohaden says, 'I am with you all to put him up for 7 years,' and got up at the same time he was talking. Mr. Vice did not say a word that caused the jury to center upon the 10-year proposition. Mr. Vice never said a word, except that he wanted to reduce his time from 10 years to 7 years." On cross-examination this witness testified: "I did not hear any one suggest a 5-year punishment, and I did not hear anything at all said about a 5-year term for him. Mr. Vice just said to some of the jury— I might have been the one. I think I says: 'I think 7 years is enough for him. He don't look like he is over 17 or 18 years old.' And then Mr. Vice spoke up and says, 'He is older than he looks,' and that he was a pretty bad negro; that he had shot a negro on his place once; and Mr. Vice says further, 'I think 7 years is enough time for him.' When he told us that, the verdict had done been written and signed. That was all Mr. Vice said about the negro. If he said anything about his conduct here in town, I never heard it. I guess Mr. Hamm heard this talk by Mr. Vice, and Mr. Hamm did not ask any questions about the negro's conduct."

J. M. Cohaden, another witness, testified that he was a member of the jury, and in his testimony he states that Mr. Vice was for the lowest term. Some of the jury, and most of them, wanted to give the defendant 10 years, and that Mr. Vice argued with them to get them down. He further states that, after they had agreed on 7 years, Mr. Vice spoke up and said, "I know the negro; he worked on my place once;" that the negro had been struck over the head, and had his skull bursted, and that he has a silver half dollar sewed up in his head, and that he was a "fussy" negro among the negroes; that to the witness' best recollection Mr. Vice was for a 5-year term.

Mr. Vice took the stand, and testified that he was a member of the jury; and here we will set out Mr. Vice's testimony in full, as follows: "My name is Bill Vice; sat upon

the jury on the trial of the above case last week. I don't know that I can recall everything that I said in the jury room; but I will try to give the sum and substance of it. We went in the jury room. Some one nominated me foreman, and I was elected foreman; and I says, 'All that think Sun Greenwood is guilty of the charge claimed by the state, let it be known by rising to his feet,' and everybody rose, and I remember having gotten up before we decided the case and told the jury that I wanted to speak a few words in behalf of the defendant; that I didn't think he could be held accountable for his crime as a clear-minded man; that he can't possibly be a very bright man; and about this time one of the jurors says, 'If I thought he was old enough, I would be more hard on him; but he seems to be just a kid,' and I remarked, 'I expect he is about 35 years old,' that he deceives his looks, and that we better be light on him; that I didn't think he intended to kill the other negro; that he was just one of them egotistical persons who wanted to make a record for himself, and that we ought to just try him for the injury he done; that he can't be a very bright fellow; that he had his skull broke by being hit over the head with a stick by another negro, and had a half dollar sewed in his head; and then I think I taken the sentiment of the jury, and some of them spoke up even as high as 15 years—don't think any of them said less than 10 years, and I said I would be willing to put the negro in for 5 years; that was my first statement, and then some man spoke up to give him 7 years. I could not say which juror it was that spoke up and says, 'Let's give him 7 years.' I think I made the impression on the jury that I was the best friend Sun Greenwood had on the jury. I made the statement about the half dollar in his head, etc., before we deliberated any at all on the verdict, and before we settled on the verdict. I was a little inclined not to give him a very heavy penalty; but I seen the way the jury was leaning, and I agreed to give him the 7 years with the balance. I made some statement to the jury about him shooting a negro on my place, as sworn to by Mr. Hamm; but I could not tell you when that statement was made, but think it was made after we had agreed on the verdict. I know John Montgomery. He lives about a mile from town, and works at the new planing mill here in town, probably half mile from the courthouse." Cross-examined, he testified as follows: "I think it was after we had decided on what we would give Sun. I wanted to get a lighter verdict for him, and just made the remark that, if Sun or his attorney had thought about it, they would not have had me on the jury, because he had shot a negro on my place once; and at that time the verdict had not been signed. I said awhile ago that, so far as Sun was concerned, I stated in the jury room that he was just

one of these egotistical negroes that wanted to make a showing for himself, and that I didn't think he intended to kill the negro."

It may be stated that there was very little difference in the testimony of the different members of the jury who were examined as to what Mr. Vice said; but there is some difference between the jurors as to when it was said. Some of the jurors testified that the remarks of Vice as to the negro being a bad negro and fighting other negroes were made after the verdict had been agreed upon; others, that it was made before. However, in passing, it may be stated that all the jurors testified that what was said by Mr. Vice did not influence them. Without passing on the question as to whether this court or the trial court should be concluded by the statement of the jurors that testimony adduced in the jury room after their retirement did not influence the jury, we hold that, there being a conflict in the testimony, and the issue having been formed and a trial had thereon in the court below, before the judge, in passing upon the motion for new trial, and the judge having found as a matter of fact adverse to appellant's contention, and that the remarks that were made by Mr. Vice were made after reaching the verdict, this court would not feel justified in granting a new trial upon this ground. See *Sam Veas v. State*, 55 Tex. Cr. R. 125, 114 S. W. 830.

This disposes of all the grounds of the motion for new trial. No complaint is made of the charge of the court; and, finding no error in the record, the judgment is affirmed.

#### WOODS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

##### 1. LIBEL AND SLANDER (§ 152\*)—CRIMINAL RESPONSIBILITY — INDICTMENT — SUFFICIENCY.

An indictment alleging that accused imputed to a married woman that she "was not a respectable woman," without containing innuendo averments alleging what the language meant, and that as spoken and intended it meant that she was unchaste, does not state an offense under Pen. Code 1895, art. 750, making a person falsely imputing to a female a want of chastity guilty of slander.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 417-424; Dec. Dig. § 152.\*]

##### 2. LIBEL AND SLANDER (§ 152\*)—INDICTMENT — ISSUES.

Where an indictment for slander, in violation of Pen. Code 1895, art. 750, for imputing to a female a want of chastity, specifically selected the imputation and charged it, the state was bound thereby as to the imputation, and the court could not permit the jury to convict accused for the imputation of want of chastity otherwise than as alleged.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 427; Dec. Dig. § 152.\*]

Appeal from Young County Court; E. W. Fry, Judge.

Morris Woods was convicted of slander, and he appeals. Reversed, and prosecution ordered dismissed.

Kay & Akin, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment, omitting the formal parts, charges that appellant "did then and there orally, falsely, and maliciously, and falsely and wantonly, impute to one Mrs. Dosia Harty, the wife of Willis Harty, a married female in this state, a want of chastity, in this, to wit: He, said Morris Woods, in the presence and hearing of J. W. Foster and Willis Foster, did falsely, maliciously, and wantonly say of and concerning the said Mrs. Dosia Harty that 'she was not a respectable woman'; that 'no one associated with her on this account'; that 'John Harty, the eldest child of said Mrs. Dosia Harty and Willis Harty, her husband, had no father'; 'that the reason that no one ever come to see them, the said J. W. Foster and Willis Foster, and their family, was because they associated with the said Mrs. Dosia Harty and her family'; that 'he, the said Morris Woods, could prove that John Harty had no father'—against the peace and dignity of the state."

This indictment is vigorously assailed, because it fails to allege a violation of the statute under which it was framed. Article 750 of the Penal Code of 1895, reads as follows: "If any person shall orally or otherwise, falsely and maliciously or falsely and wantonly impute to any female in this state, married or unmarried, a want of chastity, he shall be deemed guilty of slander," etc. It is insisted that the language employed does not of itself impute to Mrs. Dosia Harty a want of chastity; that in order to bring this within the statute there should have been innuendo averments, alleging what the language meant; and that as spoken and intended it meant by the language employed that Mrs. Harty was a female without chastity. Under our authorities this contention is well taken. The language that Mrs. Dosia Harty "was not a respectable woman" does not of itself impute a want of chastity. There are many ways that a woman may be regarded as not respectable, without impugning her virtue or chastity. It will be noticed, from the indictment copied above, that there is no innuendo averment setting forth the meaning of the imputed language, nor is there any innuendo averment in regard to any of the language. We therefore are of opinion that the indictment is vicious.

2. There is another question raised which may be well to notice in case of further prosecution. The court instructed the jury that, if appellant imputed a want of chastity

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to Mrs. Harty orally or otherwise, he would be guilty. This is error. While the statute provides that a want of chastity may be imputed orally or otherwise, yet when the pleader has selected the imputation and charged it, the state will be bound by such pleading in regard to the imputation. The jury are not authorized to consider other matters than charged, nor was the court warranted in instructing that they might convict him for the imputation of the want of chastity "otherwise" than alleged in the indictment, which is set out in the language averred to have been used by appellant. The charge should have confined the jury to the specific allegations.

3. It is not necessary to discuss that part of the motion for a new trial in regard to newly discovered evidence. If there should be another trial, this evidence could be obtained, and would not, therefore, then be newly discovered.

For the errors pointed out, the judgment is reversed, and the prosecution is ordered dismissed.

#### SMITH v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### 1. CRIMINAL LAW (§ 511\*)—ADULTERY—WITNESSES—CORROBORATION.

In a trial of a man for adultery, the woman with whom the crime is charged to have been committed cannot corroborate herself by testimony as to certain letters which she testified were received by her from defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.\*]

#### 2. ADULTERY (§ 14\*)—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to sustain a conviction for adultery.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 27-33; Dec. Dig. § 14.\*]

Appeal from Fannin County Court; H. A. Cunningham, Judge.

Albert Smith was convicted of adultery, and appeals. Reversed and remanded.

Taylor & Lipscomb, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for adultery; the punishment being assessed at a fine of \$250.

The indictment charged the adultery as having occurred by means of habitual carnal intercourse without living together; appellant having a living wife, to wit, Alice Smith. Willie Smith testified that she had been married to appellant; that this occurred in January, 1908; that she lived with him about three months. And the theory of the state was that appellant in October, 1908, married Alice Smith; that about the 1st of November appellant began having in-

tercourse with the witness, and this continued at intervals until about April 10, 1909. She says that would occur sometimes twice a week, and that these acts were never farther than three weeks, from November 1, 1908, to the following April 10th, and that appellant had intercourse with her about 30 times during these months. Alice Smith, appellant's wife, gave birth to a child along about the 1st of April, 1909; the marriage having occurred on the last Sunday in October, 1908. No witness except Willie Smith testified to any act of intercourse between the parties. Two witnesses, Summers and Tacker, testified that about the 1st of March he and Tacker were crossing a pasture, and saw defendant and the witness Willie Smith, or Tacker, as he called her, in the public road about a quarter of a mile from where they were; that defendant got on his horse and rode away, and Willie Smith came down the road to where they were. Lanham testified that appellant and Lige Lawrence came to his house during the month of March and asked the way to Mr. Tacker's residence (Tacker was the father of Willie Smith), stating he wished to go there, but did not know where he lived. The evidence shows that Willie Smith was living with her father. Witness said he directed appellant, and he and Lawrence went away, and they came back in a couple of hours and told witness they could not find the place; that witness must have given him the wrong direction. Witness then told him he would go with him and show him the way; but appellant replied that that would let the cat out of the sack, and drove off. Luther Taylor testified that he was working for appellant's father, and had been over to see Willie Smith twice since he came back to Fannin county; that he had been back about three months; that he walked about five miles each time that he called to see her; that he wanted to see Willie Smith, and for that reason he went to see her; that he had known her several years, and was remotely related to her. Willie Smith was again introduced, and stated that she had seen appellant write, and that she had been married to defendant in January, and lived with him several months, and had received letters from him, and knew his handwriting, and that the letters offered in evidence were written by defendant and received by her, some through the mail, and some were handed to her by defendant in person. These letters were introduced in evidence, and were of a rather endearing nature. Russell Ball testified that he went to see Mrs. Smith after appellant was arrested; that this was done at appellant's request. He stated he wanted to talk to her about his case, and to tell her to meet him down at the slat gate. It was about a quarter of a mile from her house. Witness said he went and told her, and she went to-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ward slat gate. This is the substance of the testimony.

We might state that the letters contained no admissions of adulterous intercourse. While endearing in their nature, they were somewhat complaining that she was not responsive in her affections. Under this state of case there are several legal questions presented. Some special charges were requested and refused, and there are other exceptions relating to matters of evidence. A discussion of these matters is pretermitted, in view of the fact that we are of opinion that the evidence is not sufficient to support the conviction. If it be conceded that the act of sexual intercourse happening from the 1st of November to the 10th of April at intervals of from twice a week to three weeks apart will constitute habitual intercourse, as testified by the prosecutrix, her testimony is not corroborated in the manner required by law. A proper test has been laid down by the decisions of this court in ascertaining necessary corroboration, to wit: Eliminating the testimony of the accomplice, does the remainder of the testimony show or tend to show that the defendant did have intercourse with the woman as charged; that is, habitual intercourse? From the statement above made we are under the impression this must be answered that the facts and circumstances are not sufficient to tend to show that he had habitual intercourse with Willie Smith. The letters cannot be regarded as evidence of corroboration. No witness swore or undertook to swear that appellant ever wrote the letters, except Willie Smith. Under the well-settled rule she cannot corroborate herself. The other facts and circumstances mentioned are too insignificant in character and nature to show or tend to show acts of intercourse.

As the record presents this case, we are of opinion that the evidence is not sufficient to sustain the conviction, and therefore the judgment is reversed, and the cause is remanded.

McCORD, J., not sitting.

#### FRY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### CRIMINAL LAW (§ 406\*)—ADMISSIONS BY ACCUSED—ADMISSIBILITY.

Statements by accused, made before the grand jury, when he was practically under arrest, and was suspected of the offense investigated by the grand jury, not reduced to writing as required by the statute, are inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 920-921; Dec. Dig. § 406.\*]

Appeal from Titus County Court; W. E. Riddle, Judge.

Zeb Fry was convicted of theft, and he appeals. Reversed and remanded.

Rolston & Ward, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of theft of a pistol.

1. A bill of exceptions was reserved by appellant, which is as follows: "I was foreman of the grand jury in March, 1909. We had under investigation a charge against the defendant for stealing a pistol, and we sent out and had the defendant brought before us, and had him duly sworn, and then presented a pistol to him, and asked him if it was the pistol his father had turned over to Cat Goss, constable of precinct No. 3, Titus county, Tex., and the defendant then stated that it was. I then asked the defendant where he got it, and he told me that some time in July, I think he said, about the 25th of August, 1908, he bought it in a hardware store in the town of Mt. Pleasant, Tex., on the west side of the courthouse square. I then had him to take me and show me what house, or point it out to me, where he bought the pistol. I then asked him what he gave for it, and he stated that he gave \$3 for it."

Various objections were urged to the introduction of this testimony. Without going into these seriatim, appellant was practically under arrest at the time, and was suspected of the theft of the pistol, which was then being investigated by the grand jury. He was not in any wise warned. Under the authority of *Wood v. State*, 22 Tex. App. 431, 3 S. W. 336, this evidence was inadmissible. The *Wood Case* has been followed by all subsequent cases, where the question was involved under a condition stated in that case. At the time the *Wood Case* was written, a verbal confession or admission could be introduced: the particular predicate having been laid for that purpose. However, the rule is now different by the statute. Where a statement, admission, or confession of an accused party, when under arrest or in confinement, is sought to be used, under the present statute, the same must be reduced to writing under the formalities and solemnities set out in the terms of that statute. The statements of appellant were not reduced to writing as required by the recent statute, and therefore, are inadmissible.

2. There is also a bill of exceptions to the action of the court in regard to failing to enter an order allowing the prosecution of defendant under the provisions of section 9 of the act of the Thirtieth Legislature (page 137); appellant being at the time under the age of 16 years. We deem it unnecessary to enter into a discussion of that question in this opinion. The question may not arise upon another trial, or, if it does, it may come up in a different form. We therefore think it unnecessary to decide it on this appeal.

The judgment is reversed, and the cause is remanded.

**McCOY v. STATE.**

(Court of Criminal Appeals of Texas. Jan. 12, 1910. Rehearing Denied Feb. 9, 1910.)

**CRIMINAL LAW (§ 792\*)—PARTIES TO OFFENSE—INSTRUCTIONS.**

After defining theft and principals, the court properly instructed that, if the prosecutor's hog was taken under circumstances amounting to theft, and defendant and F. acted together in such taking, with a common purpose and intent fraudulently to take such hog, knowing it not to belong to either of them, and with intent to deprive the owner of its value, or that F. had such knowledge and intent, and defendant, knowing F.'s unlawful intent, aided him in taking the hog, in either case defendant would be principal in the offense; but if defendant shot the hog at the instance of F., believing it to be F.'s hog, then defendant would not be guilty, whether F. believed it to be his hog or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1818-1820; Dec. Dig. § 792.\*]

Appeal from District Court, Shelby County; James I. Perkins, Judge.

Eddie McCoy was convicted of theft, and appeals. Affirmed.

D. M. Short & Sons, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**RAMSEY, J.** This is a companion case to that of Jackson Fields v. State (this day decided) 124 S. W. 652, where the facts are stated at some length. There are no bills of exceptions in the record, and the questions raised on this appeal are substantially the same as those presented in the Fields Case, above referred to. The charge of the court in this case is somewhat fuller than the charge given in the Fields Case.

After defining theft, principals, and the other matters proper to be charged, the court then thus instructs the jury: "So in this case, if you believe from the evidence beyond a reasonable doubt that Henry Davis' hog was taken, and was taken under circumstances amounting to theft, and that this defendant and Jackson Fields acted together in such taking, with a mutual understanding and with a common purpose and intent fraudulently to take such hog, knowing it did not belong to either of them, and with intent to deprive the owner of same of its value, and to appropriate it to the use or benefit of themselves, or if you so believe Jackson Fields had such knowledge and intent, and that the defendant, having the same knowledge and knowing Fields' unlawful intent, aided Fields in taking the hog, by shooting the hog or otherwise, you will in either such case find that the defendant is a principal in the offense; but if this defendant shot the hog at the instance and direction of Jackson Fields, believing it was Fields' hog, then this defendant would not be guilty, no matter whether Fields believed it was his hog, or knew it was not his. So

in this case, if you believe this defendant killed Henry Davis' hog, or participated with Jackson Fields in killing such hog, yet if you believe from the evidence that at the time the hog was killed this defendant believed, and acted upon the belief, that the hog belonged to Jackson Fields, or if you have a reasonable doubt as to whether or not he had and acted upon such belief, you will acquit the defendant." This was a clear presentation of the issues arising under the facts, and leaves appellant without just cause of complaint. The evidence was sufficient to sustain the verdict.

There is no error for which the judgment should be reversed, and it is therefore accordingly affirmed.

**ROGERS v. STATE.**

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

**LARCENY (§ 40\*)—INDICTMENT AND INFORMATION—VARIANCE AS TO DESCRIPTION OF MONEY.**

The descriptive averments of an indictment must be proved as they are alleged; and in a prosecution for theft, where the property taken was described in the indictment as current money of the United States of America, it was necessary to prove that it was such, and the testimony of the loser that it consisted of certain coins was insufficient.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 117; Dec. Dig. § 40.\*]

Appeal from Titus County Court; W. E. Riddle, Judge.

Luther Rogers was convicted of theft, and appeals. Reversed and remanded.

Rolston & Ward, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** This conviction was for theft of money alleged to be \$2.55 in current money of the United States of America, to wit, two silver dollars, of the value of \$1 each, and two 25-cent pieces of silver, of the value of 25 cents each, and one 5-cent piece of the value of 5 cents.

It is insisted the evidence is not sufficient to support the judgment, first, because it is not shown defendant ever took the money; and, second, the failure of the state to prove the money taken was money coined by the United States government. There seems to have been no attempt to prove that the money was current money of the United States of America. The alleged owner testifies that he lost two silver dollars, two 25-cent pieces, and one 5-cent piece, which in the testimony is called a "nickel." This is not sufficient. *Early v. State*, 56 Tex. Cr. R. 61, 118 S. W. 1036. The authorities are uniform that, where the money is described to be money of the United States of America, the evidence must correspond, and sustain that allegation. In other words, the general proposition is

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

correct that the descriptive averments of an indictment must be proved as they are alleged.

Because of the failure of the evidence in the respect mentioned, the judgment is reversed, and the cause is remanded.

### FRICKS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### CRIMINAL LAW (§ 211\*)—PRELIMINARY COMPLAINT—SUFFICIENCY.

The complaint in a prosecution for aggravated assault alleged that affiant had good reason to believe and did believe that accused had committed an aggravated assault. Const. art. 1, § 9, prohibits the issue of any warrant to seize any person, etc., without probable cause, supported by affirmation. Code Cr. Proc. 1895, art. 257, providing what the complaint shall contain, requires affiant to swear that a crime has been committed, or that he has good reason to believe and does believe that a particular person committed it. *Held*, that the complaint was not insufficient for being on information and belief, so as to make an arrest thereunder a violation of section 9.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 423; Dec. Dig. § 211.\*]

Appeal from Corporation Court of City of Texarkana; A. B. De Loach, Judge.

Milton Fricks was convicted of aggravated assault, and he appeals. Affirmed.

E. Newt. Spivey, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

MCCORD, J. This is an appeal from the corporation court of the city of Texarkana. Appellant was tried and convicted of an aggravated assault in said court.

At the first called session of the Thirtieth Legislature, in 1907 (see Sp. Laws, p. 851, c. 104, §§ 131, 132), the charter of the city of Texarkana, in Bowie county, was amended, and within the limits of said corporation there was created what is called a corporation court of the city of Texarkana, Tex., and jurisdiction was conferred in said court to try all misdemeanor criminal cases arising within the corporate limits of said city under the criminal laws of the state of Texas, and the jurisdiction of the county court of Bowie county, Tex., was made to conform to the changes made in said corporation court. The Thirty-First Legislature amended the charter of the city of Texarkana, and among other provisions of said amendment it was provided that appeals should be had from said corporation court directly to the Court of Criminal Appeals of Texas from every conviction had for violation of the penal laws, and that appeals from said corporation court shall in all regards as far as practicable be governed by the laws of the state of Texas regulating appeals from the county court to the Court of Criminal Appeals.

This preliminary statement is made to

show the authority by which this case is in this court. No question is made on this appeal as to the constitutionality of the court or of the right of appellant to appeal directly from the corporation court to this court. In the case of *Ex parte Abrams*, 120 S. W. 883, the constitutionality of the law conferring the power upon the corporation court to try cases was upheld by this court.

Counsel for appellant, in their brief, insist that the court below erred in not sustaining appellant's motion to quash the complaint, and the contention is made that the complaint is insufficient because it states that the affiant has good reason to believe and does believe that appellant had committed an aggravated assault, and that such an affidavit will not authorize an arrest and prosecution; that the same is violative of section 9, art. 1, of the Constitution, which reads as follows: "The people shall be secure in their persons, houses, papers, and possessions from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation." A complaint made on information and belief has been before our court in several cases. An affidavit similar to the affidavit in this case has been upheld in the following cases: *Brown v. State*, 11 Tex. App. 451; *Clark v. State*, 23 Tex. App. 260, 5 S. W. 115; *Hall v. State*, 32 Tex. Cr. R. 594, 25 S. W. 292; *Anderson v. State*, 34 Tex. Cr. R. 96, 29 S. W. 384; and *Smith v. State*, 45 Tex. Cr. R. 411, 76 S. W. 436. It may be stated, however, that in none of the above cited cases was the constitutional question raised. The court simply held in those cases that a complaint which alleged that affiant had good reason to believe and did believe that a certain party committed an offense was sufficient.

Without committing ourselves as to what might be our views, were this an original proposition before us, we do not feel justified in breaking away from the unbroken line of authorities upon this question. In the case of *Dupree v. State*, 119 S. W. 301, our Supreme Court had occasion to review section 9, art. 1, of the Constitution, in the search and seizure feature of the section, and while that court did not hold that an affidavit founded upon belief would invalidate the warrant, as the case went off on other grounds, yet the reasoning of the Supreme Court in that case rather supports the position taken by appellant here. However, in view of the unbroken line of authorities on the subject, we do not feel disposed to adopt a new or different rule. Article 257 of the Code of Criminal Procedure of 1895, in setting forth what a complaint shall contain, states that the affiant shall swear that a crime has been committed, or that he has

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

good reasons to believe and does believe that a certain party committed the crime. This is the only article of the Code of Criminal Procedure that provides that an affidavit may be made in this way.

We have not before us the charge of the court below. The record contains two bills of exception as to questions propounded to the state's witnesses when they were on the stand as to what took place just before the assault was made. This was part of the res gestæ of the transaction, and was admissible.

Finding no errors in the record, the judgment is in all things affirmed.

### LOCKHART v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### PHYSICIANS AND SURGEONS (§ 6\*)—PRACTICING WITHOUT AUTHORITY—PROSECUTION—INDICTMENT.

Under Acts 30th Leg. c. 123, §§ 4, 6, providing that it shall be unlawful for any one to practice medicine who has not registered in the district clerk's office of the county in which he resides his authority for practicing, an indictment which charges that accused did unlawfully engage in the practice of medicine in C. county without having first filed for record with the clerk of the district court of said county his authority for practicing medicine, is insufficient for failure to allege either that accused resided in C. county or that he did not register his authority to practice in the office of the district clerk of the county in which he resided.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 9; Dec. Dig. § 6.\*]

Appeal from Cherokee County Court; R. L. Robinson, Judge.

J. J. Lockhart was convicted of unlawfully practicing medicine, and appeals. Reversed, and cause dismissed.

Norman & Shook, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

MCCORD, J. Appellant was tried in the court below for unlawfully practicing medicine. A jury being waived, the case was tried before the court, appellant convicted, and the punishment assessed at \$50 fine and one day imprisonment, from which he has appealed to this court, and seeks a reversal on the ground that the bill of indictment charges no offense against the law.

The indictment charges that appellant, on or about the 15th day of May, 1909, and anterior to the presentment of the indictment, in the county of Cherokee and state of Texas, did unlawfully engage in the practice of medicine for pay and as a regular practitioner of medicine in its various branches and departments, and as such practitioner did prescribe for and visit patients professionally, to wit, did prescribe for and visit one Mollie Hunt without having first filed for record with the clerk of the district court of said county a verification license, and with-

out having filed for record with the clerk of the said district court any license issued by some authorized board of medical examiners.

Appellant, in the court below, moved to quash the indictment because it failed to allege that appellant had not filed a verification license with the clerk of the district court of the county where he resided, and failed to allege that appellant resided in the county of Cherokee. Section 4, c. 123, of the Acts of the 30th Legislature, regulating the practice of medicine, provides that after the passage of said act it shall be unlawful for any one to practice medicine in any of its branches within the limits of this state who has not registered in the district clerk's office of the county in which he resides his authority for so practicing; and section 6 provides that within one year after the passage of the act all legal practitioners of medicine within the state, who, practicing under the provisions of previous laws, or under diplomas of legal colleges, shall present to the Board of Examiners for the State of Texas documents or transcripts of documents, showing the existence or the validity of the diplomas, or valid and existing license issued by boards heretofore, and thereupon shall receive from said board verification license "which shall be recorded in the district clerk's office in the county in which the licensee may reside"; and section 14 prescribes the penalty for failing so to do. So it will be seen, by the sections above quoted, that the offense is in failing to register his authority to practice, in the office of the district clerk of the county in which he resides, and in failing to have recorded in the district clerk's office his verification license in the county in which he may reside. An inspection of the indictment in this case shows that the pleader omitted to allege either that appellant resided in Cherokee county, or that his license or authority to practice medicine was not recorded in the district clerk's office of the county of his residence. This omission makes the indictment invalid, and the court below erred in failing to sustain appellant's motion to quash the indictment. See *Marshall v. State*, 119 S. W. 310.

For the error indicated, the judgment of the court below is reversed, and the cause dismissed.

### LOCKHART v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### PHYSICIANS AND SURGEONS (§ 6\*)—PRACTICING WITHOUT AUTHORITY—PROSECUTION—INDICTMENT.

Under a statute providing that it shall be unlawful for any one to practice medicine who has not registered in the district clerk's office of the county in which he resides his authority for practicing, an indictment which charges that accused did unlawfully engage in the practice of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

medicine in C. county without having first filed for record with the clerk of the district court of said county his authority for practicing medicine, is insufficient for failure to allege that C. county is the one in which accused resides.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 6.\*]

Appeal from Cherokee County Court; R. L. Robinson, Judge.

J. J. Lockhart was convicted of unlawfully practicing medicine, and appeals. Reversed, and cause dismissed.

Norman & Shook, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The charging part of the indictment avers that appellant "did then and there unlawfully engage in the practice of medicine for pay and as a regular practitioner in its various branches and departments, and as such practitioner did prescribe for and visit patients professionally, to wit, did prescribe for and visit Mrs. Hattie Sessions, without having first filed for record with the clerk of the district court of said county a certificate from some authorized board of medical examiners, and without having filed for record with the clerk of the district court of said county a verification license from the State Board of Medical Examiners for the state of Texas, against the peace and dignity of the state."

Motion to quash and motion in arrest of judgment were both urged to the insufficiency of the indictment. Among other things, the motion in arrest of judgment attacks the indictment because it fails to allege that Cherokee county was the county of appellant's residence, and that the indictment is vicious for this reason, inasmuch as the law requires that a verification license shall be filed for record in the county of the physician's residence. This point is well taken. See *Marshall v. State*, 119 S. W. 310.

The judgment is reversed, and the prosecution is ordered dismissed.

#### DEAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### 1. CRIMINAL LAW (§ 656\*)—TRIAL—REMARKS BY JUDGE.

A statement by the trial judge, addressed to the attorneys, but within the hearing of the jury, that he believed that defendant was guilty under his own statement, and would like defendant's attorney to find some law governing the matter, is a violation of the statute prohibiting the court from making remarks as to the effect of the evidence, or stating his conclusion as to defendant's guilt or innocence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.\*]

#### 2. INTOXICATING LIQUORS (§ 239\*)—TRIAL—INSTRUCTION—ISSUE OF CASE.

L., having taken orders for whisky from various people, had it shipped to B., and hired

defendant to get the whisky and deliver it to the various purchasers, collecting the amount due, and pay himself \$3 for the services of himself and team, and deliver the balance of the money to L. Held, that the court should have charged that if prosecutor, prior to the time charged in the indictment, had ordered whisky from L., who hired defendant to get the whisky and deliver it to prosecutor and collect the money therefor, defendant was guilty of no offense, in accordance with defendant's theory of the evidence, and that his failure to do so was erroneous.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 239.\*]

Appeal from District Court, San Augustine County; W. B. Powell, Judge.

John Dean was convicted of violating the local option law, and he appeals. Reversed.

Foster & Davis, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for violating the local option law.

1. A bill of exceptions recites that after the testimony had been introduced by both sides, and while the jury were present, the presiding judge, while on the bench, addressing himself to the attorneys in the case, said in the hearing and presence of the jury, and from the bench: "Gentlemen, as a question of law I believe he is guilty under his own statement, and I would like for you to find me some law governing the matter." Thereupon appellant excepted to the remark of the court, so stating at the time the exception was taken. Thereupon the court repeated in substance his remark, and again exception was taken. This bill is approved, with the following qualification: "After all the evidence was in, and the jury warned not to talk about the case and to be back next morning at 8:30, and before they dispersed, the court addressed the attorneys for defendant, and told them he would be glad to have some authority on the law of the case; and counsel for defendant said in substance that he thought the law of the case was settled in favor of the defendant in a number of cases, but did not just recall them; and the court remarked that as a matter of law it appeared to him that he was guilty, from his own statement, the remark being made exclusively to counsel, but was heard by the jury, and the counsel excepted to the remark, and the court said, 'I was referring to the law only.'" This bill shows a violation of our statute, which prohibits the court from making such remarks in regard to the effect of the evidence, or his conclusion as to the guilt or innocence of the defendant; that being a matter relegated exclusively to the jury. This necessitates a reversal of the judgment.

2. The court gave this instruction to the jury: "If the defendant received the whisky from Henry Lewis, to deliver to the owners thereof, and that he had no interest in the whisky in any way, he would not be guilty;

and if you so believe you will find him not guilty. But if the defendant was acting as agent of the said Lewis, in aiding and assisting him in the sale of the whisky, or if he had any interest in the sale, whether directly or indirectly of said whisky, he would be guilty of selling intoxicating liquor." Exception was reserved to this charge, and the following instructions requested: "Gentlemen of the jury, you are instructed that if Boy Dodd had ordered the whisky from Henry Lewis, prior to the time defendant brought it from Broadus, and Henry Lewis hired defendant to bring the same from Broadus, with other whisky, and instructed defendant to collect the money for same and to apply it to the hire of himself and team for said trip, then defendant would be guilty of no offense, and it is your duty to acquit him."

The following instructions were also asked: "Gentlemen of the jury, you are instructed that if you believe from the evidence that Boy Dodd, some time prior to the time charged in the indictment, ordered whisky from Henry Lewis, and that Henry Lewis hired defendant and his team to go to Broadus and get said whisky and deliver it to said Dodd, and collected the money due by said Dodd for said whisky, then defendant would be guilty of no offense, and it is your duty to acquit him." Appellant asked the further instructions: "Gentlemen of the jury, you are instructed in this case that if you believe from the evidence that Boy Dodd, some time prior to the time charged in the indictment, ordered whisky from Henry Lewis, and that Henry Lewis hired defendant and his team to go to Broadus, and get said whisky and deliver it to said Dodd, and instructed defendant to collect the money due by said Dodd to said Lewis for said whisky, and that defendant did deliver said whisky to said Dodd and collect \$1.25 for same, he would be guilty of no offense, and it would be your duty to acquit him." Another charge was asked, similar to those above quoted, submitting the good faith of defendant upon practically the same state of facts as set out in the other instructions. These special charges were all refused. We are of opinion that they should have been given; at least the phase of the case presented in those instructions should have been given.

The facts applicable to those charges may be summed up briefly as follows: Henry Lewis took orders for quite a lot of whisky, amounting to three or four gallons or more, from different parties. Among those from whom he took the orders was the witness Dodd, the alleged purchaser. After getting a sufficient amount of orders, he telephoned to a whisky establishment in Angelina county, and had the whisky sent on the train to a station called Broadus. He hired appellant to go to Broadus and bring the whisky to San Augustine, for which he paid appellant

for the services of himself and his team the sum of \$3. Lewis authorized appellant to collect the money, and pay himself the \$3 from the amount collected. Boy Dodd received his bottle of whisky, and paid appellant the \$1.25. Among those who ordered whisky was appellant. His order was for one gallon of whisky. Under this state of case we are of opinion the requested charges should have been given. It has not been thought necessary to make a full statement of the evidence, and it is only that portion of the evidence we state that bears more directly on the question involved in the special charges. This was appellant's theory of the matter, and if those facts were believed by the jury we are of opinion he should have been acquitted. While the court's charge criticised was correct as given, yet there was error in refusing the requested charges presenting appellant's side of the case.

The judgment is reversed, and the cause is remanded.

McCord, J., not sitting.

#### FARMER v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### 1. FENCES (§ 28\*)—TEARING DOWN FENCES—CRIMINAL RESPONSIBILITY—EVIDENCE.

Evidence held insufficient to sustain a conviction of accused for unlawfully breaking, pulling down, and injuring a fence belonging to complainant.

[Ed. Note.—For other cases, see Fences, Dec. Dig. § 28.\*]

#### 2. FENCES (§ 28\*)—DESTRUCTION—CRIMINAL PROSECUTION—ELEMENTS OF OFFENSE—PEACEABLE POSSESSION.

Where prosecutor was not in peaceable possession of land, protected by a fence which defendant was charged to have destroyed, but was a trespasser in constructing the fence, a criminal prosecution could not be sustained against defendant for its destruction.

[Ed. Note.—For other cases, see Fences, Cent. Dig. § 62; Dec. Dig. § 28.\*]

Appeal from Kimble County Court; Clarence Martin, Judge.

G. W. Farmer was convicted of unlawfully breaking complainant's fence, and he appeals. Reversed and remanded.

Moursund, Moursund & Rowe, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with unlawfully breaking, pulling down, and injuring the fence of Adam Murr.

Murr testified: That his land joined appellant's. That during the year he had occasion to build some fence. This, as he recalled, was about the 1st of May. The fence ran east and west. Appellant had a fence close to where Murr built his fence. That

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fence ran north and south. Appellant's fence had been located there about 18 years. He further testified: That he built his fence right up to appellant's fence, and set down a post and joined that post. That he set down a post against the fence of appellant, and in that way closed his fence. Murr testified: "As to whose possession the land was in on which I built that fence, well, I was trying to get possession. Me and Mr. Farmer had swapped land. He had taken his land, and I was fencing mine from his out of his pasture. It was along late in the evening when I finished the fence. I guess it was about sundown. The next morning I went down there to see if there were any cattle in there, so I could get them out. I found the fence torn down and dragged back. As to how far it was, I never measured the distance. It was something like 15 or 20 steps. The fence was torn down right where it went up against Mr. Farmer's fence. It started at his fence, and was dragged back west. I saw Mr. Farmer the next morning. I saw him at his son's house. The place where I saw him must have been something like a quarter of a mile from this fence. I had a conversation with him about this fence. I told him I had closed that fence up, and this morning I had found it torn down, and I wanted to see about it. I wanted to see his son. Mr. Farmer was there, but his son was not there. \* \* \* I told Mr. Farmer my fence was torn down, and this is what he said: He said he tore it down." The witness says: "I was trying to get my land out of his pasture. As to whether I was there when that stone pile was put there, there was a line run through there years ago, and I helped to run that line. I could not say whether that was the same pile of rock or not. The corner of the section was marked from there. I knew there ought to be a stone pile there somewhere. The pile of rock there was supposed to mark the line."

It further appears from the testimony of this witness there had been an exchange of land between the parties for grazing purposes. There had been no deeds passed. It seems to have been a verbal contract. The witness said that in their conversation Mr. Farmer had not informed him that there was a small strip there on the west of his fence that belonged to him, that was his land; nor did he say that he should not come with his fence on that strip. The fence had not been started, and there was not anything said about the line in the conversation. There had been, also, a re-exchange of the land.

Appellant, testifying in his own behalf, stated that Murr, in the conversation they had last fall in regard to building the fence, had informed him (appellant) that he (Murr) was going to fence his land out, and Farmer told him, "All right." Appellant further testified: "In regard to other things, I told him that he could not come over and join onto my fence. He must fence his own land

separate to himself. I have about eight or nine sections of land up there where this fence was. On the morning that I removed that fence at that place, I found a bunch of my cattle standing there starving for water. The watering place was about 400 yards southeast of that corner. I just untwisted the wires of that fence, and laid them back, and let the cattle out. I untwisted the wire from the post that Murr had put in over against my fence. It was about 23 or 24 steps from that post to the next post. I never authorized or gave Mr. Murr my consent to put that 23 yards of fence there. It was in the spring of the year, and some of my cows had young calves. They had been away from their calves some 12 or 15 hours when I turned them out." Further testifying, he says: "The water I wanted to get at for my cattle was about 400 yards south of that corner." He says he probably could have gotten his cattle through a gate that was some distance away from where the fence joined his. He further states that in their conversation he told Murr that he could not connect with his (appellant's) fence, but told him how far he could go with his fence. "I told him he could come to that stone mound mark. The post next to the one that was close to the fence was about ten inches from the stone mound, on the west side. I saw the place where that post was erected. It looked like it was intended for a corner post, and it was about two feet deep." It may be inferred from the testimony that the stone mound referred to marked the division line or corner of the land between the two parties, appellant and Murr.

Under the view we take of the record, it is unnecessary, we think, to discuss the averments of error in regard to the charge given and those refused. We do not think the testimony is sufficient to justify the verdict of the jury. *McNeely v. State*, 50 Tex. Cr. R. 279, 96 S. W. 1083, is a case directly in point. See, also, *Klein v. State* (Cr. App.) 39 S. W. 369, and *Jamison v. State*, 27 Tex. App. 442, 11 S. W. 483. The proposition may be generally stated that it is not so much the title to land that controls in cases of this character as it is the quiet and peaceable possession of the property on which the fence is situate. But the *McNeely Case*, supra, draws the distinction between quiet and peaceable possession of the land on which the fence is situate, and that character of case where the placing of the fence makes the party putting it there a trespasser. This case comes squarely within the rule laid down in the *McNeely Case*, supra. We are of opinion this conviction should not have occurred. Murr was a trespasser, and was not in the quiet and peaceable possession of the land.

The judgment is reversed, and the cause is remanded.

McCORD, J., not sitting.

## MAXEY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 28, 1910.)

1. CRIMINAL LAW (§ 396\*)—EVIDENCE—SELF-SERVING DECLARATIONS—ADMISSIBILITY.

Where, on a trial for theft of money, the state showed that accused had told a witness that she had received money from a third person, accused was entitled to show the balance of the conversation with the witness, and her explanation as to her false statement that she had received money from such person, and that she had received the same from her mother.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 862; Dec. Dig. § 396.\*]

2. LARCENY (§ 40\*)—INDICTMENT—PROOF.

Where the indictment alleged the larceny of a \$5 gold piece of United States money, the state must not only prove that a \$5 gold piece was stolen, but must show that it was United States money.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 102-106; Dec. Dig. § 40.\*]

Appeal from District Court, Shelby County; James I. Perkins, Judge.

Della Maxey was convicted of theft from the person, and she appeals. Reversed and remanded.

Bryarly, Carter & Walker and F. P. Brewer, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of theft from the person of Edmond Pilot.

Pilot testified: That he was at the residence of Alex Maxey, father of appellant, on Sunday. That he engaged with other parties who were present in pitching dollars at some holes in the ground. Four parties were engaged in this pitching of the dollars. He also testified, not having a sufficient number of dollars, he borrowed one from the mother of appellant. When the game was over, he returned this dollar to appellant's mother. Shortly afterward they had dinner, and after dinner Pilot, Dalton Jones, and perhaps one or more other persons were sitting on the front gallery. Pilot was sitting on the east end of the gallery, and appellant was either lying down or sitting on a pallet just behind Pilot. Dalton Jones, a white man, was sitting about four or five feet from Pilot and appellant. While sitting there a general conversation was carried on. Pilot testifies: That he had a pocketbook closed by a clasp. That he heard it click, looked around, and found appellant with the pocketbook trying to return it to his hip pocket. He took it away from her, and himself placed it in his pocket, and paid no further attention to the matter. That appellant got up immediately and went away. As she went away, he says her right hand was closed. That she went to Mr. Hall's, a neighbor near by, and returned and told her father, Alex Maxey, that Mr. Hall wanted him to go for some watermelons, and would furnish the money for the purpose of paying for the melons. Shortly

after this statement appellant, her father, and Pilot left her father's residence, and traveled together some 40 yards, where they separated, one taking the right-hand road, and the other the left-hand; appellant accompanying her father. That it then occurred to him, Pilot, to look at his pocketbook, which he did, and found that the \$5 gold piece was gone. That he went on home. That the other parties came to his house later, but he did not see them, as he had gone to sleep. This was in the daytime. He further testified he went to the residence of Alex Maxey, appellant's father, early the next morning, which was Monday, and mentioned the matter of having lost a \$5 gold piece, and Alex Maxey called his daughter, appellant, and said something about it. She neither admitted nor denied that she got it, but went on to the cow pen to milk the cows. He says he has never recovered his \$5. He also stated that, at the time they began pitching the dollars, he had some silver dollars in his pocketbook with the \$5 gold piece, which he took out while in the yard to be used in pitching at the game they were playing; that when the game was over he put his silver dollars in his vest pocket, and did not return them to the pocketbook. This is the substance of the prosecuting witness' testimony.

Mr. Dalton Jones, a white man, who is mentioned as being a highly respectable man, was at the residence of Alex Maxey, who was a negro, for the purpose of hiring Alex Maxey to do some work for him the next day. He reached the residence of Alex Maxey after dinner. After staying there a while and talking to Alex Maxey with reference to the object of his visit, he returned home, about a half mile distant. He places himself on the east end of the gallery four or five feet from where appellant and Edmond Pilot were sitting. He says he noticed the girl reach towards the pocket of Edmond Pilot, and was pulling the pocketbook out, when Edmond Pilot reached around and got it, and that the girl did not open the pocketbook; that when she reached for it she looked at him, the witness, and smiled; that when the pocketbook was taken by Edmond Pilot, or pushed back into his pocket, they laughed about it, and treated it as a joke. He excludes the idea that the girl got the money out of the pocketbook at the time. Both Pilot and the witness Jones agree that there was but one attempt to get the pocketbook. This is practically the evidence in regard to appellant's connection with the pocketbook, as shown by the testimony of both sides.

Alex Maxey testified that Pilot came to his house on Monday morning, and worked for him during the day, and did not say anything about having lost his \$5, or mention the subject; but on Tuesday morning Pilot returned and called his (witness') at-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tention to the fact that he had lost a \$5 gold piece, and thought his daughter had gotten it. She was called up and asked about it, and denied taking it. Pilot stated that he had missed it, and thought maybe she got it; but this she emphatically denied. On cross-examination of this witness, the state was permitted, over appellant's objection, to prove that he, a few days after this occurrence, had a conversation with one Brown, another negro, in which he told Brown that, in talking with his daughter, appellant, she told him she had \$2.50 in silver which had been sent her by Will McGee. The court says he withdrew the conversation with Brown and permitted the evidence to go before the jury that appellant stated to the witness she had received the money; that McGee sent her \$2.50. This occurred a few days after the alleged taking. On redirect examination appellant undertook to go into this conversation; but this was excluded, on the ground that the court had withdrawn from the jury the fact that the witness had told Brown that appellant had stated she had gotten the \$2.50 from McGee, but permitted the statement of appellant to the witness to remain before the jury. It also developed that appellant had had another conversation, just after the other with this witness with reference to the \$2.50. Appellant undertook to prove her statement in this conversation in regard to the \$2.50, and this was excluded on the ground that it was self-serving, and was not a part of the original conversation between Alex Maxey and his daughter. It was proposed to be shown by the witness that in the second conversation appellant told her father that her mother, witness' wife, had given her the \$2.50, and the reason she made the former statement to her father was under her mother's instructions, because the father always raised trouble and fussed at appellant a great deal, when he discovered the fact that she had money. This was excluded over the objection of appellant.

The mother of appellant testified that she had loaned Edmond Pilot the dollar on Sunday with which to pitch at the holes in the ground; that this dollar was part of the money she had given her daughter, appellant; that when the game was over witness Pilot returned the dollar she had loaned him. She also testified that she instructed her daughter to tell her father that she had gotten the money from Will McGee, because the father always created a disturbance and fussed at the daughter a great deal when he discovered that she had money, and that it would result in family trouble between herself and her husband, and she wished to avoid that. She assigns this as a reason she instructed her daughter to tell her father this story in regard to Will McGee. Appellant took the stand and testified that she did not take the \$5 gold piece, or any other money, from prosecuting witness'

pocketbook, and she did not open the pocketbook. The substance of her testimony in regard to her taking the pocketbook was practically as the witness Jones, at least substantially so. Will McGee testified that he did not send or give appellant any money.

This is practically the case as disclosed by the statement of facts.

1. On redirect examination appellant asked the following question: "Now, you have stated that appellant told you that Will McGee had sent her \$2.50. We will now ask you what else she told you about where she got the \$2.50, about which you had been questioning her, and why she had told you that Will McGee had sent it to her?" The answer would have been, had the witness been permitted to testify, which she was not, that defendant's mother gave appellant the \$2.50, and that her mother told her to tell this witness that Will McGee sent it to her, for the reason that this witness, who was the father of defendant and the husband of defendant's mother, fussed at defendant's mother every time she gave this defendant any money, and that said witness would have further testified that defendant told him that her mother gave her the money to pay a doctor's bill. The court qualifies this bill by stating that he thought, trusting to his memory, that the statement of facts would show that this question called for another and different conversation, occurring subsequent to that called forth by the state, and was, therefore, hearsay and self-serving, but again refers to the statement of facts. Having permitted the introduction of the first statement, to wit, that in which appellant told the witness she had received the money from McGee, we are of opinion this conversation should have been permitted to go to the jury. It was in relation to the same matter and explanatory of the first conversation. We are of opinion that this comes directly within the rule laid down by this court in *Pratt v. State*, 53 Tex. Cr. R. 281, 109 S. W. 138, wherein Judge Ramsey, in a well-considered opinion, reviewed this character of question. Having introduced the first statement, we believe, under the statute, which was construed fully in the *Pratt Case*, supra, the other conversation should have been permitted to go to the jury as explanatory of the first. This, we think, is emphasized by the fact that Will McGee was permitted, over appellant's objection, to testify that he had not sent or given appellant any money.

2. It is contended the evidence is insufficient to support the conviction. The indictment charged appellant with taking the \$5 gold piece of the United States currency. There is not any evidence in the record from any witness that it was United States money. The witness Pilot said it was a \$5 gold piece, and no witness anywhere testified to the fact that it was money of the United States. Having alleged this fact, the

evidence should have corresponded, and shown that it was United States money.

The judgment is reversed, and the cause is remanded.

### WYATT v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### 1. CRIMINAL LAW (§ 539\*)—EVIDENCE—TESTIMONY ON FORMER TRIAL.

Testimony of a witness on a former trial is not admissible in evidence, in the absence of a showing that he is dead or beyond the jurisdiction of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1230; Dec. Dig. § 539.\*]

#### 2. CRIMINAL LAW (§ 730\*)—TRIAL—CONDUCT OF COUNSEL—REFERENCE TO FORMER CONVICTION.

Under Code Cr. Proc. 1895, art. 823, providing that "the former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument," it is reversible error for the county attorney to ask defendant: "Have you not been convicted and given 10 years in this case?" though the question was not answered, and the court at once reprimanded the attorney, and instructed the jury that the question should not be considered for any purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1603; Dec. Dig. § 730.\*]

#### 3. ROBBERY (§ 20\*)—INDICTMENT AND PROOF—VARIANCE.

Under an indictment charging robbery by an assault and violence by putting the prosecutor in fear of life and bodily injury, evidence that defendant used a pistol as a bludgeon does not constitute a variance.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 27; Dec. Dig. § 20.\*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

Willie Wyatt was convicted of robbery, and appeals. Reversed.

Baskett & Evans, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for robbery; the punishment assessed being 15 years' confinement in the penitentiary. The former appeal is reported in 55 Tex. Cr. R. 73, 114 S. W. 812.

A bill of exceptions was reserved which recites matters with reference to the absence of appellant's father, and the circumstances are set forth in the bill of exceptions in regard to his absence as a predicate for offering his testimony, given on a former trial. Without going into a detailed statement of these matters, the evidence in regard to the absence of the father excludes the idea that he is beyond the jurisdiction of the state. The testimony was excluded upon the ground that a sufficient predicate had not been shown that the witness was either dead or absent from the state; that is, beyond the jurisdiction of the court. There was no error in this ruling. We have not been furnished with a brief in the case,

nor are any authorities cited in support of this alleged error. We have been unable to find any authorities which support this contention of appellant. Under no provision of our statute was this testimony introducible as a matter of law or right. Nor have we been able to find a rule of evidence which would justify its introduction. Had the father been absent from the state or dead, a very different proposition would have been presented. Provision has been made in the Code of Criminal Procedure authorizing the accused to take depositions of witnesses when beyond the jurisdiction of the state, or to introduce depositions of such witness when taken in the state before his departure from the state; but that is not the question here involved or contended for by appellant. We are here confronted with the proposition that the mere absence of a witness from court or his inaccessibility would justify appellant in asking for a reproduction of the testimony of the absent witness, although within the jurisdiction of the court and within the state. There was no error in excluding this testimony.

2. Another bill of exceptions was reserved to the action of the court in respect to impaneling the jury. This question was decided adversely to appellant in the case of Hattie Martin v. State (decided at the present term) 124 S. W. 681. It is therefore unnecessary to discuss that question.

3. Another bill discloses that, while the assistant county attorney was cross-examining the defendant, he propounded this question: "Have you not been convicted and given ten years in this case?" The court immediately interrupted and stopped the attorney, and remarked to him: "Don't ask such questions as that. You know you have no right to ask such questions, and if you do it again the court will punish you." The court then turned to the jury, and instructed them that the question was not in evidence, and that it was illegal and improper, and that they should not consider it for any purpose whatever. After this reprimand, appellant's counsel objected to the question of the attorney for the state, and asked that they be allowed to take a bill of exception, and complained of the conduct of the state's counsel, etc. We are of opinion this conduct was of such a nature and character that under the statute would require this court to reverse the judgment. It is true, there was no answer to the question; but it was stated in such manner that the jury did not fail to understand what was meant, and this view of it is emphasized by the statement of the court and reprimand of the attorney, and admonition to the jury not to consider it. These matters manifested the fact that it was understood by the court and counsel and the jury, and the whole matter emphasized the fact that it was an allusion to the former

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 124 S. W.—59

conviction; and this bill demonstrates the further fact that it was an intentional allusion by the attorney asking the question to the former conviction. The manner and promptness of the court's interference were such as to carry convincing weight to the jury that he knew, and that the fact was, that appellant had been convicted before this. True, the trial court did his utmost to minimize the wrong done in asking the question. While not answered in terms, in the light of the entire record, the jury knew the fact from the question and all that occurred as certainly and as truly as if it had been answered in the affirmative. It is unfortunate that we should under such circumstances be required to reverse a case. But we cannot consent to the impairment or infringement of a right which the law in express terms gives every defendant, however humble.

In *Baines v. State*, 43 Tex. Cr. R. 490, at page 498, 66 S. W. 847, at page 851, Judge Henderson, delivering the opinion of the court, used this language: "Evidently, the intent and purpose of the statute was to guard appellant against the use by the state of his former conviction as evidence of his guilt, and it may be that any intentional allusion to a former conviction ought to afford ground for reversal." In that case, as in this, the infraction of article 823 of the Code of Criminal Procedure of 1895 was under consideration. That article provides as follows: "The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former conviction shall be regarded as no presumption of guilt; nor shall it be alluded to in the argument." *Baines Case*, supra, lays down a correct rule, and, we think, applicable to the case at bar. This statute was provided by the Legislature for the purpose indicated by its terms. If we give that statute the construction that its words would indicate or import, this conduct of the prosecuting officer was an infraction of the legislative will in regard to this question. Neither appellant nor his counsel were in any manner responsible for this conduct, did not provoke it, and it is evident that it was an intentional allusion for whatever advantage it might have before the jury in impressing them with the fact that on a former trial appellant had been given 10 years in the penitentiary. The verdict this time was for 15 years, and enhanced the punishment on this trial of 5 years over the former conviction. We therefore are of opinion that this judgment should be reversed. *Hatch v. State*, 8 Tex. App. 416, 34 Am. Rep. 751; *House v. State*, 9 Tex. App. 567; *Moore v. State*, 21 Tex. App. 666, 2 S. W. 887; *Fuller v. State*, 30 Tex. App. 560, 17 S. W. 1108; *Richardson v. State*, 33 Tex. Cr. R. 518, 27 S. W. 139;

*Clark v. State*, 23 Tex. App. 263, 5 S. W. 115; *Pickett v. State*, 51 S. W. 375; *Hargrove v. State*, 33 Tex. Cr. R. 431, 26 S. W. 993; *Baines v. State*, supra. See also, *Hood Brown v. State* (decided at present term of this court) 122 S. W. 565.

4. Another bill of exception presents the matter of variance. The evidence discloses that appellant struck Dixie Harris over the head with a six-shooter at the time of the robbery. Appellant's contention is that this was a robbery with firearms, and, this being true, it constituted a variance, because the indictment only charged that the robbery occurred by means of an assault and violence by putting Harris in fear of his life and bodily injury. The indictment does charge the assault was made by violence. While the pistol was used in making the assault, it was used as a bludgeon only, and not for the purpose of shooting. Concede that under this state of facts the state would have been justified in charging robbery by means of deadly weapons, still we are of opinion that under the circumstances appellant cannot be heard to complain that the state did not so charge, but only prosecuted him for robbery by means of an assault and violence. An assault was committed, and violence was used by means of striking with the pistol; but the mere fact that this was done by the use of a pistol as a bludgeon would not, in our judgment, constitute a variance. The facts met and established the allegation in the indictment that this robbery was by means of an assault and violence. The pistol was not fired at the time, nor used as firearms, but was only used as a bludgeon. Subsequently to the robbery, and after appellant had separated from his victim, and had gone about a block or such matter, there was a pistol fired, but not at the assaulted party, and this was subsequent to the robbery. We are therefore of opinion that this contention is without merit. Discussion of the ruling refusing the continuance is pretermitted.

There are some criticisms of the charge, but we think these are without merit. In fact, we are of opinion the charge favorably presents the issues of the case for appellant.

The judgment is reversed, and the cause is remanded.

McCORD, J., not sitting.

#### ARREDONDO v. STATE

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

GAMING (§ 94\*)—INFORMATION—VARIANCE—PLAYING AT CARDS—"MONTE."

In a prosecution for gambling, where defendant was charged with unlawfully playing at a game of cards at a place other than a private residence occupied by a family, and the uncon-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

tradicted evidence showed that, if gambling at all, he was betting at a game of "monte," his conviction was unauthorized.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 274-283; Dec. Dig. § 94.\*]

Appeal from Newton County Court; E. J. Newberry, Judge.

L. Arredondo was convicted of gaming, and appeals. Reversed and remanded.

West & Forse, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. Under the authority of Chancellor v. State, 52 Tex. Cr. R. 464, 107 S. W. 823, this case must be reversed, for that the uncontradicted evidence shows that appellant, if gambling at all, was betting at a game of monte. The charge against him was thus stated: That he "did then and there unlawfully play at a game with cards at a place other than a private residence occupied by a family." In the case of Chancellor v. State, supra, the court say:

"So it will be seen that the court did not submit to the jury the issue charged in the first count, to wit, betting at a banking game or table, but limited the jury in their consideration of the facts to betting at a game played with cards. The evidence of the state is that appellant bet at banking game or table, known as 'monte.' The statute (article 384 of the Penal Code of 1895) specially names 'monte' as a banking game, and the evidence shows that it was in fact a banking game, because it was kept by a dealer, and comes within the definition of what it takes to constitute a banking game; that is, the dealer against all the betters. In other words, 'monte' is a banking game, and it was at this bank that the state's evidence shows that appellant bet.

"Error is properly suggested in regard to the court instructing the jury, if appellant bet at cards, he would be guilty, the punishment being not less than \$10, nor more than \$50, when in fact he confined their consideration to betting at a game played with cards. The statute provides that, where the betting was on a gaming table or bank, the punishment is not less than \$10 nor more than \$50, and may in addition to said fine impose a jail penalty of not less than 10 nor more than 30 days. In other words, the state charged appellant with one offense, and the state's evidence supports that charge, and the jury were instructed to convict upon another phase of the statute, not included in the count submitted to the jury. One offense was charged, and another submitted, and the conviction is, therefore, not authorized."

The facts of this case are clearly brought within the rule laid down in the Chancellor Case, supra, and the conviction cannot, therefore, be sustained.

For the error pointed out, the judgment is reversed, and the cause is remanded.

## REYNOLDS v. STATE

(Court of Criminal Appeals of Texas. Jan. 12, 1910. Rehearing Denied Feb. 9, 1910.)

### 1. CRIMINAL LAW (§ 186\*)—FORMER ACQUITTAL—JEOPARDY.

Where, in a prosecution for assault, accused had been previously acquitted because of a variance in the name of the person assaulted, such acquittal did not constitute jeopardy, preventing a subsequent conviction for the same offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 312, 320, 345-361; Dec. Dig. § 186.\*]

### 2. CRIMINAL LAW (§ 1172\*)—ASSAULT—INSTRUCTIONS—HARMLESS ERROR.

Where, in a prosecution for assault on defendant's wife by striking her, the court charged that if defendant struck R. with his hands and fists as alleged, and defendant was an adult male, while R. was a female, then he would be guilty of aggravated assault, he was not prejudiced by the court's error in a general definition of what constitutes assault.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1172.\*]

Appeal from Delta County Court; C. C. Dunagan, Judge.

Tom Reynolds was convicted of aggravated assault, and he appeals. Affirmed.

Lane & Ratliff, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This appeal results from a conviction had in the county court of Delta county, had on May 19, 1909, on a charge of aggravated assault committed by appellant on his wife.

1. Before entering into trial he interposed a plea of former acquittal. The affidavit and information contained in his plea recites the assault to have been made upon one Liz Randles. It is not denied, as we understand, that the first trial really involved the same transaction and assault as that for which he was convicted in this case. We gather, also, that the former acquittal resulted on account of the variance between the name of the person alleged to have been assaulted as charged in the information and as in fact developed on the trial. In the case of Branch v. State, 20 Tex. App. 599, it was held that where there had been an acquittal or a nolle prosequi entered, after pleading to a charge of theft from Fabian Flores, a plea of former jeopardy would not lie as against an indictment charging the theft from Antonio Flores. So it would seem to follow that where there is a distinct, unquestioned error in the name of the person assaulted as set out in the information, and an acquittal thereafter had, this would not bar prosecution for an assault upon the same person charged under the correct name.

2. The charge of the court is complained of, in that, in defining what constitutes assault and battery, it is broader than the means charged in the information to have

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

been used, and in this respect erroneous. The charge is that appellant, being an adult male, committed an aggravated assault and battery by striking his wife, Rose Reynolds, with his hands and fists. In defining what constitutes an assault, the court, among other things, stated that the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with intent to alarm another, under circumstances calculated to effect that object, comes within the meaning of an assault. However, when the court came to submit the issue to the jury, he did so in this language: "If you believe from the evidence beyond a reasonable doubt in this case that the defendant, Tom Reynolds, in Delta county, Texas, on or about the 21st of October, 1908, did then and there strike Rose Reynolds with his hands and fists as alleged in the information herein, and you further believe Tom Reynolds was an adult male, and you believe Rose Reynolds was a female, then in that event you will find the defendant guilty of an aggravated assault and battery." There can be no doubt, therefore, that the issue submitted, and the only issue submitted, to the jury, was the one distinctly charged in the information. We do not think that a case should be reversed where there is error in the general definition of what constitutes an assault, which is elementary and general in its character, when the matter is properly submitted to the jury in the charge, under which alone a conviction could be had. See *Rallsback v. State*, 53 Tex. Cr. R. 542, 110 S. W. 916.

The judgment is affirmed.

McCord, J., not sitting.

#### LOVE et al. v. STATE

(Court of Criminal Appeals of Texas. June 23, 1909. State's Rehearing Denied Feb. 9, 1910.)

#### 1. CRIMINAL LAW (§ 427\*)—EVIDENCE—ACTS OF CODEFENDANT.

In a prosecution of two persons for burglary, in the absence of evidence of co-operation between them, evidence that goods taken from the building burglarized were found in the possession of either defendant is not admissible against the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1012-1017; Dec. Dig. § 427.\*]

#### 2. BURGLARY (§ 41\*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Evidence that defendants were seen near the burglarized house a short time before, without positive identification of the goods alleged to have been taken, is insufficient to support a conviction.

[Ed. Note.—For other cases, see Burglary, Dec. Dig. § 41.\*]

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Ed Love and Floyd McDonald were convicted of burglary, and appeal. Reversed.

Lee Upton and A. R. Burges, for appellants. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellants were convicted of burglary, and their punishment each assessed at two years' confinement in the penitentiary.

The evidence in this case is insufficient to support the judgment of conviction. There is no positive identification, as we read the record, of the goods alleged to have been taken out of the burglarized house. This, in substance, is all the testimony that goes to connect appellants with the burglary of the house. They were seen in or near the house a short while before in the town of San Angelo; but various other parties were evidently in or near said house about said time, but they did not and could not have burglarized the house at the time they were seen near the house, since there is no evidence suggesting that they did. Furthermore, the evidence in this case shows that the house in question was burglarized on two or three different occasions by some one. Now, goods found in possession of either of the defendants, where the evidence does not show a co-operation and acting together on the part of the defendants, in any given case of burglary, would not be admissible testimony against the other. A good deal of the evidence introduced is of this character. For a discussion of this matter, see the following authorities: *Hill v. State*, 44 Tex. Cr. R. 603, 78 S. W. 9; *Herndon v. State*, 50 Tex. Cr. R. 552, 99 S. W. 558.

On account of the fact that the evidence is insufficient to support the verdict, the judgment is reversed, and the cause remanded.

#### DURHAM v. STATE

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### JUDGES (§ 47\*)—DISQUALIFICATION—PARTICIPATING IN CAUSE.

When accused consulted an attorney and detailed to him his defenses, he was advised by him to plead guilty and pay the fine. The attorney admitted giving the advice, but claimed that it was not given as an attorney, but as a friend. Held, that such attorney was disqualified from sitting as special judge in accused's trial.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214-222; Dec. Dig. § 47.\*]

Appeal from Hardin County Court; D. F. Singleton, Judge.

R. L. Durham was convicted of unlawfully carrying a pistol, and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the county court of Hardin county on May 20th last year on a charge of carrying a pistol in violation of law, and his fine assessed at the sum of \$100.

The chief question raised on the appeal involves the disqualification of Hon. D. F. Singleton, a member of the bar of that county, who under appointment sat as special county judge, and before whom the trial was had. When the case was called, appellant filed a motion asking that the said Singleton recuse himself as disqualified for the reason, in substance, that he had been of counsel for appellant in the case. This motion was denied. The facts touching this matter, and set out at length in the record, are substantially as follows: Appellant testified to this effect: "Shortly after the date of the alleged offense information was filed in the county court, by the county attorney thereof, charging this defendant with the same offense as is charged in the indictment filed herein, and that while said prosecution was pending under said information the defendant consulted and advised with Hon. D. F. Singleton, both as a friend and an attorney, as to the defendant's defense and the probability of his acquittal or conviction, and related to Hon. D. F. Singleton in detail all his defenses, and the defense he would rely upon on the trial hereof, and obtained D. F. Singleton's advice and counsel therein. That subsequent to the communication made to and advice given by Hon. D. F. Singleton as aforesaid, said information was quashed, and the case was dismissed on the motion of the county attorney of said Hardin county; and that thereafter, to wit, the 30th day of September, 1908, the grand jury of Hardin county returned an indictment against the defendant for the same offense. That the charge now pending against the defendant is the same charge, and is the offense about which he consulted and advised with Hon. D. F. Singleton, and about which this court advised this defendant to plead guilty to said charge. That at the time said communications were made to, and the matter discussed with, the said D. F. Singleton, this defendant discussed with the court the probabilities of getting or obtaining from the county attorney an agreement to let this defendant plead guilty to a disturbance of the peace by rudely displaying a pistol. That Hon. D. F. Singleton at that time advised the defendant that, on account of the political condition that had been existing in Hardin county, the county attorney could not afford to make any such agreement, and that the best thing defendant could do would be to plead guilty and pay the fine. That the reason defendant consulted with Hon. D. F. Singleton about the charge brought against him, and the possibility of his ac-

quittal or conviction, was on account of the great legal ability of the said D. F. Singleton, and that if defendant had known at the time he made such disclosures to said Singleton that he would not have made same if he could have anticipated that the said Singleton would be appointed special judge to try his case." Mr. Singleton testified as follows: "That the statements made by the defendant were substantially true, except that he (Singleton) when first approached by defendant, declined employment and refused to have any connection with the case, but that he talked the matter over with the defendant, and he did advise the defendant as stated by the defendant, but not as his attorney, and he declined to go into open court and represent him in the trial of said cause."

We understand the statement of Mr. Singleton to admit that appellant related to him in detail all his defense, and obtained from him his advice and counsel in respect thereto. We understand his testimony to admit that he advised appellant that, on account of the political conditions that had been existing in Hardin county, the county attorney could not afford to make such an agreement, and that the best thing he could do would be to plead guilty and pay the fine. Nor do we understand that his testimony denies the statement that if appellant had known at the time he made the disclosures to him that he would not have made same if he could have anticipated that the said Singleton would be appointed special judge to try the case. It is admitted in Mr. Singleton's statement that he gave appellant the advice to plead guilty, but that this advice was not given as his counsel, and that he declined to go into open court and represent him in the trial of his cause. The affidavit makes no attack upon the good faith or integrity of Singleton. On the contrary, it recognizes both his high character and legal ability, and the motion is rested solely on the ground that as a matter of law, under the facts, he was disqualified. The case in many of its aspects is strikingly like that of *Graham v. State*, 43 Tex. Cr. R. 110, 63 S. W. 558, and under the authority of that case we think that we must hold that Mr. Singleton was disqualified to hear and determine the question.

On this ground, the judgment of conviction is reversed, and the cause is remanded.

MCCORD, J., not sitting.

#### DOUGLAS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### 1. CRIMINAL LAW (§ 1111\*)—BILL OF EXCEPTIONS—QUALIFICATION OF BILL OF EXCEPTIONS.

The qualification or explanation of the court appended to a bill of exceptions will con-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

trol the recitals in the bill, in so far as such explanation modifies the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2895; Dec. Dig. § 1111.\*]

**2. CRIMINAL LAW (§ 1112\*)—APPEAL—BILL OF EXCEPTIONS—QUALIFICATION—ESTOPPEL.**

Where counsel for accused accepts a bill of exceptions with a qualification of the judge indorsed thereon, and files the same, he estops himself from declaring it to be unfair and injurious to his case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2896; Dec. Dig. § 1112.\*]

**3. CRIMINAL LAW (§ 1092\*)—APPEAL—BILL OF EXCEPTIONS—CERTIFICATE OF JUDGE.**

Mere statement of a ground of objection in the bill of exceptions is not a certificate of the judge that the fact stated is true.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2845; Dec. Dig. § 1092.\*]

**4. CRIMINAL LAW (§ 1110\*)—APPEAL—BILL OF EXCEPTIONS—AIDED BY OTHER PROCEEDINGS.**

A bill of exceptions cannot be aided either by statements in reply to a motion for a new trial, or by the statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2908; Dec. Dig. § 1110.\*]

**5. CRIMINAL LAW (§ 1111\*)—APPEAL—BILL OF EXCEPTIONS—STATEMENT OF FACTS.**

A bill of exceptions controls the statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2895; Dec. Dig. § 1111.\*]

**6. DIVORCE (§ 168\*)—JUDGMENT—COLLATERAL ATTACK.**

Where, after divorce, the party securing it remarried and lived with her new husband openly, and they were treated by defendant and the world as husband and wife, the divorce decree could not be attacked in a collateral proceeding, unless the record affirmatively showed lack of jurisdiction.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 549; Dec. Dig. § 168.\*]

**7. JUDGMENT (§ 497\*)—RECITALS—SERVICE.**

A recital in the judgment of service on defendant imports absolute verity in a collateral proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.\*]

**8. DIVORCE (§ 168\*)—DECREE—WAIVER OF SERVICE.**

Where a divorce was attacked on the ground that it appeared that defendant's waiver of citation was signed by him three days prior to the date when the suit was filed, it must be presumed in a collateral attack on the decree, in the absence of anything to the contrary in support of the judgment, that the citation was filed by defendant, or under his authority, after the suit had been instituted.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 549; Dec. Dig. § 168.\*]

**9. CRIMINAL LAW (§ 1156\*)—APPEAL—DISCRETION—MISCONDUCT OF JURY.**

Whether accused should be granted a new trial for alleged misconduct of the jury is particularly cognizable by the trial court, whose conclusion thereon will not be interfered with on appeal, unless it is clearly wrong and unsupported by the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3067; Dec. Dig. § 1156.\*]

**10. CRIMINAL LAW (§ 957\*)—NEW TRIAL—MISCONDUCT OF JURY.**

Denial of an application for a new trial for misconduct of a juror held not so clearly erroneous as to require a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2392-2395; Dec. Dig. § 957.\*]

**11. HOMICIDE (§ 203\*)—DYING DECLARATIONS—PREDICATE.**

Deceased, prior to making alleged dying declarations, had bled profusely. He stated he was going to die, and had been so told by two physicians. The nature of his wounds was also shown. Held, that there was a sufficient predicate for the admission of his statement as a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

Appeal from District Court, Erath County; W. J. Oxford, Judge.

Ben Douglas was convicted of murder, and he appeals. Affirmed.

L. N. Frank and Robert L. Thompson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**RAMSEY, J.** Appellant was convicted on a charge of murder in the district court of Erath county on July 12, 1909, the jury fixing the grade of murder as murder in the second degree and assessing his punishment at confinement in the penitentiary for a period of 41 years.

The appeal in the case raises some very interesting and novel questions; and, in view of the penalty as well as character of the questions raised in the record, we shall treat the case at more length, perhaps, than the difficulty of the questions presented by the record might ordinarily seem to require. All the parties were negroes. The evidence shows that one Vina Phillips, who was the wife of deceased at the time he was killed, had for some years theretofore been the wife of appellant. The deceased, Jim Phillips, had also been married before. The record tends to show that about January 31, 1909, Vina Phillips secured in the district court of Erath county a divorce from appellant, and that some two or three days after that the deceased, Jim Phillips, secured a divorce from his then wife, and that Jim Phillips and Vina a short time thereafter married, and for some little time before the difficulty, with the knowledge of appellant, were living together as husband and wife, and seem in good faith to have occupied that relation, and that for some considerable time appellant not only manifested no resentment, or expressed any disappointment over their relations, but his attitude was one of friendliness. The testimony of the state is to the effect, in substance, that on the day of the homicide, and late in the afternoon, while Phillips and his wife were returning from the house of one Lee Means, appellant, armed with a pistol, without excuse or provocation, shot Phillips, inflicting a mortal

wound upon him, continuing to fire upon him until he had fired some four or five shots, pursued deceased into the bushes, and repeatedly stabbed him with a knife, during all of which time deceased was calling for help, imploring appellant not to kill him, and saying to him that he could have the woman. Appellant presents by his testimony a case of self-defense which, however, as we view the record, was neither satisfactory nor reasonable. This matter, as well as all the issues in the case, was by the court submitted to the jury. That this charge, neither in matters contained in it nor omitted therefrom, is not in any respect the subject of complaint is the strongest demonstration of its accuracy. There is no complaint that the court misdirected the jury in any matter, or that he failed to submit any issue to the jury raised in the evidence. All the questions presented relate to other matters, which we will now examine.

1. When the witness Vina Phillips was sworn, and her testimony was offered, appellant objected to her testifying in the case, and urged that she was disqualified by law from so doing. The bill of exceptions touching this matter thereupon proceeds as follows: "Defendant by his counsel at the time objected to any and all testimony that might be given by said witness in the case, and showed to the court that at the time of the alleged killing of deceased, Jim Phillips, said witness Vina was in law and in fact the wife of defendant, Ben Douglas, and that said witness is now in law and in fact the wife of defendant, Ben Douglas, and that therefore said witness is incompetent to testify against the defendant herein. Defendant showed to the court, on said objection, that the alleged judgment and decree of divorce between the said Vina and defendant was and is a nullity and void, and of no force or effect in law, in this: That in the proceedings in which said alleged divorce judgment was granted by this court the petition of the said Vina Douglas was filed in this court on the 31st day of January, 1909, and that no citation was ever issued or served on the defendant therein, the said Ben Douglas, but that a waiver of citation, signed by said defendant, Ben Douglas, at least three days prior to said 31st day of January, 1909, was filed in said cause on said 31st day of January, 1909, the same being executed by the defendant at least three days before the filing of said petition and the judgment of divorce thereon, and the defendant says that no judgment of divorce could have been rendered thereon having any force or effect in law, and that same was null and void, and that, therefore, the witness Vina is incompetent in law to testify against the defendant in this case; she being his wife at this time." This bill is allowed, with the following qualification: "That the court does not certify to the truth of the grounds of objection, but only that they were urged."

It has been held by this court, and seems to be the settled law, that the qualification or explanation of the court appended to a bill of exceptions will control the recitals in the bill in so far as such explanation modifies same. *Hardy v. State*, 31 Tex. Cr. R. 289, 20 S. W. 561. And that where counsel accepts a bill of exceptions with the qualification of the judge indorsed thereon, and files the same, he estops himself from claiming it to be unfair and injurious to his case. *Jones v. State*, 33 Tex. Cr. R. 7, 23 S. W. 793. It is also the settled rule of practice in this state that the mere statement of a ground of objection in the bill is not the certificate of the judge that the fact stated is true. *Fuller v. State*, 50 Tex. Cr. R. 14, 95 S. W. 541; *Bigham v. State*, 36 Tex. Cr. R. 453, 37 S. W. 753; *Hamlin v. State*, 39 Tex. Cr. R. 579, 47 S. W. 656; *McKinney v. State*, 41 Tex. Cr. R. 434, 55 S. W. 341; *Burt v. State*, 38 Tex. Cr. R. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; and *Benson v. State*, 69 S. W. 165. It seems, also, to be the settled rule of law in this state that a bill of exceptions cannot be aided either by statements in reply to a motion for new trial, or by the statement of facts. *McGlasson v. State*, 38 Tex. Cr. R. 351, 43 S. W. 98; *Howerton v. State*, 43 S. W. 1018; *Cline v. State*, 34 Tex. Cr. R. 347, 30 S. W. 801; *Railroad v. Gay*, 88 Tex. 111, 30 S. W. 543; *Buchanan v. State*, 24 Tex. App. 195, 5 S. W. 847; *Smith v. State*, 4 Tex. App. 627; *Hamlin v. State*, 39 Tex. Cr. R. 601, 47 S. W. 656; *Edens v. State*, 41 Tex. Cr. R. 522, 55 S. W. 815; *McAnally v. State*, 57 S. W. 833; *Price v. State*, 43 S. W. 97; *Carter v. State*, 40 Tex. Cr. R. 229, 47 S. W. 979, 49 S. W. 74, 619; *Ogle v. State*, 58 S. W. 1004; *Diaz v. State*, 53 S. W. 633; *Hopkins v. State*, 53 S. W. 621; *Brown v. State*, 43 Tex. Cr. R. 293, 65 S. W. 529; *Schweir v. State*, 50 Tex. Cr. R. 119, 94 S. W. 1049. And further that the bill of exceptions controls even the statement of facts. *Briscoe v. State*, 27 Tex. App. 193, 11 S. W. 113; *Ezzell v. State*, 29 Tex. App. 521, 16 S. W. 782; *Arcia v. State*, 28 Tex. App. 196, 12 S. W. 599. However, if the matter could be considered, and the objections urged as a ground of disqualification of the witness could be assumed to be true, still we think the testimony shows that the objections urged are not tenable. By the judgment of the district court of Erath county Vina Phillips and appellant had theretofore, by decree duly entered, been divorced. She and deceased had thereafter been married, and were recognized and treated by appellant and by all the world as husband and wife. This in a sense fixed their status. To declare such relations to be adulterous, and the divorce theretofore obtained void in a collateral proceeding such as this, is not to be done lightly or inconsiderately, and can only be so treated if under the well-settled principles of law no other judgment or conclusion is permitted. It is the settled

law of this state that the judgment of a court of competent jurisdiction cannot be collaterally attacked, unless the record affirmatively shows lack of jurisdiction (*Williams v. Haynes*, 77 Tex. 284, 13 S. W. 1029, 19 Am. St. Rep. 752), and that a recital in a judgment of service of citation on a defendant involves absolute verity in a collateral proceeding. *Finch v. Edmonson*, 9 Tex. 512; *Mikeska v. Blum*, 63 Tex. 46; *Davis v. Robinson*, 70 Tex. 398, 7 S. W. 749. Taken most strongly in favor of appellant, it appears from the matters stated in the bill that the waiver of citation was signed by him some three days prior to the date when the suit for divorce was filed. It is not made to appear when this waiver of citation was filed into court. We must and should assume that the court rendering the judgment would have made inquiry and satisfied himself that service on defendant had been obtained by the means provided by law, or that proper waiver had been made; and, in the absence of anything to the contrary, where such fact is not in terms negatived, we would assume, in aid of the jurisdiction of the court below, that if signed three days before the filing of the suit, the waiver of citation was filed by him, or under his authority, after the suit for divorce had been instituted.

The cases cited by appellant are not in point. The case of *McAnelly v. Ward*, 72 Tex. 342, 12 S. W. 206, was a case where the regularity of the service was a matter of inquiry on appeal from a judgment theretofore rendered; and, of course, such being the case, the court was required to take cognizance of any irregularity in the matter of obtaining service, or touching the filing of a waiver irregularly and not in accordance with the law. Nor, as we believe, does the case of *O'Neal v. Clymer*, 21 Tex. Civ. App. 386, 52 S. W. 619, support appellant's contention, but rather is an authority against him. In discussing that case, after quoting articles 1240, 1241, 1348, and 1349 of our Revised Statutes of 1895, Judge Finley, speaking for the court says: "The article last recited (article 1349) plainly prohibits the acceptance and waiver of service of citation and the agreement for judgment before the institution of the suit. This statutory prohibition rendered the agreement indorsed on the petition illegal and void, and it could not have the effect to give the court jurisdiction of the defendants in that suit. It being manifest upon the face of the judgment that the court rendering it had no jurisdiction of the defendants in the suit, the judgment was unauthorized and void, and could not be the basis of a valid execution." In this case it does not affirmatively appear from the judgment itself that same is invalid. The farthest that the proof goes is that the waiver was signed before the suit was filed. It may well be doubted whether, in any case where a judgment is sought to be collaterally attacked for want of service, its invalidity

may be shown by parol. This would indeed institute a dangerous doctrine.

2. The next question of importance presented as a ground for the motion is the supposed misconduct of the jury. This was based upon the allegation and claim that, while the jury were deliberating upon the case, Mr. East, foreman of the jury, made in the presence and hearing of all the other jurors the following statement: "I have heard so much criticism of the juries of this county that I am getting tired of it, and think we should give him (the defendant) a stiff penalty. I have heard a great deal of criticism of the jury in the Baum Case, and think that we should give this man a high penalty"—and that this was misconduct of the jury in that they were guided in making up their verdict by the popular sentiment of the community, and by referring to other cases heretofore tried in this court. It is further averred that a number of the jurors in the case were originally for a much lower penalty than that finally agreed upon, and that by reason of the argument made by Mr. East, and the criticism of the verdicts of juries theretofore made in the court, and especially the criticism of the jury in the Baum Case, this had the effect to influence the jury in this case to assess a much higher penalty against the defendant than they might otherwise have done had they not been threatened with public censure if they should render a lower penalty, and that the effect of this misconduct of the jury was to greatly increase the punishment of the appellant, and to increase same far above what many of the jurors thought the merits of the case required. In support of this ground of appellant's motion, the court heard evidence from the jurors. One of the jurors, Joe Hughes, testified, in substance, that during their consultation in the jury room, he heard Mr. J. C. East say that he was tired of hearing jurors criticised for their low verdicts, and that he thought we should give a higher verdict in this case on that account, and he also stated that when this remark was made the jury had agreed on the grade of murder that the appellant was guilty of, but that the jurors were divided on the amount of punishment to be assessed, ranging all the way from 34 years to 50 years as a penalty against the defendant. This juror states that the remarks made by Mr. East did not have any influence upon him in arriving at his verdict and fixing the amount of the penalty against appellant; that he arrived at and rendered his verdict solely upon the charge of the court. This is the strongest evidence in the record in support of the motion. A number of jurors introduced say that they heard no such remark made by Mr. East, or any other person, as that testified to by Hughes. Others of them in a vague way say that something was said along that line, without being able to state just what it was. Appellant in-

roduced only three of the jurors, Hughes, Williams, and Palmer. Palmer expressly denied hearing any of the remarks testified to by Hughes or the other juror. Mr. East was produced by the state, who expressly and unequivocally denied making any remark of the kind attributed to him, or any remark similar thereto, and he is supported by others of the jury introduced by the state, the remainder of whom, who were not theretofore introduced, were examined on behalf of the state. We have not infrequently held that matters of this sort are particularly cognizable by the trial court, and unless the conclusion reached by the court on the hearing of same is clearly wrong and unsupported by the testimony, we ought not to and cannot interfere. *Benevides v. State*, 121 S. W. 1107; *Holt v. State*, 51 Tex. Cr. R. 15, 100 S. W. 156; *Fox v. State*, 53 Tex. Cr. R. 150, 109 S. W. 370; *Goodman v. State*, 49 Tex. Cr. R. 191, 91 S. W. 795; *Mayes v. State*, 33 Tex. Cr. R. 33, 24 S. W. 421; *Cockerell v. State*, 32 Tex. Cr. R. 585, 25 S. W. 421; *Driver v. State*, 37 Tex. Cr. R. 160, 38 S. W. 1020; and *Shaw v. State*, 32 Tex. Cr. R. 155, 22 S. W. 588. In the light of the entire record we are not prepared to say and hold that the conclusion of the court before whom this matter was fully investigated was wrong, and we would certainly be without warrant in concluding from this distance that it was so clearly wrong as to justify us in reversing and setting aside his judgment after hearing in person the evidence.

3. During the trial the state offered and was permitted to read in evidence a written statement made by deceased touching the circumstance of the assault upon him. This was offered as a dying declaration. Its admission was strenuously objected to, and this objection was based upon the ground therein stated that said written statement was not properly or sufficiently verified as the dying statement of said deceased. The court approves this bill of exceptions with this explanation: "Drs. Keith and McGaughey both testified on the predicate that they had told deceased he could not live; that he had bled profusely, and he stated that he was going to die. They also testified as to the nature of the wounds, deceased's throat being cut, and as to the shot wounds." It is also shown, if we may look to the statement of facts, that the admissibility of this testimony is rendered even clearer. It shows that he was much weakened by loss of blood; that his mind was clear; that the matter of making a statement in view of his approaching death was discussed; that he was advised of the impossibility of his recovery, and in the light of all these suggestions dictated the statement which, when reduced to writing, was thereafter read over to him, and with the knowledge of its contents he deliberately signed it. We had occasion in the case of

*Morgan v. State*, 54 Tex. Cr. R. 542, 113 S. W. 934, to consider and discuss at some length the subject of dying declarations. We there stated the rule to be as follows: "The rule is universal that, before dying declarations can be admitted in evidence, it is essential, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death; but Mr. Greenleaf says (section 158) it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind." We have no doubt of the correctness of the rule there stated, and that, tested by such rule, the statement was admissible as a dying declaration.

4. There are some other questions raised in the record, but they relate to matters of mere practice and other questions not of a vital or important character. These we have carefully considered, and have concluded there is no other error in any of them. The matters heretofore discussed are the serious questions raised in the appeal; and, in view of the lengthy opinion, we premit a discussion of the other matters. The evidence clearly supports the verdict, and in view of the full and fair submission of the issues, and that there was no improper evidence admitted against him, we believe the judgment of conviction, serious and severe as it is, ought to be, and must be, affirmed, which is accordingly done.

McCORD, J., not sitting.

#### GONZALEZ et al. v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

**LIBEL AND SLANDER (§ 152\*)—CRIMINAL PROSECUTION—INDICTMENT—"LIBEL."**

Pen. Code, art. 721, declares that he is guilty of "libel" who, with intent to injure, makes, publishes, or circulates any malicious statement affecting the reputation of another as to any matter or thing pointed out in the chapter; and article 727 declares that the written, printed, or published statement, to come within the definition of "libel," must convey the idea that the person to whom it refers has been guilty of some penal offense, etc. *Held*, that an indictment for libel, alleging that defendant published a malicious statement concerning complainant, reciting that he was a United States federal guard, that he was a highwayman and cowardly assassin, and the murderer of a certain person who on the morning of March 19, 1906, was cowardly assassinated on a public highway, etc., sufficiently charged complainant

\*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

with a penal offense, and was therefore sufficient.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 417-424; Dec. Dig. § 152.\*

For other definitions, see Words and Phrases, vol. 5, pp. 4116-4125.]

Appeal from District Court, Zapata County; John F. Mullally, Judge.

Clemente G. Gonzalez and others were convicted of libel, and they appeal. Affirmed.

A. Winslow, for appellants. John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The record is without a statement of facts, bill of exception, motion for new trial, or motion to quash or in arrest of judgment. There is filed in this court an original paper attacking the information for its alleged insufficiency to charge the offense of libel. If the information fails to charge that offense as required by the statute, we would reverse and dismiss the prosecution, although not attacked in the trial court. This question is not a novel one. It is not here meant to hold that for all inaccuracies in the indictment this court would reverse and dismiss. The insufficiency of the indictment must be sufficiently manifested to show that it does not charge the offense defined and denounced by the statute.

The charging part of the information is that appellant and Everardo Torres, in the county of Zapata, on or about the 22d of March, 1908, "did then and there, with intent to injure Zaragoza Dominguez, unlawfully and maliciously make, write, print, publish, sell, and circulate a malicious statement of and concerning the said Zaragoza Dominguez and affecting the reputation of the said Zaragoza Dominguez to the tenor following." Then follows a document, set out in the information in Spanish. We copy the information, omitting the words in Spanish, at the conclusion of which the information continues: "Which said malicious statement is in the Spanish language, and which, when translated from the Spanish to the English language, is to the tenor following: 'March 19th, 1908. On the morning of this day Mr. Eduardo Gutierrez was cowardly assassinated at a place about one and a half miles distant north of this ranch, on one side of the public road that leads from Zapata to Laredo. The victim was a brother of our editor Mr. Clemente G. Gonzalez, and the doer of the deed is named Zaragoza Dominguez, who is actually a federal guard stationed at San Ygnacio, Texas. Many will be surprised that a crime of this nature should not have been enough to send the cowardly assassin (meaning Zaragoza Dominguez) to the cells of a prison; but when we consider the kind of justice that is administered in this county, the partiality and folly

of many of our jurors, and the measureless, shameful, and powerful influence which, unfortunately, many highwaymen enjoy (meaning that Zaragoza Dominguez is a highwayman), it is very clearly explained why this insulting and criminal favoritism is shown to an astute and fortunate individual who has known how to impose himself on the dominant element in order to commit with impunity his cowardly and felonious acts (meaning that Zaragoza Dominguez has committed felonies with impunity). But sooner or later the light of truth will penetrate the mists of mystery and real justice will overwhelm the cowardly criminal and assassin in the dark cell of a penitentiary (meaning that Zaragoza Dominguez is a cowardly criminal and assassin), which is the place where assassins, highwaymen, and all kinds of bandits and evil doers go.' Which said malicious statement was published in a newspaper in the Spanish language at the Uribeno ranch, in the county of Zapata, Texas. The name of said newspaper is 'El Aldeano,' and the editor is Clemente G. Gonzalez, and the director is Everardo Torres—against the peace and dignity of the state." The above is a translation of the printed document into the English language.

It is contended this language does not come within the terms of the statute denouncing a punishment for the publication of libelous matters. Article 721 of the Penal Code of 1895 reads as follows: "He is guilty of libel who, with intent to injure, makes, writes, prints, publishes, sells or circulates any malicious statement affecting the reputation of another in respect to any matter or thing pointed out in this chapter." Among other articles set out in this chapter is article 727, Pen. Code 1895, which is as follows: "The written, printed or published statement to come within the definition of libel, must convey the idea either—(1) that the person to whom it refers has been guilty of some penal offense." Without going into a discussion of the charging part of the information in detail, we are of opinion that the libelous matter set out is sufficient, under the statute, to accuse appellant of a penal offense, to wit, the murder and assassination of Eduardo Gutierrez, as is the reference to Zaragoza Dominguez as being a cowardly assassin. It will be noted that, as stated in the alleged libelous document, Dominguez was a United States guard along the Rio Grande river, and therefore in that sense an officer. This would entitle appellant to prove the correctness of the published statement, and thus show the truth of the alleged libelous statement. Pen. Code 1895, art. 747. However, on the face of the pleadings we are of opinion that this part of the published statement justifies the charge of libel.

The proof of the matter would be a different proposition. The evidence is not be-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fore us. So we hold that the pleadings are sufficient, and the attack on the information is not well taken. *Smith v. State*, 39 Tex. Cr. R. 321, 45 S. W. 1013; *Mankins v. State*, 41 Tex. Cr. R. 662, 57 S. W. 951.

Believing the information is sufficient, the judgment is affirmed.

### JONES v. STATE.

(Court of Criminal Appeals of Texas. Dec. 15, 1909. Rehearing Denied Feb. 2, 1910.)

**BURGLARY (§ 41\*)—SUFFICIENCY OF EVIDENCE.**  
Evidence held sufficient to sustain a conviction for burglary.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 94-109; Dec. Dig. § 41.\*]

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Walter Jones was convicted of burglary, and appeals. Affirmed.

Hart, Mahaffey & Thomas, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** Appellant was convicted of burglary of a private residence, and his punishment assessed at five years' confinement in the penitentiary. The following is a synopsis of the evidence:

Marshall Northcott, a witness for the state, testified that he owned a building located in Texarkana, Tex., which was occupied by the Texarkana Livery Company; that said building was a three-story building; that he used and occupied as his private room and residence one of the small rooms on the second floor of the building, but the remainder of said building was used for the purpose of storing wagons, buggies, horses, feed, and other things necessary to the carrying on of a livery business; that the room which he occupied was furnished as a bedroom, and that he slept there, kept his personal effects there, and had his meals served to him in said room; that on the night of April 17, 1909, at about 9 o'clock p. m., he went to his room to go to bed; that when he left his room the door was closed, but not locked; that the door was fastened with a latch, and when he left the window shades were pulled up; that upon going to his room at said time he discovered appellant under his bed and ordered him out, at the same time asking him what he was doing there, to which appellant replied, "I am waiting for Uncle Charlie"; that he cursed appellant, and called for his partner, Mr. Scott, who came upstairs and cursed appellant and struck him over the head with a bottle; that appellant ran out and leaped down the elevator shaft and ran off. He also states that they afterwards found appellant's coat, hat, and shoes in the room near the head of the stairs, and that a bunch of keys was in his hat; that he missed no property from the room, except a pistol from

one of the dresser drawers, which he had not seen for two or three weeks prior to the time of the alleged commission of the offense; that he did not consent for appellant to enter his room, nor did any one else except Roy McKinley, a negro, who cleaned his room for him; that he had about \$75 in his pocket, but did not know whether appellant knew he had money or not. On cross-examination he stated that there was a man working at the stable by the name of Gaines, an uncle of appellant; that buggies were washed on the second floor of the building; that the negro boys who washed the buggies and worked around the stable had access to the second floor of the building, but not his room; that any one on the second floor of the building could enter his room by turning a knob and pushing it open. Roy McKinley, another witness for the state, testified that he cleaned up Mr. Northcott's room, and that he did not consent for appellant to go in the said room on the date alleged, 17th of April; that he had noticed the pistol in the dresser drawer two or three weeks before, but did not know who took it; that he saw appellant around the livery stable that afternoon, and if he was drunk he could not tell it. The constable, Nelvin Anderson, testified that he arrested appellant about 11 o'clock of the night mentioned; that he asked him if he was not the negro who had been in Mr. Northcott's room, which appellant denied.

Charlie Gaines, a witness for defendant, testified that he saw appellant around the stables that afternoon, and that he noticed that he was either sick or drunk, or something was the matter with him; that he told him to get up, and he got up off of the express wagon upon which he was lying, and went around and lay down on a bale of hay; that appellant was his nephew, but he did not give him permission to go into Mr. Northcott's room; that witness has no right to go in said room; that he did not tell appellant to wait for him. Appellant testified that he was a train porter on one of the Texas & Pacific passenger trains; that he was paid off on the day in question, and spent his money around Texarkana in saloons; that in the afternoon he was drunk and sick; that he went to sleep on the seat of a wagon, and his uncle made him get up; that one of the boys asked him to help him wash a buggy; that he went upstairs with the boy; that he had on his good clothes, and pulled them off, and put on some old shoes; that he had some keys with which he unlocked the doors of the different cars, and laid them down with his hat, shoes, and coat; that he just fooled around up stairs, laid down awhile, and sat down awhile; that he did not know what became of the boy who went up there with him, and did not remember going to Mr. Northcott's room; that he waked up under the bed when Mr. Northcott hollered at him,

and when Mr. Scott hit him with the bottle he ran; that he was just drunk; that he took nothing out of the room, and did not go in there with that intention; did not know how he happened to go in there. On cross-examination he stated that he did not know the boy's name who went up there with him to wash the buggy; that he did not wash any buggy; that he did tell Mr. Anderson he was not the man who went in the room; that he did not know Mr. Anderson was an officer, but was afraid to own up that he was the man who went in the room.

The witness Scott stated, on rebuttal for the state, that he was a partner with Northcott, and remembered the event of the appellant being found in Northcott's room; that they kept a negro around the stable to wash buggies, but he always got through between 12 and 1 o'clock in the afternoon; that he did not think any buggies were washed on the evening mentioned.

Appellant complains that this testimony is insufficient to sustain the conviction. We believe, after a careful consideration of same, that the specific intent to commit burglary is properly suggested by the evidence. While appellant's testimony and that of his witnesses contravenes the state's case, yet the evidence is sufficient to support the finding of the jury.

We accordingly hold that the evidence is sufficient, and the judgment is affirmed.

#### HILL v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

##### 1. ANIMALS (§ 57\*)—RUNNING AT LARGE—CRIMINAL PROSECUTIONS—PROOF—ADOPTION OF LAW.

In a prosecution for violating the local stock law adopted by a county, it was essential to allege and prove the precedent steps, required by law, by which the local law was adopted.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § 57.\*]

##### 2. ANIMALS (§ 57\*)—RUNNING AT LARGE—CRIMINAL PROSECUTIONS—INFORMATION—SUFFICIENCY OF ALLEGATIONS—ADOPTION OF LOCAL STOCK LAW.

The information, in a prosecution for violating the local stock law, alleged that a petition was presented, asking that the commissioners' court order an election to determine whether horses, cattle, etc., be permitted to run at large in said county, and that at the next regular term the court passed an order directing an election, and that the county judge issued an order for the election and caused public notice thereof to be given, and that the election was held and the law adopted. *Held*, that the information was defective, for not directly alleging that the commissioners' court made an order directing an election to be held to determine whether horses, cattle, etc., should be permitted to run at large in the county.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 191; Dec. Dig. § 57.\*]

Appeal from Montague County Court; A. W. Ritchie, Judge.

Bob Hill was convicted of willfully turning out cattle in violation of the local stock law, and he appeals. Reversed, and prosecution ordered dismissed.

Geo. S. March, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. This appeal is prosecuted from a conviction had in the county court of Montague county on September 7th of last year, wherein appellant was found guilty of willfully turning out and causing to be turned out on land not his own or under his control certain cattle, in violation of the local stock law. The information on which this charge was based, so far as material, is as follows:

"Said act and offense was committed after the following proceedings were had in Montague county, Texas: A petition of more than one hundred freeholders of Montague county, Texas, with not less than twelve freeholders from each of the eight justice precincts of said county, was presented to the commissioners' court of said county, asking that said court order an election in and throughout said county for the purpose of determining whether or not horses, mules, jacks, jennetts, and cattle shall be permitted to run at large in said county. That at the next regular term after the filing of the aforesaid petition the commissioners' court of said county made and passed an order directing an election to be held in and throughout Montague county, Texas, not earlier than thirty days after said order was passed and made. That immediately after the passage of said order by said court the county judge of said Montague county, Texas, issued an order for said election and caused public notice thereof to be given for at least thirty days before the day of the election thereof, by publication of said order of said election in a newspaper in Montague county, Texas. That in accordance with law said election was held in and throughout Montague county, Texas, and the returns duly made to the county clerk of said county, and were opened, tabulated, and counted by the county judge of said county in the presence of the county clerk and a justice of the peace of said county. Said count showed that a majority of the votes cast were cast for the stock law, whereupon the county judge of said county immediately issued his proclamation declaring the result of said election in accordance with the count had, which proclamation was posted at the courthouse door for thirty days."

It was contended in the court below, and is now contended, that the information is insufficient, in that it is not in terms stated that the commissioners' court passed an order directing an election to be held for the purpose of determining whether stock should

be permitted to run at large in said county, or that the order of the court directing notices thereof was to this effect, or that the election was held for this purpose. This being a local law, it was essential to prove the precedent steps required by the law of the land. In order to admit such proof, the information must in terms declare that the essentials of the law were complied with. We may infer, perhaps, that the commissioners' court of Montague county passed an order directing an election to be held for the purpose of determining whether or not horses, mules, jacks, jennetts, and cattle should be permitted to run at large in the county; but it is evident that this is not directly and positively alleged in the information. We think that the motion to quash on this ground should have been sustained, and that under the information filed no conviction can be upheld.

For the error pointed out, the judgment is reversed, and the prosecution ordered to be dismissed.

#### MUNOS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

##### 1. HOMICIDE (§ 340\*)—HARMLESS ERROR—INSTRUCTIONS—MANSLAUGHTER.

In a prosecution for homicide, an instruction on the issue of manslaughter, erroneous in that it required the jury to believe both that decedent used insulting language about defendant's mother and also assaulted defendant with a knife, will be considered harmless, where defendant was only convicted of manslaughter, and was given the lowest penalty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 720; Dec. Dig. § 340.\*]

##### 2. HOMICIDE (§ 286\*)—TRIAL—INSTRUCTIONS—INTENT.

In a prosecution for homicide, where the court instructed on the law of self-defense, and the evidence did not clearly show the nature of the weapon used by defendant, nor that it was of necessity a deadly weapon, the court properly instructed that the instrument or means by which the homicide was committed should be considered in judging the intent of the party offending, and, if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appeared.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 586; Dec. Dig. § 286.\*]

##### 3. HOMICIDE (§ 300\*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for homicide, where the evidence showed that, if any assault was committed on defendant, it was very slight, but that decedent's body bore numerous wounds, that he had a cut in the left side of the stomach and in the breast, that his throat was cut from near the ear to past the middle, and that his fingers were cut twice, an instruction on the law of self-defense, that every person may defend himself against any unlawful attack reasonably threatening injury to his person, and is justified in using all necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be

necessary, was not erroneous, as indicating to the jury that the court thought that defendant had used more force than was necessary, and that he should have resorted to other means of defense than those used.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 622; Dec. Dig. § 300.\*]

##### 4. HOMICIDE (§ 300\*)—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

In a prosecution for homicide, where the evidence showed considerable familiarity between the parties and that decedent was at the time quite drunk, it was proper for the court to charge that if decedent had made an attack on defendant, which, from the manner and character of it and the relative strength of the parties, and the defendant's knowledge of decedent's character and disposition, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such fear, he killed decedent, he should be acquitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 622; Dec. Dig. § 300.\*]

Appeal from District Court, Potter County; J. N. Browning, Judge.

Pilar Munos was convicted of manslaughter, and appeals. Affirmed.

John A. Mobley, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Potter county on May 13, 1909, charged with the murder of one Jose Ferris. On a trial therein had on June 2d of the same year he was found guilty of the offense of manslaughter, and his punishment assessed at confinement in the penitentiary for two years.

1. The court submitted the issues of murder in the first degree, murder in the second degree, manslaughter, and self-defense. Among other things, on the issue of manslaughter, the court thus instructed the jury: "Insulting words or gestures, or an assault and battery, so slight as to show no intention to inflict pain or injury, are not deemed adequate causes. The following are deemed adequate causes, to wit: The use of insulting language to defendant by the deceased about the defendant's mother, as testified by defendant and other witnesses, accompanied by an assault upon defendant with a knife, if done in such manner and under such circumstances as to indicate an intention to kill or do serious bodily injury."

This charge of the court is complained of as being erroneous under the facts, and to cure the error therein appellant requested the following special instruction: "You are instructed, at the request of the defendant, that homicide may be reduced from murder to manslaughter upon any cause that produces a degree of passion in the mind of the slayer that renders him incapable of cool reflection; and if you believe from the evidence that the deceased struck the defendant with a knife which produced bloodshed from the defendant, then the law declares the same to be adequate cause, and a homicide committed

under terror, rage, and resentment of such injury, then you cannot consider any higher degree of crime than manslaughter."

The charge of the court complained of is erroneous under the facts, in that it requires the jury to believe both the use of insulting language by the deceased about defendant's mother, and, further, that such language should be accompanied by an assault with a knife. Since, however, appellant was convicted of manslaughter, and particularly in view of the fact that he was given the lowest penalty, an incorrect charge on this subject could not possibly have injured him. This view also disposes of many other criticisms of the court's charge on this subject.

2. The court, on the law of self-defense, thus instructed the jury:

"Every person is permitted by law to defend himself against an unlawful attack, reasonably threatening injury to his person, and is justified in using all necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary.

"Homicide is justified by law when committed in defense of one's person against any unlawful and violent attack, made in such a manner as to produce a reasonable expectation or fear of death or some serious bodily injury.

"A reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time, and in such cases the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant.

"If from the evidence you believe the defendant killed the said Jose Perris, but further believe that at the time of so doing the deceased had made an attack on him which, from the manner and character of it, and the relative strength of the parties, and the defendant's knowledge of the character and disposition of the deceased, caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant killed deceased, then you should acquit him; and if the deceased was armed at the time he was killed, and was making such an attack on defendant, and if the weapon used by him and the manner of its use were such as were reasonably calculated to produce death or serious bodily harm, then the law presumes the deceased intended to murder or aimed to inflict serious bodily injury upon the defendant."

In paragraph 15 of the court's charge, just preceding the charges above quoted, the jury are thus instructed: "The instrument or means by which a homicide is committed are to be taken into consideration in judging the

intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears."

This charge was objected to for the reason that appellant's intent was not a question to be determined on the trial, and that said charge is without evidence to support it, and that same was prejudicial, for the reason that the court applied said charge to that portion of same on which appellant was convicted, to wit, manslaughter, and same was a limitation on his right of self-defense. We are not prepared to agree to this contention. The character of the weapon used by appellant was not very clearly shown in the evidence, nor does it appear that it was of necessity a deadly weapon, and in such state of case it was indispensable for the court to have given the charge complained of, and a failure to have given same would have been error. Such charge was helpful and beneficial to appellant, and he is without just cause of complaint that same was given.

3. Complaint is made to the following portion of the court's charge on the law of self-defense: "Every person is permitted by law to defend himself against any unlawful attack reasonably threatening injury to his person, and is justified in using all necessary and reasonable force to defend himself, but no more than the circumstances reasonably indicate to be necessary." It is claimed this charge is erroneous for the reason that it had a tendency to impress the jury with the belief that the court thought that defendant had used more force than was necessary, and also indicated to the jury that he should have resorted to other means of defense than the means used. We think that this complaint is without just basis. The evidence showed, if any assault was committed at all on appellant, that same was very slight; whereas, the evidence showed that the body of deceased bore numerous wounds, and in view of the entire record justified the submission of this issue to the jury. The evidence showed that he had two stabs in front, one on the left side of the stomach from which his entrails were protruding, and the other higher up in the ribs and just under the nipples, and that his throat was cut from pretty near the ear to just past the middle of the throat, and that his fingers were cut twice. If any case required a charge such as this, it seems peculiarly applicable here.

4. Nor do we think, under the facts of the case, there was any error in giving the following portion of the charge on self-defense, which is made the basis of complaint: "If from the evidence you believe the defendant killed Jose Perris, but further believe at the time of so doing the deceased had made an attack upon him, which from the manner and character of it and the relative strength of the parties and the defendant's knowledge of the character and disposition of the deceased,

caused him to have a reasonable expectation or fear of death or serious bodily injury, and that, acting under such fear, he killed deceased, you should acquit him." In this case the evidence showed considerable familiarity between the parties; that deceased was at the time quite drunk, and, generally, such a state of affairs as made the giving of such charge appropriate, and same can in no sense be said to be harmful. We think, in view of all the facts, that the charge of the court on self-defense was sufficient. There are no bills of exception in the record, and the only matter complained of is the court's charge. We think, in view of all the facts, which we have carefully examined, that appellant's objections to the charge on self-defense, considered as a whole, are not substantial. That it was subject to some verbal criticisms may be conceded; but these were not of a serious character, or such as, in our judgment, could possibly have influenced the result of the trial.

5. The evidence seems well to sustain the verdict, and on the entire record we think appellant is without just cause of complaint. The judgment is affirmed.

#### WILSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### 1. CRIMINAL LAW (§ 404\*)—DEMONSTRATIVE EVIDENCE.

In a trial for theft of a buggy axle, buggy spring, ax, and ax handle, where accused claimed that the articles in his possession did not conform to the description given by a witness, and the state had exhibited part of the property to the jury, accused was entitled to have the witness bring the axle and springs into court for comparison by the jury with those described.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.\*]

#### 2. LARCENY (§ 26\*)—DEFENSES.

In a trial for theft, accused was entitled to prove that the property did not belong to the prosecuting witness and was not in his possession at the time of the alleged taking, but was in the possession of and was owned by another.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 54; Dec. Dig. § 26.\*]

Appeal from Angelina County Court; J. T. Maroney, Judge.

John F. Wilson was convicted of theft, and appeals. Reversed and remanded.

W. J. Townsend, Jr., for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

McCord, J. This is an appeal from a conviction for petty theft, with a punishment of \$50 fine add 24 hours in the county jail.

The indictment charged the theft of a buggy axle, of the value of 50 cents, one buggy spring, of the value of \$1, and one ax and ax handle, of the value of 50 cents. It may be stated that appellant claimed that he pur-

chased this property from one Cook some two years before the trial. He also proved by the witness Cook that he sold to the defendant a wagon that had a buggy spring and buggy axle like the one in controversy. It may be further stated that there was a sharp controversy in the testimony as to whether the property found in the possession of appellant was the property of the prosecuting witness or not. The prosecuting witness, Frank Schverak, was upon the witness stand, and brought into court an ax and ax handle, and exhibited them before the jury, and claimed that this was his ax and handle, and that the same was taken from him the same time that the buggy springs and the axle were taken from him; that the witness in the presence of the jury examined the said ax and handle, and said that it was his property. The witness then described the buggy springs and axle. The appellant contended that the buggy springs and axle that were in his possession, and which he was charged with stealing, did not suit the springs and axle described by the witness, and asked the court to require the witness, in view of the fact that the witness had exhibited the ax and handle, to bring said axle and buggy spring into court, that the jury might see that they did not fill the description that the witness gave of those lost by him, and that they would corroborate appellant's theory that it was his property, and impeach the state's witness, and as showing that the state's witness was mistaken in his description of the property. The county attorney objected to the introduction of said springs and axle in evidence, and objected to making proof of same to the jury, which objections were sustained by the court, and the appellant was not permitted to offer in evidence the said springs.

We think, under the peculiar circumstances of this case, that this testimony was clearly admissible for the purpose of impeaching the state's witness; that if the springs were of the description that the state's witness had given it would have strengthened the state's case, and if they were not then appellant was entitled to such testimony, not only to show his innocence, but to show that the property that was claimed to have been stolen by the appellant was not the property found in the possession of appellant. In view of the insistence of the appellant that he had acquired this property innocently and lawfully, and in view of his insistence that the property he acquired was not the property of the state's witness, and did not suit the description of the property that the state's witness claimed was lost, the court should have permitted this testimony to go before the jury. The state had exhibited before the jury part of the property. Most certainly the court ought to have allowed this testi-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mony. It would have thrown light upon the transaction, and have enabled the jury to have reached a correct conclusion in regard to the matter, in view of the fact that the appellant was arrested for having this property and being found in the possession of same some years after the state's witness claims to have lost it.

Bill of exceptions No. 2 was to the action of the court in not allowing the defendant to prove by the state's witness, Frank Schverak, while he was on the stand, that he was not the owner of the property at the time of the alleged theft; that said property belonged to one Rudolf Roszler at the time of the alleged theft, and that if defendant became the owner of any of the property it was since the alleged theft, and that if he had been permitted to do so he could have proved that the property described in the indictment was on a place that belonged to one Rudolf Roszler, and that said Rudolf Roszler had purchased it from one Julius Henning prior to the time of the alleged theft, and that said Roszler is now living in the state of California and had made no disposition of said property; that he (Roszler) owned the property, and not the defendant. This testimony was objected to. We think that the appellant was entitled to prove this fact, if it was a fact, and if the property did not belong to the prosecuting witness the appellant could not be charged with theft of property from him without his consent, unless he had possession at the time of taking.

For the errors indicated, the judgment is reversed, and the cause is remanded.

#### FEENEY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

##### 1. FORGERY (§ 34\*)—INDICTMENT AND INFORMATION—VARIANCE.

Where an indictment for forgery undertakes to set out the forged instrument according to its tenor or in *hæc verba*, the proof must show the instrument exactly as alleged, and where the check introduced in evidence as the forged instrument was different from the check described in the indictment as to the names of the parties, the bank on which it was drawn, the manner of stating the amount for which it was drawn, and some things alleged to be on the check did not appear on the check produced in evidence, there was a fatal variance between the indictment and proof.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 89-102; Dec. Dig. § 34.\*]

##### 2. FORGERY (§ 48\*)—TRIAL—INSTRUCTIONS.

In a prosecution for passing a forged instrument, an instruction requiring defendant's conviction if the instrument was forged, and if the defendant "did knowingly pass said instrument as true," was faulty, in that it failed to require that defendant must have known that the instrument was forged at the time he passed it, in order to render him guilty.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 124-128; Dec. Dig. § 48.\*]

##### 3. FORGERY (§ 16\*)—ELEMENTS OF OFFENSE—INTENT.

In a prosecution for passing a forged instrument, the proof must show that defendant knew, at the time he passed the instrument, that it was forged.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 6; Dec. Dig. § 16.\*]

##### 4. FORGERY (§ 48\*)—TRIAL—INSTRUCTIONS.

In a prosecution for passing a forged instrument, where the count in the indictment upon which the conviction was predicated alleged that the party whose act the instrument on its face purported to be was a fictitious person, the jury should have been instructed on this averment.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 124-128; Dec. Dig. § 48.\*]

##### 5. FORGERY (§ 48\*)—TRIAL—INSTRUCTIONS.

In a prosecution for passing a forged instrument, the court should instruct that, in order for defendant to be convicted, he must have done so with intent to defraud.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 125; Dec. Dig. § 48.\*]

Appeal from District Court, Potter County; J. N. Browning, Judge.

William H. Feeney, alias William H. Fitzgerald, was convicted of passing a forged instrument, and appeals. Reversed and remanded.

Robertson & Robertson, for appellant. John A. Mobley, Asst. Atty. Gen., and Henry S. Bishop, Dist. Atty., for the State.

DAVIDSON, P. J. An indictment was preferred against appellant, containing eight counts, charging forgery and passing a forged instrument. It is unnecessary to discuss any of them, except the seventh. It was upon this count the conviction was predicated and the verdict of the jury returned.

The seventh count charged appellant with passing as true the following instrument, which purported to be the act of another, to wit: "R. C. Cameron & Son, per R. C. C., Prest. & Treas., and was of the tenor following, to wit: 'Waco, Texas, July 31st, 1908, No. 614. The Provident National Bank of Waco, Texas: Pay to William H. Feeny or bearer \$475.00 Four Hundred Seventy-Five Dollars. Not over Five Hundred \$500\$ Wm. Mann Co., Philadelphia. R. C. Cameron & Son, per R. C. C., Prest. & Treas.'; the said word 'Prest' in said instrument being intended for the word 'Prest,' as an abbreviation for the word 'President,' and the said word 'Treas' in said instrument, being intended for the word 'Treasurer,' and the said words 'Wm. Mann Co., Philadelphia,' being printed in the lower left-hand corner of the said instrument, and the said instrument, when it was so passed as aforesaid, had, on the back thereof, a certain false writing, which had theretofore been unlawfully and willfully made, without lawful authority and with intent to injure and defraud by some person to the said grand jury unknown, which was of the tenor following, to wit: 'In

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

payment in full for services rendered R. O. C., and also at that time said instrument on its back had an indorsement of the tenor following, to wit: 'Wam. H. Feeny'—the said word 'Wam.' in said instrument being intended as the abbreviation for the word 'William'; the said 'R. C. Cameron & Son, per R. C. C., Prest & Treas.' whose act the said face of said instrument purported to be, being a fictitious person; and the said William H. Feeny, alias William H. Fitzgerald, did then and there well know that the said instrument was false and forged when he attempted to pass said instrument and when he did pass said instrument as true, as aforesaid, against the peace and dignity of the state."

The instrument offered in evidence is as follows:

Waco, Texas, July 31, 1908.

No. 614.

The Providence National Bank of Waco.  
Pay to Wm. H. Feeny or bearer \$475.00  
Four Hundred and seventy-five. . . . Dollars.  
R. C. Cameron & Sons,  
Per R. C. C., Pres. & Treas.

And it was indorsed on the back as follows:

In payment in full for services rendered.  
R. C. C.  
Wam. H. Feeny.

Among other contentions appellant urges a variance between the instrument declared upon and that introduced in evidence in several respects, and, therefore, the verdict of the jury is contrary to law and the evidence, in that the instrument offered in evidence does not support the allegations of the indictment. We are of opinion that this contention is correct. The instrument declared upon was drawn upon the Provident National Bank of Waco, Texas; that introduced in evidence was drawn on the Providence National Bank of Waco. The check set out in the indictment sets out the name of William H. Feeny as follows: "William H. Feeny;" the check introduced in evidence sets out the name, "Wm. H. Feeny." In the check set out in the indictment appear the words "Four Hundred Seventy-Five Dollars"; whereas in the check in evidence it is written "Four Hundred and seventy-five Dollars." The check set out in the indictment contained the words: "Not over Five Hundred \$500\$ Wm. Mann Co., Philadelphia." These words do not appear in the check in evidence. In the indictment it appears that in the face of the check the words "R. C. Cameron & Son, per R. C. C., Prest. & Treas." are used. In the check introduced in evidence the words thus appear: "R. C. Cameron & Sons, Per R. C. C., Pres. & Treas." The indictment alleges the indorsement on the back of the check to be "Wam. H. Feeny." It appears in the check introduced in evidence as follows: "Wam. H. Feeny."

Thus it will be seen there are distinct variances in regard to these matters between the

check declared upon and that offered in evidence. It seems to be held, almost, if not quite, universally, that where an indictment undertakes to set out a forged instrument according to its tenor, or in *hæc verba*, the strictest proof is required, and this must be furnished by exact copy. This has been declared, not only in this state, but all the other states, practically, at least. *Baker v. State*, 14 Tex. App. 332; *Edgerton v. State*, 70 S. W. 90; *Shipman v. Fulcrod*, 42 Tex. 248. The tenor of an instrument means or imports an exact copy, and the proof must comply with it literally. *Roberts v. State*, 2 Tex. App. 4; *Coulson v. State*, 16 Tex. App. 189; *Thomas v. State*, 18 Tex. App. 213; *Smith v. State*, 18 Tex. App. 399; *Moore v. State*, 20 Tex. App. 223.

Where the indictment sets out a written instrument by its tenor, the proof must conform thereto with almost minutest precision. 1 Bish. Crim. Proc. (1st Ed.) 488; 1 Wharton, Crim. Law (8th Ed.) 737; *Ex parte Rogers*, 10 Tex. App. 655, 38 Am. Rep. 654. One of the most recent cases by this court is the case of *Fischl v. State*, 54 Tex. Cr. R. 55, 111 S. W. 410. See, also, *Warrington v. State*, 1 Tex. App. 168; *Robinson v. State*, 35 Tex. Cr. R. 54, 43 S. W. 526, 60 Am. St. Rep. 20; *Hanks v. State*, 54 S. W. 587; *Murphy v. State*, 6 Tex. App. 554; *Overly v. State*, 34 Tex. Cr. R. 500, 31 S. W. 377; *Potter v. State*, 9 Tex. App. 55; *Webb v. State*, 39 Tex. Cr. R. 534, 47 S. W. 356; 19 Cyc. 1400 et seq.

Applying the law to the case, the court thus instructed the jury: "You are further instructed that if you believe from the evidence beyond a reasonable doubt that the instrument set out in the seventh count of the indictment was forged as that offense is defined in the first paragraph of this charge, and you further believe beyond a reasonable doubt that the defendant, in the county of Potter and state of Texas, on or about the 31st day of July, 1908, as alleged in said seventh count, did knowingly pass said instrument as true to the First National Bank of Amarillo, through and by the said Charles J. F. Lowndes, and that he was then and there the cashier and agent of the said bank, as alleged in the indictment, then you will find him guilty as charged in said seventh count, and assess his punishment at confinement in the penitentiary for a term of years not less than two nor more than five years."

Objection is urged to this charge, because it fails to instruct the jury that appellant knew that the instrument was forged at the time he passed it. This criticism is correct. The instrument might have been forged, and appellant passed it as true, believing that it was true. In order to convict appellant for passing a forged instrument for the purpose of defrauding, he must knowingly do so; that is, he must know at the time he passed the instrument that it was a forgery, in order to constitute him guilty of the crime of passing a forged instrument. *Henderson v. State*,

14 Tex. 509; *Thurmond v. State*, 25 Tex. App. 371, 8 S. W. 473; *United States v. Kelsey* (D. C.) 42 Fed. 889; *Johnson v. State*, 9 Tex. App. 252; *Maynard v. State*, 39 S. W. 667; *Bishop, New Crim. Law*, § 605; *Walker v. State*, 127 Ga. 48, 56 S. E. 113, 8 L. R. A. (N. S.) 1175, 119 Am. St. Rep. 319; 19 Cyc. 1388. It is therefore necessary, in order to sustain this conviction, to show, at the time that he passed it, that he knew it was a forgery. This is one of the serious questions in the case arising under the evidence, which should have been submitted to the jury by appropriate instructions. It is so alleged in the indictment, and is made an issue in the case both by the averments in the indictment and under the statute.

2. It will be noticed that the count in the indictment, under which this conviction is predicated, alleges that R. C. Cameron & Son was a fictitious person. This issue was not submitted to the jury, and exception was taken to the charge on account of this omission. Having charged that R. C. Cameron & Son was a fictitious person or firm, it appears to us the jury should have received an appropriate instruction upon this averment. *Davis v. State*, 84 Tex. Cr. R. 117, 29 S. W. 478; *Hocker v. State*, 84 Tex. Cr. R. 362, 30 S. W. 783, 53 Am. St. Rep. 716; *Ham v. State*, 4 Tex. App. 645.

3. It will be noticed that the charge of the court as copied above fails to instruct the jury that, in order to convict appellant, he must have passed the instrument with intent to defraud. This should have been embodied in the charge given the jury when the court applied the law to the facts. *Thurmond v. State*, 25 Tex. App. 371, 8 S. W. 473.

There are other questions in the case, more or less of a serious import, which are not discussed. They may not arise upon another trial.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

#### CULP v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### 1. ASSAULT AND BATTERY (§ 96\*)—AGGRAVATED ASSAULT—SELF-DEFENSE—INSTRUCTIONS.

Where, on a trial for aggravated assault, there was evidence that prosecutor threatened accused, who cut prosecutor with a knife, and that prosecutor then retreated, followed by accused to keep prosecutor from shooting him, the failure to charge that accused had the right to continue his self-defense as long as the danger appeared to him, and that accused could follow prosecutor, provided it was necessary, was reversible error.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 144; Dec. Dig. § 96.\*]

#### 2. ASSAULT AND BATTERY (§ 96\*)—AGGRAVATED ASSAULT—SELF-DEFENSE—INSTRUCTIONS.

Where, on a trial for aggravated assault, the issue of provoking a difficulty was not raised

by the evidence, a charge limiting accused's right of self-defense, by charging on provoking a difficulty, was erroneous.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 144; Dec. Dig. § 96.\*]

Appeal from Comanche County Court; J. M. Rieger, Judge.

Henry Culp was convicted of aggravated assault, and he appeals. Reversed and remanded.

Geo. E. Smith, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with aggravated assault upon one Muri Alsup by cutting him with a knife, inflicting thereby serious bodily injury. The jury found him guilty of simple assault and battery, assessing his punishment at a fine of \$25.

Muri Alsup, the alleged assaulted party, testified that on Sunday, the 13th of December, 1908, he saw appellant, and spoke to him, and asked him why he did not turn him in, as he was drunk; that appellant replied that he was no officer, that he had not been sworn in. Alsup had a bolt in his hand at the time, and punched appellant in the stomach with it two or three times. Alsup said this was done in a good-humored way, and in fact he was not drunk, but had had two or three drinks. The parties separated. The second time the witness met appellant was in front of Butler's barber shop. Witness was sitting on the edge of the sidewalk whittling on a piece of pine when appellant came from around the barber shop. Witness had been talking to some parties who were with him about what he had said to appellant in regard to him (witness) having been at a certain house one night. He says: "I had just told the boys who were sitting on the sidewalk with me—that is, Jockie Burks and George C. Jones—that I had called Henry Culp a son of a bitch there in town on a previous occasion, and that he took it. About this time Culp walked up, and I thought that he had probably heard what I had stated; so I, after having shut up my knife and put it in my pocket, got up, and walked up to Culp, and said: 'Henry, you know I cursed you for a son of a bitch, if you said I was out at that house that night, didn't I?' And Culp said that it was not him." Witness further testified: "I took Culp by the lapel of the coat when I first walked up to him, but I never attempted to strike him at all. At this juncture Jim Alsup came up. Culp stooped down and got a piece of an old buggy and hit me with it across the arm." Jim Alsup interfered at this point, and took hold of the witness. Appellant stepped back, jerked his knife, and, as the witness jerked away from his brother, appellant came within reach and

cut him in the back just over the right kidney, and cut at him the second time as witness was going away; that attempt to cut him made a hole in his coat, but did not touch his person. This witness denied having his knife in his hand during the difficulty, and stated he made no effort to strike appellant, but took hold of the lapel of his coat.

The witness Ward testified that he was standing away some distance when he saw Murl Alsup approach defendant. He says, when he and Jim Alsup got to where they were, Jim Alsup got between Murl Alsup and appellant, and pushed Murl Alsup back; that appellant stooped down, and picked up a piece of a buggy spoke, and struck Murl Alsup with it; that Culp then threw down the stick, and jerked out his knife, and cut Murl Alsup with it, and struck at him again, and followed him 12 or 15 feet, as Murl Alsup went away. Jim Alsup testified that, when his brother approached appellant in front of Butler's barber shop, Ward and himself were standing a little distance away, and went to where they were; that Murl took hold of the lapel of appellant's coat with his left hand, but he did not see him make any attempt to strike appellant; did not see a knife in Murl Alsup's hand; that he caught his brother, and pushed him back, and got between the parties. He describes the remainder of the trouble about as did Ward. The attending physician described the wound as being about three-quarters of an inch deep and three or four inches in length. He stated it might have become a serious wound, had infection occurred.

Jockie Burks testified he was sitting on the edge of the sidewalk, in company with two or three other parties, when Murl Alsup came up and engaged in a conversation with Jones and himself. He says: "Murl Alsup told me and Mr. G. C. Jones that he had tried to get Henry Culp to turn him in for being drunk, and that Culp stated that he was no officer, and that he had called the defendant, Culp, a son of a bitch some time before that, and Culp would not resent it, and that he had something else to tell Culp, when about this time Culp came up. I did not notice where he came from. Murl had been whittling on something while he was sitting on the porch, but I did not see the knife after he got up off of the porch. Culp said something to Jones, who was sitting to my left, next to the east gallery, and, when Culp stopped, Murl Alsup got up from the porch and approached Culp, and said to him: 'I have been telling these boys about the time I cursed you for a son of a bitch.' Henry says: 'Murl, do you want trouble out of this? I have treated you nice, and you had better go on and leave me alone.' He (Murl) did not call Henry (appellant) a son of a bitch, but told him he had called

him a son of a bitch at a prior time; that is, if he said that he was at a certain house. Culp said that he guessed that it was not him, and that he must be mistaken, and that he did not remember of him ever calling him that. I did not see a knife in Murl's hand while he was approaching Culp, for I was not in a position to have seen one if Murl had one in his right hand. Murl made some kind of gesture at Culp; but I won't be sure, because I was not in a position to see his right hand. Jim Alsup came up and interfered, and Henry Culp stooped down, got an old buggy spoke, and stepped back to Murl, and struck Murl with the stick." The witness says they separated, and appellant stepped back and pulled his knife out and said, "God damn you, I have been run over as long as I am going to," and that as Murl jerked loose from Jim Alsup, appellant cut him across the back, and Murl went around the barber shop to the west, appellant following him until he got about half way around.

Jones testified as to the position of the parties on the sidewalk at the time appellant approached. Murl Alsup had stated that about the time appellant approached him that he had called appellant a son of a bitch, and that appellant had not resented it. Appellant asked the witness Jones if he had sold the mule. It seems they had had some discussion about a mule trade. Witness told him that he had, and appellant said, "Well, I am too late," and witness said, "Yes, you have waited a little too long." Witness says he and defendant had been on a trade, and appellant wanted to borrow the mule to haul some wood if he had not sold it. He describes the difficulty about as did the other witnesses, and in regard to the beginning of the difficulty he stated that Alsup, the alleged assaulted party, got up off the porch, and went to where appellant was, stopping right in front of him. As he did so he remarked: "I have just been telling these men that I called you a son of a bitch, and that you took it." He then caught appellant by the lapel of the coat, and this witness says it was his best impression that Murl had his right hand drawn back, and from his position he could not see whether he had anything in his right hand or not, because his right hand and side were opposite from where he was; that Jim Alsup came up and got hold of Murl, and tried to separate the parties.

Hill testified, in regard to the first meeting between the parties, that they were standing in front of Dr. Daniel's store, and Murl Alsup called for the defendant to come to him, and that he and appellant walked over to where Murl Alsup was, or near where he was; that appellant and Murl Alsup were talking while the witness was talking to other parties. Witness said he was not paying sufficient attention to understand what

they were talking about, but he saw Murl Alsup punching appellant in the stomach with something, and heard him say, "God damn you, why don't you turn me in for being drunk," and appellant replied, "You are all right, Murl," and just then Lewis Wells spoke up and said, "No, Murl; Henry is not an officer." Then appellant turned and walked away, and went up to witness' residence with him.

Appellant testified in regard to the first meeting that occurred between himself and Murl Alsup; that, when Alsup came up and called him aside, he said he did not think of any trouble, as they had been getting along all right as far as he knew; but, when he got to where Murl Alsup was, Murl said, "I am as drunk as hell, and now, by God, you turn me in, if you think you can, and you are an officer, by God, turn me in," and during this time he was punching him with an iron bolt. Appellant remarked: "No; I can't turn you in. I am no officer." He said: "Well, you were elected constable; turn me in, by God." And appellant remarked, "If I was elected, I did not qualify." Just at this point Lewis Wells spoke up and said, "No, Murl; Henry is not an officer." Appellant said he turned around and left him, and went up home with Mr. Hill. In regard to the second meeting, he said: "I saw Mr. Jones sitting down on the edge of the gallery next to me, and when I walked up I noticed some other parties sitting on the same porch on the west of him. I saw Murl Alsup there. He got up and started towards me. I just walked up to the corner of the gallery, and asked Mr. Jones if he had traded the mule yet, and he said that he had, when Murl Alsup got up and came right up to me, with his hands hanging down by his side, and with his knife open in his right hand, with only the blade showing, and he said to me, 'I have been telling these fellows that I cursed you for every God damn son of a bitch I could lay my tongue to, and you took it.' I said, 'You must be mistaken; I guess I was not there,' and he said, 'Yes, by God, you was; and, by God, I done it right over yonder on that gallery.' I said, 'Murl, you go on and let me alone; I don't want to have any trouble with you.' I said, 'Murl, what is the matter with you? You are just hunting trouble,' and he said, 'Yes, by God; and I had just as soon have it right now as any other time,' and grabbed me in the collar with his left hand, with a knife in his right, and started to strike me with the knife, and I grabbed his right hand with my left hand, and about that time Jim Alsup grabbed Murl, and I stooped down and picked up a stick, and struck him across

the arm the knife was in; but I saw I could do nothing towards protecting myself in that way, and him with a knife, and I threw down the stick and got my knife, and just about that time Murl slung Jim loose from him, and, as he did so, came around towards me, and I cut him one time with my knife, and cut at him the second time, but think that I only cut his coat, and he then retreated, and I followed him around on the west side of the barber shop, and tried to get as close to him as I possibly could, so as to keep him from shooting me. He put his hand to his hip pocket and said, 'Stop, by God, or I will shoot you,' and about this time Jim Alsup said, 'Don't follow him, Henry,' and I said, 'I am not going to follow him,' and he went on across the street to the doctor's office." The testimony is rather voluminous for a difficulty of its proportion, and the above is rather a condensed statement of the facts.

1. The court charged the law, among other things, applicable to self-defense, but failed to charge the jury that appellant had the right to continue his self-defense as long as the danger appeared to him. We are of opinion that this phase of the law should have been given under the facts stated.

2. The court also limited appellant's right of self-defense by charging on provoking a difficulty. That issue was not in the case under any of the evidence.

3. Special charge No. 2, requested by appellant, asked the court to instruct the jury that, if Murl Alsup was in the act of inflicting serious injury on defendant by some act on his part then done, the defendant was not required to wait until the injury was actually inflicted, but he would have the right to strike before he received the violence, if any, and would further have the right to continue his defense by following Alsup and inflicting such violence as appeared to him to be necessary in his defense, provided in so following him, if he did, he then believed from the circumstances that Alsup was seeking to gain some advantage for the purpose of inflicting serious harm on him, as it appeared to him. This charge was refused. Upon another trial we are of opinion this phase of the law should be submitted to the jury. These two issues are properly presented for revision, and we are of opinion that both are well taken: First, that the law of self-defense was not sufficiently given, as indicated; and, second, that the issue of provoking a difficulty by appellant is not raised by the evidence, and that it was an unwarranted limitation on his right of self-defense.

The judgment is reversed, and the cause is remanded.

## PACE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

1. CRIMINAL LAW (§ 1099\*)—APPEAL AND ERROR—STATEMENT OF FACTS—TIME FOR FILING.

Under Act 81st Leg. p. 376, c. 39, § 7, providing that when an appeal is taken, the parties shall be entitled to 30 days after adjournment to prepare and file statement of facts, and for good cause the judge trying the cause may extend the time upon application of either party, where the court adjourned on the 16th day of September, and an application to extend the time to file a statement of facts was granted by the judge to November 1st, a statement of facts which is filed before the expiration of the extended time should not be stricken out on motion for failure to file within the time required by law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2876-2877; Dec. Dig. § 1099.\*]

2. CRIMINAL LAW (§ 369\*)—ADMISSIBILITY OF EVIDENCE.

Accused on the day of the murder was told by deceased that the latter had taken up hogs belonging to accused because they were injuring his crops, and both went to the house of deceased and subsequently accused went to the house of deceased's landlord, and from there returned to the house of deceased, where the murder was committed. *Held*, that evidence that, while at the landlord's house, accused cursed and abused some of the people he met there, and assaulted one of them, was not admissible, as evidence of extraneous crimes is inadmissible unless the same will develop the res gestæ, intent, system, or identity of the parties.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

3. HOMICIDE (§ 338\*)—APPEAL—HARMLESS ERROR—ADMISSIBILITY OF EVIDENCE.

*Held*, further, that the admission of such evidence was prejudicial error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.\*]

4. HOMICIDE (§ 169\*)—ADMISSIBILITY OF EVIDENCE.

*Held*, also, that evidence that accused while at the landlord's house asked the landlord if he had told the tenant to kill the hogs of accused if they got into the tenant's crops, and the landlord's reply thereto, was admissible.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 169.\*]

5. CRIMINAL LAW (§ 742\*)—ACCOMPLICE—QUESTION FOR JURY.

In a prosecution for homicide, a witness testified that after the killing, the witness, accused, and C. entered into an agreement to manufacture a defense by getting another person to testify that he was out riding on the day of the homicide; that, as he approached the house of the deceased, he saw C. shoot deceased; and that before the shooting deceased stated to C. that he would kill him, C., and grabbed for his gun. *Held*, that whether the witness was an accomplice was properly submitted to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1775; Dec. Dig. § 742.\*]

6. CRIMINAL LAW (§ 780\*)—INSTRUCTIONS—NECESSITY—ACCOMPLICES.

When the court leaves to the jury the question whether a witness is an accomplice, it

should give the jury a guide to determine the question.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 780.\*]

7. CRIMINAL LAW (§ 507\*)—TESTIMONY OF "ACCOMPLICE"—WHO ARE ACCOMPLICES.

An accomplice is properly defined in a charge on accomplice's testimony as any one connected with the crime committed, either as principal offender, as an accomplice, as an accessory, or otherwise, including all persons connected with the crime by unlawful act or omission on their part, transpiring either before, at the time, or after the commission of the offense, and whether or not he was present and participated in the commission of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. § 507.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 75-79; vol. 8, p. 7561.]

8. CRIMINAL LAW (§ 780\*)—INSTRUCTION—EVIDENCE OF ACCOMPLICE.

In a prosecution for homicide, an instruction that if the jury believed that a witness named was an accomplice, or had a reasonable doubt as to whether he was or not, that they could not find accused guilty upon his testimony, unless they believed that his evidence was true, and that it showed, or tended to show, that accused was guilty as charged, and that there was other evidence but his tending to connect accused with the commission of the offense, was erroneous, as the evidence of the accomplice must do more than tend to prove the guilt of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.\*]

9. CRIMINAL LAW (§ 719\*)—TRIAL—STATEMENT OF PROSECUTING ATTORNEY.

A prosecuting attorney should never state a proposition to the jury in such a way as to leave an inference that he knows a fact that might be damaging to accused or a witness, but, if he is in possession of such a fact, which would be legitimate testimony, it should be given to the witness stand.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1069; Dec. Dig. § 719.\*]

Appeal from District Court, Cass County; P. A. Turner, Judge.

Henry Pace was convicted of murder, and appeals. Reversed and remanded.

Hart, Mahaffey & Thomas and O'Neal & Figures, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

MCCORD, J. In this case the state has filed a motion to strike out statement of facts on the ground that the same was not filed within the time required by law. The court began on the 23d day of August, 1909, and adjourned on the 16th day of September, 1909. An inspection of the record shows that the appellant was granted 30 days in which to file statement of facts; that before the expiration of that time the appellant made an application to the district judge to extend the time allowed by law in which to file statement of facts and the application was granted by said judge, and the time allowed for filing such statement of facts was extended by said judge until November 1, 1909, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the statement of facts shows to have been filed before the expiration of the time granted in the order by the trial judge extending the time. Section 7, c. 39, of an act passed by the Thirty-First Legislature, prescribing the duties of stenographers and preparation of statements of facts, as found on page 376, provides: "When an appeal is taken from the judgment rendered in any cause in any district or county court, the parties to the suit shall be entitled to thirty days after the day of adjournment in which to prepare and file statement of facts and bills of exception; and upon good cause shown the judge trying the cause may extend the time in which to file the statement of facts and bills of exception, and this power to extend the time is granted the court to be exercised either in term time or vacation upon the application of either party for good cause." The time having been extended by the district judge in this case in compliance with section 7 of the above-recited act, the motion of the state will be denied.

The appellant was convicted in the court below of murder in the second degree, and his punishment assessed at confinement in the penitentiary for 50 years. From this conviction he has appealed, and assigns various reasons why the case should be reversed.

The facts in this case show: That appellant, Henry Pace, resided in Bowie county on the north side of Sulphur river. That Sulphur river was the dividing line between Bowie and Cass counties. That the deceased Felix Grundy, lived in Cass county, some mile and a half from Sulphur river and on the south side of the river. The stock law was in force in Cass county, but not in Bowie county, the home of appellant. Appellant on his farm on the north bank of Sulphur river kept a hog ranch. His hogs had been accustomed to getting out and crossing the river into Cass county, and getting into the field of Felix Grundy, the deceased. Grundy had taken these hogs up several times, and had notified appellant. Appellant would go and get the hogs, and had notified deceased that, if his hogs bothered him any, to take them up and notify him, and he would come and get them and pay him for his trouble. It seems that Pace, the appellant, and one Cain, were partners in this hog ranch, and that Cain lived close by where the appellant lived, but on the south side of the river. It appears that on Sunday, the 23th day of July, 1909, the deceased, Felix Grundy, appeared at the place of appellant, and notified him that he had taken up some of his hogs that were depredating upon some of his crops, and wanted appellant to come and get them. Appellant agreed to go. The deceased stayed at appellant's house some four or five hours. Appellant gave him his dinner, and deceased assisted in hitching up the team, when they started over to the deceased's house to get the hogs. They went by and got Cain, and

one Watt McLimore accompanied them also. Watt McLimore lived with Cain, but was over at Pace's house Sunday when the deceased arrived. The parties all of them were drinking some, and, when they arrived at the home of the deceased, Felix Grundy, he was so drunk that they had to lift him out of the wagon, and his wife assisted him to the gallery, where he lay down. Appellant, Pace, Cain, and McLimore went on further south to the home of Mr. Rhudy, who lived some three quarters of a mile south of where Felix Grundy lived, and on the same plantation with Rhudy, and on what is known as the "Moore or Simmons farm." The witness Rhudy testifies: "The first I seen of Mr. Pace was when he came around the corner of the yard fence, toward the side gate, in my premises. The road does not pass right by my place or come up to the gate. The road runs down a little distance from the house. My house fronts south, \* \* \* and the road comes down from Sulphur river on the east side of my premises." That, when the appellant came around the house, he asked witness' son where Frank Hill was. That his son told him Frank Hill was in the house. That appellant told his little grandson Ray to go and tell Frank to come out there, and about that time Mr. Cain and Watt McLimore came up from opposite the blacksmith shop, and one of these parties called Frank to come out to the front gate. This was about 5 o'clock in the evening. Appellant, Pace, spoke to the witness, and said: "I come here to raise hell with you." The witness remonstrated with him for talking that way in presence of his family. Some words passed between them when the appellant asked the witness why had he instructed this negro down here on the place to kill his hogs. He called no names. Now, over the objection of appellant, the state was permitted to prove by this witness, and also the witness Frank Hill, that the appellant was very quarrelsome and abusive; that he denounced the witness Rhudy; that he denounced Hill; that he made an assault upon Hill, seized him by the collar, and cursed him; that the parties were drinking whisky all the time. Appellant declared that he had come there to whip Frank Hill, and, in fact, the state was permitted to go into all the details of the conversation, the conduct of appellant, the assault upon witness' son-in-law, and this over the objections of appellant. After remaining at this house awhile the three parties, Cain, McLimore, and appellant, returned to the home of the deceased, and shortly after they arrived at the deceased's house the deceased was killed by being shot. Some of the witnesses testify that Cain shot the deceased. The wife of deceased says that Pace shot him. Some of the witnesses say that Cain paid the negro 60 cents for taking up the hogs, and, when he handed him the 60 cents, stated to the deceased: "I find only six hogs, and you had nine up. I saw blood around

the lot. You had better account for the other three hogs"—when deceased replied that he had killed the hogs, and would kill Cain, and reached for his gun that was by him on the porch, when Cain shot him. The wife of deceased testified that deceased was on the porch, sitting down with his back leaning against the wall, that she was by her husband, and that the appellant was in the wagon, and said to her to get out of the way, and told the appellant that it was time for him to pray, and without cause, and, without any reply being made by her husband, shot and killed him. This is a sufficient statement of the facts to make plain the objections raised by the appellant.

We find in the record bill of exceptions No. 3, and here the bill will be set out in full with the qualification of the judge: "Be it remembered that upon the trial of the above entitled and numbered cause that the state offered to and did prove by its witness S. T. Rhudy that defendant came to his, Rhudy's, house at about 5 o'clock p. m. on Sunday July 25, 1909, and prior to the killing of the deceased and stated to him, Rhudy, on the gallery of his said home, that he, defendant, had come there to raise hell; that he would kill any man who killed his hogs, and would whip any man who took it up; that he would as leave die then and there as anywhere else, and that when he, Rhudy, remonstrated with defendant for using such language in the presence and hearing of his, Rhudy's, family, and said he was liable to prosecution, that defendant stated that it made no difference; that he, Rhudy, would get the worst of the prosecution. To all of which defendant then and there objected upon the ground that the same was immaterial, irrelevant to any issue in the case, that it threw no light upon the killing of Felix Grundy, and was calculated to prejudice the jury against him, all of which objections the court overruled and permitted the witness to testify as above stated, to all of which the defendant then and there excepted and now here tenders his bill of exceptions, and prays that the same be allowed, approved, and ordered filed as a part of the record in this case." The bill is qualified by the judge as follows: "This bill is all right as far as it goes, but it does not go far enough to make it a fair bill. It is true that the witness testified to the facts set forth in the bill, but he further testified that the defendant was a stranger to him, and that he did not understand his conduct, and he asked him what he meant and what this was all about, and that defendant replied: 'You told this negro down here on the lower end of your farm (meaning Felix Grundy) to kill my hogs if they got in his crop.' Rhudy says: 'I did not even know that your hogs had been trespassing on his crop.' The negro was a tenant on Rhudy's place. It was further shown that the defendant had come for the express purpose of seeing Rhudy about telling the negro to kill de-

fendant's hogs. Defendant had just come from the negro's house, and went immediately back to the negro's house and killed him in 30 minutes after he left Rhudy's house. The state continued and established that defendant killed the negro about his hogs. With this explanation and addition the bill is allowed and ordered filed."

Now, the testimony complained of as to what the appellant did at Rhudy's house was objected to upon the ground that the same was immaterial, irrelevant to any issue in the case, that it threw no light upon the killing of Felix Grundy, and was calculated to prejudice the jury against the appellant. We are inclined to think that the court below erred in admitting this testimony, and that the admission of this testimony was prejudicial to the appellant and hurtful to him. We are further of opinion that so much of the testimony of Rhudy as to the appellant asking him if he had told the negro to kill his hogs if they got in his crop, and Rhudy's reply thereto, was admissible, but that part of the testimony that relates to appellant assaulting the said Rhudy and the said Hill and cursing and abusing them was not admissible. This question has been before this court in a number of cases, and this court has in all the cases held that such testimony was not admissible against a party on trial. It is never permissible to introduce testimony of extraneous crimes, unless the same would develop the *res gestæ*, intent, system or identity of the parties. See *Brown v. State*, 54 Tex. Cr. R. 121, 112 S. W. 80; *Sherar v. State*, 30 Tex. App. 349, 17 S. W. 621; *Richardson v. State*, 32 Tex. Cr. R. 524, 24 S. W. 894; *Long v. State*, 39 Tex. Cr. R. 537, 46 S. W. 821; *Williams v. State*, 38 Tex. Cr. R. 128, 41 S. W. 645; *McAnally v. State*, 73 S. W. 404; *Herndon v. State*, 50 Tex. Cr. R. 552, 99 S. W. 558. In *Brown's Case*, *supra*, this court held that it was error for the court below to allow the state to prove that Brown had a difficulty with one Bob Miller a few minutes before the difficulty with Albert Sidney Johnson, the man whom he killed. When Brown was placed on the stand, the state over his objection was permitted to interrogate Brown as to the particulars of the difficulty that he had with Miller, and that he had stood with his hand on his pistol and cursed and abused the said Bob Miller, and that he had slapped his jaws. This court in passing upon this question stated: "When it was proposed to go into this matter, and the first inquiry was made in respect thereto, appellant objected to the question, and objected to any inquiry into the details of the difficulty with Miller, or evidence of any of the details of his difficulty with a third party, as not having any connection with the homicide on trial, except in so far as it may have affected appellant's apprehension and fear from the apprehended attack from Miller, and

whether appellant was right or wrong in the difficulty with Miller could not be used as a circumstance against him, and the testimony was inadmissible, irrelevant, and immaterial, and contained and related to extraneous matters hurtful and prejudicial to him. After the cross-examination of appellant, the state introduced both A. B. Tabor and Bob Miller in rebuttal, who testified at great length as to the details of said difficulty between appellant and Miller prior to the homicide, and each of said witnesses was permitted to give his version of what occurred in such controversy. We think that, as presented, these objections should have been sustained. Appellant had gone no further in his testimony than to assert as a fact some prior difficulty with Miller. This was not only admissible, but important, as throwing light on his claim that he believed, when he saw Miller and Johnson in conversation and looking in his direction, that, in view of such former difficulty and conference, their conversation related to him. It would, of course, have been admissible for the state to have shown that in fact no such difficulty or controversy with Miller had taken place, and it might have been proper to have shown that, if in fact there had been such controversy, it was not of such gravity as would fairly have justified Brown in believing that the conversation between the parties named had any reference or relation to him; but it cannot be claimed that the testimony elicited from appellant, or produced from Miller and Tabor, stopped here. On the contrary, the effect of it was probably to place appellant in a bad light before the jury and to prejudice his case. It is always a safe rule to limit, as far as practicable, evidence to the very matter and case in hand, and to exclude admissions and testimony of extraneous offenses, contests, controversies, and difficulties. *Ware v. State*, 36 Tex. Cr. R. 597, 38 S. W. 198; *Brittain v. State*, 36 Tex. Cr. R. 410, 37 S. W. 758; *Morrison v. State* [40] Tex. Cr. R. [473], 51 S. W. 358; *Woodard v. State* (Cr. App.) 51 S. W. 1122; *Barkman v. State* (Cr. App.) 52 S. W. 69; *Chumley v. State*, 20 Tex. App. 556." We therefore think the court erred in admitting the details of the conversation, conduct and acts of appellant at the home of Rhudy.

The next bill of exceptions, No. 4 is similar to the previous bill of exceptions—that is, it was to the action of the court in permitting Frank Hill to testify that appellant at Mr. Rhudy's house on the evening of the killing and just prior to the killing caught the witness in the collar and told him, "God damn you, I believe I will whip you any way." Appellant objected to this on the same grounds as the objections to Rhudy's testimony. Under the authorities cited, this bill of exceptions was well taken, and the court below erred in permitting the testimony.

On the trial of the case the state placed Watt McLimore upon the witness stand, and he testified. His testimony was very damaging to the appellant. He claimed that he was present when the difficulty took place, and that appellant did shoot the deceased. He furthermore testified that, after the killing, he, together with Cain and appellant, entered into an agreement to manufacture a defense in the case, and that they fixed up the plan that they would all agree to get a certain witness by the name of Don Cochran to testify in the case that he was out on this Sunday riding around, and that, as he approached the house of the deceased, he saw Dick Cain whirl and grab his gun and whirl back and shoot, and that, before this, the deceased had stated to the said Cain that he had killed three of the hogs, and, God damn him, he would kill him, and grabbed for his gun. The witness McLimore testified that this was the agreement that was entered into after the killing, and that such testimony was false and fabricated, and that no such thing occurred. It may be further remarked that McLimore was not indicted, but he, in company with Cain and Pace, had been denied bail, and was in jail at the time of the trial, and had been since the killing. Now, the court submitted to the jury the issue as to whether the witness McLimore was an accomplice, and left it to the jury to decide whether he was or not. Complaint is made of this, and appellant contends that the court should have charged the jury as a matter of law that McLimore was an accomplice. We are of opinion that the court did not err in submitting this issue to the jury. It might be proper to state that wherever the court leaves it to the jury to pass upon the question as to whether a witness is an accomplice the court ought to give the jury a guide to determine this, and we think the court correctly defined an accomplice in the charge given. The court gave the following charge to the jury on the subject of accomplice: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed and the corroboration is not sufficient if it merely shows the commission of the offense. An 'accomplice,' as the word is here used, means any one connected with the crime committed, either as principal offender, as an accomplice, as an accessory, or otherwise. It includes all persons who are connected with the crime by unlawful act or omission on their part, transpiring either before, at the time, or after the commission of the offense, and whether or not he was present and participated in the commission of the crime. Now, if you are satisfied from the evidence that the witness Watt McLimore was an accomplice, or you have a reasonable doubt as to whether he was or not as that term is defined in the foregoing instruction, then you are further instructed that you cannot find the defendant

guilty upon his testimony alone, even if you believe his testimony is true, and it alone satisfies you beyond a reasonable doubt that the defendant is guilty, as charged. But if you believe that his evidence is true, and that it shows or tends to show that the defendant is guilty, as charged, and that there is other evidence in this case outside of his tending to connect the defendant with the commission of the offense charged in the indictment, then you may convict defendant, if from the whole evidence you believe beyond a reasonable doubt that defendant is guilty." Now, it will be seen by this charge that the court charged the jury that if they believed said McIlmore's testimony was true, and that it showed or tended to show that the defendant is guilty, and that there is other evidence tending to connect the defendant with the commission of the offense, then to convict defendant. This charge has been condemned by this court in a number of cases. In the case of *Oates v. State*, 51 Tex. Cr. R. 449, 103 S. W. 859, the charge of the court below was similar to the charge in this case, and in that case the court directed the jury that if they believed the accomplice's evidence true and that it shows or tends to show defendant is guilty, etc. In commenting on this charge this court says: "The main portion of the charge is stereotyped as to the definition of an accomplice, and who they are and what it takes to constitute an accomplice. This charge is in our judgment clearly erroneous. It authorizes the conviction of appellant upon the testimony of an accomplice which 'tends' to show that appellant committed the offense charged, provided he is corroborated by evidence 'tending' to connect the defendant with the offense. So this charge, condensed, may be stated to announce the proposition that, if an accomplice detailed evidence which 'tends' to show an accused party guilty, it is sufficient, provided there is corroboration tending to connect the defendant with the offense charged. So we have in the place of evidence which must prove beyond a reasonable doubt the guilt of the accused facts from two sources, one legally discredited, which tends to show guilt. This is not legally sufficient. Facts must do more than 'tend' to show guilt. They must be cogent enough to overcome the presumption of innocence and reasonable doubt. There may be quite a mass of testimony which would tend to show guilt; but, even in a case of circumstantial evidence, these facts must be of sufficient cogency to exclude every reasonable hypothesis except that of guilt. Statements of an accomplice tending to show the guilt of an accused, aided by facts tending to show it from another source, do not meet the requirements of the law. This charge is without precedent, so far as we have been enabled to ascertain, and for the first time a charge of this sort has been

brought to the attention of this court." This charge was excepted to at the time, and was also assigned as error in the motion for new trial. We think the court erred in giving this charge, and that it authorized the jury to convict if the testimony of the accomplice "tended" to prove appellant's guilt. This is not the law, and the court below erred in giving this charge.

There are quite a number of other questions raised in the record. We do not deem them, however, of sufficient importance to require us to pass upon them. Some of them are not likely to occur upon another trial. We are not prepared to say that the argument of the district attorney complained of in appellant's bill of exceptions would authorize a reversal of the case. However, we would remind prosecuting officers in the discussion of cases before the jury to confine themselves to a discussion of the facts of the case. They should never attempt to state a proposition to the jury in such way as to leave the inference that they knew a fact that might be damaging to a defendant or a witness. If they are in possession of a fact which would be legitimate testimony, this should be given from the witness stand, and not from their place at the bar as an advocate.

For the errors indicated, the judgment is reversed, and the cause is remanded.

### CARDENAS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### 1. INDICTMENT AND INFORMATION (§ 122\*)—COMPLAINT—VARIANCE.

Under the statute providing that no information can be filed, except where there is an affidavit or complaint filed on which the information is based, a complaint charging the unlawful riding on a train of the "G., H. & S. A. Ry. Co.," there being no explanation as to the meaning of the letters, did not support an information charging that the train was on the track of the Galveston, Harrisburg & San Antonio Railway Company.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 321-325; Dec. Dig. § 122.\*]

#### 2. CRIMINAL LAW (§ 304\*)—EVIDENCE—JUDICIAL NOTICE—"CLERK."

The court takes judicial notice of the names and signatures of its own officers, and where the officer's signature is followed by the word "Clerk" it will be presumed on appeal that he was clerk of the court in which the case was tried.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 709; Dec. Dig. § 304.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1224-1229.]

#### 3. CRIMINAL LAW (§ 1144\*)—APPEAL—PRESUMPTIONS.

Where the record showed that one B. was the county judge of a certain county, the Court of Criminal Appeals would judicially determine that he was authorized to administer oaths, and it would be presumed, in the absence of any-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thing to the contrary, that such B., as county judge, took the complaint in the case, though the name of the county was omitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3018; Dec. Dig. § 1144.\*]

Appeal from Ft. Bend County Court; G. C. Baker, Jr., Judge.

Raymundo Cardenas was convicted of an offense, and appeals. Reversed and remanded.

McCabe, Davidson & Slyfield, for appellant. John A. Mobley, Asst. Atty. Gen., for the State.

McCORD, J. This is an appeal from a conviction for unlawfully riding on a train, the punishment being assessed at a fine of \$5.

The complaint charged that appellant did then and there unlawfully board a freight train on the track of the "G., H. & S. A. Ry. Co.," which was then and there, etc. The information charges that appellant did unlawfully board a freight train on the track of the Galveston, Harrisburg & San Antonio Railway Company. Appellant filed a motion for new trial, and also motion in arrest of judgment, on the ground that there is a variance between the complaint and information, in that the complaint fails to give any railway company, or the attempt of the state in the complaint to set out the name of the company by initial letters, and there being no allegation in the complaint as to what these letters meant, and nothing in the information to show that the initial letters meant the Galveston, Harrisburg & San Antonio Railway Company, that the same would be such a variance as would not authorize a conviction in the case. Our statute provides that prosecutions in the county court may be had upon information filed by the county attorney, but that no information can be filed, except where there is an affidavit or complaint filed, upon which the information shall be based. If the information, therefore, has to be predicated upon a complaint or affidavit, if there should arise a variance between the complaint and affidavit or information, it would be fatal to the conviction; and there being no allegation, either in the complaint or information, that the "G., H. & S. A. Ry. Co." meant the Galveston, Harrisburg & San Antonio Railway Company, we hold that the initial letters used in the complaint, without explanation, do not support an information charging that the train was on the track of the Galveston, Harrisburg & San Antonio Railway Company. The information must show the complaint as to all descriptive averments. For the error indicated, the judgment will be reversed.

There is another point raised in the record that we deem necessary to notice. The complaint was made and sworn and subscribed to before "G. C. Baker, Jr., County Judge

County, Texas." The objection is made that the complaint is not attested by any officer. The record in the case shows that the case was tried before G. C. Baker, Jr., county judge of Ft. Bend county. It has been held that the court will take judicial notice of the names and signatures of its own officers, and where the office and signature is followed by the word "Clerk" it will be presumed on appeal that he was clerk of the court in which the case was tried. See *Mountjoy v. State*, 78 Ind. 172, and *Simon v. Stetter*, 25 Kan. 155. The record in this case showing that G. C. Baker, Jr., was the county judge of Ft. Bend county, this court would judicially determine that he was authorized to administer oaths, and it will be presumed, in the absence of anything to the contrary, that G. C. Baker, Jr., the county judge of Ft. Bend county, was the person who took the complaint of Scott in this case.

For the error above indicated, the judgment is reversed, and the cause is remanded.

#### WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

##### 1. FORGERY (§ 48\*)—TRIAL—INSTRUCTIONS—INSTRUMENT AFFECTING "PROPERTY."

An instruction, in a prosecution for forgery, that "the instrument must be such, if true, as would have created, increased, diminished, discharged, or defeated any pecuniary obligation, or that would have transferred or affected any property or any money whatever," is not erroneous because of the use of the word "money," though the statute uses only the word "property," as "property" includes "money."

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 124-128; Dec. Dig. § 48.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

##### 2. CRIMINAL LAW (§ 784\*)—TRIAL—INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.

The court is not required to charge on circumstantial evidence, unless the testimony is wholly circumstantial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1883; Dec. Dig. § 784.\*]

##### 3. CRIMINAL LAW (§ 784\*)—TRIAL—INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.

Where the act constituting the crime is proved by direct evidence, the court is not required to instruct on circumstantial evidence, because the intent with which the act was done is proved by circumstances.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1883; Dec. Dig. § 784.\*]

##### 4. CRIMINAL LAW (§ 784\*)—TRIAL—INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE.

Where the only question to be determined by the jury is intent, the court is not required to charge on circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1883; Dec. Dig. § 784.\*]

Appeal from District Court, Bosque County; O. L. Lockett, Judge.

C. P. Williams was convicted of passing a forged instrument, and appeals. Affirmed.

John A. Mobley, Asst. Atty. Gen., for the State.

MCCORD, J. This is an appeal from a conviction for passing as true a forged instrument, the punishment being assessed at two years in the penitentiary.

The indictment contained but one count. The facts show that Mrs. M. L. Reeder lived in Bosque county, at a town called Clifton, and that the appellant, C. P. Williams, secured a check from her for \$5. For what purpose the record does not disclose, but on July 31, 1909, she gave to appellant, on the Clifton State Bank, and payable to the order of appellant, a check for \$5. This check was raised from \$5 to \$25, and was changed so as to read "payable to the order of C. R. Williamson." This check was transferred to Jodie Grimland, who was in the drug business in the town of Clifton, by the defendant, and he (defendant) indorsed the check at the time, and claimed that Mrs. Reeder had given it to him, and he (Grimland) afterwards presented the check to the bank. At the time the witness bought this check from Williams, he paid Williams \$10 in money and gave him a check for \$11.60, and credited Williams' account at the drug store for \$3.40, making \$25. Appellant claimed on the trial of the case that he had purchased this check for \$25 from a man who gave his name as Williamson; that he traded him a gun and some other things, and gave him \$5 in addition, for the check; that he had never seen that man before or since.

The court gave a very full charge, and at the request of appellant gave the following: "You are instructed by the court that, even though you find that the \$25 check offered in evidence was a forgery, still you cannot convict defendant for passing it, unless you find that he forged it, or knew at the time he passed it that it was a forgery; and if you have a reasonable doubt of these facts you should find defendant not guilty, even though you believe that he did pass it." In the main charge the court charged the jury that if the jury found or believed, or had a reasonable doubt whether, defendant bought said check from one C. R. Williamson, and afterwards passed the same to Jodie Grimland, and that at the time he passed the same said check or written instrument was forged, as above defined, or that he did not pass the same with the intent to injure or defraud, they would acquit the defendant.

Appellant filed a motion for new trial on the ground that the verdict was contrary to the law and the evidence; that the trial court erred in the second paragraph of his charge to the jury, in that the court charged that the written instrument must be such an instrument, if true, as would have created, increased, diminished, discharged, or defeat-

ed any pecuniary obligation, or that would have transferred or affected any property or any money whatever; that the error of the court's charge consisted in using the word "money," when the statute did not use that word. It is true the statute uses the words "affect any property"; but we cannot say, because the court used the word "money," that that gave to the offense of forgery an enlarged meaning. Property would certainly include money.

It is claimed the court's charge is upon the weight of the testimony. It is not pointed out in the motion for a new trial how the court's charge was a charge upon the weight of the testimony.

The first ground in the motion for new trial states that the court below erred in not charging on circumstantial testimony, as the case involved circumstantial testimony. As the law has been written in this state, the court is never required to charge upon circumstantial testimony, except in cases where the testimony is wholly circumstantial. In this case the testimony was not wholly circumstantial. Here was a check that was delivered to appellant, and was identified as the check delivered. This check was directed to the Clifton State Bank, and it may be said that the forgery was proven other than circumstantially, and it may further be said that passing the instrument, knowing the same to be a forgery, was proven by circumstantial evidence. These are questions, however, involving intent, which in law is discoverable by the acts of the party, and when an act has been once proved in a case by direct and positive evidence, because the intent with which the act is done is proven by circumstances, the court is never required to charge the jury that the state relies upon circumstances to establish the intent with which the act was done. A case not unlike this is the case of Conway v. State, 53 Tex. Cr. R. 216, 108 S. W. 1185. In that case the court did charge on circumstantial evidence, and in this case it was held that, while it was not prejudicial, still the facts did not call for a charge upon circumstantial evidence. One of the most cogent circumstances in this case is the fact that, after this check was raised to \$25, appellant, when he went to the drug store to settle his account, indorsed the check. We cannot see how, in this case, appellant can claim that the court should have charged on circumstantial evidence. It is true, where the case rests upon circumstantial evidence, it must be given in charge, and it may be stated as a general rule that, where the only question to be determined by the jury is intent, the court is not required to charge on circumstantial evidence. Flagg v. State, 51 Tex. Cr. R. 602, 103 S. W. 855.

Finding no error in the record, the judgment is affirmed.

## NEWMAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 12, 1910. On Motion for Rehearing, Feb. 9, 1910.)

1. PHYSICIANS AND SURGEONS (§ 6\*)—REGULATION—LICENSE TO PRACTICE—STATUTES—“PRACTICING MEDICINE.”

A party who advertised in a local newspaper that he was a masseur doctor located at a certain place, and that he could heal all diseases, and who treated many person who came to him afflicted with various ailments, for which he received compensation, was “practicing medicine,” within the meaning of Acts 30th Leg. 1907, pp. 224–228, c. 123, forbidding the practicing of medicine without a license, and declaring, by section 13, that any person shall be regarded as “practicing medicine” who shall publicly profess to be a physician or surgeon, and treat or offers to treat any disease or disorder, mental, or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof, and receive compensation therefor, and hence was required to have a license, although he prescribed and used no drugs, but only massage treatment.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 6; Dec. Dig. § 6.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5488–5491; vol. 8, p. 7758.]

On Motion for Rehearing.

2. INDICTMENT AND INFORMATION (§ 111\*)—REQUISITES AND SUFFICIENCY—NEGATING EXCEPTIONS IN STATUTE.

In a prosecution for violation of Acts 30th Leg. 1907, pp. 224–228, c. 123, forbidding the practice of medicine without registering and filing for record the certificate required, the complaint and information need not negative the exceptions in the act, where they are not contained in the enacting clause, which defines the offense, since the prosecution is not required to anticipate defenses arising under the act.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295–298; Dec. Dig. § 111.\*]

Appeal from Kendall County Court; H. Theis, Judge.

J. M. Newman was convicted of practicing medicine without a license, and appeals. Affirmed.

W. F. Hays, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged in the county court of Kendall county with unlawfully engaging in the practice of medicine without having first registered and filed for record the certificate required by law. A jury was waived, and the case submitted to the court, and as result of the trial appellant was fined the sum of \$50, and condemned to suffer confinement in the county jail for one hour.

1. There are two questions raised in the appeal. One was that the complaint and information are insufficient, in that they do not negative the exceptions set forth in section 10 of the act in question. This was not necessary. It is only necessary to negative exceptions where they are contained in the

enacting clause, which defines the offense. It is not required to anticipate defenses arising under a general act, and negative them.

2. The other question relates to the sufficiency of the evidence to sustain the conviction, and involves a construction of Acts 30th Leg. pp. 224 to 228, inclusive, c. 123. The evidence shows that some time in 1908 appellant inserted in the local paper at Boerne the following advertisement:

Prof. J. M. Newman

THE MASSEUR DOCTOR

Has Located in Boerne at the Boerne Hotel  
Room No. 21 Upstairs

He is the doctor that cures Consumption, Appendicitis, as well as all other diseases. Now is your time to be healed. Come and see him while he is here.

Soon thereafter he undertook to treat a number of persons for sundry ailments, including warts, fever, kidney diseases, and stammering. Testifying in his own behalf, appellant stated he was a doctor and a great one; that he could cure the diseases that the M. D.'s could cure, and the diseases that they could not cure; that he had treated and cured various patients of various ailments, and received pay for his services in so doing; that he never used or prescribed medicine in treating his patients; that he only used the massage treatment; that he only rubbed patients for their ailments, and at no time pretended to be a physician or surgeon; that he did not practice medicine, but was opposed to the use of any medicine to effect cures. It was shown by the clerk that he had filed no license or authority to practice medicine.

In the recent case of *Ex parte Collins*, 121 S. W. 501, we had occasion to consider the act in question. We there held that the word “medicine,” as used in the Constitution, embraced the art of healing, by whatever scientific or supposedly scientific method, the art of preventing, curing, or alleviating diseases, and remedying as far as possible results of violence and accident, and that it was broad enough to include any method that was supposed to possess curative power, and authorized the passage of the act in question requiring physicians and surgeons, including osteopaths, to obtain a license before engaging in the practice of their profession. Section 13 of the act in question provides that “any person shall be regarded as practicing medicine within the meaning of this act (1) who shall publicly profess to be a physician or surgeon and shall treat, or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof; (2) or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation.” Section 10 of the act

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

provides that nothing in it shall be construed so as to discriminate against any particular school or system of medical practice, and that the act shall not apply to dentists legally qualified and registered under the laws of this state, who confine their practice strictly to dentistry; nor to nurses, who practice only nursing; nor to masseurs, in their particular sphere of labor, who publicly represent themselves as such. A fair analysis of section 13 classifies the practitioner who shall be subject and amenable to the law. First, it includes any one who shall publicly profess to be a physician, and claim to effect cures by any system or method; and, second, those who shall treat or offer to treat any disease by any system or method, or to effect cures thereof, and charge therefor. Evidently the words "system or method" were intended to be wide enough in their scope to reach any and every school of medicine, whether based on the administration of pills, potions, or pellets, or the modern—as many persons believe, excellent—system of osteopathy or massage. The history of legislation upon this subject in this state shows that heretofore the Legislature, in dealing with the practice of medicine, had attempted to classify the different branches, and provide for boards for the different schools. Evidently the ineffectiveness of these laws was brought to public attention, because it is certain that the Thirtieth Legislature, with a view of closing every avenue of escape on technical grounds, and for the protection of the public health, as well as individual citizens, against the quack faker and charlatan, undertook to provide that any person shall be regarded as a practitioner of medicine who professed for pay to cure any kind of disorder or injury by any system or by any method.

The first statement in the advertisement put out by appellant characterizes him as a masseur doctor. He advertised himself to be the doctor, and to cure consumption, appendicitis, as well as all other diseases, and warns the public that "now is your time to be healed." Pursuant to his invitation, many people did call to see him, to be healed of their troubles. Can it be said that this man was not holding himself out as a physician, as one who treated and cured diseases? Can it be said that he did not, in the sense that the Legislature understood this term and method or system of treatment, know he is not exempt on the mere ground that he does not use drugs and medicines or surgical instruments? In the case of *People v. Alcutt*, 189 N. Y. 517, 81 N. E. 1171, in treating a somewhat similar statute, it is said "that to confine the definition of the words 'practice medicine' to the mere administration of drugs, or the use of surgical instruments, would be to eliminate the cornerstone of successful medical practice, namely, the diagnosis. It would rule out of the profession

those great physicians whose work was confined to consultation—the diagnostician, who leaves to others the details of practice. Section 146 of the public health law [Laws 1893, c. 661, as amended by Laws 1901, c. 646] provides that persons desiring to practice must pass a regent's examination, made up of suitable questions for thorough examination in anatomy, physiology, hygiene, chemistry, surgery, obstetrics, pathology, diagnosis, and therapeutics, including practice and materia medica (and here we may say that this section corresponds with section 9 of our law). Diagnosis would, therefore, seem to be an integral part of both the study and practice of medicine, so recognized by the law as well as common sense. The correct determination of what the trouble is must be the first step for the cure thereof. \* \* \* It may be difficult by a precise definition to draw the line between where nursing ends and the practice of medicine begins, and the court should not attempt, in construing this statute, to lay down in any case a hard and fast rule on the subject." The court further says: "We are of opinion, from the general current of the authorities throughout the country, and from examination of the history and growth of our public health statutes, that we should not apply the rule as laid down in *Smith v. Lane*, 24 Hun [N. Y.] 632. When we find, as in this case, a defendant holding himself out by sign and card as a doctor with office hours, who talks of his patients and gives treatments, who makes a diagnosis and prescribes diet, conduct, and remedies, simple though they may be, and who asserts the power to cure all diseases that any physician can cure without drugs, and also diseases that they cannot cure with drugs, and who takes payment for consultation, wherein there was an examination and a determination of the trouble—that is, a diagnosis—as well as payment for subsequent treatment, even if no drugs are administered, we must hold that he comes within the purview of the statute prohibiting the practice of medicine without being lawfully authorized and registered."

We think what we have said sufficiently disposes of the case. The appellant was undoubtedly guilty under all the proof, and the matters urged as a basis for reversal are, as we believe, without merit.

The judgment is affirmed.

MCCORD, J., not sitting.

On Motion for Rehearing.

RAMSEY, J. In this case the appellant has filed a motion for rehearing, in which the correctness of the court's opinion as to the sufficiency of the information is attacked on the ground that the exceptions in the act defining the offense are not negated, and in said motion we are cited to the case of *Salter v. State*, 44 Tex. Cr. R. 591, 73 S. W. 395, and the contention is earnestly made

that the opinion herein is in conflict with the decision of that case. Our opinion is, however, that there is no conflict in the two cases.

Counsel, as we think, seems to have overlooked a fact touching the law considered in the Salter Case. By reference to Acts 27th Leg. p. 12, c. 12, it will be seen that section 8 of that act defines the offense for which Salter was prosecuted. That section is as follows: "From and after the passage of this amendment it shall be unlawful for any person to practice medicine, surgery or obstetrics in this state except: First, all those who were practicing medicine in Texas prior to January 1, 1885. Second, all those who began the practice of medicine in this state after the above date who have complied with the laws of this state regulating the practice of medicine in force prior to the passage of this act: Provided, that those who had diplomas recorded since January, 1891, shall present to the State Board of Medical Examiners herein provided for satisfactory evidence that their diplomas were issued by bona fide medical colleges of respectable standing, receive a certificate from said boards, which shall be recorded as herein provided for, and provided that no fees shall be required for the issuing of such certificates. Third, all persons who shall hereafter receive certificates from the Board of Medical Examiners of this state as above provided for, and who shall also in all other respects have complied with the provisions of this act. Fourth, and provided, that all persons who may change their residence to the state of Texas, on filing a true copy of a license granted by the board of medical examiners of another state or territory, certified by the affidavits of the president and secretary of said board, with satisfactory proof of the genuineness of the same, and showing that the standard of requirements of the medical laws of said state or territory and that adopted by said board of medical examiners are equal to that provided for in this act; and who, on payment of the usual fee of fifteen dollars, may be registered and receive a license from the Board of Medical Examiners of Texas to practice in this state. Fifth, and provided further, that all persons who desire to hereafter begin the practice of midwifery in this state, and charge for their services, shall make application to the medical examining boards, said application to be accompanied with the fee of five dollars as herein provided, and when the said medical examining boards may admit to examination such applicant, and after passing a satisfactory examination in this special branch, will be granted a license to practice midwifery in the state of Texas: Provided, this shall not apply to those who do not follow midwifery as a profession, and who do not advertise themselves as midwives, or hold

themselves out to the public as practicing the profession of midwifery."

The holding in the Salter Case, *supra*, is directly in line with the statement in the original opinion to the effect that "it is only necessary to negative exceptions where they are contained in the enacting clause which defines the offense." We think this may be stated to be the rule of pleading on this question: "Where an offense is created by statute, and there is an exception in the enacting clause, the indictment must negative the exception." *State v. Duke*, 42 Tex. 455; *Young v. State*, 42 Tex. 404; *Summerlin v. State*, 3 Tex. App. 446; *Rice v. State*, 37 Tex. Cr. R. 37, 88 S. W. 801. This is placed on the ground that such exceptions are essentially descriptive of the offense. In the case at bar the matters relied on are purely defensive, and are contained in a different section of the law than that which defines the offense. Some of the authorities have gone to the extent of holding that although negative averments may be in the enacting clause, still if they are not essentially descriptive of the offense, they need not be set out in the indictment. *Mosely v. State*, 18 Tex. App. 311; *Hodges v. State*, 44 Tex. Cr. R. 444, 72 S. W. 179; *Wilkerson v. State*, 44 Tex. Cr. R. 456, 72 S. W. 850; *Osborn v. State*, 72 S. W. 592; *Hankins v. State*, 72 S. W. 191.

The other matters raised in the motion were thoroughly considered on the original appeal, and need not be further noticed.

Believing that the disposition made of the case is correct, the motion for rehearing will be refused.

McCORD, J., not sitting.

#### KELLOGG v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### CRIMINAL LAW (§ 761\*)—TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS.

In a criminal prosecution, it is improper for the judge, in charging the jury, to assume that any fact has been proved against the defendant, however strong the evidence may be; and in a prosecution for practicing medicine without a license, where the evidence was conflicting as to what county defendant was a resident of, it was error for the court, on the request of the jury for a statement as to what constituted a resident of a county, to charge that the uncontradicted testimony in the case showed him to be a resident of B. county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1764; Dec. Dig. § 761.\*]

Appeal from Bell County Court; W. S. Shipp, Judge.

S. Kellogg was convicted of practicing medicine without a license, and appeals. Reversed and remanded.

John A. Mobley, Asst. Atty. Gen., for the State.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

RAMSEY, J. Most of the material questions raised on this appeal have been decided adversely to appellant in the cases of *Ex parte Collins*, 121 S. W. 501, and *Newman v. State* (recently decided) 124 S. W. 956.

It appears from the evidence, in a general way, that appellant resided in Bell county, and was, in the legal sense of that term, a resident of such county, though the evidence of some of the witnesses leaves this fact in doubt. Among others, T. M. Harris testified as follows: "I saw him in Killeen frequently, and he was staying there while he gave me the treatments. He had formerly lived over in Ooryell county, and my impression is that his family was staying there, and that he had moved his family to Killeen since last spring. He had been boarding in Killeen at Mr. Sprott's for over a year, and kept his office at his house." Another witness, W. A. Stafford, testified as follows: "The defendant had an office at the residence of Mr. H. L. Sprotts, in Killeen, Bell county, Tex., at the time he gave me the treatment, and he has been living there in Killeen for about one year." In this connection it should be stated that appellant was charged with practicing medicine without license during May of 1909. Another witness, Dr. Wood, testified that he had known appellant since before the 17th day of May, 1909, and that he had been living in Bell county for about two years.

It is made to appear by bill of exceptions that after the case had been closed, and after the jury had received the charge of the court, and had retired from the courtroom, and had considered of their verdict for some time, they came in open court, and presented to the court the following question in writing, to wit: "Judge W. S. Shipp: We would ask the law, or an opinion, on what it takes to constitute a resident of a county. J. E. Sparks, Foreman." To which question the court made answer in writing, and delivered the same to the jury, as follows: "The uncontradicted testimony in this case is that the defendant in this case was and is a citizen of Bell county, Tex." To which action of the court appellant then and there excepted on the ground that said instruction was on the weight of the evidence. It has been quite uniformly held that it is improper for a judge, in charging the jury in a criminal case, to assume that any fact has been proved against the defendant, however strong the evidence may be. *Webb v. State*, 8 Tex. App. 115; *Baker v. State*, 6 Tex. App. 344. It is said that it is the object of our Code, gathered from every provision relating to that subject, to prohibit the judge from expressing any opinion as to the weight of the testimony or the credibility of the witnesses. *Kirk v. State*, 35 Tex. Cr. R. 224, 32 S. W. 1045. The jury are the exclusive judges of

the weight of evidence, except when it is provided by law that a certain weight or effect is to be attached to a certain species of evidence; and a judge, in framing his charge to a jury, should not undertake to advise them or instruct them upon the weight or effect of the evidence. If in any case it were proper to instruct the jury that any issuable fact was shown by the uncontradicted evidence, we think in this case, where the matter was not placed clearly beyond doubt, that it must be held erroneous and reversible.

We deem it unnecessary to discuss the many other questions raised in the case, since most of them are fully covered by the recent cases above cited.

For the error pointed out, the judgment is reversed, and the cause is remanded.

### WADKINS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 26, 1910.)

#### 1. INDICTMENT AND INFORMATION (§ 132\*)—JOINDER OF OFFENSES—ELECTION.

Counts for rape and incest, based on the same transaction, could be joined in the indictment, so that the state was not required to elect upon which count it would proceed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 443; Dec. Dig. § 132.\*]

#### 2. INCEST (§ 5\*)—PERSONS WHO MAY COMMIT—ILLEGITIMATE CHILD.

The crime of incest may be committed between a father and an illegitimate child.

[Ed. Note.—For other cases, see Incest, Cent. Dig. § 3; Dec. Dig. § 5.\*]

#### 3. INCEST (§ 13\*)—PROSECUTIONS—ADMISSION OF EVIDENCE.

In a prosecution for incest with accused's illegitimate child, evidence was admissible that accused claimed prosecutrix, who was born to her mother out of wedlock, as his child when she was an infant, shortly after her mother's death, and took her to his home and recognized her as his child.

[Ed. Note.—For other cases, see Incest, Dec. Dig. § 13.\*]

#### 4. CRIMINAL LAW (§ 741\*)—TRIAL—WEIGHT OF EVIDENCE.

The weight of the evidence is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1713; Dec. Dig. § 741.\*]

#### 5. CRIMINAL LAW (§ 811\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction as to the effect or insufficiency of an isolated part of the evidence was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. § 811.\*]

#### 6. CRIMINAL LAW (§ 780\*)—INSTRUCTIONS—WEIGHT OF EVIDENCE—ASSUMPTION OF FACTS—TRUTH OF EVIDENCE.

In a prosecution for incest with accused's illegitimate child, the court instructed that if the jury was satisfied from the evidence that prosecutrix was an accomplice to the intercourse, or had a reasonable doubt whether or not she was, they could not find accused guilty upon her testimony alone, unless it had been corroborated as to the offense. *Held*, that the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

charge was erroneous for permitting a conviction if there was evidence corroborating the prosecutrix showing that accused committed the offense, and also for not charging that before the jury could convict on the testimony of prosecutrix they must believe that it was true and showed accused's guilt as charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.\*]

#### 7. CRIMINAL LAW (§§ 507, 780\*) — ACCOMPLICES.

If accused's illegitimate daughter voluntarily had intercourse with him, she was an accomplice to the crime of incest, and the jury should have been so instructed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1090, 1859-1863; Dec. Dig. §§ 507, 780.\*]

Appeal from District Court, Navarro County; H. B. Daviss, Judge.

General Wadkins was convicted of incest, and he appeals. Reversed, and remanded for new trial.

El J. Gibson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. By indictment filed in the district court of Navarro county appellant was charged with the offense of rape committed upon one Rittie Wadkins, and, in a separate count, that appellant had carnal intercourse with said Rittie Watkins, she being then and there his daughter. Upon a trial had in said court on the 12th day of April, 1909, appellant was convicted of the offense of incest, and his punishment assessed at confinement in the penitentiary for a period of five years.

For the most part, the case was well tried, and few grounds set out in appellant's motion for a new trial, or matters evidenced by bills of exception, require attention. We think the charge of the court on the subject of incest, except in so far as it relates to the matter of accomplice testimony, when taken in connection with special charge No. 3, given at the request of counsel for appellant, fairly and well presents all the issues arising under the evidence.

1. Objection was made on the trial that the court erred in not requiring the state to elect as to the count in the indictment on which a conviction would be sought. The refusal of the court so to do is rested on the safe ground that the transaction and occurrence with reference to which both rape and incest were charged occurred at the same time and were one and the same transaction. It therefore follows, if the intercourse was shown and it was by force, it would be rape. The intercourse being shown, in the absence of proof of force, or if consent were shown, and the relationship being proven, it would be incest. Under the circumstances an election was not required.

2. It seems well settled in this state that the crime of incest can be committed between a father and an illegitimate child. Clark v.

State, 39 Tex. Cr. R. 179, 45 S. W. 576, 73 Am. St. Rep. 918; 2 McClain, Criminal Law, § 1120. It seems also to be well settled by the authorities that it is competent to introduce as proof of such relationship, admissions and statements of the defendant. Am. & Eng. Ency. of Law, vol. 16, p. 140; Morgan v. State, 11 Ala. 289; Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672. It seems also to be the rule that relationship between the parties may be shown by reputation (State v. Bullinger, 54 Mo. 144; Ewell v. State, 6 Yerg. [Tenn.] 364, 26 Am. Dec. 480), though the contrary to this view has been held in Alabama (Elder v. State, 123 Ala. 35, 26 South. 213).

In this case testimony was introduced by the state to the effect, in substance, that when the complaining party, Rittie Wadkins, was an infant, and soon after the death of her mother, to whom she was born out of wedlock, appellant claimed her as his own child, took her into his home, and recognized and treated her as such. Some proof was introduced by the state of intimate relations between appellant and the mother of the child, rendering it probable that in fact she was his child. Recognition of her as his child was shown practically without contradiction. All this testimony was admissible in proof of the fact alleged. Its weight, of course, was a question for the jury, and, like any other evidence, it was before them for their consideration; nor was appellant entitled to instructions with reference to the effect or value or insufficiency of any single and isolated part of this evidence. We think none of the questions raised on the appeal, therefore, will entitle appellant to a reversal of the case, except the charge of the court on the subject of accomplice testimony.

3. On accomplice testimony the court thus instructed the jury: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of the offense. The accomplice, as the word is here used, means any one connected with the crime committed, either as principal offender, as an accomplice, as an accessory, or otherwise. It includes all persons who are connected with the crime by an unlawful act or omission on their part, transpiring either before, at the time of, or after the commission of the offense. Now, if you are satisfied from the evidence that the witness Rittie Wadkins was an accomplice to the act of carnal knowledge, or you have a reasonable doubt as to whether she was or was not an accomplice as that term is defined in the foregoing instructions, then you are further instructed that you cannot find the defendant guilty upon her testimony alone, unless you are satisfied that the same has been corroborated by other evidence tending to establish

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

that the defendant did in fact commit the offense."

This instruction was excepted to at the time by proper bill, and was also made a ground of the motion for new trial, and its accuracy questioned for the following reasons: (1) Because said charge was upon the weight of the evidence, and, in effect, instructed the jury to find the defendant guilty if the testimony of the prosecutrix, Rittle Wadkins, was corroborated by other evidence tending to establish that the defendant committed the offense. (2) Because said charge only defined an accomplice in the abstract; whereas, under the facts of the case, the court should have told the jury in express words that, if there was an offense committed, Rittle Wadkins was an accomplice. (3) Because the court, in said charge, assumed that a carnal act was committed between prosecutrix and the defendant. (4) Because said charge left it to the jury to determine whether or not the prosecutrix, Rittle Wadkins, was an accomplice, when, as a matter of fact, the evidence left no room for any other conclusion. (5) Because the charge of the court, as given, failed to instruct the jury that they could not convict on the testimony of the prosecutrix, Rittle Wadkins, although they believed she told the truth, and that the testimony made out a case against the defendant, unless there was other evidence besides her testimony that connected the defendant with the offense, which was believed by the jury to be true. (6) Because said charge of the court should have gone further, and charged on the character of corroboration required, viz., not only the commission of the act of carnal intercourse, but proof of defendant's paternity.

We think the charge of the court is inaptly expressed, and is inaccurate in several particulars. In the first place, it is undeniably true that if the intercourse, as the verdict affirms, was voluntarily entered into by Rittle Wadkins, she was in law an accomplice, and the jury should in terms have been so instructed. The charge was also erroneous because it permitted a conviction if there was other evidence tending to corroborate Rittle Wadkins, and establishing the fact that appellant had committed the offense, and was further inaccurate in that it failed to instruct the jury that, before they could convict on the testimony of the prosecuting witness, Rittle Wadkins, they must believe that her testimony was true, and that it showed that appellant was guilty of the offense charged. The inaccuracy of this charge has been pointed out in very many cases by this court, notably in the cases of *Oates v. State*, 50 Tex. Cr. R. 39, 95 S. W. 105; *Fruger v. State*, 56 Tex. Cr. R. 393, 120 S. W. 197; *Bell v. State*, 39 Tex. Cr. R. 677, 47 S. W. 1010; *Jones v. State*, 44 Tex. Cr. R. 557, 72 S. W. 845; *Garlas v. State*, 48 Tex. Cr. R. 449, 88 S. W. 845; *Hart v. State*, 47 Tex. Cr. R. 156, 82 S.

W. 652; *Crenshaw v. State*, 48 Tex. Cr. R. 77, 85 S. W. 1147; *Washington v. State*, 47 Tex. Cr. R. 131, 82 S. W. 653; *Barton v. State*, 49 Tex. Cr. R. 121, 90 S. W. 877; *Dixon v. State*, 90 S. W. 878; *Morawitz v. State*, 49 Tex. Cr. R. 366, 91 S. W. 227; *Reagan v. State*, 49 Tex. Cr. R. 443, 93 S. W. 733; *Oates v. State*, 48 Tex. Cr. R. 131, 86 S. W. 769; *Barrett v. State*, 55 Tex. Cr. R. 182, 115 S. W. 1187; *Newman v. State*, 55 Tex. Cr. R. 273, 116 S. W. 577; *Tate v. State*, 55 Tex. Cr. R. 397, 116 S. W. 604.

We have recently, in the cases of *King v. State*, 123 S. W. 135, and *Brown v. State* (not yet officially reported) 124 S. W. 101, commended and approved certain charges on the law of accomplice testimony, and in the more recent case of *Campbell v. State*, 123 S. W. 583, we set out in *hæc verba* an approved charge on this subject, with a view of furnishing trial courts with an accurate instruction on this question.

For the error pointed out, the judgment of conviction is set aside, and the cause remanded for another trial.

MCCORD, J., not sitting.

#### BARBEE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1909. On Motion for Rehearing, Jan. 26, 1910.)

#### 1. WITNESSES (§ 268\*) — CROSS-EXAMINATION — WHOLE OF CONVERSATION.

In a prosecution for homicide, where defendant's wife testified that prior to the killing the decedent came to the house, where she was alone, and made an indecent proposal to her, of which she told her husband the night before the homicide, it was proper on cross-examination to ask her what her husband said when she told him, and if he asked any questions, since, under the statutes, where a part of a conversation is introduced, all parts that illustrate or explain any other part are admissible.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 933; Dec. Dig. § 268.\*]

#### 2. HOMICIDE (§ 166\*) — MOTIVE—EVIDENCE — ADMISSIBILITY.

In a prosecution for homicide, where the wife of defendant testified that prior to the killing decedent came to the house, where she was alone, and made an indecent proposal to her, of which she told her husband the night before the homicide, the testimony of defendant's son, who went to live with decedent after the time of the claimed insult to his mother, that his mother knew he was to stay with decedent, and that she never told him not to associate with decedent, or made any objection to his association with him, was admissible as tending to discredit the testimony of the mother.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

#### 3. HOMICIDE (§ 169\*)—EVIDENCE — ADMISSIBILITY.

In a prosecution for homicide, in which there were two trials, where there was no dispute in either of them over the fact that the defendant brought his own pistol with him from

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

home, it was not error on the second trial to allow witness to state that the defendant exhibited it to him shortly before the homicide.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 341-350; Dec. Dig. § 169.\*]

**4. HOMICIDE (§ 166\*)—EVIDENCE—ADMISSIBILITY.**

In a prosecution for homicide, where there was evidence that decedent prior to the killing went to the house where defendant's wife was alone, and made an indecent proposal to her, of which she told her husband the night before the homicide, it was proper to allow a witness to testify that he was with defendant on the morning of the homicide, that defendant asked him if he had seen decedent, stated that he wished to see him, that one of his boys had a little trouble with him the evening before, and that he wanted to straighten it up, that he was awful mad when the boy told him, and that defendant appeared to be mad and showed him a pistol he had, since this tended to show that the motive of the killing was not the insult to the wife, but malice because of the difficulty with the boy.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

**5. HOMICIDE (§ 166\*)—EVIDENCE—ADMISSIBILITY.**

In a prosecution for homicide, where there was evidence that prior to the killing decedent went to the house where defendant's wife was alone, and made an indecent proposal to her, of which she told her husband the night before the homicide, it was proper to allow defendant's son to testify that decedent came to defendant's house after the time of the claimed insult to his mother, stayed all night, and ate with the family, and that he did not notice any difficulty in the relationship between decedent and his mother.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. § 166.\*]

**6. WITNESSES (§ 388\*)—CONTRADICTION—TESTIMONY OF FORMER TRIAL.**

Where there have been two trials in a prosecution, it is proper to ask a witness testifying on the second what he testified to on the first to lay a predicate to contradict him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1246; Dec. Dig. § 388.\*]

**7. HOMICIDE (§ 193\*)—SELF-DEFENSE—POSSESSION OF WEAPON—EVIDENCE—ADMISSIBILITY.**

In a prosecution for homicide by shooting, testimony of a witness that after decedent fell he saw him making a motion with his hand as if putting a knife in his pocket was inadmissible, since defendant could not have acted on anything decedent was doing at that time.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 416; Dec. Dig. § 193.\*]

**8. HOMICIDE (§ 340\*)—APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.**

Under the statute stating that the fact that defendant has been convicted of a lower grade of offense than that which he is guilty of is not a ground for new trial, where, in a prosecution for homicide defendant was found guilty of murder in the second degree, he cannot complain of error in the court's charge on manslaughter upon sudden impulse on the ground that the evidence does not suggest manslaughter upon sudden impulse, since it could not have injured him, as it authorized the jury to find a lower grade than he was guilty of and which the evidence warranted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.\*]

**9. HOMICIDE (§ 254\*)—EVIDENCE—SUFFICIENCY.**

In a prosecution for homicide, evidence held to sustain a verdict of guilty of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533-538; Dec. Dig. § 254.\*]

**On Motion for Rehearing.**

**10. HOMICIDE (§ 309\*)—TRIAL—INSTRUCTION.**

In a prosecution for homicide, an instruction was erroneous which required that, before defendant would be entitled to a reduction of his offense to manslaughter, the jury must believe both that he was led to commit the homicide from learning that decedent had insulted his wife, and also that the decedent had used violent language to and threatened him with bodily harm, since, where the law makes any given fact adequate cause for homicide, a defendant is entitled to an unequivocal instruction that, if such fact is proven, it is adequate cause, and where any one or more issues are raised by the evidence, either of which, if found to be true, would as a fact constitute adequate cause, the jury should be so instructed, and it is error to blend the two and require that the affirmative of both be proved.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.\*]

**11. CRIMINAL LAW (§ 810\*)—TRIAL—INSTRUCTIONS—CONFLICTING INSTRUCTIONS.**

In a prosecution for homicide, it was error to charge in one instruction that if defendant was led to commit the homicide from learning that decedent had insulted his wife, and also that the decedent had used violent language to and threatened defendant with bodily harm, he was only guilty of manslaughter, and in the next that, in order to reduce his offense to manslaughter, it was only necessary for the jury to believe that he was led to commit the homicide from learning that decedent had insulted his wife.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1968; Dec. Dig. § 810.\*]

Appeal from District Court, Grayson County; B. L. Jones, Judge.

E. L. Barbee was convicted of murder, and appeals. Reversed and remanded.

Head, Dillard, Smith & Head and Wolfe, Hare & Maxey, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

**BROOKS, J.** This is the second appeal of this case. The former opinion will be found in 50 Tex. Cr. R. 426, 97 S. W. 1058. Upon this conviction appellant's punishment was assessed at five years' confinement in the penitentiary for murder in the second degree.

We glean from appellant's brief the following as the uncontradicted evidence upon the trial: "The uncontroverted evidence upon the trial shows: That about noon on the 6th day of March, 1905, on the public square in Sherman, Tex., appellant shot deceased one time with a pistol and killed him. That at the time of the shooting deceased was standing near the rear end of a wagon. That immediately after the shot he fell with his body partly under the hind end of the wagon, and that very soon after he fell he died without speaking or saying anything

after he was shot. That the day of the homicide was stray sale day, and that a large number of people were at the time of the homicide in close proximity to the scene of the shooting, conversing, trading horses, and standing around. Deceased and appellant had been acquainted for several years, and at one time deceased had worked for appellant on his farm. In the latter part of the summer of 1904 appellant, with his family, moved from a farm near Howe, Tex., to a farm near Southmayd, Tex. At the time of moving appellant's crop had not been fully gathered, and he left deceased and his son Frank on the farm at Howe to look after and gather the crop. Just before Frank Barbee left the farm at Howe, he sent a package of laundry from Howe to Sherman to be laundered, and, when he left there to join his parents at Southmayd, the laundry had not returned. Frank gave deceased the necessary money to pay for the laundry, requesting deceased to receive it, and keep it until he (Frank) should call for it at some time. On Sunday before the homicide on Monday Frank Barbee attended church near Howe, and deceased also attended that church. After service, Frank told deceased that he would go up home with him and get his laundry and deceased said all right. Deceased, his cousin, and brother-in-law left the church together in a buggy, and were overtaken near the place where deceased lived by Frank Barbee. When Frank came up to the buggy, it was stopped, and Jenkins had gotten out. Frank asked deceased if he was going on with him after the laundry. Deceased said no. That appellant owed him some money, and he was not going to give Frank his laundry until he got his money. Frank told deceased that he (Frank) did not owe deceased anything, and that he would have to look to his father for his money. If his father owed him anything, he would pay it, and that deceased ought not to hold the laundry for something somebody else owed him. Deceased said that appellant had to pay him that money. That appellant could not beat him out of anything, and that Frank could not have the laundry until he got the money unless he rode over his dead body. Deceased said to Frank: 'You tell the old man, if he says he don't owe me, that he is a damned old lying son of a bitch.' That deceased seemed out of humor, and had an open knife in his hands. On that evening, after returning home a short time before night, Frank told appellant the incident of his meeting and conversation with deceased. In July, 1904, while deceased was working at appellant's house and while the members of the family were away from the house, deceased went to appellant's house, and made an insulting and indecent proposal to appellant's wife. Appellant's wife told deceased that she would tell her husband. Deceased told appellant's wife that if she told her husband and her husband came on to him that he would kill her husband; and, after some

parleying and insisting on the part of deceased that appellant's wife say nothing about the matter, deceased left the house and nothing was said about the matter by appellant's wife at that time to anybody, but deceased told one Henry Rankin of the incident that occurred between him and appellant's wife. On Sunday night before the homicide on Monday appellant's wife told appellant of the insult that had been offered to her by deceased. On the morning of the homicide deceased asked Joel Collins, a trader, to buy a couple of mules that he (deceased) had for sale. Collins told the deceased that he did not want the mules, and suggested that deceased sell them to appellant. Deceased replied that he would not sell appellant anything; that he would rather cut his (Barbee's) paunch out than to sell him the mules. The occasion of the homicide was the first meeting between appellant and deceased on the day of the homicide. At the time of the homicide deceased had in his pocket two pocketknives. Immediately after the shooting appellant stated that deceased was coming at him with a knife. The controverted facts are that the state showed that before the homicide appellant inquired for deceased, stating he had a settlement to make with him, and that appellant had said that he never had been as mad in his life as he was either the evening before or the night before. At the time of the homicide, it was claimed by appellant that he approached deceased and asked him why he treated his wife the way he did, that deceased drew a knife, and said he would cut appellant's damned paunch out, and was advancing toward him when appellant shot, and in this connection appellant is corroborated; while it was claimed by the state that at the time the fatal shot was fired that deceased was standing with his hands by his side doing and saying nothing."

1. Appellant complains the court erred in admitting the evidence of defendant's wife as shown by bill of exceptions No. 1. Mrs. Barbee testified by deposition in chief that on the night before the killing in March, while they were thrashing oats at defendant's, deceased had come to the house, where she was alone, and insulted her, and then testified that she had related in detail to her husband on the night before the killing the acts and conduct of deceased. The state then offered in evidence the questions and answers in cross-examination of said witness, as follows: "Q. What did your husband say in reply when you told him what had happened between you and Lon Jenkins? A. He never said anything that I remember. Q. When you told your husband, the defendant in this case, about you and Lon Jenkins, did he ask you any questions? A. I do not remember any questions he asked." Appellant objected to this cross-examination on the ground that same was irrelevant and immaterial, and not in cross-examination of any matter testified to by the witness,

the wife of the defendant, or of any matter about which she was interrogated on direct examination. The objections being overruled, the questions and answers as above set forth were read to the jury. After all the evidence was closed in the case, the court informed appellant's counsel that he was going to exclude the testimony above set forth of the witness Mrs. Barbee, which was admitted over appellant's objection. Appellant's counsel contended that the testimony had been read to the jury, and for the court to reread it for the purpose of excluding it was simply to emphasize it, and the effect of it could not be thereby withdrawn from the jury, and all the injury to defendant that could be done by the introduction of the evidence had been accomplished, and defendant was entitled to his bill for the admission of it over his objection. Whereupon the court on his own motion reread to the jury the questions and answers above set forth, and instructed the jury that said evidence was withdrawn from them, and that they could not consider it in the case at all for any purpose. The court told the jury that they could not consider said cross-examination, that the same was withdrawn. If this testimony had been erroneously admitted, when the court at the instance of appellant withdrew same, it would be a matter of which appellant could not complain—that is, the withdrawal of it—since, if error at all, under that state of facts, it would be an error committed by the court at the instance of appellant. But we take it the learned trial court was in error in excluding this testimony. The state was entitled to same. Under the statutes of this state, where part of a conversation is introduced, all parts and parcels of the same conversation that illustrate or explain any other portion of the conversation are admissible. This testimony was clearly admissible under this statutory rule.

2. Bill of exceptions No. 2 shows that while appellant was introducing the depositions of appellant's wife to the effect that on the night before the killing in March, while they were thrashing oats at defendant's, deceased had come to the house, and she was alone and insulted her, and then testified that she had related in detail to her husband on the night before the killing the acts and conduct of deceased, the witness detailing in her testimony what she had told her husband, the defendant. Thereupon appellant introduced his son, Frank Barbee, who testified on direct examination, in substance: That his father, the defendant, had lived for several years near Howe on a farm, from which place he moved in August prior to the killing to a place near Southmayd, about 14 miles away. That appellant employed deceased to finish gathering his crop near Howe, and witness remained on the farm and lived with Jenkins and assisted about gathering the crop. That,

when witness left deceased's home, he left some laundry there, and on the day before the killing, when witness started after his laundry, deceased refused to give it to him, and claimed that defendant owed him, deceased, and said he would hold the laundry until the debt was paid, and told witness to tell defendant, if he denied owing him, he was a God damned old liar. That, when witness returned home about 5 o'clock on the evening before the killing, he informed defendant of what had transpired between him and deceased. Thereupon, on cross-examination of said witness, state's counsel asked him the following questions: "If when defendant moved away from Howe up to Southmayd witness' mother knew where witness was going to stay? If during the time witness lived with deceased his mother knew about it, and if witness' mother ever told him not to associate with deceased and if she ever made any objection to witness' associating with deceased?" To which questions and answers the defendant objected on the ground that same was irrelevant, immaterial, and hearsay, and throws no light on any issue in the case, which objection was by the court overruled, and the witness, being required to answer, testified that, when defendant moved away from Howe to Southmayd, witness' mother knew that witness was going to stay with deceased, and during the time witness lived with deceased his mother, Mrs. Barbee, knew about it and never did tell witness not to associate with the deceased, and never did make any objection to witness' associating with deceased. This testimony was clearly admissible, since it tends to discredit the testimony of the mother wherein she testified of insults offered by the deceased, and thereby rendered improbable that she told appellant that deceased had insulted her. It is true it does not conclusively establish the fact, but it largely tends in that direction, and, if appellant was not told that deceased had insulted his wife, then this killing would have been under the evidence, outside of appellant's defense, murder in the first degree, or at least murder in the second degree. Here we have a case where appellant is relying as a defense for the crime upon insults to his wife. It then became a pertinent inquiry as to whether said insult was offered. Any circumstance therefore, however shadowy or remote, that tends to disprove the defense, is admissible on the part of the state for that purpose. Certainly appellant would have strenuously and justly insisted that if the wife had made a great cry upon being insulted, ran away from the place where the insult was offered, that this res gestae act, so to speak, would have been admissible as corroborative of the verity of her statement that deceased had insulted her. Now, then, if her conduct is such as not to indicate any resentment towards the deceased, it goes strongly to indicate that

no such insult was offered. The testimony was admissible.

3. Bill of exceptions No. 3 shows that the state introduced Jim Poindexter and proved by him that on the morning of the homicide, about 11 o'clock, he met appellant in Sam Reisenburg's place of business, and had a drink of frosty with him and others; that afterwards, about half past 11 o'clock, he met appellant and had another drink of frosty with him, and that on that occasion appellant asked him if he had seen deceased, and told him that he wanted to see deceased, that one of his boys had a little trouble with deceased the evening before, and that he wanted to straighten it up; that he appeared to be mad, and told witness that, when his boy told him about the trouble with deceased the evening before, he was awful mad; that appellant then called witness back to the back yard of Sam Reisenburg's place of business; he and defendant were together, and that he saw the appellant with something. Whereupon, the state's counsel asked the witness what it was that he saw defendant with, to which question at the time it was asked appellant objected on the ground that it was irrelevant and immaterial, and in no way connected with this transaction, prejudicial to the rights of appellant; that what this witness would testify would not throw any light on this transaction. The objections being overruled, the witness testified that, when he and defendant went to the rear of Reisenburg's place of business, the defendant exhibited to him a pistol. Appellant in the bill, in addition to the above objections, states that this case has been tried twice, and the testimony showed the appellant killed the deceased on the public square in Sherman about 12 o'clock by shooting him with a pistol, and that the pistol was the pistol of defendant, and that he brought it with him to town from his home in the country on the morning of the homicide, and that there was never any dispute over this proposition on those trials, nor was there any dispute on the present trial. If, as the bill shows, there was no dispute or cavil over the fact that appellant brought his own pistol with him from home, then certainly it would not be inadmissible to show by this witness whose testimony is complained of in this bill that appellant exhibited the pistol to him. On that phase, it could simply be cumulative evidence of an admitted fact, and therefore would be harmless on that theory; but it is also admissible to show the mental status of the appellant just prior to the difficulty. Here he is found talking in Reisenburg's place of business with the witness, telling him about some laundry, which goes to a very large extent to show that the killing did not occur on account of the insults to his wife, but was on account of indignities and insults offered his son. This testimony was very material from the state's standpoint to establish the fact

that the motive for the killing was not insults, but malice on account of the previous difficulty or quarrel that deceased had had with appellant's son. It follows the testimony was admissible.

4. Bill of exceptions No. 4 complains that on cross-examination the state was permitted to ask Frank Barbee, appellant's son, the following question: "If after defendant and his family had moved deceased came over to defendant's house, if witness noticed any difference in the relationship between deceased and Mrs. Barbee up until the time deceased was killed?" Appellant objected to this testimony on the ground that it was irrelevant, immaterial, and hearsay, and an effort to impeach Mrs. Barbee, and called for a conclusion and opinion of the witness, and could not in any way affect the matter of what information was given defendant by his wife. Over objection the witness testified "that deceased was at defendant's house once after defendant and his family had moved to Southmayd, which the testimony showed was in August after defendant's wife claimed the insult was offered her in July, and on that occasion deceased stayed all night at defendant's and ate there with the family, and that he did not notice any difference in the relationship between deceased and his mother, Mrs. Barbee, up to the time the deceased was killed." This question has been discussed above. We think the testimony was clearly admissible.

5. Bill of exceptions No. 5 shows that the state introduced Fred Lyall, and, after said witness had testified to the facts and circumstances of the homicide, that he saw the defendant shoot the deceased; that he saw the deceased before the shooting; that he was standing with both hands resting on the hind gate of a wagon, and making no demonstrations or movement whatever at the time he was shot. After said witness had been examined, cross-examined, re-examined, and was again being cross-examined, said witness on a former trial testified that it was about a second he reckoned after the shot was fired before he saw the deceased, and that he knew that it was after the shot was fired that he first saw the deceased. Appellant's counsel asked said witness if it was not a fact that on the previous trial the following question was asked him: "How long after the shot was fired was it before you saw Jenkins?" and if he did not answer "About a second," to which question the witness answered: "I don't remember whether I did or not." Whereupon counsel for appellant asked the witness if that statement was correct, to which question the state objected on the ground that it called for a conclusion of the witness, was argumentative, and improper, which objection was by the court sustained, and the answer of the witness was excluded. Whereupon appellant's counsel asked said witness the further question if on the former trial the following

question was not asked him: "The first time you saw Jenkins was about a second after the shot was fired was it?"—and if the witness did not answer, "I suppose it was," to which the witness answered that he did not remember whether the question was asked and answered that way or not. Whereupon counsel for appellant asked said witness if on the former trial the following question was not asked him: "You know it was after the shot fired"—and if the witness did not on a former trial answer "Yes, sir," to which question the witness answered, "I don't remember whether I answered it that way or not." Whereupon counsel for appellant asked him if he did was that the truth, to which question the state interposed the objection that the question called for a conclusion, was argumentative and improper, which objection was by the court sustained, and the answer of the witness excluded. If said witness had been permitted to answer said question, appellant's counsel expected to be able to show by the said witness and cause said witness to admit that having testified on a previous trial that he did not see the deceased until after the shot was fired, and admit that he did not see the deceased before the shot was fired. The bill is approved with this qualification: "This bill allowed with the qualification that the only answer the witness could have made to such question was either yes or no, and it is the court's opinion that from the record of this witness' testimony counsel for defendant would have been unable to have secured such admission from the witness." The bill is defective in not stating what the witness would have sworn. Counsel for appellant stated they expected to be able to show that witness would swear as suggested, but they do not say the witness would have so sworn. The court says in the light of the record he does not think the witness would have so sworn as appellant states. We are left to conjecture as to what the witness would or would not have sworn. Where a witness testifies in a trial, and subsequently testifies in the same trial, it is legitimate and proper to ask him what he swore on the first trial, and lay a predicate to contradict him as to what he did testify. It would not be a conclusion of the witness as state's counsel seems to insist for him to state what he testified on a former trial, but in the shape of this bill we cannot tell whether there was any error in the ruling of the court or not, since we cannot tell what the witness' testimony would have been.

6. Bill of exceptions No. 6 presents exactly the same matter, and the court appends to the bill the following statement: "This bill is allowed with the qualification that all the answer the witness could have made to the question as propounded was that, if he had made such answer at a former trial, it was either correct or incorrect." So it will be seen, as stated above, the bill does

not show what the witness would have stated, and we cannot say whether there was any error in the ruling of the court or not.

7. Bill of exceptions No. 7 complains that after the witness Holt had testified in direct examination that he was in his office in the second story of a building, a short distance south of where the shooting occurred, that the window in his office was up, that he was near the window and heard a shot fired, and instantly arose from his seat and looked out and saw a man lying partially under a wagon, and saw the man making a movement with his left hand, and put his left hand up to his pocket, appellant's counsel asked said witness whether or not deceased in making said movement made any impression on witness' mind as to what the deceased was doing. State's counsel objected on the ground that the same was irrelevant, immaterial, and a conclusion. Appellant's counsel then asked the witness: "What impression did that movement of deceased make on your mind, if any, as to what the deceased was doing?" Counsel for the state objected, and the court sustained the objection. The witness, if permitted to do so, would have testified that the movement by the deceased did make an impression on the mind of the witness at the time, and that such impression was that deceased in making the movement closed or shut a knife and put it in his pocket. This testimony was not admissible. At the time deceased was moving his hand appellant could not have acted on anything deceased was doing.

8. Bill of exceptions No. 8 urges various objections to the charge of the court. It is a stereotyped charge on manslaughter, and murder in the first and second degree.

9. Appellant complains of the sixteenth paragraph of the court's charge, because it blends two theories of self-defense, is confusing and misleading, in that it is not a clear, affirmative submission of the issue of self-defense as made by the evidence offered by appellant, and confines the right of self-defense on the part of the defendant to an actual attack by deceased, and to actual danger from deceased, and limits the appellant's right to act in self-defense, and confines his right of self-defense to the use only of such means as were actually necessary; that it excludes the idea of apparent danger and apparent necessity, is not called for by the evidence, is not applicable to the facts in the case, is contradictory in its terms, and confusing and misleading. None of these criticisms are correct. The charge very properly presents all the law applicable to the facts of this case.

10. Bill of exceptions No. 9 complains of the eighth paragraph of the court's charge wherein the jury were instructed: "The provocation must arise at the time of the commission of the offense and that the passion is not the result of a former provocation."

The court properly instructed the jury as

to the law of manslaughter based on the insult to the wife. This portion of the court's charge can only be held to apply to the issue of manslaughter, as this issue was based on the facts occurring at the time of the homicide. Appellant excepted to that portion of the charge because the only evidence of adequate cause and the only ground to reduce the killing to manslaughter was the evidence of the insult toward the wife of appellant by deceased, and the charge complained of is misleading, restrictive of, and prejudicial to, the rights of appellant. On the former appeal of this case, we held that the court below very properly charged on manslaughter, following the authority of *Swain v. State*, 48 Tex. Cr. R. 98, 86 S. W. 335, and others that have laid down a similar rule. But if the evidence in this case does not suggest manslaughter upon sudden impulse, as appellant insists, it could not in the nature of things have injured the rights of appellant, since appellant was found guilty of murder in the second degree with the minimum punishment. If appellant had been convicted of manslaughter on any given state of facts, the statute of this state defining the grounds of a motion for new trial says that the fact that a defendant has been convicted of a lower grade of offense than that which he is guilty of is not a ground for a new trial. Then suppose the evidence in this case did not suggest manslaughter, but the appellant is given the benefit of a manslaughter charge, the jury have seen fit not to award him that benefit. Could a charge upon an issue not presented by the evidence, which the jury did not find appellant guilty of, and which charge authorized them to find a lower grade than he was guilty of, be injurious to appellant? We say not. So, waiving the question as to whether manslaughter upon sudden impulse is suggested by this evidence, and conceding for the sake of argument that it is not, still an erroneous charge on that phase of manslaughter could not have injured appellant, because it authorized the jury to convict him of a lower grade of offense than the evidence warranted. We very properly said in the former opinion of this case that to present manslaughter upon sudden impulse did not confuse a proper charge on manslaughter predicated upon first meeting on account of insults to a female relative. In other words, it is proper where the evidence suggests it for the court to charge on manslaughter upon sudden impulse. Then, if the evidence suggests that appellant killed deceased upon first meeting on account of insults to a female relative, it is proper and required that the court should charge on that issue. It follows, therefore, on either phase of the question that it may be looked at, that there was no error in the charge of the court presenting manslaughter upon sudden impulse. The evidence very cogently and positively establishes the fact that deceased and appellant's son had had

a very bitter and acrimonious quarrel the day before. On the morning of the killing appellant was seen in a store in the town of Sherman exhibiting his pistol to a friend, expressing great anger at the deceased on account of this difference that deceased had had with his son. Now, at the time he met deceased, if his mind was thereby rendered incapable of cool reflection, and laboring under that condition of mind he slew deceased, it would be killing upon sudden impulse, upon adequate cause, and would be manslaughter. On the other hand, if the killing of deceased was through settled and sedate resentment at indignities that had been previously offered to his son, it would either be murder in the first or second degree, according to the other circumstances surrounding the killing. The jury have seen fit to convict appellant of murder in the second degree. The evidence amply warrants the verdict. The charge in all of its phases properly present the law applicable to the facts in the case.

Finding no error in the record, the judgment is in all things affirmed.

#### On Motion for Rehearing.

RAMSEY, J. We think on further reflection that there was error in the conclusion reached in affirming the judgment in this case, and that a rehearing should be granted and the cause remanded for another trial.

The fourteenth and fifteenth paragraphs of the court's charge are as follows:

"(14) Again, if you find and believe from the evidence that the defendant, E. L. Barbee, on the night previous to the homicide, was informed by his wife that the deceased, Lon Jenkins, had some time in July of the previous year, at the home of defendant, insulted his said wife by making improper proposals to her, and by placing his hands upon her person, and if you further believe from the evidence that defendant believed the statement thus made to him, if you believe same was made to him, and if you further believe from the evidence that the defendant was thereby aroused to such degree of anger, rage, sudden resentment, or other violent emotion of the mind as rendered his mind incapable of cool reflection, and that at the first meeting with the said Lon Jenkins after being informed of such conduct on the part of the said Jenkins towards his, defendant's, wife, and while under the influence of such passion and prompted thereby and not in the defense of himself against real or apparent danger from said Jenkins, he shot with a pistol and thereby killed said Jenkins, such killing would be manslaughter.

"(15) Also, if you find and believe from the evidence that the defendant on the night previous to the homicide was so informed of the said conduct of the said Jenkins toward his wife, and if you further believe from the evidence that on the occasion of the homicide the defendant approached the deceased and

inquired of him in reference to said conduct of said Jenkins toward defendant's wife, and if you further believe from the evidence that thereupon the deceased used violent language and threatened him, defendant, with bodily injury, and if you further believe from the evidence that by reason of the said information, if any, so received from his said wife, and by reason of the language and conduct of the deceased on said occasion, if you find there was any such language or conduct on said occasion, the defendant's mind was aroused to such a degree of anger, rage, sudden resentment, terror, or other violent emotion of the mind as rendered it incapable of cool reflection, and that while under the influence of such passion, and prompted thereby, and not in the defense of himself against real or apparent danger from said Jenkins, as the issue of self-defense is hereinafter submitted to you, defendant shot and killed said Jenkins, such killing would be manslaughter." We think there could be no doubt that the last paragraph of the court's charge copied above is erroneous, in that before appellant would be entitled to an acquittal of murder in the second degree, and a reduction of his offense to manslaughter, the jury were required to believe not only the affirmative of the issue of insulting conduct towards his wife, but further to find that the deceased had used violent language to and threatened appellant with bodily harm, and, further, that under such charge, before the jury were authorized to find that such violent language and threatened injury would reduce the offense to manslaughter, they must further believe the insulting conduct towards appellant's wife. We believe further that the two paragraphs of the court's charge are in irreconcilable conflict. Under the fourteenth paragraph insulting conduct towards appellant's wife is made as a matter of law, if believed, adequate cause, and the jury are instructed that, if his mind was aroused to sudden anger and on the first meeting he killed deceased, the offense would be manslaughter; whereas, in the next paragraph of the court's charge, it is required that both insulting conduct and the violent language and threatened injury must be found to be true. Wherever the law makes any given fact adequate cause, a defendant is entitled to a positive and unequivocal instruction that, if such fact is proven, it is adequate cause. And where any one or more issues are raised by the evidence either of which, if found to be true, would as a fact constitute adequate cause, the jury should be so instructed, and it is error to blend the two, and require that the affirmative of both issues must be found. *Hightower v. State*, 53 Tex. Cr. R. 486, 110 S. W. 750, and *Casey v. State*, 54 Tex. Cr. R. 534, 113 S. W. 534.

We think in view of all the facts that this charge may and probably did contribute to

and bring about appellant's conviction of murder in the second degree, and, being convinced that it is erroneous, we think we ought to grant a rehearing, which is here done, and the case is reversed and the cause remanded for another trial.

McCord, J., not sitting.

MISSOURI, K. & T. RY. CO. OF TEXAS v. KEMENDO et ux.

(Court of Civil Appeals of Texas. Jan. 5, 1910. Rehearing Denied Feb. 9, 1910.)

1. DEATH (§ 104\*)—ACTION BY PARENTS—DAMAGES.

In an action by parents for the negligent death of a minor child, a charge that the parents are entitled to recover the reasonable value of the services of the child during minority is erroneous for failing to require the jury to deduct the cost of the maintenance of the child during minority.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 146; Dec. Dig. § 104.\*]

2. RAILROADS (§ 350\*)—INJURY TO PERSONS ON TRACK—NEGLIGENCE—QUESTION FOR JURY.

Where, in an action for the death of a child while attempting to pass under a train which had stopped at a crossing, there was evidence that the crossing was much used, that it was the habit of pedestrians finding the crossing blocked by a train to pass between or under the cars, and that the trainmen knew of the custom, the question whether the exercise of ordinary care required the conductor to see if persons were under the train before starting the same was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1160; Dec. Dig. § 350.\*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by Chris Kemendo and wife against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Clark, Yantis & Clark, for appellant. Williams & Williams, for appellees.

FISHER, C. J. This is a suit by the appellees against the railway company for damages on account of the death of their minor son. The minor, about seven years of age, was killed in the city of Waco at one of the public street crossings. The train of cars pulled up to the crossing and stopped, and when in that position the deceased passed under or attempted to pass under one of the cars, when the train was cut in two or disconnected at the crossing, the front part of which was moved away from the crossing, and ran over the deceased and killed him. The grounds of negligence relied on by appellees are that the railway company negligently failed to provide a watchman at that particular crossing, so as to warn the public of the approach of a train, and that the

employés in operation of the train negligently failed to look out for and discover if any one was in danger before causing the train to move. A verdict and judgment were rendered in appellees' favor for the sum of \$2,000.

Appellant's first assignment of error, which complains of the action of the trial court in refusing to grant an application to continue, will not be considered because the case will be reversed on other grounds.

Appellant's fifth assignment of error complains of the charge of the trial court on the measure of damages, which is to the effect that, if the jury found for plaintiffs, to assess their damages at such sum as will compensate them for the pecuniary loss, if any, sustained by them by reason of the child's death, and, in arriving at such sum, to take into consideration the reasonable value, if any, of the services of the child to the plaintiffs until he arrived at the age of 21 years. The complaint is that this charge makes no allowance for the cost of the maintenance and support of the child during that time. Since the decision of the Supreme Court in the McVey Case, 99 Tex. 31, 87 S. W. 328, this court has held that in cases of this character the charge in submitting the measure of damages should exclude those improper items which a jury might consider in determining the amount of damages that the plaintiff might be entitled to recover. By analogy the principle of that case applies to the charge in question. The charge instructs the jury that, in arriving at the pecuniary loss sustained by the plaintiffs, the jury should take into consideration the reasonable value of the services of the deceased child until he arrived at the age of 21 years. There is no qualification or limitation imposed upon this expression. It broadly informed the jury that the plaintiff is entitled to the reasonable value of the services of the child for that period of time. It nowhere makes any allowance for the support and maintenance of the child. Of course, it cannot be disputed but that the cost of the support and maintenance of the child during that period should be deducted from what a jury might determine to be the reasonable value of his services. The least that can be said of the charge is that it is calculated to lead the jury to believe that they had the right to determine the reasonable value of the services of the child, independent of the question of charging the plaintiffs with the cost and expense of his maintenance. This charge is erroneous.

Appellant's fourth assignment of error complains of the fourth section of the court's charge. We are not sure that the assignment of error is broad enough to point out the objection we have discovered to the

charge, and which will doubtless be corrected upon another trial. It occurs about the middle of the charge set out on page 13 of appellant's brief, and commences with the words: "Or if you believe from the evidence that the conductor in charge of said train failed to exercise ordinary care before having said train started, and after it had stopped in crossing, to discover if the starting thereof would injure any one, and that had he exercised such care before signaling the engineer to start same that he would have discovered the perilous situation of the child," etc. The submission of this question as presented by the charge is predicated upon the idea that it was the duty of the conductor to look out or to exercise ordinary care to discover if some one was under the train before starting the same. It assumes that this duty was burdened upon the conductor. This is not correct. It was a question of fact as to whether or not the conductor is charged with the duty of looking out in order to discover if some one was in a perilous position before starting the train. There is evidence to the effect that this was a much used crossing, and that it was the habit and custom of pedestrians, when they found the crossing blocked by a train, to pass between the cars or under them in order to cross the street, and the evidence upon this subject is of such a character that the jury might have concluded that the employés in charge of the train knew of such custom; and, if such was the case, also have reached the conclusion that the exercise of ordinary care for the safety of the public would have required them, before starting the train, to look out in order to discover if some one was under the train or between the cars and attempting to cross. The court should not have assumed that the duty to look out existed, but should have left that question to the jury.

Much of the evidence of Mrs. Maggie Kemendo, complained of in the eighth assignment of error, was admissible. Part of it was not. Her testimony identifying the book as belonging to her deceased child was properly admitted, and also the information she received from her son Philip that the deceased was killed, but it was not proper to admit what he said with reference to the book. The appearance of the book, as testified to by her, was also admissible.

We have pointed out what we consider to be the errors presented in appellant's brief. The remaining assignments have been carefully considered, and we are of the opinion they present no reversible error. We do not deem it necessary that they should be discussed.

For the reasons stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

**KELLAM et al. v. HAMPTON.**

(Court of Civil Appeals of Texas. Jan. 12, 1910. Rehearing Denied Feb. 9, 1910.)

**1. DAMAGES (§ 77\*)—CONTRACTS—LIQUIDATED DAMAGES—PENALTY—INTENT.**

While the law favors viewing of the sum reserved in a contract as a penalty and not as liquidated damages, the criterion in the interpretation of the contract is the intention of the parties ascertained by the terms of the instrument itself.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 156; Dec. Dig. § 77.\*]

**2. DAMAGES (§ 76\*)—CONTRACTS—LIQUIDATED DAMAGES—PENALTY—DOUBTFUL CASES.**

Where there is a doubt as to whether the sum reserved in a contract is a penalty or liquidated damages, the law declares the sum a penalty.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 155; Dec. Dig. § 76.\*]

**3. DAMAGES (§ 79\*)—CONTRACTS—"LIQUIDATED DAMAGES"—"PENALTY"—CERTAINTY AS TO ACTUAL DAMAGES.**

Where damages are not capable of being ascertained by any satisfactory rule and the language of the contract admits of the construction, the sum reserved is "liquidated damages," but where the loss may be easily determined by proof of market values, the sum reserved is a "penalty" subject to the intention of the parties as evidenced by the contract.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 164-169; Dec. Dig. § 79.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4175-4179; vol. 6, pp. 5272-5276; vol. 8, p. 7750.]

**4. DAMAGES (§ 76\*)—CONTRACTS—LIQUIDATED DAMAGES—PENALTY—ABSENCE OF AGREEMENT.**

In the absence of an agreement the law decrees that the sum reserved in a contract is a penalty which cannot be recovered by the person for whose benefit it is reserved without proof of the damages sustained by him.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 154; Dec. Dig. § 76.\*]

**5. DAMAGES (§ 81\*)—CONTRACTS—LIQUIDATED DAMAGES—PENALTY—DEPOSIT TO SECURE PERFORMANCE.**

To give a deposit the character of liquidated damages the contract must be proved by which the parties agreed that, in case of a breach on the part of the depositor, the amount of the deposit shall go to the other as the agreed damages arising from the breach.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 177; Dec. Dig. § 81.\*]

**6. DAMAGES (§ 74\*)—CONTRACTS—LIQUIDATED DAMAGES—PENALTY.**

Contracts for liquidated damages are not sustained except on the principle that parties may agree in advance as to what the damages will be in case of breach of the contract, and where no such agreement has been made the law will not make it for the parties.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 74.\*]

**7. DAMAGES (§ 78\*)—CONTRACTS—LIQUIDATED DAMAGES—PENALTY.**

A contract for the sale of real estate which stipulates that the purchaser has given a note for a part of the price; that if the title is found good the vendor shall give a deed; that if the title is defective the vendor will return the note, but which does not provide what shall be done with it on the breach of the contract by the purchaser, does not make the note stipulated

damages for the purchaser's breach, but makes it a penalty, and the vendor to recover must show the damages sustained.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 158, 159, 162; Dec. Dig. § 78.\*]

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by C. E. Hampton against C. H. Kellam and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Joel A. Lipscomb, Bertrand & Arnold, and Ernest Fellbaum, for appellants. W. A. Silveus and Seth Searcy, for appellee.

**FLY, J.** This suit was instituted by appellee on a promissory note for \$2,500 executed by C. H. Kellam, D. L. Graham, A. E. O'Brien, and J. Vanlandingham, appellants herein. The cause was tried by jury, and resulted in a verdict and judgment for appellee for the amount of his claim.

The facts show that the note was given for a payment on certain lands, as is disclosed by the following contract: "Know all men by these presents that we, W. J. Francy, and C. E. Hampton of Mt. Pleasant in state of Iowa, in consideration of \$69,620.00 to us in hand paid and secured to be paid as follows: One certain promissory note for the sum of \$2,500.00 due and payable 20 days from date to the order of C. E. Hampton, and \$10,000.00 cash to be paid to C. E. Hampton on delivery of deed to hereinafter described property. One personal note for \$9,120.00 due and payable twelve months from date of delivery of deed. One store building and lot valued at \$2,500.00 and one stock of merchandise valued at \$2,500.00, owned by J. W. Kellam and C. H. Kellam situated in the town of Pflugerville, county of Travis, state of Texas. \$8,000.00 received from the Texas Business Exchange, the receipt of which is hereby acknowledged. One note for \$30,000.00 to be secured by vendor's lien on hereinafter described property due and payable on or before three years after date of delivery of deed. As a part consideration the said C. E. Hampton agrees to retain \$5,000.00 interest in the property hereinafter described. Have bargained, sold and agrees to convey to C. H. Kellam of the county of Travis and state of Texas, the following described property, to wit: 3,481 acres of land located about one mile west of the station of Reynolds in Nueces county, Texas. Said land is known as the Clegg, Doyle, and Berry tract, and is a part of the John Reynolds tract and is now owned by W. J. Francy and C. E. Hampton. As part consideration it is further agreed by the owner of the above described property that the said C. H. Kellam shall have possession of said described land on or before July 1, 1907. The said W. J. Francy and C. E. Hampton agrees with the said C.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

H. Kellam to execute releases to any tract of land sold by the said C. H. Kellam on or before 30 days after the date of notice given to said W. J. Francy and C. E. Hampton that said property has been sold. And it is further agreed that after the sale of any tract or tracts of land made by said C. H. Kellam, that the said C. H. Kellam shall only be required to turn over to said W. J. Francy and C. E. Hampton the sum of \$8.60 on each acre sold by the said C. H. Kellam. Said money to be credited on the \$30,000.00 note. It is further agreed that all the above described notes, except the note for \$2,500.00 shall bear interest at the rate of 7% per annum, until paid. The said W. J. Francy and C. E. Hampton obligates themselves to deliver to the said C. H. Kellam a complete abstract of title to said property, showing a good and sufficient title in law. Said Kellam shall have 20 days time in which to examine said abstract after said abstract has been delivered to said Kellam. If title is found good, then said Francy and Hampton shall deliver to said Kellam general warranty deed conveying said property to said Kellam, and if there should be defects in said title said W. J. Francy and C. E. Hampton shall have reasonable time in which to cure said defects, and if said defects cannot be cured within a reasonable time, then in that event, said W. J. Francy and C. E. Hampton agrees to return to the said Kellam the above described note of \$2,500.00. Witness our signature, in triplicate, on this the 4th day of June, 1907, city of San Antonio, Texas. W. J. Francy, C. E. Hampton, by C. E. Hampton. C. H. Kellam."

It is the claim of appellee that the note was given as earnest money and was liquidated damages, and of course that he could recover without proof of any damages resulting from a failure of appellant, C. H. Kellam, to comply with the contract of sale. On the other hand it is the contention of appellants that the note represented a penalty, and that in order to recover appellee was compelled to allege and prove the damages sustained by a breach of the contract. The court in the charge to the jury treated the amount of the note as liquidated damages, and instructed a verdict for appellee unless it appeared from the evidence that he had failed to tender a deed embodying a release clause as demanded by the contract, and had failed to correct the abstract of title. The law prefers viewing a sum reserved in a contract as a penalty, rather than liquidated damages, but the true criterion in the interpretation of a contract in this, as well as other respects, is the true intention of the parties, which is to be ascertained by the terms and stipulations of the instrument itself. The contract in this case is silent on the subject of the disposition of the amount of the note in case of default upon the part of the prospective buyer of the land, the only provision in regard to it being

that the note should be returned to Kellam in case the title was found to be defective. The note was clearly given as the first payment on the land in case the trade was perfected, and it was to be returned to the maker of it in case defects in the title prevented the consummation of the sale. What was to be done with it in case there was a breach of the contract on the part of the vendee? On that matter the contract is silent, and there must at least be a doubt as to the intention of the parties in regard to it, and whenever there is a doubt in regard to such a matter the law will declare the sum reserved a penalty rather than liquidated damages. *Durst v. Swift*, 11 Tex. 273; *Hall v. York*, 16 Tex. 18.

It is true that if damages are not capable of being ascertained by any satisfactory and known rule, then, if the language of the contract will admit, the reserved sum will be held to be stipulated or liquidated damages, but where the loss or injury may be easily determined by proof of market values the sum will be regarded as a penalty, and not as liquidated damages. These rules are dependent, however, upon the intention of the parties as evinced by the terms of their contract, and where there has been no contract as to the amount deposited all rules must give way to that rule of law which in the absence of an agreement will decree it to be a penalty, which cannot be recovered by the person for whose benefit it was deposited without proof of the damages sustained by him. *Maupin on Marketable Title*, pp. 231-232. To give a deposit the character of estimated, stipulated, or liquidated damages, a contract must be proved by which the parties agreed that in case of a breach upon the part of the depositor, the amount of the deposit should go to the other party as the agreed damages arising from a breach of the contract. Contracts for liquidated damages are never sustained except upon the principle that parties have the right to agree in advance as to what the damages will be in case of a breach of the contract, and, if no such agreement has been made, the law will not make it for the parties. No such agreement appears in the written contract in evidence in this case, and the oral testimony, if of any value, was to the effect that the note was given as evidence of good faith of appellants in the purchase of the land. There is not one word in the record which tends to show that it was ever agreed between the parties that the amount of the note was to be stipulated or liquidated damages. In such case the law will declare it a penalty. *Beach Mod. Law Cont. § 629*, and note.

No case has come within our observation in which it has been held that a sum deposited will be considered liquidated damages, where there is no language in the contract evidencing the intention of the parties to consider the deposit as liquidated damages. The opinion in the case of *Collier v. Betterton*,

87 Tex. 440, 29 S. W. 467, relied on by appellee, was based on a contract which specially designated the amount to be recovered as stipulated damages and the court in view of that agreement and the circumstances surrounding the case held that the contract was for stipulated damages.

The case was tried by the court below on the theory alone that the contract provided for stipulated or liquidated damages, and consequently we do not feel disposed to deprive appellee of an opportunity of trying his case on the theory of the note being given for a penalty, and will not, therefore, render judgment, as we would do if an opportunity had been offered or forced upon him by the ruling of the trial court to so develop his case.

The judgment is reversed and the cause remanded.

### MEZLAR v. CITY OF MILES et al.

(Court of Civil Appeals of Texas. Jan. 28, 1910.)

#### MUNICIPAL CORPORATIONS (§ 623\*)—PUBLIC NUISANCE—SICK HORSE—DAMAGES FOR KILLING—RIGHT TO RECOVER.

A horse, left by the owner in charge of a livery stable keeper, became sick with an incurable disease, and when it became a public nuisance, it was killed, pursuant to the instructions of the mayor and aldermen and the town health officer, and at the request of the livery stable keeper. *Held*, that as the city had the right under Rev. St. 1895, arts. 447, 402, to summarily abate such a nuisance, calculated to affect the public health or comfort of its inhabitants, the owner was not entitled to recover even nominal damages from the city or the other parties concerned, on the ground that a trespass was committed because they did not get his consent; he being absent at the time.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1371-1374; Dec. Dig. § 623.\*]

Error from Runnels County Court; B. B. Stone, Judge.

Suit by John Mezlar against the City of Miles and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

Lee Upton, for plaintiff in error. J. B. Wade, for defendants in error.

FISHER, C. J. This is a suit by the plaintiff in error against the city of Miles, Geo. S. Graves, George W. Reader, J. W. Hinkle, A. D. Dillinger, and S. M. Scott, to recover damages for a horse killed by defendants, owned by the plaintiff, alleged to be worth \$250, also to recover exemplary damages in the sum of \$250. The case was tried before the court without a jury, and judgment entered that the plaintiff, John Mezlar, take nothing by reason of his suit, and that the defendants recover their costs.

On the second page of plaintiff in error's brief is a statement to the effect that it is admitted by him that the city of Miles would not be liable for the acts of its officers, as the basis of the suit was a tort committed by the mayor and the aldermen of the city and the city marshal and a livery stable keeper; but the plaintiff does contend that the individuals named are liable under the findings of fact by the court for at least nominal damages, and on which the plaintiff in error relies for a reversal of this case. There is no statement of facts in the record, but it comes up to this court on the following findings of fact and conclusions of law of the trial court:

#### "Conclusions of Fact.

"(1) I find from the evidence that plaintiff was the owner of the horse, for the loss of which this suit was filed, and that some two or three weeks prior to December 19, 1907, he placed the horse with defendant S. M. Scott for keeping and attention, for hire in Scott's public livery stable in the town of Miles, Runnels county, Tex., and that Scott was given no authority with reference to the horse, except to feed and properly care for him during the absence of plaintiff from the county.

"(2) That about ten days prior to December 19, 1907, the horse became seriously sick with bladder and kidney trouble, and after two or three days was down practically all the time, unable to get up on his feet, and that within two or three days after he got down, the horse in his struggles caused large sores to form in all places on his body where he came in contact with the ground, from which he contracted blood poison four or five days before December 19th, when he was killed.

"(3) That defendant Scott procured the services of a veterinary surgeon, who could do nothing for the horse, which for three or four days prior to December 19th was unable to get on his feet.

"(4) That the sore places on his hips and legs rotted out to the bone, the odor of which became very offensive to passers-by on the street, and to occupants of other buildings within one-half city block.

"(5) That Scott's livery stable was located on one of the principal business streets of the town, and the horse lay within five or six feet of the sidewalk. That various citizens of the town complained to the town authorities concerning the condition and offensiveness of the horse, and defendant Scott, on December 19th, called upon the city authorities to take the horse off his hands, on which date the mayor of the town, defendant Geo. S. Graves, and two aldermen of the town, defendants Reader and Hinkle, and the town health officer held an informal con-

ference, and instructed the city marshal, defendant Dillinger, to kill the horse and burn his carcass, which was done by him on the afternoon of December 19th, with the consent and at the request of the defendant Scott, but without the consent or knowledge of plaintiff, who was in a distant county, and knew nothing of his horse's condition.

"(6) That the horse was in a dying condition at the time he was dispatched, and would have lived only a few hours, if left alone.

"(7) I further find from the overwhelming weight of evidence that the horse was absolutely valueless at the time he was killed, and that therefore plaintiff suffered no damages by reason thereof.

#### "Conclusion of Law.

"(1) I find that in view of the facts detailed above, neither the defendant A. H. Dillinger, who killed the horse, nor the other defendants who advised him, incurred any liability to plaintiff herein."

It is admitted by the plaintiff in error, and it is clear from the facts, that he sustained no actual damages, that the horse was worthless and practically dead when he was killed by the defendants; but the contention is that the killing was without his consent, and therefore unlawful, and from that fact alone a trespass was committed, and he is at least entitled to nominal damages. But an answer to this contention consists in the fact that it is apparent that the horse in its then condition was a public nuisance when killed; and it is clear from articles 447 and 462, and possibly other articles upon that subject of the Revised Statutes of 1895, that the city had the right to summarily abate and abolish a nuisance of this character, which was calculated to affect the public health or the comfort of the inhabitants of the city, and that by the second article cited the city had the right to have the same removed. The animal at the time of its destruction could practically be regarded as dead. It was in a very offensive condition, to such an extent that the inhabitants of the town complained of it. It would have been inhuman to have undertaken to remove the horse while he was alive, and it was an act of humanity upon the part of the defendants to kill the horse and relieve him from his then evident suffering, knowing, as they did, that the horse was suffering from an incurable disease, and was down and helpless, and that it was a matter of a short time until he would die. The owner was not present, and he could not be appealed to in order to get his consent that the means resorted to could be taken in order to abate the nuisance and relieve the animal in his then condition, which the facts clearly showed to be of such an of-

fensive nature to the inhabitants of the city as to likely affect their comfort and the public health.

We find no error in the record, and the judgment is affirmed.

#### BUCHANAN & GILDER v. MURAYDA.†

(Court of Civil Appeals of Texas. Jan. 12, 1910. Rehearing Denied Feb. 9, 1910.)

#### 1. MASTER AND SERVANT (§§ 101, 102\*)—OBLIGATION TO FURNISH SAFE PLACE TO WORK.

It is the duty of a master to exercise ordinary care to furnish his servant a reasonably safe place to work, except where the place becomes unsafe during the progress of the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 171, 179; Dec. Dig. §§ 101, 102.\*]

#### 2. MASTER AND SERVANT (§ 103\*)—SAFE PLACE TO WORK—DELEGATION OF DUTY.

The duty of a master to exercise ordinary care to furnish his servant a safe place to work cannot be delegated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.\*]

#### 3. MASTER AND SERVANT (§ 96\*)—INJURY TO SERVANT—PROXIMATE CAUSE.

A master whose negligence results in injury to a servant is not relieved from liability by the fact that the negligence of a third person concurred in producing the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 162; Dec. Dig. § 96.\*]

#### 4. MASTER AND SERVANT (§ 217\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A servant does not assume the risk of his master's negligence, unless he knows or is charged with knowledge thereof, and of the danger arising therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 584; Dec. Dig. § 217.\*]

#### 5. MASTER AND SERVANT (§ 97\*)—INJURY TO SERVANT—LIABILITY—ACCIDENTAL OR IMPROBABLE INJURY.

A master is not liable to his servant for an injury resulting from pure accident, or from causes which could not be reasonably anticipated, unaccompanied by lack of ordinary care on the master's part, but the fact that an accident was so unusual and extraordinary that it could not reasonably have been expected to happen does not relieve the master from the effect of his negligence; and, where an injury is such that it might have been reasonably anticipated, he is liable, where his negligence proximately caused the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.\*]

#### 6. MASTER AND SERVANT (§ 96\*)—INJURY TO SERVANT—LIABILITY—INDEPENDENT CONTRACTOR.

A master is not liable to his servant for the negligent act of the servant of an independent contractor; but, where the master is negligent, and the negligence of the servant of the independent contractor concurs with his own in causing the injury to his servant, he is liable therefor to the same extent as if the injury had been caused by his negligent act alone.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 158, 162; Dec. Dig. § 96.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

# 7. APPEAL AND ERROR (§ 1001\*) — REVIEW — VERDICT—CONCLUSIVENESS.

Negligence is primarily for the jury; and, where there is any evidence reasonably tending to show its existence, and that it was the proximate cause of an injury complained of, the verdict is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

# 8. MASTER AND SERVANT (§ 276\*)—INJURY TO SERVANT—CAUSE OF INJURY—EVIDENCE.

Evidence held to justify a finding that the injury to a servant of a contractor erecting a building, sustained while constructing a stairway in a shaft by the fall of a ladder on an upper floor, was caused by the negligent failure of the contractor to properly secure the ladder, authorizing a recovery, though the ladder was displaced by the negligence of a servant of an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 959; Dec. Dig. § 276.\*]

# 9. MASTER AND SERVANT (§ 193\*) — FELLOW SERVANTS—WHO ARE.

A servant of a contractor erecting a building and a servant of an independent contractor are not fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 482; Dec. Dig. § 193.\*]

# 10. MASTER AND SERVANT (§ 201\*)—INJURY TO SERVANT—FELLOW SERVANTS—CONCURRENT NEGLIGENCE OF MASTER.

Where a servant of a contractor erecting a building was injured by the fall of a ladder because of the negligence of the contractor in improperly securing it, and in putting a servant to work beneath it where he might be injured by its fall if displaced, the contractor failed to use ordinary care to furnish the servant a reasonably safe place to work, and his negligence was the proximate cause of the injury, though the displacement of the ladder was caused by the negligence of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 527; Dec. Dig. § 201.\*]

# 11. MASTER AND SERVANT (§ 217\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where the place where a servant was injured did not become dangerous during the progress of the work he was doing, but was dangerous when his master put him there to work, and the servant did not know of the danger, he did not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

# 12. TRIAL (§ 260\*) — REFUSAL TO GIVE INSTRUCTIONS—MATTERS INCLUDED IN CHARGE GIVEN.

A party cannot complain of the refusal of an instruction, where the instructions given were more favorable to him than the requested instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

# 13. TRIAL (§ 141\*) — SUBMISSION OF QUESTIONS TO JURY—UNCONTROVERTED FACTS.

A party should not request the submission to the jury of an issue, where the undisputed evidence shows the facts as a matter of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 386; Dec. Dig. § 141.\*]

Appeal from District Court, Bexar County; Edward Dwyer, Judge.

Action by Pablo Murayda against Buchanan & Glider. From a judgment for plaintiff, defendants appeal. Affirmed.

Union & Henry, for appellants. Anderson & Belden, Perry J. Lewis, and H. C. Carter, for appellee.

NEILL, J. This is an action brought by appellee against appellants to recover damages for personal injuries alleged to have been inflicted by the latter's negligence. It was alleged by plaintiff, in substance, that on May 5, 1908, while he was in the employ of defendants as a common laborer in the construction of a certain building in the city of San Antonio, and at work in it in the discharge of the duty of his employment, a ladder, which defendants had negligently caused and permitted to remain in an insecure position, fell from above the place where he was working upon him, seriously and permanently injuring him; that defendants had negligently caused and permitted the ladder to occupy an insecure, precarious, unfastened, and dangerous position above the place where plaintiff was at work under defendants' orders and instructions, the ladder being so dangerously and negligently placed and suspended as likely to fall at any moment of its own weight, or by reason of vibration, or the slightest interference, or shaking of the building, which was in process of construction; that while he was in the discharge of the duty of his employment, at the place where he had been ordered and directed by defendants to work, by reason of defendants' negligence in placing and permitting the ladder to be so placed and suspended in such an unsafe and dangerous position, and failing in any manner to secure and fasten the same, it fell upon him as aforesaid; that he did not know whether the ladder fell of its own weight, or by reason of the vibration caused by the work progressing in the building, or by reason of some one or some object coming in contact therewith, but that the dangerous and insecure position of the ladder, placed and suspended by defendants and negligently permitted by them to so remain, directly caused or contributed to its fall and his consequent injuries, for that it could not have fallen had it been properly fastened and secured in position. The petition then alleges the character and extent of plaintiff's injuries and the damages sustained by reason of defendants' alleged negligence. The defendants, after interposing a general demurrer and denial to the petition, pleaded: (1) That, if plaintiff was injured, his injuries were not caused by them, but through the agency of independent contractors, Kuhlman & Blue, or their employes, or some person else than defendants or their employes; (2) assumed risk; (3) unavoidable and unforeseen accident which could not be anticipated by them or their servants; (4) contributory negligence; and (5) negligence of a fellow servant. The general demurrer to plaintiff's petition was overruled, the case tried before

a jury, and the trial resulted in a verdict and judgment in his favor for the sum of \$10,000.

As the first, second, third, fourth, fifth, and sixth assignments of error complain of the court's refusal to give, at defendants' request, certain special charges, corresponding in number to the assignments, peremptorily instructing the jury to return a verdict for defendants, we will dispose of such assignments in arriving at our

#### Conclusions of Fact.

The evidence so clearly shows the following facts that they may be regarded as indisputable: (1) On or about May 5, 1908, the defendants were the contractors engaged in the erection and construction of the Frost Building, in the city of San Antonio, Tex., and had been such contractors and engaged in such work for some time prior thereto. (2) The firm of Kuhlman & Blue were sub-contractors of the defendants for plastering the building; and it may be assumed, for the purpose of this case, that they were what are technically called "independent contractors," over whom, nor their employes, the defendants had no control in doing their work. (3) On the same day there was a ladder in the shaft for the stairway extending from the fourth of the fifth floor, the lower end of which rested upon the fourth floor, and the other leaned against the fifth, extending several inches above. This ladder had been placed there for some time prior to said date by defendants for the use of the workmen in ascending and descending to and from the fifth floor. It was not in any way fastened at either end or made secure or stable in its position, and was liable at any time to fall or be thrown down by the vibration of the building, or by persons at work thereon or by objects handled by them coming in contact therewith. (4) The defendants knew of such instability of the ladder, of its liability to be displaced and fall down the stair shaft, and that if it should so fall, it was liable to strike and injure any of their servants at work in the shaft beneath the fourth floor of the building. (5) The plaintiff, who was on said day in the employ of defendants as a laborer on said building, having been in such employment a day and a half, was by his employers put to work in constructing the stairway in the shaft on the second floor, and, while at work there under their directions, the ladder by some cause was displaced and fell upon him and fractured his skull, and hurt his shoulder, whereby he was seriously and permanently injured, to his damage in the sum of \$10,000. These facts leave for our determination the questions: (1) Whether the injuries to plaintiff were caused by negligence of the defendants; and (2) if they were, whether plaintiff was guilty of any negligence contributing to his injuries. An affirmative finding on the

first of these questions will also demonstrate that plaintiff's injuries were not proximately caused by any risk assumed by him as incident to his employment, nor by an unavoidable accident, nor by the negligent act of a fellow servant. Therefore, before determining the two principal questions thus stated, we will enunciate the principles of law applicable, and make our findings of fact on such issue in the light of such enunciations.

These principles may be regarded as postulates: (1) It is the duty of the master to exercise ordinary care to furnish his servant a reasonably safe place to work, but this rule does not apply where the place becomes unsafe during the progress of the work. This duty is positive and nondelegable, and the failure of the master to discharge it is negligence, and renders him liable for an injury arising therefrom, although the negligence of a third party may have concurred in producing it. (2) The servant does not assume the risk of his master's negligence, unless he knows or is charged with the knowledge thereof, and of the danger arising therefrom. (3) The master is not liable to his servant for an injury which results from pure accident, or from causes which could not be reasonably anticipated, unaccompanied by lack of ordinary care on the master's part. But the fact that an accident was so unusual and extraordinary that it could not reasonably have been expected to happen does not relieve the master from the effect of his negligence; but, where an injury is such as might have been reasonably anticipated he is liable, if his negligence proximately caused such injury. (4) The master is not liable to his servant for the negligent act of the servant of an independent contractor; but, if the master is negligent, and the negligence of the servant of such a contractor, or any one else, concurs with his own in causing an injury to his servant, he is as much liable as he would be if the injury had been caused by his negligent act alone. (5) Negligence is primarily a question of fact for the jury; and, if there be any evidence reasonably tending to show its existence, and that it was the proximate cause of an injury complained of, the finding of a jury upon such issue will not be disturbed on appeal.

In view of the indisputable facts hereinbefore stated, it cannot be said, as a matter of law, that the defendants were not guilty of the negligence upon which this action against them is founded. They knew or were charged with knowledge of the position of the ladder in relation to the place where they put plaintiff; that it was not fastened, braced, or in any way secured so as to prevent it from falling down the shaft of the stairway, and that it might be caused to fall by the workmen in the building, or the materials they were handling, coming in contact with it; that if it should fall, it

was liable to strike and injure the plaintiff, whom they had put to work in the shaft on the second floor beneath; that, like a dead fall, it had only to be thrown to crush any human being in its way beneath it. To say that the jury was not warranted in finding that defendants failed to exercise ordinary care in providing the plaintiff a safe place to work would, to our minds, in view of the facts, be preposterous. If, as the evidence seems to show, the ladder was displaced and caused to fall by reason of a mortar box, which was being carried to the fifth floor by the employes of Kuhlman & Blue, coming in contact with it, the defendants would not, on that account, be relieved from the consequence of their negligence. For if it should be conceded that the servants of the independent contractors were negligent in bringing the mortar box in contact with the ladder (which the evidence wholly fails to show), their negligence would simply be a concurrence with that of defendants in causing plaintiff's injuries. Nor can it be said, in view of the evidence, as a matter of law, that plaintiff's injuries resulted from an unavoidable accident, or from causes which could not have been reasonably anticipated by defendants from maintaining an unfastened and insecure ladder in a position above where their servants were at work. See *El Paso & N. W. Ry. v. McComus*, 36 Tex. Civ. App. 170, 81 S. W. 760; *G., O. & S. F. Ry. v. Hayter*, 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. Rep. 856; *El Paso Electric Ry. Co. v. Furber*, 45 Tex. Civ. App. 348, 100 S. W. 1041; *St. L. S. W. Ry. v. Murdock*, 116 S. W. 139; *M., K. & T. Ry. v. Harrison*, 120 S. W. 255; *Duerler Mfg. Co. v. Elchhorn*, 44 Tex. Civ. App. 638, 99 S. W. 715; *Doyle v. Chicago, etc., Ry. Co.*, 77 Iowa, 607, 42 N. W. 555, 4 L. R. A. 420; *Reed v. Ry.*, 94 Mo. App. 371, 68 S. W. 364. Certainly it cannot be said, in view of the evidence in this case, as a matter of law, that plaintiff's injuries resulted from an accident pure and simple, unmixd with any act of negligence on the part of the defendants proximately contributing thereto. On the contrary, the jury were fully warranted in finding that his injuries were proximately caused by defendants' negligence as alleged in his petition.

If, as is insisted by the defendants, the ladder was displaced by the employes of Kuhlman & Blue, whom defendants claim were independent contractors, if its displacement were the act of negligence upon which this action is based, it is clear that plaintiff's injuries were not caused by the negligence of his fellow servants. For if, as defendants contend, Kuhlman & Blue were independent contractors, their employes were not plaintiff's fellow servants. But that is neither here nor there. It was not the displacement of the ladder, but placing it unsecured where it was by defendants, and putting plaintiff to work beneath it where he might be in-

jured by its fall if displaced, which constituted the negligence averred and proved. This was a breach of defendants' obligation to use ordinary care to furnish plaintiff a reasonably safe place to work; and, as the duty could not be delegated to another, such negligence, which was the proximate cause of plaintiff's injuries, could not be that of his fellow servant.

Nor is there anything tending to show that plaintiff's injuries resulted from a risk assumed by him as incident to his employment. The place where he was injured did not become dangerous during the progress of the work he was doing, but was dangerous when defendants put him there to do the work. And, as there is no evidence tending to show that he knew of the insecure or unstable position and condition of the ladder, he cannot be said to have assumed the risk of its falling and injuring him while he was at work.

There is not a bit of evidence squinting in the direction of negligence towards the plaintiff. Therefore, we find as matters of fact that defendants were guilty of the negligence alleged against them, that such negligence was the proximate cause of plaintiff's injuries, and that he was guilty of no negligence contributing thereto. As is before intimated, these findings involve the further facts that plaintiff's injuries were not caused by an unavoidable accident, nor an assumed risk, nor from the negligence of a fellow servant. We, therefore, overrule defendants' first, second, third, fourth, fifth, and sixth assignments of error.

#### Conclusions of Law.

1. The seventh assignment of error, which complains of the court's refusal of special charge No. 4, is overruled, because the fifth special charge, given at their request, directs the jury to find for defendants if they believe from the evidence that plaintiff's injuries were caused by the employes of Kuhlman & Blue in knocking down the ladder which fell and struck him. This is more favorable to defendants than the one which the assignment complains of the court's refusing; for it, in effect, assumes that defendants were not liable for such act, if done by the servants of Kuhlman & Blue. Whereas, under the one refused, the jury would have to find that Kuhlman & Blue were independent contractors in order to find for the defendants.

2. The eighth assignment of error complains that the verdict is directly contrary to the fifth special charge given at defendants' request. It will be observed that the assignment does not complain of any error made by the trial court, but of the jury's finding upon an issue submitted at defendants' request. If, as is here contended, the undisputed evidence shows as a matter of law that plaintiff's injuries were directly and proximately caused by the employes of

Kuhlman & Blue in knocking down the ladder which struck him, defendants should not have requested the submission of such a fact as an issue. But, as will be seen from our conclusions of fact, that evidence does not conclusively show that plaintiff's injuries were directly and proximately caused by such act of the employés of Kuhlman & Blue.

3. The ninth assignment of error is directed against the first paragraph of the court's charge. When the entire charge, including the special charges given at the instance of defendants, is read and construed in connection with the part complained of, it is apparent that it is not obnoxious to any of the objections urged under the assignment.

There is no error in the judgment, and it is affirmed.

### GORE v. WESTERN UNION TELEGRAPH CO.

(Court of Civil Appeals of Texas. Jan. 12, 1910. Rehearing Denied Feb. 9, 1910.)

#### 1. TELEGRAPHS AND TELEPHONES (§ 35\*)—CONTRACTS FOR SERVICES—CONDITIONS—ACCEPTING MESSAGE BY TELEPHONE.

A telegraph company, after accepting a message by telephone, cannot claim that the conditions in its printed forms are applicable, where it is accustomed to receive messages in that way.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 25; Dec. Dig. § 35.\*]

#### 2. TELEGRAPHS AND TELEPHONES (§ 48\*)—ACCEPTING MESSAGE BY TELEPHONE—OPERATOR AS AGENT FOR SENDER.

The agent of a telegraph company who receives a message by telephone, is not thereby made the agent of the sender though the company requires all messages to be given in writing, if the sender does not know of such requirement.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 80; Dec. Dig. § 48.\*]

#### 3. CUSTOMS AND USAGES (§ 11\*)—CREATION OF CONTRACT FOR SERVICES—ACCEPTING TELEGRAPH MESSAGE BY TELEPHONE.

A custom by a telegraph company to receive messages by telephone will render the contract to transmit the message binding, and the company liable for failure to deliver the message.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. § 22; Dec. Dig. § 11.\*]

#### 4. TELEGRAPHS AND TELEPHONES (§ 35\*)—CONTRACT FOR SERVICES—ACCEPTING MESSAGE BY TELEPHONE.

Where the agent of a telegraph company received a message by telephone, and agreed to transmit the same without requiring it to be reduced to writing, and the failure to transmit it is not due to the failure of the sender to reduce it to writing, the right to recover for failure to transmit and deliver is not affected by the sender's failure to reduce it to writing.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 25; Dec. Dig. § 35.\*]

Appeal from El Paso County Court; Albert S. Eylar, Judge.

Action by C. H. Gore against the Western Union Telegraph Company. Defendant had judgment, and plaintiff appeals. Reversed.

U. S. Goen, for appellant. Beall & Kemp, for appellee.

NEILL, J. This suit was instituted by appellant against appellee to recover damages alleged to have been caused his wife by the negligence of appellee in not correctly taking, transmitting, and promptly delivering to her at Chihuahua, Mexico, a certain telegram, informing her of the death of her mother, in Austin, Tex., wherein she was prevented from being present at her mother's funeral. Plaintiff alleged that a sister of his wife, on March 8, 1908, about 8:30 p. m., telephoned the following message to the office of defendant in Austin, Tex., for transmission to appellant's wife, at Chihuahua, Mexico: "Mrs. C. H. Gore, Chihuahua Shops, Chihuahua, Mexico. Your mother is dead. Wire if you can come immediately. Lula." That defendant accepted said message as given over the phone, and agreed to send it, but was guilty of negligence in not correctly taking said message, in that the words, "Chihuahua Shops" were made to appear "Chihuahua St.," and that, owing to the address being incorrectly stated, said message was not delivered promptly, and she was not apprised of the death of her mother for several days after her death and burial, and was thereby prevented from being present at her funeral, to her damage, etc. Appellee pleaded general demurrer, general denial, and the provisions of the contract, providing for repetition of message; that the company was made the agent of the sender in forwarding over another line; that no responsibility regarding messages attaches until same are presented and accepted at the transmitting office; that the company would not be liable in damages, when claim was not presented in writing within 90 days after the message was filed for transmission and accepted; and that the clerk in the office of appellee, in taking said message over the phone and writing it down, was acting as the agent of the sender. The proof showed that Mrs. Ada Johnson phoned the message to the office of the appellee in Austin; that it was accepted in this manner, was written out by a clerk in the office of appellee on one of the regular blanks, containing the stipulations pleaded by defendant, but was incorrectly taken, and was made to read: "Mrs. C. H. Gore, Chihuahua St., Chihuahua, Mexico. Your mother is dead. Wire if you can come immediately. Lula." That said message in this form was promptly transmitted to El Paso, Tex., where it was delivered to a connecting line *Telegrafos Federales de Mexico*, which received the message at Chihuahua,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

but did not deliver, and reported no such address. At the conclusion of the evidence the court peremptorily instructed a verdict for defendant.

The first assignment of error complains that the court erred in giving such peremptory instruction. It does not appear from the record in the case upon what grounds or view of the case the court gave the instruction, but we presume from the briefs of either party that it was upon the ground that appellee's clerk in the telegraph office, in taking down the message dictated over the telephone, and in repeating it to the sender in order to be sure that it was correct, was acting as the agent of the sender when he did so. Appellant's proposition under the assignment is as follows: "Where the proof was uncontradicted that an employé of the telegraph company received the message by telephone, and undertook to transmit it, it is, at least, a question for the jury to determine whether or not the clerk receiving the message was acting as the agent of the company, or of the sender, and the court cannot say as a matter of law that he was acting as the agent of the sender, and that the sender would be responsible for his mistakes." Mrs. Johnson testified that she sent the message by telephoning it down to the office of appellee, and that the operator at its office who answered the phone when she sent the message accepted it in that way, and agreed to send it, and to get her an answer by 12 o'clock, if possible. That she did not send it to any street anywhere, but sent it to the Railway Shops at Chihuahua. Another witness testified that he stood by the phone while Mrs. Johnson phoned the message, and told her how to tell the telegraph company where to find Mrs. Gore; that he told her to tell them that her address was Chihuahua, Mexico, care of Chihuahua Railway Shops, and that he heard her repeat what he told her to the party who was talking. Smith Johnson testified that at the time of the delivery of the message to appellee he was in its employ, and took the message in over the phone. There was no evidence that Johnson, or any of appellee's employés, in receiving the message, was acting as the agent of the sender, save as may appear from the testimony stated, and it is undisputed that the telegram, while transmitted to Chihuahua, was never delivered to plaintiff's wife at Chihuahua.

The law seems to be well settled that a telegraph company which accepts a message by telephone cannot claim that the conditions in its printed forms are applicable, where it is accustomed to receive such messages. It is also held in such cases that the agent of the company is not the agent of the sender. Obviously the same rule applies to receiving and transmitting a telegram delivered orally that obtains for one delivered by telephone and accepted by the company. As is said in *Western Union Telegraph Com-*

*pany v. Todd* (Ind. App.) 53 N. E. 194: "Where the company, in receiving a message orally by telephone, is pursuing a custom of so accepting patronage from the sender and others, we cannot agree that the company so carrying on its business for its own convenience and profit may thereby relieve itself from the obligation to exercise the skill and diligence which such a method demands. If such be the customary method of receiving messages, it cannot be claimed that a message so received and transmitted over the wire for the usual hire was not received by the company, or that in the act of receiving and writing down the message the company's employé was acting as the servant of the sender. \* \* \* There is no legal obligation of the company to accept oral messages; and, if it be true that such method of receiving them by telephone cannot be relied upon to secure the requisite precision, it would not seem wise to encourage the risk of such want of precision by holding the company not responsible to the addressees of messages thus received by telephone with the company's authority, and under circumstances such that it would be a violation of the servant's duty to the telegraph company to refuse to so receive and write down the message."

In *Carland v. Western U. Teleg. Co.*, 118 Mich. 369, 76 N. W. 762, 43 L. R. A. 280, 74 Am. St. Rep. 394, it is held that the sender of a telephone message to the agent in charge of a telegraph office, with directions to send it by telegraph, does not make such agent his agent, although the telegraph company requires all messages to be given to the agent in writing, unless that fact is known to the sender. In this case there was no notice of the rules of the company brought home to the sender, and the court said: "The law does not forbid such authority [to the agent to write the message], nor does it make it the duty of the sender to write the message. If the rules of the company forbade it, there is nothing in the case to show that the fact was brought home to the knowledge of the patron, and the rule would have no greater force than any other of which he was ignorant. We cannot conclude, in the absence of proof, that the telegraph companies expect their operators to turn away patrons who cannot write, or that they keep telephones in the office, but do not permit their use in their business by their patrons who send and receive messages. And we are of the opinion that such use should not be altogether at the peril of the patron, or that he should suffer for mistakes made at either end of the line, merely because such are the instructions to the operator, or made the subject of a rule of which the patron has no knowledge." And in an action for damages for failure to deliver a message given to the company by telephone, it was held that a custom to receive messages in that manner would render the company liable, and that

a contract to transmit, made in that way, would be binding. It was further held that if the agent of the company received the message over the telephone, and agreed to transmit the same without requiring that it be reduced to writing, and the failure to transmit was not due to the failure to reduce to writing, the agent would be the agent of the company, and not of the plaintiff, and the right to recover would not be affected by the failure to reduce the message to writing. *Texas Teleg. & Teleph. Co. v. Seiders*, 9 Tex. Civ. App. 431, 29 S. W. 258.

In view of the principles stated, we are of the opinion that the case should have been submitted to the jury, and that the court erred in peremptorily instructing a verdict for the defendant.

For such error, the judgment is reversed and the cause remanded.

# FINBERG et al. v. GILBERT.

(Court of Civil Appeals of Texas. Jan. 5, 1910.  
Rehearing Denied Feb. 2, 1910.)

## 1. TRESPASS TO TRY TITLE (§ 38\*)—BURDEN OF PROOF.

Where the petition described the land according to plaintiff's patent, and also by field notes of an actual survey, a plea which, besides the general denial, alleges that the boundaries of the section described in the patent do not include the land which the petition described by the survey on the ground, but covers land other than that claimed by plaintiff, does not relieve plaintiff from the necessity of showing the identity of the land sought to be recovered with that described in a patent under which he claims.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 53; Dec. Dig. § 33.\*]

## 2. PUBLIC LANDS (§ 176\*)—PATENTS—VALIDITY.

A patent for a survey of land will not be held void because of difficulty in determining its locality, or because it is not susceptible of being located in the usual way, where there exists any means of identifying the land sought to be included.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 571; Dec. Dig. § 176.\*]

## 3. EVIDENCE (§ 175\*)—BEST AND SECONDARY—LAND SURVEYS.

Where the land sought to be recovered was originally located by what is known as office work, without being actually surveyed on the ground or tied to any survey or object, it is not necessary to produce the original field notes and maps, and a patent containing the field notes afterwards prepared and used in the general land office is presumed to be in accordance with the work by the surveyors and admissible as original evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 569; Dec. Dig. § 175.\*]

## 4. EVIDENCE (§ 460\*)—EXTRINSIC EVIDENCE—APPLICATION OF LANGUAGE—DESCRIPTION OF LAND.

Where the land sought to be recovered was originally located by what is known as office work without being actually surveyed on the ground or tied to any exterior survey or object,

extrinsic evidence is admissible to identify the land as that described in plaintiff's patent.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2120-2122; Dec. Dig. § 460.\*]

## 5. TRESPASS TO TRY TITLE (§ 41\*)—SUFFICIENCY OF EVIDENCE.

Where defendant in trespass to try title stands on plaintiff's allegation of title to make out a case, a prima facie case is sufficient to entitle plaintiff to a judgment.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.\*]

## 6. EVIDENCE (§ 342\*)—CERTIFIED SKETCH FROM MAP—IDENTITY OF LAND.

A certified sketch from a map in use in the general land office at the time the land in suit was located purporting to show the block of which the land in suit is a section with reference to the adjacent surveys on three sides is admissible as evidence of whatever appears thereon.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1304; Dec. Dig. § 342.\*]

## 7. APPEAL AND ERROR (§ 1010\*)—REVIEW—FINDINGS OF COURT.

Findings of fact by the court having evidence to support them are conclusive on review.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

## 8. EVIDENCE (§ 471\*)—CONCLUSION OF WITNESSES.

A blue print of a survey introduced with the testimony of the surveyor who made it, is not objectionable as the conclusions of the witnesses.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2151; Dec. Dig. § 471; \**Witnesses*, Cent. Dig. §§ 833-836.]

## 9. JUDGMENT (§ 708\*)—CONCLUSIVENESS—AS TO PERSONS NOT PARTIES—BOUNDARIES.

Where the land sought to be recovered was originally located by what is known as office work without actual survey of the ground, a judgment in another action finding corners of adjacent land by which the land in suit could be identified is admissible in evidence, though defendant was not a party thereto.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1230; Dec. Dig. § 708.\*]

## 10. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of evidence which is merely cumulative of proper evidence, even if erroneous, is harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

## 11. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—EVIDENCE.

Where the report of a surveyor to the general land office introduced in evidence, in trespass to try title to identify the land mentioned, a judgment in another action as fixing a line or corner by which the land in suit could be identified, the admission of such judgment, if erroneous, was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

## 12. BOUNDARIES (§ 54\*)—PRESUMPTIONS AND BURDEN OF PROOF—FIELD NOTES.

The commissioner of the general land office being charged with the duty of correcting surveys and field notes (9 Gammel's Gen. Laws, p. 107) corrected field notes of surveys approved and adopted by such commissioner identifying

the land claimed by plaintiff under his patent, constitutes a prima facie case in his favor.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 274; Dec. Dig. § 54.\*]

**13. APPEAL AND ERROR (§ 719\*) — ASSIGNMENTS OF ERROR—NECESSITY.**

In the absence of an assignment of error or propositions, the objection in argument to certain evidence will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2968; Dec. Dig. § 719.\*]

Appeal from District Court, Uvalde County; R. H. Burney, Judge.

Action by Mrs. Kate Gilbert against Mrs. George Finberg and others. Plaintiff had judgment, defendants appeal. Affirmed.

Martin, Old & Martin, G. B. Fenley, and Clark, Bliss & Lytle, for appellants. W. D. Love and Webb & Goeth, for appellee.

**JAMES, C. J.** Mrs. Gilbert brought this action in trespass to try title, alleging herself to be the owner of section No. 71 in block 3 of T. W. N. G. Ry. Co. lands, in Edwards county. The petition alleges the patent and copies its field notes, which are: "Beginning at the northwest corner of Sur. No. 70; thence south 1900 varas to stake; thence west 1900 varas to stake; thence north 1900 varas to stake; thence east 1900 varas to stake." Then it describes the land with more particularity by field notes of an actual survey, alleging such field notes to constitute the land patented.

Defendants disclaimed 56 acres of the land so designated, giving metes and bounds of the 56 acres, and as to the remaining portion thereof pleaded general denial and not guilty, and alleged that the lines and boundaries of said section 71 does not cover or include the land as set out in the petition as it describes it to be on the ground, except the 56 acres, but that it covers other and different lands than that claimed by plaintiff. The effect of this plea did not, we think, relieve plaintiff from the necessity of showing as to the part not disclaimed, the identity of the land sought to be recovered with that described in the patent, and we overrule, at the outset, this point made by appellee. The case was tried by the judge, who gave judgment for plaintiff, filing his conclusions. The defendants offered no evidence, except by reading answers to cross-interrogatories, and rely on the inadmissibility of certain of the evidence introduced by plaintiff, and upon the inadequacy of the entire evidence to make out a case legally sufficient to authorize a finding that the land sued for (except that disclaimed) was within the patent.

Title in plaintiff to section 71, block 3, under the patent is undisputed. The questions that arise are merely as to whether or not the land patented, and the land as described in the petition and sought to be recovered (except that disclaimed) were, with reasonable certainty, the same. The court

found that they were. The field notes in the patent call for section 71 to begin at the N. W. corner of No. 70. The court found that Sur. 71 is one of a large number of surveys constituting block 3; that neither it nor any of the other surveys in block 3 was originally surveyed on the ground, but were what is known as office work, and that originally there were no marked lines or corners to any of the surveys in the block. The testimony is in accordance with this conclusion; and it appears also that block 3 was composed of as many as 80 sections. Consequently we must conclude and state as a fact that the survey in question could not be fixed by the N. W. corner of No. 70, nor from any other marked line or corner in the block, because the whole block was office work and none of its sections had any marks, and therefore every section in it may be said to be as incapable of being identified by such means as the one in question.

A patent to a survey will not be held void because of difficulty in determining its locality, or because it is not susceptible of being located in the usual way, nor when there exists any means whatever of arriving with reasonable certainty at what land was intended to be granted. Here the survey has no locative call except that the N. W. corner of Sur. 70, which as we have seen gives no assistance. The patent refers to no other section, survey, or object, except that the section was in block 3 and "in Edwards county on the waters of the Nueces river about 12½ miles N., 63° E., from junction of E. & M. Nueces river." Of course this latter call is indefinite. The data commonly used in cases of this kind to determine boundary is absent, arising from the fact that this is one of a large block of sections, which block was located by certificates and appropriated without being actually surveyed on the ground in any part thereof. Nor does it appear that the block is, from any call connected with any of the original surveys in the block, tied to any exterior survey or object. A contention of appellants seems to be that it was indispensable for plaintiff to produce the original field notes and the plat which went with the notes, as returned by the original surveyor for Sur. 71, and of 70, and that this was the primary and best evidence to determine their position, and in default of this no other testimony was admissible. These were not introduced, but the patent contains the field notes which are presumed to be what the surveyor reported, and the platting of these sections upon the map of lands in this particular county, prepared and in use in the general land office, are original evidence and are entitled to the presumption of being in accordance with the work reported by the surveyor. As the patent of 71 was introduced containing the field notes, and as it was shown and so found by the court that Sur.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

70 and all other sections in the block contained nothing which would in themselves assist in locating them or either of them on the ground, the result necessarily is that other means would have to be resorted to to place these sections on the ground if their patents are to be given any effect at all.

The patent was intended to grant some tract of land of the quantity called for, and it is not to be declared ineffectual unless all means calculated to throw light on the intention of the granting power as to what land was intended has failed to do so. We do not understand appellants to claim that this patent was void because it cannot be located from its own calls, but that it was void so far as the evidence in this case shows. The defendants stand on plaintiffs' allegation to make out a case, and, of course, what makes a *prima facie* case is sufficient to entitle plaintiffs to a judgment. Although it may appear that a particular section in the block cannot be located by other sections in the block, yet if the block itself can be located it is too plain for dispute that the position of any section in it can be arrived at by surveyors.

A certified sketch of this portion of Edwards county, from the map in use in the general land office in the year 1883, was in evidence purporting to depict this block with reference to the adjacent surveys on the north, south, and west of it. The sketch was admissible in evidence under our statute, and constituted evidence of whatever appeared on it. It is true the block of surveys in question was originally surveyed, or patented about 1874, and this sketch is from the map in use in 1883, but it was not essential to the validity, as evidence, of the land office map in use, that it should appear to have been the one in use at or soon after the time of the location. The map in use in 1883 would necessarily show all then patented lands and their relative positions, and the presumption is that previous surveys were correctly shown on it. This map alone, or rather the duly certified sketch taken therefrom, was evidence (though not conclusive) of where the block lay and of its component parts and of the situation of the block and its parts with reference to surrounding lands. The said sketch shows that section 1 in this block 3 bordered on a prior survey on the Nueces river known as survey 72 S. P. Ry. Co., patented in 1872. The testimony shows that this survey was identified, and this connection, which is evidenced by the said land office sketch, and we may add by later maps in use in the land office also in evidence, certainly affords a means of identifying the ground intended for block No. 3 to occupy. Section No. 1 of block 3 can thus be identified in the position it was intended to occupy, and from this it would be a mere matter of correct surveying to place the other sections of the block. By the surveyors, Geo. M. Williams and C. F. Hodges, and by their work

in this territory, in connection with the sketches from the general land office, plaintiff undertook to show where the section 71 in block 3 in controversy was, and, according to the judgment, succeeded in doing so.

Williams testified in substance that in 1890 while he was state surveyor under appointment by the commissioner, he had occasion to do work on behalf of the G. H. & S. A. Ry. Co.'s land department to survey some of the sections in the block F, G. H. & S. A. Ry. Co., which block adjoined said block 3 immediately on the south. [The land office sketches show the position of block F with reference to block 3 and show that the south line of Sec. 71, Bl. 3, in controversy to be identical with the north line of block 7 in said block F.] The duty of the land office was to compile the map from the data in his office, and it is presumed that it was done from the work reported by the surveyor. The testimony of this witness, as to what he did in 1890, is in substance that he did not on that occasion establish any lines or corners for said Sec. 71, Bl. 3, but did establish the position of block F by starting from the river survey No. 71 S. P. Ry. Co. above referred to which he plainly identified, and thence by traverse lines finding the N. W. corner of section 1 in block F (which the sketch shows is also the S. W. corner of section 77 of Bl. 3). This corner he intended to place three miles east and seven miles south of the S. E. corner of the survey 71 on the river, their distances having been obtained by means of the traverse just mentioned. He in this way arrived at the position of block F, and says: "I did not establish any of lines or corners for Sec. 71, Bl. 3, in 1890, but established the S. E. and S. W. corners of said section in June, 1906," when as he states he corrected the work he had done in 1890: "I established them (corners) for the N. E. and N. W. corners of Sec. 7 in block F, G. H. & S. A. Ry. Co., as my object for doing the work was to establish block F." It appears that in his survey in 1890 he made certain corners for the northern tier of sections in block F, locating this block from said river survey, in the manner we find to be indicated as proper from the land office sketches. In this survey of 1890 he used the variation of 9.45 E.

The surveyor Hodges (county surveyor of Kinney county) went there in 1893 for the purpose of locating Sec. 70 in block 12 (which is a block shown by the land office sketches to adjoin block 3 on the east). We may state in this connection, for proper understanding, that said blocks F and 12 appear to have been in the same condition as block 3 in respect to the difficulties in ascertaining their boundaries and positions, and we quote from appellant's brief this statement: "The evidence shows that no original corners, lines, marks or calls were found upon the ground for any section in block 3 which is supposed to include the land sued for, or

block F, block 12, or block O, which are supposed to be located near to block 3." Now, Hodges says he did his work in this manner, working from a sketch furnished him by the land office: He surveyed from the survey on the river (Sur. 71 S. P. Ry. Co. as Williams, it appears, before him had done), and by what appears to have been careful work, based evidently upon the maps as they appear in the record, located the southeast corner of Sur. 20 in Bl. 12, and for that corner established a rock mound. We may here remark that block 3 according to the sketches lies between block 12 and the said river survey 71 and the Sec. 71 in question is about three miles distant from said Sec. 20, and it would appear that the surveying that would correctly locate Sec. 20 would equally serve to locate the section 71 in controversy. Hodges used the variation of 9.15 east.

Now, in 1906, Williams went there again and corrected his previous work, this time adopting the variation 9.15 that Hodges had used, and making changes or corrections in corners he had previously established, making them conform with what Hodges had done on the ground in 1893. He testified that in 1890 he had made S. E. and S. W. corners for Sec. 7 in block F which lies immediately south of 71, Bl. 3, but his work on that occasion did not touch Sec. 71, Bl. 3. That in 1906 he corrected his former work, and the corners he made in 1890 were made bearings in the corrected work. He made a report of the corrected work to the commissioner of the general land office and this report and the sketch he sent with it to the land office were introduced and these show that he verified the S. E. corner of Sec. 20 in block 12, that Hodges had established and corrected his previous work in certain particulars to conform therewith. Among other things he did on this occasion was to establish the S. W. and S. E. corners of the Sec. 71 in question, marking them. He corrected the corners he had made for the section in block F just south of 71 by placing them about 200 varas below where he had located them before. This work as corrected, it seems, conformed with what Hodges had done.

It was shown further that Hodges went to this locality again in 1908, and he testified: "I was at that corner again in January, 1908, identified it, and I then ran a line from that point 2 miles north and 3 miles west that brought us to what we took to be the S. E. corner of survey 71 of block 3 T. W. N. G. Ry. land; at that point we found a rock mound with cedar bearings; I think it was marked N. W. 8 and S. E. 71; I then ran one mile due west and found a rock mound with two live oak bearings; the rock was marked, I think, N. W. 71; I then ran one mile north and established a rock mound and marked it N. W. 71; I then ran east one mile and established another rock mound and marked it N. E. cor. 71; I did not run the east line; the corners I found correspond with the cor-

ners referred to by Mr. Williams on his sketch mark 'A' for S. E. & S. W. corner of 71, and N. E. and N. W. cor. of survey 7, block F, G. H. & S. A.; in September, 1908, I did some more surveying there; I then started from same place on the S. line of survey 71 S. P. land on the Ft. McKavit road; we ran a traverse line going from that point 7 miles south and 10 miles and 349 varas east; this carried us to the corner established by Williams for the S. W. corner of survey 71, block 3; we ran 9 miles east from the S. E. corner of 71 S. P. Ry. Co. land and 7 miles south that carried us to the Williams corner."

The conclusion which the testimony sustains is that the survey in question cannot be located by the only corner called for in its field notes, viz., the N. W. corner of No. 70. It cannot be located by any calls of any section in the block it forms a part of; the block itself was not surveyed on the ground in the first instance, when patents were issued within it; the block itself is without the means of identification on the ground except with the assistance of the records officially kept in the land office, of which the maps compiled for use in that office constitute a part, and which are testimony of what they make appear; and by the assistance of said maps the position of the block where it is and has been understood by the granting power to be, is capable of being established, and by that means, the block and the section in question has, through the testimony of said maps and witnesses, been located with reasonable accuracy in the position fixed by this judgment. If this method of arriving at the boundaries of the survey in controversy is not permissible, then it would appear that all the sections in block 3 and those in blocks F, 12, and O, are incapable of identification, and the grants fail for want of description.

We conclude, in addition, that, if the method adopted by plaintiff, through the surveyors Williams and Hodges, to show the land covered by the patent to said Sur. 71, block W, was not, for some undisclosed reason, the only way to arrive at the same, it was one method of doing so, and when defendant introduced nothing to indicate that a more reliable way of doing so was feasible, the court was authorized, if not required, to treat plaintiffs' case as *prima facie* made. What has been said induces us to overrule the assignments of error Nos. 1, 3, 4, 5, 6, 10, 11, 12, and the propositions under the 7th, 9th, and 10th assignments.

We overrule the second assignment of error for the reason that the findings of fact filed by the judge was sufficient, and also for the reason that they were not without evidence to support them as alleged.

We overrule the seventh assignment because the testimony of Williams which it complains of was not objectionable as being a mere conclusion. The proposition under the eighth cannot be sustained. Williams

testified that he made a plat showing the work done by him and explaining, in a general way, what that plat showed. He stated further that he had a blue print copy of that plat which he recognized as a true blue print of the plat sent by him to the land office in connection with his work and attached the same to his deposition as "Exhibit A." The objection to the blue print is not that it was not the original, but that it is only evidence of the conclusions of the witness. The objection is not good. He testified, in referring to the plat, that it "shows the work done by me, showing all corners and monuments as established by me and the relation of the monuments to the corners of the sections—that is to say, where I established a monument in a section line I showed the distance to the section corners—I also showed the bearing trees, marked them on the sketch, and showed how the corners and monuments were marked." This was only a way of explaining what he did and found on the ground referring to the plat as illustrating it in detail.

The thirteenth assignment of error complains of the admission in evidence of a copy of a decree of the district court of Edwards county in the case of *Kate L. Gilbert v. T. J. Gabold et al.*, by which decree it appears from its recitals among other things this: "And the court further concludes that in April, 1893, at the times Hodges and McCrickett made their surveys that the same were correctly made on a variation of 9.15 min. and that the S. E. corner of Sec. 19 in block 12 is thirteen miles east from the S. W. corner of Sur. 71 and eight miles south of said Sur. 71, and that the corner of said Sec. 19 and 20 of block 12 was correctly located by Hodges and McCrickett," etc.

Appellants' proposition under this assignment, that judgment having been entered in a suit between other parties than the parties to this suit for different land and in another block, and no connection having been shown by competent evidence between the land involved in that suit and that involved in this, the said judgment was immaterial and irrelevant and should not have been admitted or considered in evidence. The proposition as made must fail if some connection was developed. We take it for granted, as appellants state in their brief, that not only this block 8 but likewise blocks F, 12, and O, contain no calls within themselves whereby to fix their position on the ground. This being so, the maps compiled in the land office properly to show the positions of these blocks afford evidence, and apparently the only evidence, of locating any and all of these blocks. These maps indicate the position of block 3 relatively to the survey on the river, No. 71, and this enables a surveyor to locate No. 3 in its proper place, and also block F, adjoining it on the south, block 12 adjoining it on the east, and block O, adjoining it on the north, as the land office maps show them. This

process of locating one applies equally to the others, and the location of any section in any of the blocks by this means practically settles the location of the others. Hence some connection does appear, and the proposition as appellant makes it cannot be sustained. Besides this, it is unreasonable to suppose that the court would have discarded the work and the testimony of Hodges and Williams as unreliable had it not been for the introduction of said judgment. The trial was before the judge, and the judgment in evidence was simply cumulative of their testimony. *Hill v. Smith*, 6 Tex. Civ. App. 312, 25 S. W. 1079; *Beeson v. Richards*, 24 Tex. Civ. App. 67, 53 S. W. 611.

There is another reason, and a more complete one, why the judgment should not be reversed because of the decree in the other case. In the report of Williams to the general land office which accompanied and explained the sketch, and which, when certified from the land office, was proper evidence, the judgment in the other case is mentioned. Among other things he states therein: "I went to S. E. corner of Sec. 20, block 12 T. W. N. G. R. Co. established by decree of court in cause No. 123, district court of Edwards county, *Kate L. Gilbert v. T. J. Gabold and W. A. Buchanan*, decree recorded in book 4, pages 4 and 5," etc. Thus, without the introduction of the decree, evidence of it was before the court. It is true the said report was objected to at the trial, but the assignment of error complaining of its admission has been overruled in this opinion for the reason that the propositions advanced under the assignment are unsound.

We may add, though it seems to be unnecessary to do so, that by statute (9 Gammel's Gen. Laws Tex. p. 107) the Legislature in 1887 saw fit to provide a method by which the land office could have corrections made of surveys of common school, university, or asylum lands, or other surveys in which the state might be interested, directly or indirectly, or lands alternating therewith, where from imperfections in field notes it may become necessary for the proper compilation of maps, or for the proper location and identification of said lands on the ground. The means provided was through a state surveyor to be appointed by the commissioner, and it was provided that he should be under the control and direction of the commissioner, and to survey such lands and prepare and return field notes of same, and certify to any and all facts, and generally to do and perform such official acts as might lawfully be done by a county or district surveyor and that he should sign his name officially as "State Surveyor." The lands the statute mentions are common school, university, or asylum lands or other lands in which the state may be interested or lands alternating therewith. The railroad lands in these blocks, we take it, are

alternate sections, and fall within the purview of the above statute. The location of the section was imperfect as the evidence in the case indicates, and correction was appropriate. Williams was state surveyor, and his sketch and his report to the land office in this matter were under his signature as state surveyor. They received the approval of the commissioner, and became official archives of that office. Certified copies of them were admissible in evidence under our statute where the originals would be, and there is no doubt in our minds that the originals would have been admissible because they were relevant to the subject under investigation. The report was therefore proper evidence, and as no objection has been made that sought to exclude from it the reference made in it to the other judgment, and it mentioned the same matter, the introduction of the certified copy of the decree was harmless.

The commissioner being charged with the duty of having corrections made in surveys and field notes, corrections made in accordance with law and approved and adopted, in our opinion, constitute prima facie evidence of the fact. Whether or not such matter would be evidence as against rights vested at the time of such correction is not before us. The defendants in this case have shown no title, and have no right, except what rests upon bare possession—when taken is not shown—and we think it clear that as against defendants it was prima facie evidence.

We think we have disposed of all the assignments of error by what has been said. We observe that in the argument appellant claims that the testimony of Hodges and of Williams and the work done by them was too unreliable to serve to ascertain the boundaries of the survey in question, because of the variations used by them in running the lines. Inasmuch as there is no assignment of error, nor proposition in the brief pointing to this matter, we have no right and cannot be expected to investigate its merits.

The judgment is affirmed.

#### STATE v. TEXAS & N. O. R. CO.

(Court of Civil Appeals of Texas. Jan. 7, 1910.  
Rehearing Denied Jan. 27, 1910.)

#### 1. COMMERCE (§ 8\*)—POWER TO REGULATE—EXCLUSIVE OR CONCURRENT POWER.

The power of Congress to regulate interstate commerce is plenary and includes the power to prescribe the qualifications, duties, and liabilities of employees of railroads engaged in interstate commerce, and any legislation by Congress on the subject supersedes any state law on the same subject.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.\*]

#### 2. COMMERCE (§ 8\*)—POWER TO REGULATE—EXCLUSIVE OR CONCURRENT POWER.

Congress having passed an act (Act Cong. March 4, 1907, c. 2939, § 2, 34 Stat. 1416 [U. S. Comp. St. Supp. 1909, p. 1170]) prescribing the hours of labor of railroad telegraph operators engaged in interstate commerce, to take effect August 12, 1907, the Acts of the 30th Leg., c. 122, giving shorter hours, is not operative during the time intervening between the passage and the taking effect of the act of Congress.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 8.\*]

#### 3. COMMERCE (§ 58\*)—SUBJECTS OF REGULATION—RAILROADS—HOURS OF LABOR.

Acts 30th Leg. c. 122, which prescribes the hours of labor of railroad telegraph operators, and by its terms is applicable to all of such employees whether engaged in interstate or intrastate commerce, is void as being in conflict with Act Cong. March 4, 1907, c. 2939, § 2, 34 Stat. 1416 [U. S. Comp. St. Supp. 1909, p. 1170], upon the same subject though the act of the Legislature only lessens the hours of labor prescribed by the act of Congress.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 58.\*]

Error from District Court, Liberty County; L. B. Hightower, Judge.

Suit by the State of Texas against the Texas & New Orleans Railroad Company. From a judgment for defendant, plaintiff brings error. Affirmed.

H. B. Tucker and Marshall & Marshall, for plaintiff in error. Baker, Botts, Parker & Garwood, Stevens & Pickett, and Parker, Hefner & Orgain, for defendant in error.

PLEASANTS, C. J. This suit was brought by the state of Texas against the defendant in error to recover penalties for the alleged violation of the act of the 30th Legislature prescribing the length of time of continuous service of telegraph operators employed by railway companies (Acts 30th Leg. c. 122). The petition alleges facts showing 655 violations by the defendant of the provisions of the act of the Legislature above mentioned by which defendant, under the penalties prescribed by said act, became liable to plaintiff in the sum of \$65,500. The defendant answered by general demurrer and 11 special exceptions. These exceptions attack the petition on the ground that the legislative act under which the suit was brought is unconstitutional and void. The general demurrer and all of the special exceptions were sustained by the trial court, and plaintiff's suit dismissed. The material provisions of the act under which the suit was brought are as follows:

Sec. 1. That it shall be unlawful for any person, corporation or association operating a railroad within this state to permit any telegraph or telephone operator who spaces trains by the use of the telegraph or telephone under what is known and termed 'Block System,' defined as follows: Reporting trains to another office or offices, or to a

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

train dispatcher operating one or more trains under signals, and telegraph or telephone levermen who manipulate interlocking machines in railroad yards or on main tracks out on the lines connecting side tracks or switches, or train dispatchers in its service whose duties substantially, as hereinbefore set forth, pertain to the movement of cars, engines or trains on its railroad by the use of the telegraph or telephone in dispatching or reporting trains, or receiving or transmitting train orders as interpreted in this section, to be on duty for more than eight hours in any twenty-four consecutive hours; provided, that the provisions of this act shall not apply to railroad, telegraph or telephone operators at stations where the services of only one operator is needed.

"Sec. 2. And be it enacted, that any person, corporation or association that shall violate section 1 of this act shall pay a fine of one hundred dollars for each violation of this act.

"Sec. 3. It shall be unlawful for any railroad, telegraph or telephone operator to work more than eight hours in twenty-four consecutive hours at such occupation, and any such operator violating this section shall pay a fine in any sum not less than twenty-five dollars nor more than one hundred dollars; provided, that in case of an emergency any operator may remain on duty for an additional two hours.

"Sec. 4. And be it enacted, that the fine mentioned in section 2 of this act shall be recovered by an action of debt in the name of the state of Texas for the use of the state, who shall sue for it against such person, corporation or association violating this act, said suit to be instituted in any court in this state having appropriate jurisdiction."

One of the grounds upon which this act was held void by the trial court is that the Congress of the United States, acting under power conferred upon it by section 8 of article 1 of the federal Constitution, has passed an act (Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 [U. S. Comp. St. Supp. 1909, p. 1170]) prescribing the time of continuous service of all telegraph operators employed by railway companies engaged in interstate transportation, and the act of the Legislature being in conflict with the provisions of said act of Congress is obnoxious to that portion of article 6 of the Constitution of the United States which provides that: "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

The act of Congress above mentioned contains the following provisions: "That no op-

erator, train dispatcher, or other employe who by the use of the telegraph or telephone dispatches, reports, transmits, receives or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

The conflict in the provisions of the two acts is apparent and both acts cannot be valid and operative as to telegraph operators employed by railroad companies engaged in interstate transportation when such operators are employed in such transportation service. It is well settled that the power of Congress to regulate interstate commerce under the provisions of the Constitution before mentioned is plenary and includes the power to prescribe the qualifications, duties, and liabilities of employes of railway companies engaged in interstate commerce, and any legislation by Congress on such subject supersedes any state law upon the same subject. *Ry. Co. v. Alabama*, 128 U. S. 99, 9 Sup. Ct. 28, 32 L. Ed. 352; *Howard v. Ry. Co.*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. The constitutional right of Congress to legislate upon this subject having been exercised by that body, the right of the state to invade this field of legislation ceased, or, at all events, no act of a state Legislature in conflict with the act of Congress upon the same subject can be held valid. The Supreme Courts of Missouri and Wisconsin, in passing upon the validity of statute of said states similar to the act we are considering, hold such statutes void upon the ground of conflict with the act of Congress before mentioned. *State v. Mo. Pac. Ry. Co.*, 212 Mo. 658, 111 S. W. 500; *State v. C., M. & St. P. Ry. Co.*, 136 Wis. 407, 117 N. W. 686, 19 L. R. A. (N. S.) 326. The act of the state Legislature under which this suit was brought was approved April 16, 1907, and took effect August 12, 1907. The act of Congress before mentioned was passed March 4, 1907, but contains a provision that it should take effect one year after its passage. We do not think the act of the state Legislature can be held operative during the time intervening between the passage and the taking effect of the act of Congress.

In discussing this question the Missouri court, in the case above cited, say: "We must construe the federal act by reading into its dry letter its manifest spirit and purpose. Its dry letter reads that it shall not go into effect for one year. What was the meaning

of—the object to be subserved by—that suspension of the operation of the law? What, except to preserve the equities of the situation by impliedly giving common carriers engaged in interstate commerce one year in which to get a supply of experienced telegraph and telephone operators and trainmen to carry on their business without interruption and hindrance, and otherwise adjust their business affairs to the shorter hours required by that act? When broadly judged, the federal law must be construed as a notice (in the nature of a caveat) to all state Legislatures, first, that Congress has occupied the ground by its statutory regulations; second, that in its high wisdom it has prescribed and marked out a transition or preparatory period of one year [a sort of truce period]. Now, with such broad and wise purposes read into the federal act, shall any state Legislature thereafter sit and say, in effect: ‘We deem it too long and too liberal?’ Shall it say, in effect: ‘We see you have suspended your act for one whole year; we find by mathematical computation there is left six months or so, which we may cover by a state law, and accordingly we shall pass a law giving shorter hours than yours, that will be good, at least from June 14, 1907, until March 4, 1908?’ If the one law grants, by necessary implication, a breathing spell, shall the other take it away? If the one chalks out a policy, may the other rub it out? In our opinion, the comity that shall exist between state and federal legislative power prohibits our taking that ungracious and narrow view. Whether the federal act is constitutional or not, we may not decide. Such prerogative is lodged elsewhere. With the wisdom of federal exercise of police power in the matter in hand, we have nothing whatever to do; that is a matter for Congress. It is sufficient for us to know that uniformity in police regulations, involving interstate commerce, seem, in the last few years, under the pressure of current events, to have called for federal legislation—a sample of which is the automatic coupling act, lately under review in *Johnson v. Railroad*, 196 U. S. 1 [25 Sup. Ct. 158, 49 L. Ed. 363]; *Schlemmer v. Railroad*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681.]”

The contention of appellant that the legislative act is not void because it only lessens the hours of labor prescribed by the act of Congress and therefore is not in conflict with the act, the main purpose of which is to prevent the employment of telegraph operators by railway companies for a longer time than nine hours, is not sound. The act of the Legislature makes unlawful that which is not prohibited by the act of Congress pertaining to the same subject-matter, and this the state Legislature cannot do. If it be possible for the state to prescribe rules of employment for those engaged in railroad transportation, which would only effect such

employés when engaged in intrastate business, the act in question does not attempt to make this distinction, but by its terms is applicable to all railroads and railroad employes of the class mentioned, irrespective of the character of the commerce in which they may be engaged.

The opinion in the *Wisconsin* case, *supra*, fully discusses this question, and the reasoning of the opinion is, we think, unanswerable. We quote from that opinion as follows:

“The further contention is made by the respondent that, even if it be beyond the power of the state to restrict the services of an operator engaged in moving interstate trains, it is competent to so restrict as to one engaged exclusively upon trains or business wholly within the state, and that the law may be so construed as so limited, and its validity as so limited be sustained. The principle invoked is, doubtless, sound, if it is reasonably possible to separate the permissible from the forbidden, and to believe that the Legislature intended by the act to effect the one and omit the other. On this subject, the *Employers’ Liability Cases*, 207 U. S. 463 [28 Sup. Ct. 141, 52 L. Ed. 297], are entirely germane and controlling. It is there pointed out that by its terms the act is aimed simply at the employer, and makes no distinction in denunciation of his acts, whether they be done in interstate or intrastate business, so that it in terms regulates purely domestic acts and transactions. Chapter 575, p. 1188, *Laws 1907*, is even more objectionable in this regard than the employers’ liability act, for it in terms is directed to every corporation operating a line of railroad, in whole or in part in the state of Wisconsin, thus expressly including those who are engaged in interstate commerce. But it is also open to the other objection, held to be fatal, that it restricts the employment of all operators without discrimination as to the character of their services. This alone, under the reasoning of the employers’ liability act, must condemn the state act, for it is matter of common knowledge, and is set up as a fact by the answer, that any operator who works upon trains or transportation wholly within the state also necessarily at the same time works upon interstate trains and transportation. The state Legislature has in terms undertaken to restrict hours of work of employés engaged in safeguarding and conducting interstate commerce, as well as domestic; and, controlled as we must be by the decision of the federal Supreme Court, we cannot impart a meaning contradictory to the express words. Neither can we feel any certainty that the generality of the restriction was not an essential element in the entire legislative scheme, so that we might believe the Legislature would have imposed upon domestic commerce, or on employés exclusively engaged therein, burdens not also resting on entirely similar acts of

employés involving interstate trains or commerce.

"Apart, however, from the controlling effect of the reasons urged in the Employers' Liability Cases, and in addition thereto, we think the impracticability, if not impossibility, of limiting hours of work devoted to domestic commerce alone is so obvious as to preclude belief in any such legislative purpose. That impracticability is largely shown by facts alleged in the answer, but also by facts which are matter of common knowledge. The direction and dispatching of every train on an interstate railway necessarily involves knowledge in the train dispatcher of all other trains which are in the same vicinity at the same time, and also ability to control such other trains. An interstate train from Milwaukee to Chicago cannot be safely forwarded if, under the direction of a separate employé, a local train may be moving between Milwaukee and Racine, over the same track at the same time, or nearly so. The very switching at local stations must be within the knowledge and under the control of him who is to decide upon and direct the most important of interstate transportation. Obviously, diversion of authority over these subjects would be fraught with great perils and delays to both kinds of transportation. Hardly any act of a train dispatcher on a busy railroad can be conceived which does not affect both interstate and domestic commerce. He cannot move or stop the most distinctively local train without affecting the interstate train, or vice versa. No extra or special can be put on the division without adjustment of other trains. Of course, also, every interstate train carries some purely intrastate freight or passengers. Many purely domestic trains carry some freight or passengers in transit to extrastate destination. It would seem that any severance of control over state from interstate trains involves so much of confusion and probability of danger, and its possibility even is so doubtful and experimental, that no Legislature would absolutely precipitate it without careful consideration nor without providing in the act for the event of the failure of such experiments. For this reason, as well, we are convinced that the legislative words include the regulation of services of all operators, and would in no wise be satisfied, even in part, by a restriction to those whose acts affect only domestic commerce, if, indeed, there are any such."

In our opinion the trial court correctly held that the act under which this suit was brought is void upon the ground above stated, and plaintiff's suit was properly dismissed. This conclusion renders a discussion of the other questions presented by the record unnecessary. It follows that the judgment of the court below should be affirmed, and it has been so ordered.

**Affirmed.**

**BEAUMONT TRACTION CO. v. TEXARKANA & FT. S. RY. CO.**

(Court of Civil Appeals of Texas. Nov. 19, 1908. On Motion for Rehearing, Jan. 6, 1910.)

**1. CONTRACTS (§ 58\*)—CONSIDERATION.**

Where the construction of a street car track over the tracks of a railroad company created a common danger, imposing an obligation of care on both the railroad and street railway companies, a contract between them that, when the city required a watchman, extra guard, lights, or gates, the expense of maintaining them should be equally divided between the railroad company and the street car company, was based on a sufficient consideration.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 58.\*]

**2. CONTRACTS (§ 98\*)—PARTIAL INVALIDITY.**

The invalidity of a portion of a written contract between a railroad company and a street car company, by which the latter was granted permission to cross the tracks of the railroad, would not vitiate a portion of the contract providing for the division of the cost of maintaining necessary lights and safety appliances.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 98.\*]

**3. STREET RAILROADS (§ 51\*)—CONSOLIDATION—LIABILITIES.**

Where defendant street car company, on taking over all the property and franchises of a prior company, except its right to be a corporation, undertook to assume all the debts of the company consolidated, it rendered itself liable under a contract of such company with the railroad company providing for the division of the cost of maintaining lights at a crossing of the street car tracks over the tracks of the railroad.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 128, 129; Dec. Dig. § 51.\*]

Appeal from Jefferson County Court; James A. Harrison, Judge.

Action by the Texarkana & Ft. Smith Railway Company against the Beaumont Traction Company. Judgment for plaintiff, and defendant appeals. **Affirmed.**

For answers to certified questions by the Supreme Court, see 123 S. W. 124.

Crook, Da Ponte & Lawhon, for appellant. Hiram Glass and Robertson & Whitaker, for appellee.

**McMEANS, J.** Appellee, Texarkana & Ft. Smith Railway Company, plaintiff below, sued the appellant, Beaumont Traction Company, defendant, to recover one-half of the cost of maintaining electric lights at four certain street crossings in the city of Beaumont, where the railway lines of the parties intersected, which lights were so maintained by appellee by requirement of the city of Beaumont. Plaintiff alleged that the liability of the defendant for said one-half arose by virtue of two certain contracts, the first between plaintiff and the Beaumont Street Railway Company, the obligations of which, plaintiff alleged, were assumed by defendant, and the second between plaintiff and defendant, by which contracts it al-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

leged defendant and its predecessor, the Beaumont Street Railway Company, obligated themselves, among other things, to pay one-half the costs and expense of the lights which the city authorities of Beaumont might require to be maintained at any of the street crossings where the lines of the parties intersected. Defendant answered by general denial, and specially pleaded that at the time and before the making of the contracts the Beaumont Street Railway Company and the Beaumont Traction Company had each been granted a franchise by the city of Beaumont to build lines of street railway upon the streets and street crossings mentioned in the contracts sued on, and thereby acquired the right to do so, and that appellee, which had nothing more than a franchise or easement to construct its tracks at those places, could not impose terms on the street railway companies as a condition of giving its assent to the crossing of its tracks in the streets of the city, and there was therefore no consideration for the contracts. Plaintiff, by way of replication to defendant's plea of want of consideration, alleged that the contract entered into between it and the Beaumont Street Railway Company had been the basis of a suit between them brought for its enforcement in the district court of Jefferson county, and that therein said contract had been upheld and its validity established, whereby this issue was *res judicata*. To this plea defendant interposed a special exception, which was overruled. A trial before the judge without a jury resulted in a finding and judgment in favor of plaintiff for the amount sued for, and from this judgment the defendant has perfected this appeal.

The evidence contained in the record warrants the following findings of fact: The city of Beaumont is, and prior to the granting of the franchises hereinafter referred to was, a municipal corporation existing by virtue of a special charter granted by the Legislature of Texas, and as such had and has the exclusive control over its streets. The city of Beaumont having granted to the Texarkana & Fort Smith Railway Company an easement for a line of railway over certain of its streets, in pursuance of which the railway company constructed its railroad, thereafter granted to the Beaumont Street Railway Company a franchise to construct and operate a line of street railway over certain streets, and over street crossings at the intersection of College street and Railroad avenue, Washington street and Pearl street, and Washington street and Sabine street, and likewise granted to the Beaumont Traction Company a franchise to construct its line of street railway over certain streets and over crossing at the intersection of Park street and Railroad avenue. The railroad company laid its track upon the streets at the intersections above named by virtue of the franchise granted to it by the

city of Beaumont, and owned no interest in the fee, or other right, save its franchise to lay its tracks upon the streets and run its cars over them. On July 11, 1902, the railroad company and the Beaumont Street Railway Company entered into a contract, which recites that the latter is engaged in the construction of a line of street railway on certain streets in the city of Beaumont and desires to construct said line on certain streets and across the line of railway of appellee at the intersection of College street and Railroad avenue, Washington and Pearl streets, and Washington and Sabine streets, "and desires to obtain the consent of the party of the first part (appellee) to such construction. \* \* \* Now, therefore, in consideration of the \* \* \* faithful performance by the party of the second part (appellant) of the terms, provisions, and stipulations herein set forth, it is hereby agreed \* \* \* that the said party of the first part has granted and does hereby grant unto the party of the second part, upon the conditions hereinafter set forth, the right and privilege to construct, maintain, and operate a single track electric railway across the line of railroad of the party of the first part at the street intersections as above set out." The contract then goes on to provide for the construction of the crossing by appellant at its own expense, and prescribed many details and imposes many obligations on the street railway company. Paragraph 8 provides: "It is further understood and agreed that, should at any time the city authorities of the city of Beaumont require that a watchman, extra guard, lights, or gates be maintained at any of the crossings so erected by the party of the second part, over the lines of the party of the first part, it is agreed that the party of the first part shall put in such extra guards, lights, or gates and employ such watchman or watchmen, and one-half the expense incurred by reason thereof shall be chargeable against the party of the second part, and party of the second part hereby agrees to pay the same." On April 20, 1903, the railroad company and the traction company entered into contract which is practically in the same words and to the same effect as that between the railroad company and the street railway company, except that it relates to and covers the crossing at Park street and Railroad avenue only.

The Beaumont Street Railway Company and the Beaumont Traction Company are distinct corporations, each having its own charters, and at the date of the contracts and time of trial were carriers of passengers in the city of Beaumont, and the said crossings were desired to be made in building the street railway lines under their franchises, and in laying tracks across the track of appellee's railroad at said street intersections they were acting under and in accordance with their respective franchises. No exclusive

franchise was granted or attempted to be granted by the city of Beaumont to the railroad company over said streets or street crossings. On the 12th day of February, 1903, the Beaumont Street Railway Company sold to the Beaumont Traction Company its property of every kind, including the franchise granted to it by the city of Beaumont, excepting only its franchise to be a corporation, for the consideration, as stated in the bill of sale, of 3,000 fully paid and non-assessable shares of the capital stock of the Beaumont Traction Company, and, "in further consideration and as a part of the purchase price of the property hereinafter conveyed, the said Beaumont Traction Company shall assume and pay all the debts of said Beaumont Street Railway Company, secured or unsecured, outstanding and existing at this date. \* \* \*" On February 19, 1904, the railroad company, in conformity to the requirements of the city of Beaumont, installed, and ever since has maintained, lights at the four crossings mentioned, and at the date of the trial had paid therefor the sum of \$1,449.08, one-half of which with 6 per cent. interest amounted to \$816.78, for which judgment was rendered. On September 23, 1902, in a suit brought by the railroad company against the Beaumont Street Railway Company to enjoin it from constructing crossings in disregard of their contract, judgment was rendered upholding and establishing the validity of the contract between the parties of date July 11, 1902.

By its first and second assignments of error appellant complains that the judgment against it is contrary to the law and the evidence, in that the undisputed proof showed that the street railway companies had valid franchises from the city to construct their tracks at street crossings where their lines intersected that of appellee railroad company, and that appellee had nothing more than an easement to lay its tracks at said street intersections, and that the undisputed proof showed that the only advantage obtained by appellant by the contract was the consent of the railroad company for the street railway companies to cross its track at said points, which they already had the right to do by virtue of their franchises, and that there was therefore absolutely no consideration to support the contracts, and the court erred in rendering judgment thereon against appellant.

The city of Beaumont under its charter powers had the exclusive control of its streets, and had the right, in order to facilitate travel over them and to more completely carry out the purpose for which the use of streets was designed, to grant the franchises, which it did, to the Beaumont Street Railway Company and to appellant, and if in constructing their lines of street railway along the route authorized by the franchises it became necessary to cross the tracks of the appellee railroad company, which had

laid its tracks upon the street pursuant to a like grant from the city without any ownership or right in the fee, they had the right to do so without payment of any compensation therefor. The right to the use of the streets was acquired by the railroad company subject to the right of the city to thereafter grant to other railroads the right to use the streets and to cross its tracks, and any injury, damage, or inconvenience it sustained thereby is *damnum absque injuria*. In *T. & P. Railway Co. v. Rosedale St. Ry. Co.*, 64 Tex. 80, 53 Am. Rep. 759, a railroad company which owned in an incorporated town a yard, sidings, and track through which ran a public street sought to enjoin a street railway company which had obtained the consent of the city to the construction of its railway on that street from building its line thereon. It was there held: "Streets are acquired, established, and maintained for the accommodation and convenience of the inhabitants and general public, and may be used for the public by ordinary modes of conveyance operated upon such streets, the chief of which in this case was the street railway. Railroad companies have not the exclusive right to a public crossing, but are restricted by public convenience and necessity." In *Elizabethtown, etc., Ry. Co. v. Ashland, etc., Street Railway Co.*, 96 Ky. 347, 26 S. W. 181, it is held: "When a railroad company has obtained the right to pass over a turnpike by the permission of those controlling the road, the right thus acquired is not exclusive of the rights of the public, or of such uses and purposes as those for which public highways and streets are established, among which uses are the establishment and operation of street railways. Therefore the railroad company has no such property rights in the crossing as entitled it to compensation from a street railway company crossing its track at that point. \* \* \*" In *Chicago, B. & Q. Ry. Co. v. Steel*, 47 Neb. 741, 66 N. W. 830, the Supreme Court of Nebraska held that: "A railroad company which has by ordinance acquired a permanent easement in the streets of a city is not entitled to compensation from a street railway company as a condition to the crossing of its tracks by the latter under a grant of power from the city." After citing many authorities upon which the above conclusion is based, the opinion closes with the following: "The doctrine of the cases cited, and which to us appear altogether reasonable and sound, is that a railroad company acquires no exclusive use of streets crossed by its tracks with the consent of the city or other municipal body, but must enjoy the right so conferred in common with the general public; that it is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interests and necessities; and that any mere inconvenience suffered by it on account of

the crossing of its lines by the tracks of street railways by permission of the proper authorities is *damnum absque injuria*." In *S. E. & St. L. Ry. Co. v. Evansville & Mt. V. E. Ry. Co.*, 169 Ind. 343, 82 N. E. 767, 13 L. R. A. (N. S.) 916, it is held: " \* \* \*

The owners of a steam railroad are not entitled to recover compensation for the crossing of its track at a public highway intersection by an electric interurban road built upon such highway with the consent of the board of commissioners of the county, nor can such crossing be enjoined until compensation therefor shall have been assessed and paid or tendered." And upon this point numerous authorities are cited. To the same effect is the case of *Southern Ry. Co. v. Atlanta R. T. Co.*, 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125. In that case the railroad sought to enjoin the street railway company from constructing its line across the railroad at a public thoroughfare without first making compensation for the damages which would result therefrom. It was shown that the street railway company had obtained from the proper authorities the right to lay its track on the public way, and it was held that this it could do without compensating the railroad company in any way. In the concluding paragraph of the opinion it is said: "But in the present case we fail to see that the defendants have invaded, or were seeking to invade, any legal right of plaintiff. As above indicated, when plaintiff was permitted to construct its tracks across an existing street or public road, it did so subject to the condition that it must submit to the increased inconvenience to it which might result from the growth and development of travel in the usual methods along such street or road. It acquired only an easement; that is, a privilege of crossing this street. It may be that the crossing of defendants' tracks over this street will cause inconvenience to plaintiff, but, as we have above demonstrated, this use thereof by the defendant, instead of constituting any burden or servitude upon them, is intended for the convenience and benefit of the traveling public. \* \* \*" When plaintiff, therefore, obtained its license to cross these highways, it necessarily took the same subject to any increased inconvenience which might arise by reason of the demands or the wants of the public for greater facilities of traveling. We are at a loss, therefore, to see how any legal right of property of the plaintiff will be invaded, or in any wise affected, by the exercise of the rights and franchises which the street railway companies are attempting to use in the present instance. It follows from the above that no legal right of plaintiff has been encroached upon, and none of its property has either been taken or threatened to be taken or damaged in contemplation of law. The companies, therefore, owning and operating street railways of the character above in-

dicated may, under permission of the proper municipal or county authorities, construct their lines across the track of plaintiff, and use the same, without instituting condemnation proceedings, or being required to pay damages.

It follows, therefore, that, inasmuch as the street railway companies had the right under the franchises granted to them by the city of Beaumont to construct their respective lines upon its streets and upon the street crossings where the appellee's railroad was intersected without compensating the railroad company therefor, the contracts made by them with the railroad company assuming burdens to be discharged upon the happening of a future contingency, such as in this case for instance, the payment of half of the expense of maintaining lights at the crossings in case such requirement should be exacted of the railroad company by the city of Beaumont as a condition upon which the railroad company would consent to the crossing of its tracks by the tracks of the street railway, were wholly without consideration and voidable at the suit of the street railway companies.

Appellee contends, however, that this case falls within the rules applicable to compromise of differences, and has cited several cases where contracts of that kind have been upheld. In all of those cases the parties on one side in good faith asserted claims which the others in equal good faith denied. While some of the authorities go so far as to hold that "an agreement entered into upon a supposition of a right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for the right must be on one side or the other, and therefore the compromise of a doubtful right is sufficient foundation for an agreement," others, which we think more applicable to the facts of this case, hold that to be binding the contract must be for the settlement of a right asserted in good faith; and the Supreme Court of this state has held that such a contract must be in respect of a well-founded claim, and there must be also some person liable to suit therefor. *Von Brandenstein v. Ebensberger*, 71 Tex. 269, 9 S. W. 153; 1 *Parsons on Cont.* 462 et seq.; 1 *Chitty on Cont.* 35 et seq.; 9 *Cyc.* 341 et seq. However that may be, the written contracts sued on are unambiguous and contain within themselves all the terms and provisions and all the considerations that induced their making. There is nothing in the pleading or evidence tending to establish a compromise of a dispute. The recitals in the contracts show nothing more than a case where the street railway companies desired to construct and operate their lines of street railway across the line of the railroad company at certain street intersections, and in consideration of the consent thereto by the railroad company, which it had no right to

withhold, they agreed to many onerous terms and conditions for which they received nothing in return except the consent by the railroad company that such crossings might be made. It is not shown in the contracts nor alleged in the pleadings that the street railways did not have the right to cross independent of the contract. The assignments are sustained.

Appellant by its third assignment complains that the judgment against it for half the costs of maintaining lights at the three street intersections mentioned in the contract between appellee and the Beaumont Street Railway Company is contrary to the law and the evidence, in that the evidence showed that the contract between appellee and said street railway company was never in any way adopted by, nor did it ever become binding on, appellant, and that there is no evidence showing that appellant is in any way bound by said contract or under obligations to carry it out. The fact that appellant bought the property and assets of the Beaumont Street Railway Company at a voluntary sale for a valuable consideration did not make it liable on that company's contracts in the absence of an agreement on appellant's part to carry them out or assume liability thereon. The only consideration for the purchase was the 3,000 shares of stock of the traction company, and its agreement to "assume and pay all of the debts of the said Beaumont Street Railway Company, secured or unsecured, outstanding and existing at this date." The date of the sale was February 12, 1903, and the lights were installed February 19, 1904. It was not shown that the street railway company after the sale was insolvent or that it was not a going concern. Certainly the assumption by the traction company of the debts of the street railway company existing at the date of the sale cannot be construed as an assumption of obligations that might in certain contingencies arise in the future. The word "debt" has often been judicially defined, but in no case that we have examined has the definition been so broad as to embrace such contingent future liability. But, even if the word could be so construed, such construction could not affect our decision, because by the very terms of the contract the debts assumed were those existing at the date of the sale. If the Beaumont Street Railway Company had the power to sell its franchise and property, it could not by a sale divest itself of its obligation upon the contract with appellee, but for its breach that company would be responsible. The appellant could only be held liable by its agreement to become so. *Dallas Consol. Traction Ry. Co. v. Maddox* (Civ. App.) 31 S. W. 702; *Eddy v. Hinnant*, 82 Tex. 353, 18 S. W. 562; *Railway v. Lyons* (Civ. App.) 34 S. W. 302; *Williams v. Railway Co.*, 22 Tex. Civ. App. 278, 55 S. W. 130. The assignment is sustained.

The fourth assignment of error is based on the refusal of the court to sustain defendant's special exception to the paragraph of the plaintiff's petition which sets up as res judicata the judgment rendered in its suit against the Beaumont Street Railway Company, establishing the validity of the contract of July 11, 1902. As before stated, the Beaumont Street Railway Company and the Beaumont Traction Company are distinct corporations. The latter was not a party to that suit. As it was not shown that the traction company was liable on the contract made by the street railway company with the appellee, the judgment establishing the validity of said contract was not res judicata as to the defenses pleaded by the appellant. Further, in that suit the want of consideration was not pleaded, and was not an issue which the judgment settled. *Moore v. Snowball*, 98 Tex. 25, 81 S. W. 5, 66 L. R. A. 745, 107 Am. St. Rep. 596. The special exception should have been sustained.

The judgment of the court below will be reversed; and, it appearing that under the pleading and proof no judgment other than one in favor of appellant should have been rendered, this court will here render such judgment as should have been rendered in the lower court. It is therefore ordered that the appellee, the Texarkana & Ft. Smith Railway Company, take nothing by its said suit, and that the appellant, the Beaumont Traction Company, go hence without day, and that it recover of appellee all costs incurred in the court below as well as in this court.

Reversed and rendered.

#### On Motion for Rehearing.

Pending the motion for rehearing we certified to our Supreme Court the following questions:

"(1) Was the agreement of the Beaumont Street Railway Company and the Beaumont Traction Company to pay one-half the cost of installing and maintaining the lights, as mentioned in said contract, supported by a valid consideration?

"(2) Under the contract of sale from the Beaumont Street Railway Company to the Beaumont Traction Company, can the latter be held liable upon the obligation of the former to pay one-half the cost of installing and maintaining the lights?"

Both these questions were answered by the Supreme Court in the affirmative in its opinion delivered December 15, 1909, not yet officially published (123 S. W. 124). The answers are opposite to the conclusions reached by this court, and require that the appellee's motion for a rehearing be granted, and that our former order reversing the judgment of the court below and rendering judgment for appellant be set aside.

We now conclude that the judgment of the court below should be affirmed, and it is

so ordered. The error of the court below in refusing to sustain defendant's special exception to the paragraph of plaintiff's petition which set up as *res judicata* the judgment of the district court rendered in the suit of defendant against the Beaumont Street Railway Company becomes immaterial in view of the opinion of the Supreme Court above referred to, and does not warrant a reversal.

### ELLIOTT v. WAITES & WILKIE et al.

(Court of Civil Appeals of Texas. Jan. 1, 1910.  
Rehearing Denied Feb. 3, 1910.)

#### 1. APPEAL AND ERROR (§ 569\*)—STATEMENT OF FACTS—SIGNING AND APPROVAL—NECESSITY.

A purported statement of facts not signed by any one, or approved by the trial court, cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2530, 2531; Dec. Dig. § 569.\*]

#### 2. APPEAL AND ERROR (§ 548\*)—STATEMENT OF FACTS—EFFECT OF ABSENCE.

In absence of a statement of facts, the Court of Civil Appeals can only consider the pleadings, findings, and judgment, and cannot consider any error depending upon the sufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433, 2434; Dec. Dig. § 548.\*]

#### 3. MECHANICS' LIENS (§ 99\*)—RIGHT OF MATERIALMAN—CONTRACT OF OWNER.

A statement by the owner that he would pay all bills and requesting a materialman to continue delivering material will not support a claim for a lien for materials furnished to the contractors before such statement was made.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 132; Dec. Dig. § 99.\*]

#### 4. APPEAL AND ERROR (§ 548\*)—REVIEW—PRESUMPTIONS—JUDGMENT—CONTRARY TO FINDINGS.

In an action against the owner to recover for lumber sold the contractor, and to foreclose a lien for materials, the jury found that certain payments were made by the owner after the contractors became insolvent, and that the owner had notice of the plaintiff's claim, and further found that the contractors became insolvent before the building was completed, and were unable to carry out their contract, and that the owner made advances to them to procure materials to complete it. The trial court entered judgment against the owners for a certain sum, awarding it to plaintiffs and other claimants. *Held*, in absence of a statement of facts, it could not be said on appeal that the judgment for plaintiff for only a part of his claim was against the findings, as it could not be determined what amounts were paid to the contractors after their insolvency, or under what circumstances the payments were made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433, 2434; Dec. Dig. § 548.\*]

Appeal from District Court, Dallas County; J. C. Roberts, Judge.

Action by J. T. Elliott against Waites & Wilkie and another. From a judgment in part for plaintiff, he appeals. Affirmed.

W. A. Kemp, for appellant. Saner & Saner, Don Robinson, and Chilton & Chilton, for appellees.

RAINEY, C. J. Appellant, a lumber dealer, brought this suit against Waites & Wilkie and the Chase Furniture & Coffin Company to recover for lumber and material sold Waites & Wilkie, contractors, which was used by them in constructing a building for the Chase Furniture & Coffin Company and to foreclose a materialman's lien on said building for the amount of his account, alleged to be \$4,617.40. Wilkie was not served, and the suit was dismissed as to him. Waites pleaded that the firm of Waites & Co. had been adjudged a bankrupt. The Chase Furniture & Coffin Company answered by general denial, and specially, in effect, that Waites & Wilkie contracted to have said building completed by February 15, 1906; that Elliott furnished said lumber knowing of said contract; that he failed to furnish and deliver lumber as rapidly as needed as the building progressed, and after January 15, 1906, failed and refused to make further delivery by which the construction of said building was delayed, and said company was compelled to purchase lumber elsewhere to complete said building and prayed that the lien be declared null and void; also pleaded certain credits. It further plead that Waites & Wilkie broke and repudiated their contract to complete said building and to complete same said company had to pay out large sums of money to complete the construction of same, that other parties had given notice of liens, and that, if it was held to be due Waites & Wilkie anything, it was willing to pay what was owing. The National Surety Company, bondmen of the contractors, W. Illingsworth, and H. H. Thornhill & Co. were made parties. Special issues were submitted, and upon the return of the jury's findings the court rendered judgment against the Chase Furniture & Coffin Company for \$2,820, prorating said amount between appellant Illingsworth and Thornhill & Co., foreclosing their liens, and that the other parties go hence with their costs. Elliott alone appeals.

The case is here without a statement of facts. The plaintiff filed what purports to be a statement of facts, but it is not signed by any one nor is there an approval by the court. The appellee objects to its consideration, and, of course, it cannot be done. Without a statement of facts we cannot consider any error as not being supported by the evidence. We can only look to the pleadings, findings of the jury, and judgment. The appellant urges that the judgment is contrary to the findings of the jury, in that the jury found that on the 12th day of April, 1906, the Chase Furniture & Coffin Company stated to him that it had plenty of money to pay

all bills, and requested him to go on in delivering material. The plaintiff's case is based upon a claim made prior to that time, and not upon said statement. There is nothing to show that Elliott furnished any material on the faith of said statement, and no recovery can be had on that statement.

The jury also found that the payments made by the Chase Furniture & Coffin Company prior to May 7, 1906, were made to Waites & Wilkie, the contractors, and, as the jury had found that notice of Elliott's claim had been given, the appellant urges that judgment should have been for the full amount claimed by him. We do not think said finding, in view of the other findings and the judgment of the court, is sufficient in the absence of a statement of facts to show error. There are other findings of the jury to the effect that Waites & Wilkie became insolvent before the building was completed and unable to carry out the original contract, and, in order to finish it, it became necessary for the Chase Furniture & Coffin Company to make advancements for material and work. We cannot tell what amount was paid to Waites & Wilkie after they became insolvent, nor under what circumstances it was paid. The evidence on the trial may have shown that the payments to Waites & Wilkie were made to settle bills contracted for work and material actually necessary to complete the building and for which the Chase Furniture & Coffin Company had become liable in order to secure the completion of the building, after Waites & Wilkie had become insolvent.

In the absence of a statement of facts, we cannot say that the judgment of the court is contrary to the findings of the jury; and the judgment is affirmed.

#### MISSOURI, K. & T. RY. CO. OF TEXAS v. BYRD.

(Court of Civil Appeals of Texas. Jan. 20, 1910. Rehearing Denied Feb. 10, 1910.)

#### 1. RAILROADS (§ 421\*)—INJURIES TO ANIMALS ON OR NEAR TRACKS—ACTIONS—PROXIMATE CAUSE OF INJURY.

Although a mare was running at large in violation of a city ordinance and a trespasser on a railroad track, if the negligence of the railroad company's employes was the proximate cause of her death, the company is liable for her value.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1510; Dec. Dig. § 421.\*]

#### 2. RAILROADS (§ 410\*)—INJURIES TO ANIMALS ON OR NEAR TRACKS—INJURY AVOIDABLE BY EXERCISE OF ORDINARY CARE.

Where a mare was unlawfully at large and a trespasser on defendant's railroad track, it was not the duty of those operating defendant's train to keep a lookout for her; but, if those in charge of the train did discover her and could by the exercise of ordinary care have avoided

injuring her, the railroad company is liable for her injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1489-1500; Dec. Dig. § 419.\*]

#### 3. RAILROADS (§ 443\*)—INJURIES TO ANIMALS ON OR NEAR TRACKS—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for the death of a mare struck by defendant's train, evidence held to sustain a finding that the negligence of defendant's employes in running the train at a speed forbidden by an ordinance of the city where the injury occurred was the proximate cause of the death of the mare.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1608; Dec. Dig. § 443.\*]

Appeal from Hopkins County Court; F. W. Patterson, Judge.

Action by D. H. Byrd against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

Coke, Miller & Coke and L. L. Wood, for appellant. J. M. Melson, for appellee.

WILLSON, C. J. A mare belonging to appellee was struck and thereby killed by one of appellant's trains while same was being operated at a point within the corporate limits of the town of Sulphur Springs where appellant was not required to fence and had not fenced its track. An ordinance of that town in force at the time declared it to be unlawful for horses, etc., to run at large within its limits; and another ordinance, also in force at the time, declared it to be an offense punishable by a fine for any engineer or other person to "run a steam engine on any railroad within the city limits at a greater rate of speed than six miles per hour." The animal had escaped from appellee's inclosure, and at the time she was killed was running at large on appellant's track. The court found that the animal was running at large without appellee's knowledge or consent and without fault on his part, and therefore not in violation of said ordinance, and further found that she was killed as a result of negligence on the part of appellant in running its train in violation of said ordinance at a rate of speed in excess of six miles per hour, and concluded as a matter of law that appellant was liable to appellee for the value of the animal. The judgment accordingly rendered is attacked by appellant on the grounds (1) that the court's finding that the animal was not running at large in violation of the ordinance was erroneous; and (2) that his finding that the animal was killed as the result of appellant's negligence was not supported by the evidence. The finding that the animal was not running at large in violation of the ordinance, though it may have been erroneous, would not require a reversal of the judgment, if the court's finding that the death of the animal was proximately caused by negli-

gence on the part of appellant can be said to have been authorized by the evidence; for, although the animal may have been at large, and a trespasser on appellant's track in violation of the ordinance, if appellant's negligence was the proximate cause of her death, it would be liable to appellee for her value. *Railway Co. v. Cocke*, 64 Tex. 154; *Railway Co. v. Tolbert*, 100 Tex. 483, 101 S. W. 208. If the animal was unlawfully at large, it was not appellant's duty in operating its trains to keep a lookout for her, and, if her position on its track had not been discovered by its servants at all or in time by the use of ordinary care to avoid injuring her, and she had been killed, it would not be liable. *Railway Co. v. Russell*, 43 S. W. 576; *Railway Co. v. Nichols*, 39 S. W. 954. But, notwithstanding she may have been unlawfully at large, if appellant's employees in charge of its train discovered her on its track, and, after discovering her, in operating its train by the exercise of ordinary care could have avoided injuring her, and she was killed because it failed to exercise such care, it would be liable. From the evidence in the record it seems that at the time the animal was killed the train was approaching the depot in Sulphur Springs from the west, and had crossed League street going east. North of League street about 24 feet from appellant's track were its stockpens. Appellant's witness, Gray, the fireman on the engine at the time, testified that the animal ran out from the east side of the stockpens and "jumped on the track right in front of the engine. \* \* \* When that animal first got on the track, it was about 35 or 40 feet from the engine. When I first noticed that animal, it was coming across the side track which is next to the stockpen. I hollered at the engineer to look out when I saw the animal coming onto the main track, and the engineer immediately blew the whistle and applied the brakes at about the same time, and the engine came almost to a standstill, but did not exactly stop, and then I hollered at the engineer, 'All right!' and he went ahead, and I told him that he had killed a mule, and I thought it was a mule at that time." The animal was killed about 12 o'clock at night. Appellee testified that on the next morning after she was killed he found her tracks showing she had gone upon appellant's track at a point directly opposite the west, instead of the east, corner of the stockpens, as testified to by the fireman. Appellee further testified: "I could see the mare's tracks on the railroad, and it seemed that she was run about 100 feet; that is, from the appearance of the track, and it seemed from the tracks that she was running east. \* \* \* I tracked her to where the engine struck her, and it was 12 feet from the west corner of the stockpen, and they run her about 100 feet before they hit

her." Neither the engineer nor the fireman in charge of the locomotive of the train undertook to say how fast it was running. Another witness, however, testified that it was moving at the rate of 10 or 12 miles per hour, adding: "I don't think the speed of the train exceeded 10 miles per hour." The evidence we have referred to was sufficient to support findings by the trial court that the mare got upon the track at a point 35 or 40 feet in front of the approaching train; that the fireman saw her as she ran upon the track; that after getting upon the track she ran east on same, ahead of the train, a distance of 100 feet before the locomotive struck and killed her; and that the train at the time, in violation of the ordinance, was running at a speed in excess of six miles per hour. That the negligence of appellant's employees in charge of the train, in operating it at a speed prohibited by the ordinance was the proximate cause of the death of the mare was, we think, an inference the court had a right to draw from such findings. Had the train not been moving at a speed in excess of six miles per hour, and had the mare run upon the track 35 or 40 feet in front of it and gone east in the direction it was moving, it is hardly probable it would have overtaken and killed her in a distance of 100 feet, or at all.

The judgment is affirmed.

LYTTLETON, County Judge, v. DOWNER.  
(Court of Civil Appeals of Texas. Jan. 6, 1910.  
Rehearing Denied Jan. 27, 1910.)

INTOXICATING LIQUORS (§ 74\*)—ISSUANCE OF LICENSE TO SELL LIQUOR—MANDAMUS.

Mandamus will not lie to compel a county judge to issue a liquor license, where the proceedings to obtain it were taken under a law enacted in 1907 (Acts 1907, c. 138), and before the hearing on appeal that law had been repealed by Acts 1909, c. 17, which provided that as soon as the law of 1909 went into effect, all licenses "heretofore issued shall immediately cease and determine."

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 74.\*]

Appeal from District Court, Harrison County; W. C. Buford, Judge.

W. M. Downer applied for a writ of mandamus to compel H. T. Lyttleton, County Judge, to grant him a license to sell intoxicating liquors. The writ was awarded in the district court and an appeal taken. Reversed and dismissed.

F. H. Prendergast, for appellant. Jones & Bibb, for appellee.

HODGES, J. This suit originated in an application filed by the appellee to the district court of Harrison county asking for a writ of mandamus to compel the appellant, as the county judge of that county, to grant

him a license to engage in the sale of intoxicating liquors in the town of Waskom. The petition states that on the 12th day of April, 1909, the applicant applied for and obtained a permit from the Comptroller of the State of Texas, and on the 14th day of April following filed with the county clerk of Harrison county his petition to the county judge, in accordance with the legal requirements provided in such cases; that the county clerk issued the notices required by law, and on the 29th day of April, 1909, the county judge heard the application for the license, and made certain findings. From these as set out in detail in the petition it appears that the county judge found as a fact that the appellant possessed the necessary qualifications to entitle him to a license under the law as it then existed, and that there was no objection to the grant of the license, except the fact that local option was in force in the territory where his place of business was to be located. The judge incorporated in his findings the facts upon which he held that local option was in force in that locality. These show that in 1894 the territory around Waskom had been organized into an independent school district, and had existed as such continuously since that time; that in December, 1900, in pursuance of an order of the commissioners' court of Harrison county, an election was held in that independent school district for the purpose of determining whether or not the sale of intoxicating liquors should thereafter be prohibited; that the election resulted in favor of prohibition, and all the subsequent requirements of law for putting local option into effect were complied with. From these facts the county judge concluded as a matter of law that local option was in effect in that territory, and, as he states, for that reason refused to grant the license to the petitioner. The petition in this case was filed on the 2d day of June, 1909, and appears to be a careful statement of all the material facts necessary to be shown under the law existing at that time to entitle the petitioner to license to engage in business as a retail liquor dealer. The record shows that at the hearing before the county judge the county attorney appeared, and contested the application for license solely on the ground that local option was in effect in the territory where the place of business was to be located. The county judge failed to answer the petition of the applicant in the court below, but an answer was filed by the county attorney, not, however, purporting to represent the county judge. Upon a trial before the district court a judgment was rendered awarding the writ prayed for. In this court that judgment is attacked solely upon the ground that local option was in force in the territory including the town of Waskom, and that under the law no license could legally be granted to the applicant to engage in such business there. That contest was an-

swered by the appellee with the contention that the election upon which the contestant relied was invalid because the commissioners' court had no authority to order a local option election for an independent school district; that such territory was not one of the subdivisions mentioned in section 20, art. 16, of the Constitution of the state of Texas, in which the Legislature might authorize the holding of local option elections. The court below concurred in this view, and in his conclusions upon the case refers to *Ex parte Haney*, 51 Tex. Cr. R. 634, 108 S. W. 1155, decided by the Court of Criminal Appeals of this state. In that case the court held that a local option election could not under the Constitution be held in an independent school district; that such territory was not a political subdivision of the county contemplated by the constitutional provisions above referred to. It seems that the parties by agreement have attempted to make the validity of that election the exclusive test by which to determine whether the writ of mandamus should be issued in this case. But without deciding that question, or the further question as to whether this is a case in which the judgment of the county judge granting or refusing a license might be controlled by a writ of mandamus from the district court, we think there are other objections to the issuance of the writ which should first be considered in disposing of this appeal.

The application for license was made at a time when what is known as the "Baskin-McGregor Law," enacted in 1907 (Acts 1907, c. 138), was in force, and the proceedings for obtaining a license were conducted in compliance with the provisions of that law. But the Thirty-First Legislature made some radical changes in those provisions. See Acts 1909, p. 293, c. 17. Among other changes there are new and additional requirements as conditions upon which a permit may be obtained from the Comptroller. These are contained in section 9 in the act referred to. Section 10a prohibits the county judge from granting a license to engage in the sale of intoxicating liquors in any village, town, or city where the proposed place of business is within 300 feet of a church, school, or other educational or charitable institution. This provision is materially different from the former law. There are also other changes not necessary to mention. Section 35 of the act of 1909 contains this provision: "All laws and parts of laws in conflict with this act are hereby expressly repealed. Providing, all of the provisions relating to the sale of intoxicating liquors contained in any special charter granted by the Legislature to any city or town shall not be repealed by this act, but the same shall be cumulative thereof. Provided that as soon as this law goes into effect all licenses heretofore issued shall immediately cease and determine, but the hold-

ers of such licenses shall have until sixty days after this act takes effect in which to obtain licenses under this act, said licenses to be dated as of the date this act takes effect, and the tax collector shall give such licensee credit for the unearned portion of such canceled license as of the date this act takes effect; and provided, during said sixty days said licensee shall have the right to pursue his business under and in accordance with the canceled license and the laws applicable to the same, which for that purpose are hereby kept in force for said sixty days." An affirmance of the decision of the court below would have the effect of compelling the county judge to grant the appellee a license in accordance with the provisions of the Acts of 1907, now repealed. Under the law as it now exists such a license would not only be useless, but would also be one which the county judge would not now be authorized to grant.

Upon the well-established principle that a mandamus will not be granted unless the party applying therefor shows a clear legal right to the relief sought, we feel it our duty to reverse and dismiss this case, and it is accordingly so ordered. It is further ordered that the appellee pay all costs of this court and the court below.

#### HOUSTON & T. C. R. CO. v. BARRON.

(Court of Civil Appeals of Texas. Jan. 22, 1910.)

##### 1. APPEAL AND ERROR (§ 1066\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

It is reversible error to submit in a charge an issue not made by the evidence, unless it is clear that the jury were not misled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

##### 2. CARRIERS (§ 230\*)—CARRIAGE OF LIVE STOCK—ACTION FOR DELAY—TRIAL—INSTRUCTIONS.

A carrier, sued for delay in the transportation of cattle, is entitled to a charge that the jury should allow nothing for loss caused by an alleged decline in the market, where the evidence shows that there was no such decline.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 230.\*]

Appeal from Limestone County Court; W. A. Keeling, Judge.

Action by W. C. Barron against the Houston & Texas Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Baker, Botts, Parker & Garwood and Williams & Bradley, for appellant.

TALBOT, J. This suit was brought by the appellee, Barron, against the appellant, to recover damages alleged to have been sustained by him on account of unreasonable delays in the transportation of two cars of cattle shipped over appellant's line of road from

Thornton, Tex., to Ft. Worth, Tex. Plaintiff alleged that on July 13, 1908, he loaded 50 head of beef cattle on defendant's cars at Thornton, to be transported to Ft. Worth; that the cattle were loaded at 4:30 p. m. on that day, and defendant could have transported them to their destination within 12 hours, but on account of its negligence they were not taken out of Thornton until 7:30 a. m. on July 14th, and they did not arrive at Ft. Worth until 1:40 a. m. July 15th; that the cattle should have been on the market on July 14th, but were not on the market until July 15th; that the market declined 20 cents per 100 pounds in the meantime, whereby he lost \$100; that on account of the delay in the shipment the cattle became "drawn, shrunk, and reduced in weight, and greatly damaged in appearance," whereby he lost \$100; that by reason of said delay in shipment the cattle lost in weight 5,000 pounds, whereby he lost \$380—for all of which he prayed judgment. A jury trial resulted in a verdict and judgment for plaintiff in the sum of \$230, and the defendant appealed.

The court, in the thirteenth paragraph of his charge, instructed the jury as follows: "If you find from the testimony that the transportation of plaintiff's cattle was unduly and unreasonably delayed by defendant in transporting said cattle, and you further find that plaintiff sustained any damages on account of such delay, by reason of decline in the stock market at Ft. Worth, Tex., and the deterioration of said cattle, if any, during the time between which they did arrive at market and the time they should have arrived, had they been transported with ordinary care and diligence, then in that event the measure of damages would be the difference between the market price, if any, of said cattle when they did arrive at destination in Ft. Worth, Tex., on said day and date, taking into consideration their weight, condition, and appearance, and the market price of said cattle when they should have reached their destination, taking into consideration the weight, condition, and appearance of said cattle, had they been transported within a reasonable time, if in fact there was any difference."

So much of this instruction as authorized the jury, in the event they found that plaintiff sustained any damages on account of unreasonable delay in the transportation of his cattle by reason of a decline in the stock market at Ft. Worth, Tex., during the time between which they did arrive there and the time they should have arrived there, had they been transported with ordinary care and diligence, to find for plaintiff the difference between the market price of said cattle on the day they arrived at Ft. Worth and the market price of said cattle when they should have reached there, had they been transported within a reasonable time, is assigned as error, and we think the assignment is well

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

taken, and requires a reversal of the judgment. We have found no evidence in the record that authorized the giving of this charge. It not only fails to show any decline in the market price of such cattle as shipped by the plaintiff, but affirmatively shows there was no such decline during the time referred to in the charge.

The evidence tends to show that the cattle should have arrived at destination on July 14, 1908, had they been transported within a reasonable time, but that they did not arrive until July 15, 1908; and the only evidence introduced touching the market price of cattle, such as were owned and shipped by appellee, was the market report thereof on said days, respectively, taken from the Ft. Worth Daily Live Stock Reporter. These reports show that the market price of such cattle was precisely the same on both of said days. It has often been held, by this and other appellate courts of this state, that it is reversible error to submit in a charge to the jury an issue not made by the evidence, unless it is clear that the jury were not misled thereby. *Andrews v. Smithwick*, 20 Tex. 111; *Railway v. Gilmore*, 62 Tex. 391; *Railway v. Hightower*, 12 Tex. Civ. App. 41, 33 S. W. 541; *Wood v. Cotton Product Co.*, 88 S. W. 496. As has been seen, plaintiff itemized his damages, and claimed to have suffered a loss of 20 cents per 100 pounds by reason of a decline in the market. The jury returned a general verdict for \$250 in plaintiff's favor, and there is nothing in the record showing that none of this amount was awarded on account of a supposed decline in the market price of the cattle. It does not, therefore, appear that appellant was not injured by the charge in question.

Appellant requested the court to charge the jury, in effect, that in determining the amount of their verdict they should not allow any sum on account of any loss or damage caused by the alleged decline in the market at Ft. Worth, and we think this charge should have been given instead of the one complained of by appellant.

Upon all other questions raised we rule against appellant.

For the error indicated, the judgment of the court below is reversed, and the cause remanded.

### SELARI v. SELARI.

(Court of Civil Appeals of Texas. Nov. 13, 1909. On Motion for Rehearing, Feb. 5, 1910.)

#### 1. DEEDS (§ 168\*)—BREACH OF CONDITION SUBSEQUENT—CANCELLATION.

Where the agreement of a son to care for and support his father during life in payment for land conveyed to him was made in good faith, the deed will not be set aside because the son subsequently changed his mind and

failed or refused to perform such agreement; such conduct not amounting to legal fraud.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 527; Dec. Dig. § 168.\*]

#### 2. EVIDENCE (§ 420\*)—PAROL EVIDENCE—IMPORTING CONDITION INTO ABSOLUTE DEED.

In absence of fraud or mistake, parol evidence is not admissible to show that a deed absolute on its face was made in reliance on a condition precedent.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1929; Dec. Dig. § 420.\*]

#### On Motion for Rehearing.

#### 3. DEEDS (§ 211\*)—VALIDITY—FRAUD—SUFFICIENCY OF EVIDENCE.

To justify cancellation of a deed, the charge of fraud in procuring its execution must be proved by clear and satisfactory evidence, such as will preponderate over presumptions or evidence on the other side.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 645; Dec. Dig. § 211.\*]

#### 4. DEEDS (§ 211\*)—VALIDITY—FRAUD—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to support a finding that a deed from a father to his son was procured by the fraud of the son.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 645; Dec. Dig. § 211.\*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by Emanuel Selari against Antonio Selari. Plaintiff had judgment, and defendant appeals. Reversed.

Read & Lowrance, for appellant. A. E. Firmin, for appellee.

**TALBOT, J.** This action was brought by the appellee against appellant to recover the several lots or parcels of land described in his petition, and to cancel the deeds under which the appellant claimed. It was alleged, in substance, as recited in appellee's brief: That plaintiff and defendant resided in Dallas county, Tex. That they are father and son. That plaintiff is married, his wife living in Italy, the mother of defendant, and never a resident of the United States. For many years plaintiff lived apart from his family. In 1907 plaintiff sent for his family, for whom he had always provided, and found defendant was in Chili. That, yearning for his son, he sent defendant means to come to Texas. He came. He avowed great filial affection for plaintiff, who had a large sum in bank, personal and real estate, and in every way sought to persuade plaintiff that he was a true, dutiful, and faithful son, whose love for plaintiff was earnest and disinterested. That plaintiff, at the various times hereinafter referred to, was persuaded and fully believed that such was in truth the fact. That so believing, and fully trusting in defendant as his son, and desiring to so arrange his affairs as to be beneficial to both himself and his child, discussed with defendant the best way of so doing, and plaintiff being ignorant of legal affairs and wholly inexperienced in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such matters, although by hard labor and economy he had accumulated a modest competency, was instructed, guided, and persuaded by his son to agree that, in consideration of the solemn promise, contract, and agreement of his said son that defendant would support him during his life, and that plaintiff should have and retain control and supremacy in the conduct of all business relative thereto and remain as he then was, the head of the family, plaintiff would convey to defendant his real estate. That this was done by plaintiff in full trust and confidence that his son was acting, and would continue to act, toward him honestly, truthfully, loyally, and in good faith, and in the belief that defendant would in all things comply with his agreement, which was as hereinbefore alleged, and was the sole consideration for the making of the contract and deeds. Plaintiff then alleged the payment of money to defendant, and that, as soon as his said property was in defendant's possession vested, he began a continued series of studied insults and humiliations, rejecting and discarding and denying and refusing to fulfill the terms and conditions of his said contract, claiming and demanding all the rights and privileges and prerogatives of actual and complete ownership of said lands and property, and denying plaintiff's right to shelter, protection, care, comfort, support, or benefit therefrom, and threatening to sell same and dispose thereof as to him might seem fit and to apply the proceeds to his own use regardless of plaintiff's rights, and defendant is still doing so in all things, and plaintiff has reason to believe, and so alleges, that defendant did not originally, does not now, and never did, intend to keep and perform the terms and conditions of the contract or agreement so forming the considerations for such conveyances and delivery to him of plaintiff's said estate, but, on the contrary, defendant did falsely, fraudulently, wickedly, and maliciously, for his own wrongful gain and profit, seek and intend by chicanery and device to secure from plaintiff his property, both real and personal, and including the cash that plaintiff had in bank, and apply the same to his own use and benefit, and then wholly and absolutely to abandon and discard the plaintiff and every obligation, duty, and demand on plaintiff's behalf created by such contract or agreement. (Here follows a description of the property.) Plaintiff prayed for cancellation of the deeds, that he be fully and completely reinstated in the possession and enjoyment of his estate and title hereto reinvested in him, for temporary injunction, and other relief. Defendant answered by general and special exceptions to plaintiff's petition, a general denial, and specially that at the time of the execution of said deeds or prior thereto he made no promise or agreement to support and care for said plaintiff, or used any deception, device, schemes, or false representations of any kind

whatever to induce said plaintiff to execute said deeds; that said plaintiff freely, willingly, and voluntarily made and executed said deeds for a valid consideration, and plaintiff executed and delivered said deeds of his own free will and accord; that at the time of the execution and delivery of said deeds they were read over to plaintiff by the conveyancer, whom plaintiff had employed to prepare the deeds, and after same were fully read over to plaintiff, who fully understood same, he executed and acknowledged same; that while defendant denies that he ever made any promise to support and care for defendant and is under no legal obligation to do so, yet, on account of his filial duty and moral obligations to his parent, said defendant has always been willing for said plaintiff to live with him and to occupy said premises and to furnish plaintiff board; that said defendant has never ordered plaintiff off of said premises, but said plaintiff has voluntarily absented himself from the home and board of defendant; that defendant has always been willing, and is now willing, for plaintiff to live with him, but plaintiff will not do so, and defendant has provided for said plaintiff. The case was tried before the court and a jury and resulted in a verdict and judgment in favor of appellee for the land in controversy and cancellation of appellant's deeds to the same. From this judgment appellant appealed.

Upon the conclusion of the evidence in the trial court, the defendant requested the court to charge the jury peremptorily to return a verdict in his favor for the land described in plaintiff's petition. This charge was refused, and its refusal is made the basis of appellant's first assignment of error. The contention is that the charge should have been given, because there was no evidence of fraud which entitled the plaintiff to a cancellation of the deeds conveying said land to the defendant; that the evidence failed to show any fraud in the execution of said deeds, or that the plaintiff by mistake, accident, or fraud omitted any provision or stipulation of defeasance from said deeds; that unless by fraud of the defendant the plaintiff was induced to omit something from the deeds which, but for such fraud, would have been inserted therein, defendant is bound by them and held to have intended to do just what the deeds declare. The deeds sought to be canceled were absolute and unconditional warranty deeds in form, and it is well settled that in the absence of fraud, accident, or mistake parol evidence is inadmissible to convert the estate so created by such deeds into those resting upon and dependent on conditions; that ordinarily a promise to perform some act in the future, although made by one party as a representation to induce the other to enter into a contract, will not amount to fraud in legal acceptance, though subsequently the promise is, without excuse, broken and nonfulfilled. To this latter rule,

however, there is a well-founded exception distinctly recognized and announced by the Supreme Court of this state. The exception is clearly stated in the case of *Railway Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39. In that case the fraud alleged was the failure of the railway company to fulfill a promise to build and maintain a station on the land granted. It was contended that the claim of fraudulent representations did not amount to a fraud in legal contemplation, but only to false promises to do something in the future, for the nonperformance of which an action for damages might lie or for specific performance, but would not give any legal ground for the rescission of the contract. The court, however, said: "If the railway company, at the time it made the representations and promises before mentioned to the plaintiffs, did so with the design of cheating and deceiving the plaintiffs, and had no intention at the time of performing the promises, but used them merely as false pretenses to induce the plaintiffs to execute the deed, and if its conduct did have that effect, then we think that such acts and declarations, coupled with its subsequent utter failure and refusal to perform the promises or assurances, would amount to such actual fraud as would authorize the plaintiffs to have the contract rescinded and the land restored to them. But, upon the other hand, if the promises or representations were made in good faith at the time of the contract, and the defendant subsequently changed its mind and failed or refused to perform the promises, then such conduct of the company, originally or subsequently, would not constitute such fraud in legal acceptance as would justify the rescission of the contract or the cancellation of the deed. *Henderson v. Railway*, 17 Tex. 560, 67 Am. Dec. 675; *Dowd v. Tucker*, 41 Conn. 203; *Wilson v. Eggleston*, 27 Mich. 257; *Gross v. McKee*, 53 Miss. 536; 2 Scott, 588."

Whether the evidence in this case was sufficient to warrant the conclusion that appellant promised and agreed with appellee that if he would deed him the land in controversy appellant would support appellee during the remainder of his lifetime and allow him to retain control and supremacy in the conduct of all business relating to said lands and remain the head of the family, and whether such promise, if made, was fraudulently made with the intention and purpose at the time not to keep it and with the intention of influencing and inducing appellee to make said deeds, and that he was so induced to make them, is to the mind of this court a matter of considerable doubt. And yet, while not as satisfactory as it might have been, it was, probably, of such a character that the court was not authorized to withdraw the issues from the jury. The case, we think, must be reversed and remanded for errors assigned in the court's charge, and while it is the rule of appellate courts ordinarily, when re-

versing a case upon some error of law, not to express any opinion concerning the facts or effect of the evidence, we have thought it proper, in view of the unsatisfactory state of the evidence in this case, and another trial thereof, to say as much as we have in the foregoing remarks.

The court instructed the jury, at the request of the appellee, as follows: "You are instructed to return a verdict for the defendant for the land involved in this suit, unless you find and believe from the evidence that defendant, by false and fraudulent representations and promises made for the purpose of cheating and defrauding the plaintiff, induced and persuaded plaintiff to omit from said deeds, described in plaintiff's petition, any provisions or stipulation that defendant should support and care for said plaintiff, suitable to his position in life, during the remainder of his natural life, and that said land described in said deeds should revert to plaintiff on failure of defendant to comply with said promises and representations; and that at the time of making said promises and representations, if any, said defendant made same for the purpose of cheating plaintiff, and said defendant had no intention of complying with said promises and representations, if any were made, at the time of said transaction."

It will be observed that by the foregoing charge the jury were instructed to return a verdict for the defendant, appellant here, unless they believe he by false and fraudulent representations and promises induced plaintiff to omit from said deeds provisions or stipulations that defendant should support and care for plaintiff during the remainder of his natural life, and that the lands described in said deeds should revert to plaintiff on failure of defendant to comply with said promises and representations. There were neither allegations nor proof that the appellant made any character of representation or promise to, or whereby, appellee was induced to omit from said deeds any provision or stipulation whatsoever, neither was there any allegation or proof whatever that the lands should in any event revert to appellee. The allegations are, in substance, that appellee was persuaded by the representations of his son to agree that, in consideration of the solemn promise, contract, and agreement of his said son, he (the son) would support, feed, clothe, and supply appellee with necessaries during appellee's natural life, and that appellee should have and retain control and supremacy in the conduct of all business relative thereto, and should remain, as he then was, the head of the family; that in fulfillment of such agreement appellee did by his several deeds convey to appellant all of his real estate; that appellant never intended to keep and perform the terms and conditions of said contract or agreement, but, on the contrary, did falsely, fraudulently, and for his own gain, intend by chicanery,

etc., to secure from appellee his said lands and did so secure it. This was the case made by the appellee's pleadings, and the only one, in the most favorable view of the evidence, upon which he could hope to recover. The charge therefore submitted the two issues, as above indicated, to the jury, neither of which was raised by the pleadings or evidence, and they were directed to return a verdict in favor of the appellee, unless both of said issues were established by the evidence, and for these errors the judgment must be reversed. It is well settled that when an issue has been submitted to the jury not raised by the pleadings or evidence, and it cannot be definitely said that the jury was not misled thereby, and the party cast in the suit was not injured, the error is of such a character as requires a reversal of the case. *Wood v. Texas Cotton Product Co.*, 88 S. W. 496; *Railway Co. v. Gilmore*, 62 Tex. 391; *Railway Co. v. Wisenor*, 66 Tex. 674, 2 S. W. 667; *Railway Co. v. McCoy*, 90 Tex. 264, 38 S. W. 36; *Railway Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756; *Andrews v. Smithwick*, 20 Tex. 111.

This is the attitude in which we find the present case, and, for the error in submitting the issues referred to, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

#### On Motion for Rehearing.

We erred in reversing this case, because of the giving of the special charge set out in our original opinion. In some unaccountable way the writer misapprehended appellant's assignment of error in connection with which said charge is quoted in the brief. He was laboring under the impression, at the time the opinion was written, that the charge was given at the instance of appellee and was made the basis of said assignment of error. The fact is the charge in question was given at the request of appellant, and the assignment complains, in effect, that the verdict of the jury is contrary to the law, as expressed in said charge, and the evidence, because there is no evidence to show that appellant induced plaintiff to omit any term, provision, or stipulation from the deeds sought to be canceled, or a breach of the alleged promise to support and care for plaintiff, or that defendant had no intention at the time he made such promise, if he made it, to comply with the same. However, notwithstanding we erred in reversing the case on the ground stated in the original opinion, we are of opinion it should stand reversed and remanded for another and different reason. In the opinion heretofore delivered, we expressed grave doubts as to the sufficiency of the evidence to support the verdict in favor of appellee; but, believing at that time that the case ought to be reversed for the supposed error of the trial court in giving the special charge referred to, we did not defi-

nately pass upon the question. It now becomes necessary to do so.

The testimony of the appellee alone is relied on to sustain the verdict. He testified, in substance, that his son, the appellant, wrote him that he was at Valparaiso, Chili; that in answer to that letter he wrote his son to come to Dallas; that his son replied that he had no money; that being desirous of having his son with him he sent him a ticket and money for his transportation and expenses from Valparaiso to Dallas; that when his son got to Dallas he lived with him (appellee); that before he transferred the property involved in this suit his son was loving and affectionate toward him; that his son wanted to get married; and that he told him he (appellee) would help him all he could. He further testified: "After the defendant was married, he says to me: 'Papa,' he says, 'Mama is afraid to come over, and I came up to keep you company, and I am going to live with you as long as you live and I live,' and he says, 'Why not transfer this property to me? You have got some property,' he says. 'You are liable to die suddenly.' I says, 'You will get the property anyhow.' But he kept on worrying me every day about the property, and so if he wouldn't worry me I wanted to transfer the property to him in good faith and good honesty and with the condition that I be in possession as long as I lived of the property, and that was the way that I owned the property, so long as I lived, because he explained, he says, 'Papa, you will be boss of the property just the same so long as you live,' and my idea was that I own the property as long as I lived, and then the understanding I had with him was that after I would die that he would divide the property with the sisters and mother if she lived. I never sold the property to him, and I didn't give it to him. I just made the transaction that way. The defendant made me the promise that after I couldn't work and was not able to work that he would take care of me and live with me. I talked the matter over with him frequently. He asked me to transfer the property to him nearly every morning. At that time he and his wife was living in the front of the house. I have got a little room separated from the house. When Antonio came here he could not speak English at all. I made arrangements for him so that he could learn English and learn a trade. He did not have any money of his own when he came to Texas that I know of. He is now earning \$10 a week, that is what I learn. After the property was transferred, I took sick last year in April, and I laid about three weeks up there with the gripe. Then I went to Galveston, and I stayed down there three weeks with some friends of mine who were raised as boys together. I started from there on Monday and I arrived here on the 4th of June. When I arrived here from

Galveston, I was standing right by the barn, and he came out of the kitchen door. He never had spoken to me, and he said he was going to run my own house, that he was not going to be bossed by me. From that time on he did not treat me with the same kindness and love and affection that he had before. It was hot, and I lay up for a few days. I was complaining with my stomach, and the boy says to me, 'It is no wonder that you have pain in the stomach because you chunk your stomach full like a horse.' Then after that some few days after he was passing about as far as from here to that chair, and he says, 'God damn son of a bitch.' His wife was standing in the kitchen with the door open, so I went to the stable to see if the horse was done eating, and then she called me to breakfast. I went in and drank a little coffee, and she says, 'Why don't you eat?' She says: 'Why don't you eat them eggs?' I says, 'I don't feel like eating much,' the way I seen things going on. I says, 'What is the matter with that boy, did you all have a quarrel?' She says, 'No,' she didn't have a quarrel. I says, 'Didn't you hear what he said?' She says, 'Yes, but he didn't think anything of it.' She said she didn't think the boy knew the meaning of the word, so I let that go. Some days after that, it was on a Saturday morning, he was leaving the house going to work, and he said some of these days he was going to get a club and make me jump around the yard and then beat me until I could dream. I told him then that I had just about enough of him. Then Sunday morning—it was on Sunday morning they called me in to breakfast—I wanted to come to town, but anyhow I asked them this question: I says, 'Antonio, look here, you are going too far with me.' I says, 'Are you living with me, or am I living with you?' And he said certainly I was living with him, that I had nothing to do there any more. I says, 'Is that the agreement I made with you?' I says: 'You promised to take care of me. Now you are cursing me and hurting my feelings and telling me that I chunk my stomach full like a hog.' After that he built a fence from the south part of the barn to the rear part of the house and built a gate there, and I says, 'Why don't you go to the proper line?' Now I have to open two gates to get in with my horse and wagon. Then he got to tying the dog right there next to the fence in front of my room. When I expect to get a little rest the dog wakes me up. Then finally he moved the dog away from there, and he dug a place there to throw all the dish water. It has got no outlet, and the dirt just smells sour, and I have got to put up with that or go and sleep in the barn. In the morning I told them about that, and he says, 'Now you have started another racket.' I says, 'I asked you politely not to tie the dog there,' and their reply was that I was always trying to pick a quarrel. Some days after he came and

knocked at the door and asked me if I was hungry. I told him I was not quite hungry. Some few nights after that he asked me if I had supper, and I told him, 'Yes,' I had some kind of supper. I have been eating always down town. After I transferred the property, and after I had that conversation with Antonio on my return from Galveston, I give my laundry to the laundryman. After I had that conversation with Antonio he never provided me with my clothes, not a stitch. He tore the sign off of my house, my name off of the house. He claims that I ain't got nothing to do with anything there any more. I can read all right, but I can write very little. I signed all those papers (meaning deeds that were presented to the witness). At the time I signed those deeds Mr. Julian and the defendant and myself were present, and there was another young man in the office; I knew who he was. Mr. Julian read those deeds over, but I never paid much attention; I thought it was all well and good; I went in good faith. He read the deeds to me. I did not tell Mr. Julian that I wanted to deed the property to Antonio. My boy had the understanding that I was going to transfer the property to him. I wanted to transfer the property to my son. I told Mr. Julian that I wanted to transfer the property to my son. I did not ask Mr. Julian to make any change in those deeds when he read them to me. I did not ask him to make any changes in the deeds because I never paid much attention when he read them. I did not ask him to make any changes. I did not ask him to put any other conditions in there that is not in there. I had had business transactions before that in regard to buying property. I knew what a deed was. After those deeds had been signed, I brought them down here to the courthouse and filed them for record."

The testimony of appellee, as to the improper or abusive treatment of him by the appellant, is contradicted by the testimony of both the appellant and appellant's wife. They also testify that they have never refused to allow appellee to live and board with them; that appellee is still living in the room at their house that he occupied before he became dissatisfied with the treatment he was receiving at their hands; and that they are still willing for him to board with them. Appellant further testified that his father promised while he (appellant) was in South America to donate his property to him as he was by himself, and also made such promise to him after he came to Texas and before his marriage. There is also testimony given by other witnesses, as well as by appellant and his wife, to the effect that the appellee drank intoxicating liquors to excess and was very quarrelsome and at times abusive towards appellant; that he did a great deal of cursing at the home of himself and appellant, and "had made a disturbance in the community in which he lives several times." After a more careful consideration

of all the testimony in the case than was given it before the original opinion was written, we have reached the conclusion that the judgment of the court below should not be allowed to stand. Indeed, we would be unwilling to sanction the verdict of the jury, even though there was no testimony in rebuttal of, or contradicting, appellee's testimony. It is well established that the charge of fraud must be proved by clear and satisfactory evidence, such as will preponderate over presumption or evidence on the other side. Bigelow on Fraud, p. 142. It cannot be sustained by strained inference, suspicious circumstances, or mere conjecture. Cyc. vol. 20, pp. 120, 121.

The charge of fraud, as shown in our original opinion in this case, has not, in our opinion, been proven by that clear and satisfactory testimony required in such case, and the appellee's motion for a rehearing is therefore overruled, and the case will stand reversed and remanded for another trial.

### ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. ANDERSON.

(Court of Civil Appeals of Texas. Dec. 23, 1909. On Rehearing, Feb. 10, 1910.)

#### 1. MASTER AND SERVANT (§ 234\*)—CONTRIBUTORY NEGLIGENCE—OPERATION OF HAND CAR.

Where an employé of a railroad company in charge of a hand car is running the car out of the yards on the main track, and is charged with the duty of looking out for switches in the yard limits, if he knew, or by the exercise of ordinary care could have seen, that a switch was open in time to avert the derailment of his car, and he failed to use such care, he would be guilty of contributory negligence, precluding a recovery for injuries received by such derailment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-709; Dec. Dig. § 234.\*]

#### 2. MASTER AND SERVANT (§ 296\*)—ACTIONS FOR INJURIES—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Plaintiff, a railroad employé, was placed in charge of a hand car, and, while attempting to run the same out of the yards on the main track, ran into an open switch, which derailed the car and injured him. The switch had been opened to allow a freight train to go upon a siding, and was left open for it to return to the main track. The switch target was set to indicate that the switch was open, and the target might have been seen by plaintiff had he looked, and he would have understood the meaning of the target as set had he seen it. *Held*, that the question of contributory negligence was a material issue, and therefore it was error for the court to instruct that, if defendant was guilty of negligence in leaving the switch set to the side track, plaintiff was not bound to use ordinary care to discover that said switch was open, but defendant was entitled to a plain affirmative instruction on the issue of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

#### 3. MASTER AND SERVANT (§ 296\*)—ACTION FOR INJURIES—CONFLICTING INSTRUCTIONS.

In an action by a railroad employé, injured while in charge of a hand car by the car being derailed at an open switch, an instruction that plaintiff was not, as a matter of law, bound to exercise ordinary care to discover that the switch was open is in conflict with a charge that if plaintiff would have discovered the open switch by the exercise of that ordinary circumspection which a prudent man would have used in his particular employment, then as a matter of law he was bound to exercise ordinary care to discover the open switch.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.\*]

#### 4. APPEAL AND ERROR (§ 1031\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

An erroneous charge is presumed to be injurious.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4043; Dec. Dig. § 1031.\*]

#### 5. TRIAL (§ 243\*)—CONTRADICTORY INSTRUCTIONS.

It is error to give contradictory and irreconcilable instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564-566; Dec. Dig. § 243.\*]

#### On Rehearing.

#### 6. TRIAL (§ 168\*)—DIRECTION OF VERDICT.

Where essential facts in the record are such that only one conclusion can be drawn from them, the court should direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 376-395; Dec. Dig. § 168.\*]

#### 7. MASTER AND SERVANT (§ 281\*)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a railroad company for injuries to an employé, evidence held to conclusively establish contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 281.\*]

Appeal from District Court, Titus County; P. A. Turner, Judge.

Action by T. J. Anderson against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed, and on rehearing judgment rendered for defendant.

Appellee, while in the service of appellant as foreman of the fencing gang, and who previous to holding this present position had served appellant in the capacity of section foreman, was ordered with his crew to go to North Ft. Worth, and there assist as an extra gang in making repairs of the track rendered necessary because of a washout, due to the overflow of Trinity river. He was in sole charge and control of a hand car and the crew. While in the yards of North Ft. Worth, coming down the main line south, the hand car was run into an open switch, causing its derailment and consequent injury to appellee, and for which he sues for damages. It appears that just previous to the injury an engine, with a caboose attached, ran in from the main line onto the switch track leading to the packeries, expecting to get enough cars to make up a train load of meat, and to return the same way to the main line. An unexpected delay in icing the meat caused a de-

lay of the train. The switch stand that worked the switch, and through which switch the train had entered the siding, stood on the west of the track and the right-hand side going south, as was appellee, and was equipped with a switch target or signal, showing a red space, and standing as high as a man. This target was properly set for the siding at the time of the injury. The purpose of the switch signal target, as appellee says he knew, was to warn the direction the switch is set at the time, and to indicate whether open or not to approaching trains, and same stood about five feet from the track. At this place the track was straight, and the switch signal plainly visible for 150 yards, and there were no obstructions to the view. Appellee was approaching the switch with his car under control; and, though he knew the switch was maintained at this place, having seen it on his trip from Hodge, he failed to see the signal showing the switch condition, and ran his car into the open switch. He gave certain reasons for not seeing the signal, not necessary to here set out. Had appellee seen the signal, knowing, as he says he did, its significance, he could have averted the injury, as he says he could. It was proved that it was a part of the duty of operatives of hand cars in the switch limits, as was appellee at the time, and as he says he knew, to watch out for the condition of switches. By his petition appellee claims that appellant, through its employees, negligently left the switch open, and that such condition was unknown to him. Appellant answered by denial and plea of contributory negligence. In accordance with the verdict of a jury, judgment was entered for appellee.

Glass, Estes, King & Burford, E. B. Perkins, and D. Upthegrove, for appellant. B. Q. Evans, J. P. Copeland, and L. E. Keeney, for appellee.

LEVY, J. (after stating the facts as above). The court in the fifth paragraph of his charge, complained of in the fourth assignment, instructed the jury that if the switching crew of appellant were guilty of negligence in leaving the switch set to the side track, and that appellee and his crew were traveling in a hand car over the main track in the discharge of their duty under their employment, "then I charge you that the plaintiff was not bound to use ordinary care to discover that said switch was open to the main track and set for the switch track." It was further charged in the same paragraph: "However, if you believe from the evidence that the plaintiff knew said switch was open, and ran into it, then you will find for defendant; or, if you believe that said open switch was obvious to plaintiff as he approached it, situated and circumstanced as he was, then you will find for defendant; or, if you believe the plaintiff in the discharge of his duty would have necessarily learned of said open switch,

then you will find for defendant; or, if you believe the plaintiff would have discovered said open switch in the exercise of that ordinary circumspection which a prudent man would have used in his particular employment, then you will find for the defendant." Knowing the danger of running a hand car into an open switch, as appellee says he did, and being charged with the duty, as appears, in operating the hand car of looking out for switches in the yard limits, then if appellee knew, or by ordinary care could have seen, that the switch was open, and in time to avert the derailment, as appears, and he failed to use such care, he would be guilty of contributory negligence precluding a recovery. 1 Labatt on Master and Servant, § 332; Ry. Co. v. Hester, 72 Tex. 44, 11 S. W. 1041. As to whether appellee was guilty of contributory negligence precluding a recovery was clearly a material inquiry in the case. It was error, therefore, to instruct the jury, as the court did, that if appellant was guilty of negligence in leaving the switch set to the side track, "then I charge you that plaintiff was not bound to use ordinary care to discover that said switch was open to the main track and set for the switch track." It was appellee's duty, as clearly appears, to look out for signals in the switchyard; and the signal was there, properly set, showing the condition of the switch, and in plain view. Such charge would reasonably be construed by the jury as meaning that negligence on appellant's part, if proved, would relieve appellee of any duty to use care for his safety, or to prevent his injury. Further, the instructions as a whole were conflicting, and quite irreconcilable by the jury. The effect of the instructions, properly read together, was to tell the jury that appellee was not, as a matter of law, "bound to exercise ordinary care to discover that said switch was open," but that if he "would have discovered said open switch by the exercise of that ordinary circumspection which a prudent man would have used in his particular employment," then, as a matter of law, he was bound to exercise ordinary care to discover the open switch. Appellant, in its right, was entitled to a plain affirmative instruction on the issue of contributory negligence, free from conflict or abridgment. A correct special charge, each No. 3 and No. 7, was offered and refused, and complained of in the sixteenth assignment. To have given the special charge, however, would still not have removed, but only made more confusing, the objection urged to the main charge. "A charge must be viewed from the standpoint of a jury, and considered with reference to the probable effect of the charge as a whole upon the minds of a jury desirous of obeying the instructions of a court." Tel. Co. v. Motley, 87 Tex. 38, 27 S. W. 52. It is a settled rule that an erroneous charge is presumed to be injurious. Ry. Co. v. Warner, 88 Tex. 648, 32 S. W. 868; Ry. Co. v. Johnson, 91

Tex. 574, 44 S. W. 1087. It is error to give a contradictory and irreconcilable charge. *Baker v. Ashe*, 80 Tex. 356, 16 S. W. 36.

The second paragraph of the court's main charge complained of should properly be omitted in another trial, as inapplicable to the case. *Pleasants v. Ry. Co.*, 121 N. C. 492, 28 S. E. 267, 61 Am. St. Rep. 674.

All the other assignments are overruled.

For the errors discussed, the case was ordered reversed and remanded for another trial.

#### On Rehearing.

We are of the opinion that the appellant's motion for rehearing should be granted, and its assignments of error numbers 14 and 23 should be sustained. The assignments present the question of negligence vel non of appellee in the facts of the case.

As stated in the main opinion, shortly before appellee came down the track to the point of injury, some cars were run in on the siding, and the switch properly set to the siding, for the purpose of bringing out a train load of meat from the packeries. An unexpected delay in king the meat caused a delay of the train on the switch track. The switch, as before stated, was properly set for the side track, and was properly equipped with a switch target or signal, plainly visible, and indicating the position of the switch and the track that it was set to at the time of the injury. No defective situation as to the switch, track, or appliances in any manner appears or is relied on in the case. The switch and tracks were in the yard, or switching limits. By his petition appellee claims that appellant, through its employees, negligently left the switch open to the main line and set to the side track, and that such condition and position of the switch was unknown to him. The pleadings and evidence would not warrant the ruling that a switch temporarily and properly set to a siding constituted a defect as such in the roadbed or track. *Pleasants v. Ry. Co.*, 121 N. C. 492, 28 S. E. 267, 61 Am. St. Rep. 674. It was conclusively shown that the particular rules in evidence had application only to regular trains, and not to hand cars. A hand car is not run on schedule time, and is employed only as a vehicle of or convenience for transportation of the particular crew, and, when operated, is lifted over the switches.

The question in the facts of the case pointedly arises: Was the appellant guilty of negligence in leaving the switch set to the switch track? Appellant had the legal right, and it was a proper exercise of such right, to use its switch track in the proper way in conducting its necessary business inside its yard limits. The appellant had the right to direct the movements of its trains by signals alone, if the signals on same were adequate to give notice and warning, and the significa-

tion known to the employees. *Ry. Co. v. Kanaley*, 39 Kan. 1, 17 Pac. 324. In the latter case it is said: "The law only requires that the means adopted shall be brought to the knowledge of its employees, and that they be reasonably well calculated to secure the safety of the employees, if obeyed." In such use of the switch track it conclusively appears that the appellant had equipped the switch stand that works the switch, as stated in the main opinion, with a switch target or signal, showing a red space, and standing as high as a man. The purpose of the switch signal target is to warn the direction for which the switch is set at the time, and to indicate whether open or not to approaching trains, and same stood about five feet from the track, and was plainly visible for a sufficient distance before reaching same. It conclusively appears that it was the duty of operatives of hand cars within the switch limits, as was known to appellee, to look out and discover the position of switches, and that it was the custom, as known to appellee, not to line up switches in the yard limits with hand cars, and that appellee knew there was a switch in the yard. The switch track was there on the ground ahead of him, and he saw it as plainly as he did the main line he was on. While appellee was at the present time serving as a foreman of the fencing gang, using a hand car as a vehicle of transportation (and it was under his control), yet it affirmatively appears, as admitted by him, that he had for some years worked for appellant in a section crew, and was entirely familiar with the mode and manner of operating a hand car as he had done. In the circumstances stated the relative duties due from the appellant and appellee to each other are evident. If in the use of the switch track the appellant adopted, as it did, the method and custom of giving notice of the switch position and condition by means of the switch signal target, then appellee had the right to expect a proper discharge of this duty, to inform him of the use and position of the switch track, so as to enable him to protect himself against injury in operating the hand car. Appellee in using the track in the yard and operating a hand car therein owed the duty of lookout for the switch and to discover its warning. Did appellant discharge its duty? Appellee states, as to the target, "I don't know whether this switch had one or not," but this statement of his is made clearer, and determines its probative force, in his evidence later on when, in respect thereto, he testified: "I don't remember noticing; I don't know positively." He nowhere denies that the target was there and properly set. All the witnesses in the case testifying in respect to the signal are positive that it was there, and properly set. A witness of the appellee, and a member of his crew, says he saw it

at the time of the injury. Robbins, a person standing near, said: "I saw a hand car run off. I could tell by the target that the switch was open, the target on the switch stand. \* \* \* I looked to see, and could see that it was open by the target." All others corroborate this. Two minds could not differ on the evidence in the record that there was a switch signal target, and that it was properly set at the time of the injury. Appellee admits that he was approaching the switch track with his hand car under control, and that "on the ground there was no obstruction between me and the switch stand." The evidence is conclusive that the track was straight for a long distance, and the switch signal target plainly visible, and that there were no obstructions to the view. Appellee admits that: "If I had looked at the switch stand or target, I could have seen it, I expect, 75 or 100 yards before I got to it. \* \* \* That would have been in ample time to have stopped. \* \* \* I could have stopped in 30 feet." Before reaching the switch an automatic derailer was passed, it conclusively appears, and the appellee had the hand car set over the derailer, and he says, "When I set the hand car over, I could have seen the switch stand, if I had looked." Did he know the signification of the target? He admits that he did. He says: "The target shows what position the switch is in. \* \* \* If I had been looking directly at it, I could have known it was thrown for the side track. \* \* \* I would have stopped the car." He further says that if he had looked, he could have seen and known the position of the switch by "a mere glance," "just a flash of my eye." He admits that he failed to look for the signal, though having, by his own admission, ample opportunity and time to do so. It being conclusively shown that a switch target was there, properly set and ample and sufficient to warn, unceasingly and unerringly, against running into the switch, could appellee reasonably ask the jury to find, and the court to sustain the finding as warranted, that the switch signal target was not there properly set, or that its warning or notice was not adequate or sufficient to protect him if he had merely glanced or flashed his eye in that direction, as he was in duty bound to do? It follows, we think, that if culpable negligence of appellant proximately causing the injury must in the facts of the case be predicated, and we do not think it could be, on either the failure to give warning or the insufficiency of the warning, then in either event appellee has failed to show negligence on appellant's part. Where essential facts in the record are such that only one conclusion can be drawn from them, the court should instruct a verdict. *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059; *Sanches v. Ry. Co.*, 88 Tex. 119, 30 S. W. 431.

A finding by the jury that appellee was

himself not guilty of negligence proximately causing the injury is contrary to the weight of, and is not warranted by, the evidence. It is admitted by appellee that he did not keep a lookout for, or even look at all in the direction or towards, the switch in front of him at any time in coming down the main line track towards the switch. It is admitted by him that, "If I had looked at the switch stand or target, I could have seen it" by "a mere glance," or "just a flash of my eye." He further admits: "I could have seen it, I expect, 75 or 100 yards before I got to it. \* \* \* That would have been in ample time to have stopped. \* \* \* I could have stopped in 30 feet." As before stated, he admits its signification and purpose, and admits that had he seen it, he would have stopped the car. Appellee gives as his reasons for not looking at the switch or signal that it was because he was intently watching a freight train at the depot ahead of him, and because a negro man riding on the hand car was standing in front of him at the time, and in the way of his looking, and because there were several bridges under the track to pass over, and he did not want to get caught on them if the freight train should move towards him. The switch stand and signal were standing five feet to the right of the track, and appellee was riding on the right of the car approaching the switch, and the switch stand stood about as high as a man's head, and there were no obstructions on the ground to appellee's view. None of the reasons given by him in the record, would justify his failure to look towards the signal, as he had merely to move his head around the negro to see, by a mere glance or flash of the eye, the signal. He admits that the freight train was standing still a quarter of a mile ahead of him. He says in respect thereto: "The train was standing still. \* \* \* The switch was between me and the train I was looking at. \* \* \* I suppose the train was about 300 or 400 yards from the switch." It may be true that appellee did not know at the time how long the train might stand there, but it is true that at the moment it was standing still, and it is true that it did stand still till appellee reached the switch, and afterwards. In this state of facts, he could not claim that his mind was so perturbed by the appearance of danger to him as that he could not exercise care to attend his duty to look for other dangers. Even if such appearance upset his calm thought and prudent action in other matters, still it appears, as admitted by him, that he had ample opportunity and time, before this time, to look at the derailment point for the switch. When lifting the hand car over the derailment, there was no reason given or apparent in the record why appellee did not look, as at that time there was nothing to keep him from looking or to distract his attention.

He admits that at the derailment point in the yard, and before he reached the switch, he could have seen the switch if he "had looked." It conclusively appears, therefore, that appellee had opportunity and time to see and look for the switch and its warning, and simply neglected to look, and could have seen by the simple act and exertion of looking, and have averted his injury, as he admits, by looking. He failed to do so and was injured, under the admitted facts. Could he reasonably predicate a recovery if his injury was due to his own want of care? We think not.

Because in the record there is a want of legal liability, the judgment, we think, should be reversed, and here rendered for appellant, with all costs.

### LEWIS v. TEXAS & N. O. RY. CO.

(Court of Civil Appeals of Texas. Jan. 27, 1910.)

#### 1. CARRIERS (§ 320\*)—CARRIAGE OF PASSENGERS—INJURIES—SUFFICIENCY OF EVIDENCE.

In an action against a carrier for injuries to a passenger, evidence held sufficient to require the submission to the jury of the question of negligence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.\*]

#### 2. CARRIERS (§ 280\*)—CARRIAGE OF PASSENGERS—CARE REQUIRED—PASSENGER ON FREIGHT TRAIN.

Although a passenger on a freight train is subject to greater inconvenience and exposure to danger, there is no relaxation of the rule requiring the high degree of care which is due to those who travel on regular passenger trains.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1098; Dec. Dig. § 280.\*]

#### 3. CARRIERS (§ 318\*)—CARRIAGE OF PASSENGERS—INJURIES—SUFFICIENCY OF EVIDENCE.

In an action against a railroad company for injuries to plaintiff while traveling on a freight train, evidence held to support a verdict for plaintiff, as evidence to show that the train was so operated as to cause a serious bodily injury to him, if unexplained, is sufficient to support a finding of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307-1314; Dec. Dig. § 318.\*]

Appeal from District Court, Cherokee County; Jas. I. Perkins, Judge.

Action by J. R. Lewis against the Texas & New Orleans Railway Company. A verdict was directed for defendant, and plaintiff appeals. Reversed and remanded.

Miller & Royall, for appellant. Jno. T. Garrison, for appellee.

HODGES, J. The appellant sued the appellee to recover damages for personal injuries which he claims to have sustained while riding as a passenger on one of appellant's freight trains from Jacksonville to Ft. Worth. At the conclusion of the testimony the court instructed the jury to return a verdict for the defendant upon the ground that no negligence was shown. The only assignment of

error is that which complains of this charge.

It appears from the testimony that during November, 1905, and January and February, 1906, the appellant made several shipments of hogs from Jacksonville to Ft. Worth, and that he accompanied these shipments for the purpose of looking after his stock. As to the circumstances under which the appellant was injured, he states them substantially as follows: On or about the 24th of February, 1906, he shipped a car of hogs from Jacksonville to Ft. Worth, and went on the train with them. He had transportation from the defendant, and the right to ride on the train and particularly in the caboose. The seats in the caboose ran lengthwise with it. He laid down on the seat with his head about 18 inches from the front end of the caboose, his head lying the way the train was going, towards Dallas. Some three or five minutes before this accident occurred, the whistle blew and the train began to run very fast. He did not notice just how long it was—could not have told—when all at once he noticed that there was a terrible shake up, and when he came to himself, or got so that he could realize anything, he was rubbing his neck, and a brakeman, or somebody, was going to the door. It was some little bit before he got his mind collected. He was suffering with his neck, and rubbed it, and it got a little bit easier. His head had run forward and hit the front end of the caboose. In lying down he had used his arm for a pillow. He supposed that the shock craned his neck. The extent of the jolt, he says, was pretty severe, very violent. As a result of that jolt, or shake up, his neck was hurt, and it hurt him all that night; got considerably easier, though, and the next day it hurt him occasionally. When he got back from Ft. Worth, he was sick, stayed in bed about four or five days, did not remember just how long. He also testified to other results from that injury, from which the jury might well have concluded that he sustained some substantial injuries for which he should have recovered damages had they found the appellee guilty of negligence in producing them.

The appellee offered in evidence the testimony of three of its conductors who claim to have had charge of the trains that carried the cars in which the appellant on the three different occasions referred to by him had shipped his stock. They all testified that no complaint had been made to them of any damages sustained by the appellant on any of those trips; in fact, the appellant admits himself that he made no complaint to any one about his injuries until he was ready to file his suit. There were also offered in evidence statements made by the appellant a few days prior to the trial in his ex parte deposition concerning the date when he was injured. It appears from these statements

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

when compared with what he testified to upon the trial that his mind was not entirely clear as to the particular trip or time when the accident occurred which he claims injured him.

We think the testimony in this case sufficiently raised the issue of negligence to require its submission to the jury. It may be that one who takes passage on a freight train assumes the risks reasonably and unavoidably incident to that method of travel, but it does not follow that such a traveler is any the less a passenger and as such entitled to that high degree of care due to those who travel upon regular passenger trains. While it is true that more inconvenience and greater exposure to danger from jerks and sudden starts and stops may be the necessary incidents of riding upon a freight train, yet there is no relaxation of the rule requiring that high degree of care merely because the vehicle of transportation is a freight train. *Sprague v. Southern Ry. Co.*, 92 Fed. 59, 34 O. C. A. 207; *Southern Ry. Co. v. Cunningham*, 123 Ga. 90, 50 S. E. 980; *Southern Ry. Co. v. Crowder*, 130 Ala. 256, 30 South. 592; *Railway Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *Fitch v. Mason, etc., Co.*, 124 Iowa, 665, 100 N. W. 619. When the appellant showed that he sustained serious bodily injuries in the manner he did, we cannot say as a matter of law that this was only one of the jerks reasonably and unavoidably incident to the prudent operation of a freight train. The occurrence of the accident in the manner detailed by the appellant was a circumstance which should have gone to the jury. Had a verdict been rendered for appellant upon such testimony, we could not say it was unsupported. Where a railroad train is so operated as to cause a serious bodily injury to one who should be the object of a high degree of care, it cannot be said that the act itself, when unexplained, is not sufficiently suggestive of negligence to support such a finding. *Sprague v. Railway Co.*, supra; *St. L. & S. F. Ry. Co. v. Burrows*, 62 Kan. 89, 61 Pac. 440; *Gleeson v. Railway Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458; *Southern Ry. Co. v. Crowder*, supra; 8 Ency. Ev. 881.

For the error in refusing to submit the issue of negligence to the jury, the judgment of the district court is reversed, and the cause remanded.

#### GULF PIPE LINE CO. v. BRYMER.

(Court of Civil Appeals of Texas. Jan. 27, 1910.)

#### 1. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING ISSUES.

Where, in an action for injuries to plaintiff's land and crops because of a leak in defendant's oil pipe line, plaintiff alleged negligence not only in defendant's construction and opera-

tion of the line, but also in that it failed to use ordinary care after the oil escaped, to prevent injury to plaintiff's land, etc., the court properly refused to peremptorily instruct the jury to find for defendant on the theory that the maxim "res ipsa loquitur" had no application to the case, as such request ignored defendant's liability for negligence in failing to prevent the injury after the oil had escaped.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

#### 2. NEGLIGENCE (§ 121\*)—RES IPSA LOQUITUR—ALLEGATION OF SPECIFIC NEGLIGENCE.

Where the legal inference of negligence from the facts proved, tended to establish not only the particular act of negligence complained of, but another act of negligence as well, on account of which plaintiff could not recover because not pleaded, and the negligence relied on was specifically alleged, the maxim, "res ipsa loquitur," was not applicable.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 218; Dec. Dig. § 121.\*]

#### 3. DAMAGES (§§ 108, 112\*)—MEASURE—INJURIES TO PROPERTY.

In an action for injuries to land, grass, and cornstalks destroyed by oil leaking from defendant's pipe line, plaintiff's measure of damages for the grass and cornstalks destroyed was their market value at the place when and where they were destroyed; and the measure of damages to the land was the difference in its market value immediately before and after the injury, excluding from such consideration the value of the grass and the cornstalks.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 273, 281-283; Dec. Dig. §§ 108, 112.\*]

#### 4. DAMAGES (§ 217\*)—MISLEADING INSTRUCTIONS.

Where plaintiff's land was injured by oil leaking from defendant's pipe line, and his grass and cornstalks were destroyed, an instruction that plaintiff's measure of damage, if any, for the destruction of the grass and cornstalks was the reasonable cash market value at the time and place they were destroyed, and the measure of damages for the destruction or injury to the grass, turf, and soil on the premises, if any, was the difference between the cash market value of the land before and after the injury, was misleading as authorizing a double recovery on account of the grass and the cornstalks.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 556-559; Dec. Dig. § 217.\*]

Appeal from District Court, Hopkins County; R. L. Porter, Judge.

Action by J. M. Brymer against the Gulf Pipe Line Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

About November 15, 1907, appellee owned a tract of land situated on Mitchell creek in Hopkins county, and appellant owned and operated in carrying crude or unrefined oil from Watkins, Okl., to Sour Lake, Tex., a pipe line crossing said creek at a point about three miles above appellee's land. On the day mentioned, and again on November 17, 1907, oil escaped from the pipe line and flowed into the creek and low places near same. On the day last mentioned, as the result of rains falling in its locality, the creek overflowed, washing oil which had escaped from the pipe line down to and over portions of ap-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

pellee's land, whereby appellee claimed the soil thereof was injured and rendered less productive, and whereby he also claimed grasses, etc., thereupon, and the sod and turf thereof, were destroyed. In bringing his suit to recover damages he claimed to have suffered, and to aggregate the sum of \$978.50, appellee alleged it to be a fact known to appellant that such oil, if allowed to run or stand upon land like his, would injure same and growths thereupon, and in his petition further alleged that "although knowing of said properties and effects of said oil upon such soil and growths, the agents and servants of the defendant in control of and operating and maintaining said pipe line so negligently operated and maintained the same, and the same had been so negligently constructed by the defendant out of such inferior material and in such negligent and careless manner, at said point where it crossed said Mitchell creek and said bottom lands adjacent to it, that the same was by reason of said negligence in its construction, maintenance, and operation by the agents and servants of defendant caused to burst and come apart so as to allow and cause said oil to run out into said creek and its bottom lands at said point where the same is crossed by said pipe line, on the south side of said creek, and to negligently cause said oil to so run for several hours thereafter in great quantities, sufficient to cause the same to collect and stand in the bed of said creek and the low places in the bottom thereof, where the defendant negligently permitted the same to so collect and stand; that very soon thereafter and while the said oil was so standing in the bed of said creek, in the low places in the bottoms adjacent thereto and adjacent to plaintiff's said lands, there came a rain and overflow in the neighborhood, which caused said creek to overflow its banks and the water to run over the bottom adjacent thereto and over said 36 acres of cultivated land and 10 acres of pasture land above described, as the same was accustomed to do under like circumstances, all of which was well known to the defendant, its agents and servants, or could have been known by the use of ordinary care, and caused said oil to be spread over the surface of the ground and the vegetation thereon of said 46 acres of plaintiff's land in the tract above described." In his said petition appellee further alleged that appellant "knew, or by the use of ordinary care could have known, that said creek would overflow and said oil be caused to spread upon said lands and crops, when it negligently caused or allowed the same to escape from its said pipe at the time and place and in the manner that it did, as alleged herein, and when it allowed said oil to stand in the bed of said creek after it so escaped thereto, and he says that by the use of ordinary care in the construction, maintenance, and operation of said pipe line at said place by the defendant said oil would not

have flowed from said pipe line, and would not have been allowed to stand in said creek and overflow plaintiff's said lands, and that the damages herein complained of would not have occurred." In a trial amendment to his said petition appellee further alleged as follows: "That in addition to the negligence of the defendant as alleged in plaintiff's said amended original petition, said defendant was further negligent in the construction, maintenance, and operation of its said pipe line at the time and place as complained of by plaintiff in said amended petition, in that in laying and constructing said pipe line at the point where it broke as alleged by plaintiff, said defendant negligently coupled two joints of its pipe in an uneven and unlevel and unskillful manner, so that the same was weak at said point and would not stand the ordinary pressure of the oil as the same was conveyed through it at said point, and negligently maintained the same in said condition to the time that it burst as alleged in said petition; that said defendant was also guilty of further negligence in forcing oil through said pipe line at said point at said time with too great a pressure, so great that said pipe would not stand the same at said point, but burst under it, as alleged by him in said petition; and was further negligent in making its construction at said point in such a weak manner and out of such weak and inferior material that the same would not withstand the pressure of the oil as it was conveyed through the same at said point and at said time, and that by reason of said negligence as above alleged, together with that alleged in plaintiff's said amended petition, the same was caused to burst as alleged therein and to do the injury and damage at the time, place, and in the manner and to the amount as set out in said petition." In its answer, after denying the allegations of the petition, appellant alleged that as a common carrier and public service corporation it was authorized by law to construct, maintain, and operate its pipe line; that it had acquired and held the right of way occupied by it through Hopkins county in the manner provided by law; that it had exercised due care in selecting the material used in the construction of its pipe line, and in constructing and afterwards maintaining and operating the same; that its said pipe line was in fact in good order and condition; and then further alleged as follows: "That said pipe was necessarily and properly placed underground where it could not be inspected and defendant kept constantly informed as to its condition, and if there was any defect in the pipe at the place where the alleged break occurred the same was latent, and under the surrounding conditions was not discoverable by defendant by the exercise of due and proper care on its part; that defendant had no reason to anticipate any such break occurring, and had taken all proper precautions to guard against such breaks and the con-

sequences thereof; that if any such break occurred as that alleged, and plaintiff has been damaged in any of the particulars alleged, which defendant denies, the same was due to inevitable accident and happened in the course of the proper conduct and operation of defendant's pipe line and business, and the damages resulting from and incident to such break occurring are not recoverable in such a suit as this under the allegations of plaintiff's petition."

On the measure of damages the court instructed the jury as follows: "7th. If you find for plaintiff the measure of damages will be as follows: The measure of damage, if any, for the destruction of grass and cornstalks upon said land is the reasonable cash market value of such grass and cornstalks at the time and place the same were so destroyed, if they were, and the measure of damages for the destruction or injury to the grass turf and soil on said premises, if there was such destruction or injury, is the difference, if any, between the cash market value of said lands upon which said grass turf and said soil were situated just before they were destroyed or injured, and just after they were destroyed or injured, if they were destroyed or injured."

The trial resulted in a judgment in appellee's favor for the sum of \$223.50, interest and costs.

D. Edward Greer and Templeton, Craddock, Crosby & Densmore, for appellant. C. E. Sheppard, for appellee.

WILLSON, C. J. (after stating the facts as above). On the theory, it seems, that if plaintiff was entitled to recover at all it must have been because and only because appellant had been guilty of negligence in the construction and operation of its pipe line, on the ground that there was no evidence whatever that it had been so negligent, appellant asked the court to peremptorily instruct the jury to find in its favor. If it should be conceded that the maxim "*res ipsa loquitur*" had no application to the case, and that proof merely that the pipe broke and that oil flowed therefrom and onto appellee's land and injured it, did not raise an issue as to negligence on its part in the construction and operation of the pipe line, the court properly refused to instruct the jury as so requested because it ignored an issue made by the pleadings and the evidence as to appellant's liability, notwithstanding it may not have been guilty of negligence in constructing and operating its pipe line, if it was guilty of negligence in that it failed to use ordinary care after the oil escaped to prevent an injury thereby to appellee's land and pasturage thereon. In *Ry. Co. v. Platzer*, 73 Tex. 117, 11 S. W. 160, 3 L. R. A. 639, 15 Am. St. Rep. 771, it was held that, notwithstanding the absence of negligence on the part of a defendant in kindling a fire on his own premises, if it spread to adjoining prem-

ises, and he should fail to use ordinary care to extinguish it, he would be liable for injury resulting from it to the owner of such premises. The ruling in that case has repeatedly since been followed by the courts of this state (*Ry. Co. v. Anderson*, 44 Tex. Civ. App. 394, 98 S. W. 440; *Ry. Co. v. Chittim*, 31 Tex. Civ. App. 40, 71 S. W. 290; *Dillingham v. Whitaker*, 25 S. W. 724; *Rost v. Ry. Co.*, 76 Tex. 168, 12 S. W. 1138), and we think the principle furnishing the basis for it is applicable in a case like this one, and that the court did not err in refusing to so peremptorily instruct the jury.

Appellant contended that the evidence failed to show any negligence on its part (1) in the selection of material with which to construct its pipe line; (2) or in constructing its said pipe line at the point where it broke; (3) or in the operation of same at the time it was broken; (4) or in connection with the escape of the oil from its pipe line, and requested the court to instruct the jury not to consider questions as to its negligence in those particulars. If the maxim "*res ipsa loquitur*" should be applied to the case as made by the pleadings, the requested instructions we think were properly refused. But we are of the opinion that that maxim was not applicable, because in his pleadings appellee charged as the negligence he relied upon specific acts and omissions on the part of appellant. In *Kennedy v. Ry. Co.*, 128 Mo. App. 297, 107 S. W. 17, it was held by the Kansas City Court of Appeals that "where a plaintiff states a case of specific negligence he abandons his right to the presumption arising from the rule of *res ipsa loquitur*, and voluntarily takes upon himself the burden of proving the specific negligence charged." A similar ruling was made by the same court in *Tighe v. Ry. Co.*, 107 S. W. 1035, and by the Supreme Court of Missouri in *Feary v. Ry. Co.*, 162 Mo. 75, 62 S. W. 458; *McGrath v. St. Louis Transit Co.*, 197 Mo. 97, 94 S. W. 874; and *Price v. Ry. Co.*, 220 Mo. 435, 119 S. W. 938. In the case last mentioned the court said that pleading specific acts of negligence "raises to the dignity of an admission of record that she (the plaintiff) knew the cause of the accident. Not only so—she points out specifically the negligent acts, and must prove them, and recover, if at all, upon the negligent acts pleaded." The same ruling seems to have been made by the Court of Civil Appeals for the Fourth District in *Brewing Co. v. Willie*, 114 S. W. 191, where *Neill, J.*, said: "This is not a case where the doctrine of *res ipsa loquitur* applies; for the plaintiff, having specifically alleged the acts of defendant's negligence, cannot make out a *prima facie* case without direct proof of actionable negligence, but must prove the acts of negligence which he averred, and that such negligence was the proximate cause of his injuries." In its opinion on a motion for a rehearing the court explained that it did not

mean by the use of the words "direct proof" that negligence specifically alleged could not be shown by circumstantial evidence, but we do not understand them to have meant by such explanation that they receded from the opinion they had expressed, that the maxim did not apply where the negligence relied upon is specifically alleged. In his work on Negligence, Judge Thompson states the rule to be that the plaintiff "is not deprived of his right to rely upon the doctrine of *res ipsa loquitur* by reason of having averred the particular act of negligence complained of, where such act is the one which the legal inference of negligence tends to establish," citing as authority for the rule as he states it to be, *Gallagher v. Edison Illum. Co.*, 72 Mo. App. 576, a case to which we have not access. 6 Thompson on Neg., § 7643, p. 627. In *Traction Co. v. Worrell*, 86 N. E. 78, the Appellate Court of Indiana followed without comment the rule as stated by Judge Thompson. An examination of the case cited in 72 Mo. App. 576, might disclose that it is not in conflict with the later cases from that state, cited above. But if it is, it should be regarded as overruled by them. If the rule is as it is stated to be in the *Kennedy and Price* and other cases cited above, it is clear the doctrine in question has no application to the case before us. And we think it is not within the rule, even as it is stated by Judge Thompson to be. It was shown that pieces of iron or steel piping, threaded at their respective ends, were used in constructing the pipe line, and that it was constructed during very warm weather, by joining consecutively, by means of a threaded collar, the pieces of piping one to another. The piping so joined was then placed in a trench prepared for the purpose, varying in depth from two to four feet, according to the lay of the land, and covered with dirt. It was shown that the oil escaped during a spell of cold weather, and the testimony tended to show that it escaped because the threading holding together sections of the piping at the place where it escaped had become broken, permitting such sections to separate and pull apart from each other. Witnesses testified that the separation of the sections was due to the effect on the iron or steel of the cold weather—that the piping before same was connected in the construction of the line had become expanded by the then prevailing heat, and as the effect of the cold weather prevailing when the oil escaped the piping had so contracted as to shorten and cause the sections to pull apart at the place where the oil escaped. In specifying the negligence he relied upon as entitling him to recover the judgment he sought, appellee did not charge as negligence on the part of appellant that it constructed its pipe line without reference to the effect thereon of variations in the temperature of weather reasonably to be anticipated in the locality where it was situated. The "legal inference of negligence,"

from an application of the maxim in question, "tends to establish" negligence in the particular we have just discussed as strongly as it does in any of the particulars specified in appellee's pleadings. We have therefore a case where the legal inference of negligence arising from the happening of the accident and consequent injury, "where the defendant owes to the plaintiff a duty to use care, and the thing causing the accident is shown to be under the management of the defendant or his servants, and the accident is such that in the ordinary course of things does not occur if those who have the management or control use proper care" (29 Cyc. 591) may as reasonably be referred to an act or omission of the defendant not pleaded as it can be to its acts or omissions pleaded. In other words, the "legal inference of negligence tended to establish" not only the "particular act of negligence complained of," but another act of negligence as well, on account of which, because he had not pleaded it, plaintiff was not entitled to recover. Under the rule as stated by Judge Thompson, it may be, if a plaintiff's pleadings in a given case should specify as negligence every act or omission of the defendant from which an inference of negligence proximately causing the injury could be deduced, the maxim might be invoked to support the judgment. But when the plaintiff's pleadings fail to make such a specification, and the legal inference of negligence can be referred as well to an act not specified as to one specified, we think the maxim cannot be invoked under the rule as he states it.

The seventh paragraph of the court's charge to the jury, copied in the statement made of the case, is attacked on the ground that it did not correctly state the measure of the damages recoverable by appellee, if the finding of the jury should be in his favor. There was evidence tending to show that grass and cornstalks on the land were rendered valueless as pasturage; that the turf of the grass was killed; and that the soil was rendered less productive, more difficult to cultivate, etc. The measure of damages for grass and cornstalks destroyed was the market value of same at the time and place when and where same were destroyed; and the measure of damages to the land by reason of injury to the turf, etc., was the difference in the value of the land immediately before and immediately after the oil injured it, not taking into consideration the value of the grass and cornstalks. *Ry. Co. v. Prude*, 86 S. W. 1047, 39 Tex. Civ. App. 144; *Ry. Co. v. Chittim*, 31 Tex. Civ. App. 40, 71 S. W. 297. The instruction was misleading and therefore erroneous, we think, in that it might have been construed by the jury as authorizing a double recovery on account of the grass and cornstalks. They might have construed it as directing them to find as the damages to the land the difference between its value with the grass and cornstalks un-

injured on it immediately before it was injured and its value immediately thereafterward, when the grass and cornstalks had become valueless. Such of the assignments in the brief as present questions likely to arise on another trial, and which have not in effect been disposed of by what has been said, are overruled.

The judgment is reversed, and the cause is remanded for a new trial.

**ITASCA INDEPENDENT SCHOOL DIST.  
et al. v. McELROY et al.**

(Court of Civil Appeals of Texas. Jan. 22,  
1910.)

**1. CONSTITUTIONAL LAW (§ 9\*)—AMENDMENTS  
—ADOPTION.**

Under Const. art. 17, § 1, providing for an amendment of the Constitution by a majority of votes cast, a majority of the votes cast on the proposition for amendment is sufficient.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 7; Dec. Dig. § 9.\*]

**2. SCHOOLS AND SCHOOL DISTRICTS (§ 97\*)—  
BONDS — SCHOOL TAXES — AUTHORITY TO  
LEVY.**

Under the express provisions of Acts 1909 (Acts 1909, c. 12, § 154), as authorized by Const. art. 7, § 3, adopted in 1908, the taxpaying voters of an independent school district may, by a majority vote, authorize the issuance of school district bonds for building purposes, and at the same election authorize a maintenance tax, the aggregate tax for both purposes not being in excess of 50 cents on the \$100 valuation, and it is not necessary at such elections that the rate of tax be determined.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 97.\*]

**3. SCHOOLS AND SCHOOL DISTRICTS (§ 103\*)—  
SCHOOL TAXES—AUTHORITY TO LEVY.**

Acts 1909, c. 12, § 154, provides for levying by the trustees of an independent school district of an annual tax to not exceed 50 cents on the \$100 valuation of taxable property for maintenance of schools, a tax not to exceed 25 cents on the \$100 valuation for the purchase of sites for school buildings, if a majority of the taxpaying voters of the district vote in favor of such tax, but the specific rate of tax need not be determined at the election; that the trustees may issue bonds for building purposes, but the aggregate shall not exceed an amount on which a tax of 25 cents on the \$100 valuation of property in the district will not pay interest, and provide a sinking fund sufficient to pay the principal at maturity. *Held*, that the purpose of the election is to determine whether a district tax shall be levied for maintaining such schools, and the payment of the bonds proposed to be issued for that purpose, not to exceed the constitutional and statutory limit, and the specific rate for maintenance and bond purposes is to be fixed by the trustees within such limit.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 103.\*]

**4. SCHOOLS AND SCHOOL DISTRICTS (§ 103\*)—  
SCHOOL TAXES — ELECTION TO AUTHORIZE  
TAX.**

Under Acts 1909, c. 12, § 154, providing for levy of tax in independent school districts, when authorized by the taxpaying voters of the district for school purposes, not to exceed 50 cents on the \$100 valuation of the taxable property, an election to authorize such tax is not

void because the order and notice of such election failed to state that the rate would be 50 cents on the \$100 property valuation, or less than that amount.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 103.\*]

**5. SCHOOLS AND SCHOOL DISTRICTS (§ 97\*)—  
SCHOOL ELECTION—POWER TO ORDER.**

Though in common school districts elections to determine the questions of issuing bonds and special taxation are ordered by the county judge, in independent school districts such elections should be ordered by the school trustees.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 97.\*]

Appeal from District Court, Hill County;  
W. C. Wear, Judge.

Action by E. A. McElroy and others against the Itasca Independent School District and others. Plaintiffs had judgment, and defendants appeal. Reversed.

See, also, 123 S. W. 117, for answers to questions certified to the Supreme Court.

R. V. Davidson, Atty Gen., C. A. Leddy, Asst. Atty. Gen., and Ivy, Hill & Greenwood, for appellants. Morrow & Smithdeal, for appellees.

**TALBOT, J.** The appellees, property taxpaying voters in the Itasca Independent School District, brought this suit against said district, which was a school district organized for school purposes only, and the trustees thereof, seeking an injunction restraining the issuance of bonds and the collection of taxes therefor, and also restraining the levy and collection of a tax for maintenance of the schools in said district. It is alleged that the Itasca Independent School District is a corporation organized for school purposes only; that within said district there is situated the town of Itasca, Hill county, Tex., which is incorporated under the general laws of this state as a town of over 1,000 and under 10,000 inhabitants; that the boundary of said independent school district embraces other territory besides that embraced in the corporate limits of said town of Itasca, to wit, in all about 16 square miles of territory; that the other defendants, namely, W. H. Coffman, M. S. Wood, W. C. Tibbs, C. L. Martin, J. T. Emerson, W. T. Bethany, and W. S. Reese, all of whom reside in Hill county, Tex., are the duly elected and qualified trustees of said school district; that the defendants Coffman, Wood, Tibbs, and Bethany, acting in their capacity as trustees of said Itasca Independent School District, together with R. R. Weir and W. R. Carr, who were then trustees, on the 12th day of April, 1909, entered on the minutes of said school district an order for an election to be held therein on the 15th day of May, 1909, to determine whether the bonds of said district should be issued to the amount of \$35,000 payable 40 years from date and bearing interest at the rate of 5 per cent. per annum for the purpose of constructing and equip-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ping a public school building of brick material, and whether there should be annually levied, assessed, and collected on the taxable property of said district for the current year and annually while said bonds or any of them are outstanding a tax sufficient to pay the current interest on said bonds and provide a sinking fund to pay the principal at maturity, and whether said board of trustees should be authorized to annually levy and collect a tax for the support and maintenance of the schools of said district, not to exceed 50 cents on the \$100 valuation of taxable property in said district, to be levied and collected for the year 1909 and annually thereafter until discontinued as provided by law; that on May 15, 1909, an election was held in said school district under said orders and resulted in favor of said bonds and the said levies and so declared by defendants; that the defendants were about to issue said bonds and levy said taxes in conformity with said orders, and, unless restrained, would do so. The principal grounds alleged for the issuance of the injunction prayed for are that the defendants claim the right to issue the bonds and levy the taxes authorized by the election of May 15, 1909, by virtue of an act of the Thirty-First Legislature (Acts 1909, c. 12), entitled, "An act putting into effect the constitutional amendment adopted by the people at the last general election, relating to public schools, by amendment sections 50, 57, 58, 59, 60, 61, 63, 65, 66, 76, 77, 78, 80, 81, and 154, and adding 154a-, of chapter 124 of the Acts of the Regular Sessions of the 29th Legislature, relating to school districts and school funds, repealing all laws and parts of laws in conflict herewith, and declaring an emergency," and that said constitutional amendment, which was an amendment to section 3, art. 7. of the present Constitution, was never in fact adopted; that, whilst it received more votes cast in its favor than cast against it, yet it did not receive a majority of all the votes polled in the general election at which it was submitted, and therefore any act of the Legislature thereunder is void, and any act of defendants thereunder is void, the contention being that article 17, § 1, of the Constitution of this state, referring to proposed amendments thereto, when submitted in a general election, requires the amendment to receive a majority of all the votes cast in such election, and that a majority of the votes cast on the proposed amendment is not sufficient to legally ratify the same; that the election for the bonds is void because the act of the Thirty-First Legislature under which said election was held is void for the reason that the caption of said act purports to put into effect the amendment to article 7, § 3, of the Constitution, adopted in 1908, and neither said amendment nor the caption of said act of the Legislature contains any reference to the issuance of bonds; that the order of the school board for said election, the amount of tax

that may be levied to pay said bonds, interest, and sinking fund, is not limited to any rate of taxation; that if said bonds should be issued and placed in the hands of innocent purchasers, not residents of the state, the same might be a lien upon the property in the district, and would require a levy of taxation upon plaintiffs' property in excess of the tax authorized by the Constitution and laws of the state; that no amount of tax was fixed or submitted to the voters, nor were they called upon to pass on the amount, and that as submitted the amount is indefinite and undetermined; that the adoption of the maintenance tax exhausted the taxing power of the district, and leaves nothing to support the bonds; that the board of trustees had no authority to order said election, but same had to be done by the county judge, and that the sheriff should have given notice of the election and the president of the school board, and that the county judge, commissioners' court, and sheriff had nothing to do with the election in question; that the act of the Thirty-First Legislature with reference to bonds and rate of tax in school district matters is unconstitutional because unintelligible, and because it authorizes a greater tax than 25 cents for payment of interest and sinking fund upon the bonds, and authorizes a change in rate of taxation as fixed by vote of the people through the county superintendent and commissioners' court, and attempts to fix an automatic rate in the particular district, though fixed by the voters. The defendants answered by general and special exceptions to plaintiffs' petition, a general denial, and among other things alleged, under oath, that they had no intention of levying and collecting more than 50 cents on the \$100 valuation of taxable property in the school district, and that they would make no attempt to collect more than said sum for all purposes; that they have not and will not attempt to collect more than 25 cents on the \$100 valuation of said property for the purpose of paying interest and creating a sinking fund sufficient to pay said bonds at maturity; that the amount of the assessed taxable property in said district for the year 1908 amounts to the sum of \$1,067,120, and that the amount of taxable property for the year 1909 is greater than it was for 1908. It is shown by the record and conceded that that the constitutional amendment in question received a majority of all the votes polled on that proposition, but did not receive a majority of all the votes polled in the election at which it was submitted. Upon a hearing in chambers the court on July 15, 1909, granted plaintiffs an injunction restraining defendants from the sale of the bonds described in plaintiffs' petition and from collecting the taxes therein mentioned. From this order and judgment of the court appellants have perfected an appeal to this court.

With the exception of the allegation that

the election should have been ordered by the county judge, etc., which is not therein insisted upon, the propositions contended for by appellees in their brief in support of the district court's action in granting the injunction applied for by them is sufficiently indicated by the foregoing grounds alleged therefor. Appellants challenge the sufficiency of these grounds to justify the court's action, and insist, in effect, (1) that it did not require a majority of all the votes cast in the general election held in 1908, at which the amendment of article 7, § 3, of the Constitution was voted on, to legally ratify and adopt said amendment, but that a majority of the votes cast thereon was sufficient for such purpose; (2) that the taxpaying voters of Itasca Independent School District had the right, by a majority vote, to authorize the issuance of the bonds for building purposes, and at the same time in said school district election to authorize a maintenance tax, the aggregate tax for both purposes not being in excess of 50 cents on the \$100 valuation, and it was not necessary that the rate of tax be determined in said election; that the voters in said election expressed their assent to and authorized a rate of tax for both purposes not to exceed the maximum fixed by the Constitution and laws; (3) that the fact that the voters assented to the maximum maintenance tax did not fix it in that amount, and did not thereby make it obligatory on the trustees of the school district to levy and collect for maintenance purposes only 50 cents on the \$100 valuation of the property situated in said district, therefore the adoption of the maintenance tax did not exhaust the taxing power of the district, and leave the trustees without authority to levy the tax required to pay the interest on the bonds and provide the sinking fund necessary for their retirement at maturity; (4) that the control of the public schools in said school district, and the calling of a tax election, and all matters incident to said district, rested with the trustees, and the county judge, sheriff, and commissioners' court had nothing to do with the same; (5) and, generally, that the adoption of the maintenance tax, and the tax to support the bonds and all the proceedings of the appellants, were authorized and have been in strict conformity with the Constitution and laws of the state.

That the amendment to article 7, § 3, of the Constitution, which was voted on at the general election in 1908, was adopted as prescribed by article 17, § 1, of the Constitution of this state, is definitely settled by the opinion of our Supreme Court rendered in this case upon the certification of the question for their decision. See 123 S. W. 117. The Supreme Court, in construing article 17, § 1, of the Constitution, which prescribes the procedure for the amendment of that instrument, holds that the language of said article, namely, "A majority of the votes cast,"

means a majority of the votes cast for the proposed amendment, and not a majority of the total votes polled at the election. The decision is based solely upon the court's construction of the language of said article 17, § 1, of the Constitution, and is in accord with the view of this court on the question. The discussion of the Supreme Court seems exhaustive, and anything we could add thereto would be superfluous.

Upon the other questions involved we agree with the contentions of counsel for appellants, and believe that neither of the propositions insisted upon by the appellees can be maintained. The amendment to section 3, art. 7, of the Constitution, empowers the Legislature to provide for the formation of school districts and to authorize "an additional ad valorem tax to be levied and collected within such school district for the maintenance of public free schools, and the erection and equipment of school buildings therein, provided that a majority of the qualified, properly taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax, not to exceed in any one year fifty cents on the one hundred dollars valuation of property, subject to taxation in said district." Section 154, Acts 31st Leg. p. 21, c. 12, putting into effect the constitutional amendment referred to, reads thus: "Trustees of incorporated districts that have been, or may be hereafter, incorporated under general or special laws, for school purposes only, shall have power to levy and collect an annual ad valorem tax, not to exceed fifty cents on the one hundred dollars valuation of taxable property of the district, for the maintenance of schools therein, and a tax not to exceed twenty-five cents on the one hundred dollars valuation for the purchase of sites, and the purchasing, construction, repairing or equipping public free school buildings within the limits of such incorporated districts; provided that the amount of maintenance tax, together with the amount of bond tax of the district shall never exceed fifty cents on the one hundred dollars valuation of taxable property. Said trustees shall have power to issue coupon bonds of the district for building purposes, to be made payable not exceeding forty years from date, in such sums as they shall deem expedient, to bear interest not to exceed five per cent. per annum, \* \* \* provided that the aggregate amount of bonds issued for the above-named purpose shall never reach such an amount that the tax of twenty-five cents on the one hundred dollars valuation of property in the district will not pay current interest and provide a sinking fund sufficient to pay the principal at maturity, and provided further, that no such tax shall be levied, and no such bonds issued until after an election shall have been held wherein a majority of the taxpaying voters, voting at said election shall have voted in favor of the levying of said tax, of the issuance of said bonds, or

both, as the case may be; provided that the specific rate of tax need not be determined in the election." This section of the act of the Legislature is in no way violative of, or prohibited by, that portion of the constitutional amendment quoted above, or any other provision of the Constitution, and expressly authorizes the trustees of school districts, such as the "Itasca Independent School District," to levy and collect an annual ad valorem tax not to exceed 50 cents on the \$100 valuation of taxable property in the district for the maintenance of schools therein, and a tax not to exceed 25 cents on the \$100 valuation for the purchasing of sites and the construction and equipping of school buildings within the limits of such district, but provides that in no event shall the amount of the maintenance tax, together with the amount of the tax for purchasing, constructing, and equipping the buildings, ever exceed 50 cents on the \$100 valuation of the taxable property, and that the specific rate of tax need not be determined in the election. The proviso contained in this statute that the "specific rate of tax need not be determined in the election" is not found in any former statute on the subject. On the contrary, until the passage of the act in question by the Thirty-First Legislature, the statute required that the amount of the tax to be levied and collected for school purposes should be determined by the voters at an election held for that purpose. And in *Parks v. West*, 108 S. W. 466, this court held that, under the statute as it then existed, an order for an election to determine whether or not a tax should be levied and bonds issued for school purposes must state the specific rate of tax proposed to be levied; that no discretion either as to whether the levy of the tax should be made, or as to its amount, was vested in the commissioners of the county or trustees of the district; and that an election held under an order that the tax should not exceed 25 cents on the \$100 valuation of taxable property was void. That decision was based upon the language of the statute that the order for the election "shall state the amount of the tax to be voted on." But, as has been seen, neither the constitutional amendment of 1908, nor the act of the Thirty-First Legislature, contains any such language, but said act expressly provides the specific rate of tax need not be determined in the election. This being true, we think it follows that the purpose of the election, as required by both said amendment and act of the Legislature in such cases, is simply to determine whether or not the voters of the school district are willing to be burdened with the tax necessary for the maintenance of the schools within the district and to pay all the bonds proposed to be issued, not to exceed the maximum as fixed by the Constitution and laws. In other words, we think that under the provisions of the present Constitution and statute relating to the subject the authority

of the voters for the levy of the tax and issuance of the bonds by the trustees is to be secured by the election, and the specific rate for maintenance and bond purposes respectively, is to be fixed by the trustees within the limits allowed to pay first the interest on the bonds and provide the sinking fund for their retirement at maturity, and then such an amount fixed for maintenance as the prescribed maximum rate will permit. We do not concur in the contention of counsel for appellees that the language of the amendment to the Constitution that the Legislature "may authorize an additional ad valorem tax to be levied, provided a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose shall vote such tax," means that the voters must pass upon and fix the specific rate of tax they are to pay. This language in our opinion refers to the "additional ad valorem tax," which the Legislature may authorize not to exceed in any one year 50 cents on the \$100 valuation, and not the specific or exact rate to be levied and collected for the purposes authorized. Nor do we concur in the contention urged by the appellees that the election for the issuance of bonds and levy of the tax therefor is void because the taxpaying voters of the school district, having voted a tax of 50 cents on the \$100 valuation of the taxable property in said district, thereby exhausted the taxing power of the district, and there existed therein no power or authority to levy an additional tax to pay the interest upon said bonds and provide the sinking fund for their retirement at maturity, as required by law. Neither do we agree to the contention that the election for the issuance of the bonds and levy of the tax therefor is void because the order and notice of said election "failed to state that the rate would be fifty cents on the one hundred dollars property valuation or less than that amount." Whether the tax voted is only for the purpose of maintaining the schools or is for such purpose and to support the bonds for building purposes, the maximum limit fixed by the Constitution and statute is 50 cents on the \$100 valuation. Now, while there were separate orders for an election to determine whether a tax should be levied for maintenance not to exceed 50 cents on the \$100 valuation, and to determine whether the bonds should be issued and the tax levied therefor, yet it appears that said orders were made on the same day and the election for both purposes ordered to be held at the same time and place. This amounted practically to one order for an election to determine whether or not a maintenance tax and bond tax, which together should not exceed 50 cents on the \$100 valuation of property situated in the district, should be levied and levied in such an amount for bond purposes as not to exceed, as prescribed by law, 25 cents on the \$100 valuation, and at such a rate for maintenance purposes that the amount for that

purpose, together with the bond tax, would not exceed the maximum of 50 cents allowed for both purposes. But, if it must be said that the voters at the election in question authorized the levy of the maximum limit of 50 cents for maintenance purposes, still we do not think that the maximum amount must be levied for that purpose. As contended by counsel for appellants, the fact that the voters assented to the maximum tax, when at the same time they authorized a bond tax, did not fix the maintenance tax in that amount, nor did it impose upon the trustees the duty or obligation to levy a 50-cent maintenance tax. The result of the election being in favor of both the maintenance and bond tax, it becomes the duty of the trustees of the school district to so apportion, by the specific rate fixed, the total amount authorized to be collected, that both purposes should be sustained rather than either should fail. This can be accomplished by levying for bond purposes only such an amount, not exceeding 25 cents on the \$100 valuation, as will pay the interest on the bonds, and provide the sinking fund and for maintenance purposes such a sum as may be necessary therefor, not to exceed the remaining amount of the 50 cents allowed; and it will be presumed that the trustees will faithfully perform this duty. To do otherwise would be to do wrong and the presumption will not be indulged that they will do wrong.

Touching the proposition, to the effect that the election authorizing the issuance of bonds and the levy of a tax therefor is void because the order and notice of the election failed to state the specific rate of tax to be levied for that purpose or an amount not to exceed 25 cents on the \$100 valuation, it may be said that under the constitutional amendment of 1908 and the statute passed by the Thirty-First Legislature, giving effect to that amendment, as we have already held, it was not necessary that the specific rate should have been so stated, and that the failure of said order and notice to state the tax would be an amount not to exceed 25 cents on the \$100 valuation of the property in the district did not render the election void. The sworn answer of the appellants show the assessed value of taxable property in the school district for the year 1908 to be \$1,087,120. The order and notice referred to stated the amount of the bonds proposed to be issued, the rate<sup>2</sup> of interest per annum, and the number of years said bonds were to run, and submitted to the voter whether or not such bonds should be issued, and whether there should be annually levied and collected on all the taxable property in the district a tax sufficient to pay the current interest on the bonds and provide a sinking fund sufficient to pay the principal at maturity. This proposition carried at the election. The law fixed the maximum amount

of the tax thus authorized for said purposes at 25 cents on the \$100 valuation, but left the specific rate to be determined and fixed by the trustees. What rate of tax was necessary to pay said interest and provide such a sinking fund was a mere matter of calculation. It could thus be definitely ascertained and known, and would not exceed, according to the known valuation of property, 25 cents on the \$100 of such valuation.

The contention that the election is void because the trustees of the district had no authority to order said election, but the same could be ordered only by the county judge and notice thereof given by the sheriff of the county, is not believed to be well taken. In common school districts, such elections are to be ordered by the county judge and notice thereof given by the sheriff, but the several sections of the statutes bearing upon the question make it clear, we think, that in independent school districts authority is conferred upon the trustees of such districts to order such elections.

It is believed that the foregoing questions are the principal ones on which the merits of the case depend, and the only one of sufficient importance to require particular notice or discussion. Our conclusion is that the facts alleged in appellees' petition are insufficient to entitle them to the relief sought.

The judgment of the district court is therefore reversed, and the injunction granted by that court dissolved.

# MISSOURI, K. & T. RY. CO. OF TEXAS et al. v. EARLY-CLEMENT GRAIN CO.

(Court of Civil Appeals of Texas. Jan. 12, 1910. Rehearing Denied Feb. 9, 1910.)

## CARRIERS (§ 99\*)—CARRIAGE OF GOODS—LIABILITY FOR DELAY—EXCUSES.

A shipment having been accepted for transportation without notice to the shipper that there was a shortage of cars and an unprecedented amount of business, the carrier should be held liable for damages for unreasonable delay.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 418-420; Dec. Dig. § 99.\*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by the Early-Clement Grain Company against the Missouri, Kansas & Texas Railway Company of Texas and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Coke, Miller & Coke and Clark, Yantis & Clark, for appellants. John W. Davis, for appellee.

FISHER, C. J. Only two questions are raised in this case:

First. Did the plaintiff, appellee here, have such an interest in the shipment as would allow him to sue for damages occurring dur-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing transportation? There is evidence which brings this question within rule of T. C. Ry. Co. v. Dorsey, 30 Tex. Civ. App. 377, 70 S. W. 576.

Second. Can carrier excuse delay in transportation on account of shortage in cars and unprecedented amount of business? The shipment was accepted for transportation without notice to the shipper of these facts; consequently carrier should be held liable for damages on account of unreasonable delay. G., C. & S. F. Ry. v. Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829; I. & G. N. R. R. Co. v. Anderson, 21 S. W. 691; G., C. & S. F. Ry. Co. v. McAulay, 26 S. W. 475.

Judgment in favor of plaintiff affirmed.

### MORIARTY v. STATE.

(Supreme Court of Tennessee. Dec. 11, 1909.)

#### 1. INTOXICATING LIQUORS (§ 50\*) — ILLEGAL SALES—SALES BY FRATERNAL LODGE.

A bona fide subordinate lodge of a fraternal benevolent and social organization, with subordinate lodges organized for benevolent and social purposes, which maintains a building for the convenience and comfort of its members, with the appurtenances of a social club, and which furnishes to its members refreshments, including intoxicants, as a purely incidental matter, is not engaged in handling liquor within the revenue act of 1907 (Acts 1907, c. 541), imposing a tax on every person, social club, etc., selling intoxicating liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 51; Dec. Dig. § 50.\*]

#### 2. INTOXICATING LIQUORS (§ 169\*) — ILLEGAL SALES—SALES BY FRATERNAL LODGE—LIABILITY OF SERVANT.

Where a bona fide subordinate lodge of a fraternal benevolent and social order was not guilty of handling liquor within the revenue act of 1907 (Acts 1907, c. 541), where it furnished as a purely incidental matter intoxicating liquors to its members, its servant, engaged in doing the service of furnishing liquor to the members, was not engaged in selling or aiding in the sale of liquor, in violation of Acts 1899, c. 161.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 187, 188; Dec. Dig. § 169.\*]

#### 3. INTOXICATING LIQUORS (§ 146\*) — ILLEGAL SALES—SALES BY CLUB.

Where a club was organized to evade, if possible, under the forms of law, the statutes prohibiting the sale of intoxicating liquor, the club, furnishing intoxicating liquors to its members as the principal purpose or one of the chief objects of the organization, violated the law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 159; Dec. Dig. § 146.\*]

Error to Criminal Court, Knox County; T. A. R. Nelson, Judge.

Dan Moriarty was convicted of selling intoxicating liquors without a license, and he brings error. Reversed.

J. K. Green, J. W. Culton, S. G. Helskell, and J. C. Harris, for plaintiff in error. Asst. Atty. Gen. Faw, for the State.

BEARD, C. J. The plaintiff in error, upon an indictment charging him with unlaw-

fully selling intoxicating liquors without license, was convicted, and a fine of \$100 was assessed against him, and it was adjudged that, in addition, he be confined in the county workhouse for six months.

The facts on which this conviction was made are, briefly, as follows: The Benevolent & Protective Order of Elks of the United States of America is a fraternal benevolent and social organization, with about 1,100 subordinate lodges, consisting of near 400,000 members, located in the different parts of the United States. One of these lodges is known as the Knoxville Lodge of Elks, No. 160. This lodge is incorporated under the laws of Tennessee, with its situs in the city of Knoxville, in this state, and has a membership of several hundred. It also has a large building in the city of Knoxville, fitted up for the convenience and comfort of its members, and having all the appurtenances of a social club. Within this building and a part thereof is a small room equipped and used as a buffet, where members of the lodge, and no one else, could obtain refreshments, including intoxicating liquors. All the supplies used in this buffet were furnished by and were the property of the lodge. The trustees of the lodge employed the plaintiff in error as steward, whose duty it was, among other things, in the operation of this buffet to serve the members, upon the presentation of printed checks, theretofore purchased by them from the lodge, intoxicating liquors. These checks had stamped upon them: "Good for service only, and not transferable." Each of these checks represented the price of one drink, and this price, fixed by the lodge, was the equivalent only of the cost of the drink, with that of "service" added. The furnishing of a drink to one of the members of the lodge by plaintiff in error in exchange for one of these checks is the basis of this indictment and conviction.

It is proper to say that there is no claim on this record that this lodge is not organized under the statute as a bona fide one for social and benevolent purposes, or that its charter was obtained as a cloak or device to serve its incorporators and members in the sale and purchase of intoxicants, in evasion of the law prohibiting such sales without license. Upon these facts, the question is: Was the plaintiff in error guilty of the offense charged?

Within the last few years many cases of a similar character to the present have reached a number of the courts of last resort in this country, and it will be found upon examination that the opinions of these courts on the question involved are irreconcilable. Thus it has been held in one class of these cases that a bona fide social club, organized for the purpose of establishing a library in connection with the clubrooms for social enjoyment, may serve its members and their

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

invited guests with intoxicating liquors, the members only paying therefor, the money so received being used to replenish the stock, but insufficient for that purpose, without being liable to pay license required from retail liquor dealers. *State v. Austin Club*, 89 Tex. 20, 38 S. W. 113, 30 L. R. A. 500; *Piedmont Club v. Com.*, 87 Va. 540, 12 S. E. 963.

There is still another class in which it has been held that the dispensing of intoxicants to its members by a bona fide social club, where the liquors are held in common, is not a sale of liquors within the meaning of the license laws. *State ex rel. Bell v. St. Louis Club*, 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573; *State ex rel. Columbia Club v. McMaster*, 35 S. C. 1, 14 S. E. 290, 28 Am. St. Rep. 826.

In *Barden v. Montana Club*, 10 Mont. 330, 25 Pac. 1042, 11 L. R. A. 593, 24 Am. St. Rep. 27, it was held that a social club, by reason of keeping a bar and furnishing liquor to its members and invited guests, where such liquor was not sold for a profit, and the club was not a device for evading the laws as to the sale of such liquors, was not subject to the license tax imposed by the statute on "all persons who deal in, sell or dispose of" intoxicating liquors.

On the other hand, there are a number of courts of high character holding, as did the Supreme Court of Illinois, in *South Shore Country Club v. People*, 228 Ill. 75, 81 N. E. 805, 12 L. R. A. (N. S.) 519, 119 Am. St. Rep. 417, that "an incorporated social club, organized in good faith for pleasure, social recreation, and outdoor sports, with a limited membership, a clubhouse elaborate in its appointments, including library, reading room, card and billiard rooms, dining room, and restaurant, with outside conveniences for exercise and sport, and a place where intoxicating liquors were dispensed to and paid for by the members, without profit," was within the statute requiring a license "to conduct a dramshop." In line with that case may be cited *Martin v. State*, 59 Ala. 34; *State v. Neils*, 108 N. C. 787, 13 S. E. 225, 12 L. R. A. 412; *Army & Navy Club v. District of Columbia*, 8 App. D. C. 544; *Mohrman v. State*, 105 Ga. 709, 32 S. E. 143, 43 L. R. A. 398, 70 Am. St. Rep. 74. A full citation of cases on this subject, with an editorial review of the same, showing the varying views of the different courts, will be found in the notes to the *South Country Club Case*, supra, reported in 12 L. R. A. (N. S.) 519, and to *Barden v. Montana Club*, supra, 24 Am. St. Rep. 27. An examination of the cases will show that, while all are determined with regard to existing statutes, yet, in those involving the dispensing of intoxicants for a price to members and guests in a bona fide club, that the real conflict grows out of the different views entertained by courts as to what constitutes a "sale," within statutes requiring payment of a privilege tax for retailing intoxicants. All the authorities

agree in holding that, where clubs are formed for the evident purpose of evading the liquor laws, such course will not be tolerated; so it is, that these cases cannot be placed on one side or the other in a controversy involving the statutory right of a bona fide club to dispense intoxicants for a price to its members.

Mr. Black, in his recent work on *Intoxicating Liquors* (section 142, p. 185), after a review of the authorities, sums up and concludes as follows: "Upon the whole, therefore, notwithstanding some conflicting rulings, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide the members with a convenient method of obtaining a drink whenever they desire it, or if form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book, or buying a ticket or a chip, thus enabling the proprietor to conduct an illicit traffic, then it falls within the terms of the law; but, on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, artistic, or other purposes, to which the furnishing of liquors to its members would be merely incidental, in the same way and to the same extent that the supplying of dinners or daily papers might be, then it cannot be considered as within the purpose or the letter of the law."

Coming, now, to our own decisions, the first case in which the question here involved was considered is that of *Tennessee Club v. Dwyer*, 11 Lea, 452, 47 Am. Rep. 298. The *Tennessee Club*, of Memphis, was a social club, organized under Acts 1875, c. 142, § 1, subsecs. 3, 5, and maintained a library, gave musical entertainments, afforded meals for its members, and kept a small stock of liquors for the use of its members, who paid for each drink as it was taken. No profit was made for the club upon the liquor so sold, but the stock was in part kept up by the monthly dues of members. The opinion in the case shows that one Dwyer, as clerk of the county court, claiming that the club was under obligation to pay the privilege tax required by section 4 of chapter 149 of the Acts of 1881, from retail liquor dealers, upon a refusal to pay, threatened a distress warrant, when a bill was filed by the club, setting out the facts hereinbefore recited, and asking that he be enjoined from issuing such warrants, or "seeking in any manner to hold complainant accountable, or proceed against it as a retail liquor dealer." This injunction was granted; but the chancellor, upon motion of the defendant, dismissed the bill for want of equity on its face, and the case was then brought by the complainant to this court.

The clause in the act of 1881, relating to

the privilege tax required of retail liquor dealers, and under which the county court clerk demanded the tax in question, was as follows: "Where they do business at any place not in a city or town, or in a city or town of one thousand inhabitants, or less, \$150 per annum; in a city or town of more than one thousand inhabitants and less than five thousand, \$150 per annum; in a city, or town, of five thousand inhabitants or more, \$250, quarterly or semiannually in the same proportion."

In the course of the opinion delivered by Cooke, J., it is said: "It cannot be controverted but that the complainant would have a right to purchase and keep liquors at its clubrooms for the use of its members, and to distribute it among them in any method it might deem proper, and to raise funds for the purpose of replenishing by assignment upon the members, and the mode adopted, or the form of a sale alone to its members of such a quantity for so much money, can be nothing more than a mode adopted of assessing each member in proportion to the amount he consumes, and cannot be distinguished in principle from that adopted in one of the cases referred to, of issuing checks to each member which entitles him to so much liquor \* \* \* according to the amount of money he contributes. \* \* \* Upon the whole case, as made by the bill, we conclude that the complainant was not a retail liquor dealer within the meaning of the statute, that it was not required to pay said tax or take out a license as such, and that the distress warrant was wrongfully issued and levied upon its property. \* \* \*

It is true that the court was aided in coming to the conclusion above announced, that it was not the purpose of the Legislature to embrace clubs, organized and conducted as was the complainant, as retail liquor dealers, from the fact that the statute provided that retail liquor dealers should be taxed "as other merchants," and graded the tax "according to the population of the town or city in which such retail traffic is carried on," the court regarding this as indicating that it was only "retailers of liquors to the public" who were contemplated by the act; yet this was not the real ground of that decision, but rather that found in the excerpt set out above.

The next case arising in this state is that of *Hermitage Club v. Shelton*, 104 Tenn. 101, 56 S. W. 838, which, it is here insisted, overruled the *Dwyer* Case. There it was held that the *Hermitage Club*, upon the agreed statement of facts, was liable to pay the privilege tax imposed on liquor dealers by chapter 432 of the Acts of 1899. It is insisted that that case is conclusive authority to sustain the conviction in the present case. It is true that the club in that case, as in the present, was a bona fide social club, organized or chartered under the act of 1875,

and that the tax then claimed, the legality of which was sustained by this court, was under an act similar in terms to the one involved in the present controversy. The act of 1899, after classifying liquor dealers with merchants and fixing the amount of privilege tax to be paid by them, graduating it according to the population of the town, taxing district, or city in which they do business, then defined such dealer to be "every person, company, or firm, selling spirituous liquors, wines, or malt liquors, beer or ale, or intoxicating bitters, or any medicated or adulterated cider, or any social club or association, incorporated or otherwise, which handled such liquors for sale." That act further provided that "the procuring of United States revenue license by wholesale or retail liquor dealers shall be taken as prima facie evidence that the parties are in a wholesale or retail liquor business, and are subject to state and county taxes, unless established by proof that they are not so engaged."

The revenue act of 1907 (Acts 1907, c. 541), which was in existence at the time of the transaction which occurred which forms the basis of the indictment in this case, was similar in terms to those just quoted from the Act of 1899. The distinction, if any, between that case and the present, is not to be found in the acts, but in the facts presented by the records in the two cases. In that it was conceded in the agreed statement of facts that the *Hermitage Club* had taken out a United States revenue license, covering the period of time for which the state and county were demanding a privilege tax. In the present case no such license had been secured. The question there was whether the *Hermitage Club* had succeeded in overcoming the prima facie case that it was engaged in the retail liquor business by reason of having secured United States revenue license, while in the present no such question arises. While it is said that a "social club" was in the mind of the Legislature in the act of 1899, yet it was conceded in the opinion that it was not such a club organized under the act of 1875 that "per se is subject to this privilege tax," but only when it "handles liquors for sale." This is followed by this question: "Having liquors on hand, dispensing them as it does, and doing this under cover of protection of a United States revenue license, as plaintiff in error established by proof, that in doing so it has not by that act been selling them." In determining whether the club had, under the given state of facts, established by proof that it had not been engaged in selling liquors, it was said as follows: "While profit is not essential to a perfected sale, yet, if it was, it is apparent in this case that profit is earned in the handling of its liquors. It is true that this profit does not go to the members, and under its charter could not do so. But it does 'go into a general fund, and that fund is not used alone

to replenish that which has been consumed, but in defraying the general expenses of the club.' \* \* \* But, in addition, not only is liquor dispensed to members, but also to guests as they may require. The same methods are pursued in both cases, and the proceeds, including the equivalent for the outlay, 'whatever of profit was made' by these sales of liquor, went back into the general fund. So it was upon these admitted facts that it was held the club had failed to establish proof that it was not within the terms of the act in question."

From what has been said, the leading and controlling facts upon which that case went off are so dissimilar from those in the present case that we do not regard it as a controlling authority. Not only is this record without suggestion that there was a profit made in the disposing of the liquors in this Elks' Lodge, which was carried into a "general fund" to be used as might be in defraying the expenses of the club; but the fact is that no profit was made, the price charged for the liquor served being the simple equivalent of its price and the cost of serving the same to the members. Further, while in the Hermitage Club liquor was served to members and invited guests, who stood on the same ground and were served alike in the dispensing of intoxicants and payment for the same, in the Elks' Lodge these intoxicants were served alone to the members of the lodge. In addition, in the one case, as has already been said, the Hermitage Club had conceded its liability as a retail liquor dealer by taking out a United States revenue license; in the present case no such thing was done.

In the course of the opinion in that case it was said: "But it is insisted that the case of *Tennessee Club v. Dwyer*, 11 Lea, 452 [47 Am. Rep. 298], had adjudicated this question, and upon similar facts to these in the present record has determined that a social club, such as is the plaintiff in error, is not in the sense of the law a liquor dealer. The reasoning and authority of that case are fully recognized by the court; but we do not think its conclusions controlling in the present." Following this statement, the court marked the difference between the two cases. There, instead of overruling the earlier case, it is said that it is recognized and approved.

With the single exception that the act of 1890 and the act of 1907 embraced by name a "social club," and where engaged "in handling intoxicating liquors for sale," requiring it in such case to pay a retail liquor dealer's license, this case is as distinct in its facts from that as was the Hermitage Club Case from that of *Tennessee Club v. Dwyer*. We think the latter of these cases can be appealed to as authority by the plaintiff in error.

We are satisfied from the uncontroverted facts in the record that the Knoxville Lodge of Elks, like the present lodge, is a bona fide association, organized for social, fraternal, and benevolent purposes, and that the furnishing of refreshments, inclusive of intoxicants, to its members, is purely incidental, and that the lodge was not engaged in the "handling of liquor for sale," within the sense of the revenue act of 1907. From this it follows, of necessity, that the plaintiff in error, who was simply its employé and doing its service, was not guilty of the misdemeanor of either "selling or aiding in the sale" of "Intoxicating liquors," created by section 1 of chapter 161 of the Acts of 1899.

It may be proper to observe, in conclusion, that it is a matter of common knowledge, of which we may take judicial notice, that since the legislative enactment of the various statutes, extending from time to time the territorial scope within which intoxicating liquors cannot be legally sold, clubs have sprung up in great numbers in different localities, and obtained charters, whose apparent purpose is to evade, if possible, under the forms of law, the effect of these statutes. It is hardly necessary to say that such a club can find no warrant for its existence in the present holding. Whenever, in any case, the legality of its action in this regard is challenged by the state, it will be the duty of the court to scrutinize closely, in order to see that no such device is attended with success. In every case, when the serving of liquor to members, or others, is the principal purpose, or one of the chief objects, of such an organization, and not a mere incident, or when it is sold for a profit, this being carried into a general fund for meeting the expenses, or into a special fund for the payment of salaries, or for distribution among its members, or otherwise, the disguise should and will be uncovered, and the club and its members made amenable to the law.

The judgment of the trial court is reversed.

#### BOWMAN v. J. H. TRAINOR CO.

(Supreme Court of Arkansas. Jan. 24, 1910.)

#### 1. CORPORATIONS (§ 387\*)—POWER TO HOLD REAL ESTATE—WHO MAY QUESTION.

Under Kirby's Dig. § 851, providing that corporations may acquire and hold such land as shall be necessary for the purposes of the corporations, etc., the inquiry whether any particular real estate held by a corporation is necessary for its business is a matter between the state and the corporation, and is not subject to investigation in a suit to quiet title.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1548-1553; Dec. Dig. § 387.\*]

#### 2. CORPORATIONS (§ 387\*)—CONVEYANCES—RIGHT TO ATTACK.

A purchaser, with constructive notice by the record of a prior conveyance to a corpo-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ration, which had changed its corporate name, and which subsequent to the conveyance to the purchaser became financially embarrassed, and sold all of its property to a trustee, who agreed to pay all its debts, cannot impeach the conveyance by the corporation to the trustee, and his conveyance to another corporation, though through inadvertence the land was not conveyed by deed.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 387.\*]

Appeal from Prairie Chancery Court, John M. Elliott, Chancellor.

Suit by the J. H. Trainor Company against W. P. Bowman and another, in which G. G. Wood was made a party pending the suit. From a decree for plaintiff, defendant W. P. Bowman appeals. Affirmed.

J. H. Harrod and J. G. & C. B. Thweatt, for appellant. Wiley & Clayton, for appellee.

BATTLE, J. On the 13th day of October, 1906, the J. H. Trainor Company filed a complaint in the Prairie chancery court against W. P. Bowman and the Little Rock Vehicle & Implement Company, alleging that plaintiff was the owner of one undivided half of a certain tract of land, deraigning title, through mesne conveyances, from the United States.

It then alleged that the one-half of the land was sold on the 8th of June, 1903, for taxes of 1902, and purchased by Bank of Grand Prairie, which assigned its certificate of purchase to the defendant, W. P. Bowman, who received a deed on the 8th day of June, 1905, and that the tax sale was void.

Prayer of complaint was that the plaintiff's title be quieted, and Bowman's tax deed be canceled.

The defendant Bowman answered, and denied that plaintiff acquired title to one-half of the tract of land, or is the owner thereof, and claimed title to the same by his tax deed and deed executed to him by Mrs. Mollie Roper, and asked that his title be quieted.

The defendant Little Rock Vehicle & Implement Company and G. G. Wood, who was made a defendant during the pendency of the suit, answered, alleging that the Little Rock Vehicle & Implement Company was a corporation, and that, after it bought the land in controversy, it changed its name to Wood Carriage Company, and that in January, 1905, the Wood Carriage Company went out of business, and transferred all of its assets to the plaintiff, and that the defendant G. G. Wood was its last president. They disclaimed all interest in the land, and joined in the prayer of the complaint.

Upon final hearing the court ordered, adjudged, and decreed that the equitable title to the land in controversy is in the plaintiff, and that the legal title is in the Little Rock Vehicle & Implement Company, and that it be divested out of such company and vested

and quieted in plaintiff; and that the tax sale of the land on the 8th of June, 1903, for the taxes of 1902, and the deed made in pursuance thereof to W. P. Bowman, be set aside and held for naught, and as a cloud upon the plaintiff's title, and that plaintiff's title be quieted as against all the parties to this suit. From this decree Bowman appealed.

Appellant says he "makes no point on the decree of the court holding that the tax sale was irregular," and further says: "Our contention is that the Trainor Company is in no position to come into a court of equity and attack anything relating to the title of the land in this case, and the only point we desire to discuss on this appeal is that plaintiff has wholly failed to show any equitable title to the land in controversy. Not having shown an equitable title, it of course cannot maintain a complaint to cancel a cloud or to quiet its title."

It is clearly alleged in effect in the complaint, and not denied in the answer, that the Little Rock Vehicle & Implement Company is a corporation. But appellant says it is not shown that it had the right to acquire the land in controversy. But the statutes of this state provide that corporations, by their corporate name, shall "have power to acquire and hold such lands, tenements and hereditaments and such property of every kind as shall be necessary for the purposes of such corporations; and such other lands, tenements and hereditaments as shall be taken in payment of or as security for debts due such corporations, and to manage and dispose of the same at pleasure." Kirby's Dig. § 851. "The inquiry whether any particular real property is necessary for that business is a matter between the state and the corporation, which does not concern third parties." That is a matter which is not subject to investigation, and cannot be called in question in this suit. *Cowell v. Springs Co.*, 100 U. S. 35, 60, 61, 25 L. Ed. 547; *Cook, Corporations* (6th Ed.) § 694.

Both parties trace title to Mollie Roper. On the 4th day of March, 1899, she conveyed the land in controversy to D. M. Livesay. This deed was filed for record on the 21st day of September, 1906. On the 21st day of October, 1902, Livesay and wife conveyed the same to the Little Rock Vehicle & Implement Company, and their deed was recorded on the 31st day of October, 1902. On the 26th day of September, 1904, she conveyed to the defendant W. P. Bowman, and he had constructive notice, by record, of the title of the Little Rock Vehicle & Implement Company to the land at the time she conveyed to him.

The name of the Little Rock Vehicle & Implement Company was changed at a meeting of its stockholders, on the 3d day of February, 1903, by a resolution, to Woods Carriage Company. This appears on the minutes or

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

record of the company. Whether the resolution was adopted in conformity to the statute in such cases made and provided is immaterial; the corporation was not changed.

The corporation became embarrassed financially. Its record shows that its stockholders, in pursuance to a notice given to them met on January 5, 1905, and authorized its board of directors to sell all its property of every description to any person or corporation who can and will take its property and pay its debts, or otherwise satisfy its creditors, and hold it harmless against its debts, and to report such sale to them (stockholders) at a subsequent meeting for ratification. Its record further shows that its board of directors, in pursuance of notice to all of them, met on the 9th day of March, 1905, and sold all of its property to J. H. Trainor, trustee, in consideration of satisfaction by him of all its indebtedness and the holding of it harmless by him against all claims, and that the stockholders, upon notice to each of them, met on the 9th day of March, 1905, and by unanimous vote ratified the sale made by the board of directors. All the property was sold and transferred to J. H. Trainor, trustee, and he took possession of it, and sold and transferred it to J. H. Trainor Company, a corporation organized under the laws of Arkansas. The claims against the Woods Carriage Company and its creditors were satisfied. But through inadvertence the land in controversy was not conveyed by deed. The plaintiff, J. H. Trainor Company, however, acquired the equitable title to the property. To these transactions Bowman was a stranger, and he cannot impeach them. *Castle v. Lewis*, 78 N. Y. 131, 135. They do not affect him.

Decree affirmed.

MERWIN, Clerk of County Court, et al. v.  
FUSSELL et al.

(Supreme Court of Arkansas. Jan. 17, 1910.)

1. CONSTITUTIONAL LAW (§ 26\*)—"CONSTITUTION"—NATURE OF CONSTITUTION.

The Constitution is the paramount law to which all other laws must yield, and is the measure of the rights and powers of the legislative department.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 80; Dec. Dig. § 28.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1462-1464; vol. 3, p. 7613.]

2. ELECTIONS (§ 38\*)—ESSENTIALS OF VALIDITY—TIME.

The time of holding an election is one of its essential ingredients.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 27; Dec. Dig. § 38.\*]

3. CONSTITUTIONAL LAW (§ 35\*)—CONSTRUCTION OF CONSTITUTION—DIRECTORY PROVISIONS.

Few of the provisions in a state Constitution should be construed as directory, as they

are the expressions of the highest will of the people, and should be followed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 34½; Dec. Dig. § 35.\*]

4. HIGHWAYS (§ 122\*)—TAXES—SPECIAL ELECTION—VALIDITY OF STATUTE.

Const. Amend. 5, providing that a county road tax may be levied in a county if a majority of the qualified voters have voted therefor at the general election for state and county officers preceding such levy at each election, is mandatory as to the time of holding the election, and Laws 1909, p. 248, authorizing a special election to vote upon the question of road tax in a county, is invalid.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 122.\*]

5. TAXATION (§ 608\*)—COLLECTION OF ILLEGAL TAX—INJUNCTION.

Under Const. art. 16, § 13, providing that any citizen may sue in behalf of himself and others interested to protect the inhabitants against enforcement of any illegal exactions whatever, and Kirby's Dig. § 3968, providing that injunctions and restraining orders may be granted in all actions of illegal or unauthorized taxes by local tribunals or officers, a citizen and taxpayer may enjoin the collection of an illegal or unauthorized tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.\*]

Appeal from St. Francis Chancery Court; Edward D. Robertson, Chancellor.

Action by James Fussell and others against T. C. Merwin and others. Decree for plaintiffs, and defendants appeal. Affirmed.

Hal L. Norwood, Atty. Gen., for appellants. Walter Gorman, for appellees.

FRAUENTHAL, J. The plaintiff below, James Fussell, on behalf of himself and all the owners of property in St. Francis county, instituted this suit in the chancery court of that county against T. C. Merwin, clerk of the county court, and W. E. Williams, sheriff and ex officio collector of said county, seeking to enjoin the extension on the tax books and the collection of a certain tax, called the "road tax," of three mills levied on the property in said county for the year of 1909. In his complaint he alleged: That he was the owner of real and personal property in said county subject to taxation, and that he brought the suit in behalf of himself and all owners of property subject to taxation in said county. That the qualified electors of St. Francis county failed to vote for a public road tax in said county at the general election for state and county officers next preceding the first Monday in October, 1909. "That the Legislature of 1909 passed an act, which was approved March 26, 1909, and entitled 'An act to provide for special elections in Mississippi and St. Francis counties for levying a tax for road purposes,' which said act, after naming the third Monday in May, 1909, as the time for holding said special election, and prescribing the manner in which said election should be held, proceeds as follows: 'Sec. 5. That if a ma-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

majority of the votes cast in said election shall be for road tax, that the quorum court for said counties, at their regular annual meeting, in the month of October, 1909, shall fix the rate as by law provided, and shall levy same on and against all real and personal property in the counties made subject to taxation by law, for the year 1910, and the clerks of said counties shall extend the taxes thus levied by said quorum courts, against all said property on the tax books of said counties for the year 1910, and the sheriffs and collectors of said counties shall collect the taxes so levied and extended, the same as any other taxes levied and collected for said counties.' That the quorum court of St. Francis county at its regular annual meeting held in said county on the first Monday in October (October 4), 1909, acting under the supposed authority conferred by said special act of the Legislature, made and caused to be entered of record an order purporting to levy a road and bridge fund tax of three mills on each dollar of real and personal property in St. Francis county, as shown by the assessment of said property for the year 1909, a certified copy of which said order is hereto attached as a part of this complaint, and marked 'Exhibit A.' That the defendant T. C. Merwin, clerk, as aforesaid, is now engaged in making up the tax books for the year 1909 for said county of St. Francis, and extending thereon the said road and bridge fund tax of three mills on each dollar of the value of all real and personal property in said county, as shown by the assessment rolls for 1909. That the defendant W. E. Williams, sheriff and ex officio collector of taxes for said county as aforesaid, if not previously enjoined by this court, will on the first Monday in January, 1910, proceed to collect from all the owners of property in said county the total amount of taxes extended against said property, including the said tax of three mills for road and bridge fund, and, if the plaintiff and other owners of said property should refuse to pay said taxes as extended against said property, the said collector will sell the same for the payment thereof, thereby clouding the title to said property and giving rise to a multiplicity of law suits."

The defendants filed a demurrer to the complaint and then an answer. In their answer they admitted the allegations of the complaint. They alleged that at the special election held in May, 1909, in said county, 800 votes were cast for road tax and 44 votes against road tax, and that the authority under which said road tax was levied by the quorum court of said county was competent and lawful. They further alleged that there was no equity in the complaint, and that plaintiff had no right to maintain the action. The chancery court sustained a demurrer to this answer; and, the defendants having refused to plead further, a decree was entered enjoining said sheriff and ex officio

collector from collecting the said tax of three mills for road and bridge fund so levied on the property in St. Francis county for the year of 1909. From that decree the defendants prosecute this appeal.

The only authority by which the county court of St. Francis county could levy a road tax must be derived from the Constitution of the state. The Constitution provides: "The county courts of the state in their respective counties, together with a majority of the justices of the peace of such county, in addition to the amount of county tax allowed to be levied, shall have the power to levy not exceeding three mills on the dollar on all taxable property of their respective counties, which shall be known as the county road tax, and when collected, shall be used in the respective counties for the purpose of making and repairing public roads and bridges of the respective counties, and for no other purpose, and shall be collected in United States currency or county warrants legally drawn on such road tax fund if a majority of the qualified electors of such county shall have voted public road tax at the general election for state and county officers preceding such levy at each election." Const. 1874, Amend. 5. It is axiomatic, under our form of government, that the Constitution is the paramount law to which all other laws must yield, and that it is obligatory on all departments and the citizens. It is the measure of the rights and powers of the legislative department; and an act passed by that body which contravenes any express mandatory provision of the Constitution is invalid. It is provided by the Constitution that the county court shall have the power to levy a road tax "if a majority of the qualified electors of such county shall have voted public road tax at the general election for state and county officers preceding such levy at each election." By this provision the Constitution has fixed the conditions which must be complied with before a valid levy of this road tax can be made. It must be first voted by the electors and the time of holding that election is fixed by the Constitution. It is said by Mr. McCrary in his work on Elections that "it must be conceded by all that time and place are the substance of every election," and that "it is, of course, essential to the validity of an election that it be held at the time and in the place provided by law." McCrary on Elections, §§ 176, 153. The authority to hold an election at one time will not warrant an election at another time, and an election held at a time not fixed by the law itself will be void. In his work on Constitutional Limitations Mr. Cooley says: "Where the time and place of an election are prescribed by law, every voter has a right to take notice of the law and to deposit his ballot at the time and place appointed." Cooley on Constitutional Limitations, 909. The time of holding an election is therefore one of its essential in-

redients, and the provision designating such time cannot be deemed to be directory merely. It is a mandatory requirement and is exclusive. In 10 Am. & Eng. Ency. Law, 681, it is said: "If the Constitution of a state fixes the time for holding an election, the Legislature cannot without constitutional authority make any change in the time." In Paine on Elections, § 306, it is said that the designation in a state Constitution of the "annual town meeting" as the time for the election of justices of the peace is equivalent to a prohibition against electing them at any other time. In the case of *State v. Johnson*, 20 Ark. 281, it is said: "Where the Constitution designates in express and explicit terms the precise time when a fundamental act shall be done and is utterly silent as to the performance at any other time, it cannot be done at any other time." Few of the provisions in a state Constitution should be considered directory. They are the expressions of the highest will of the people, and should be followed. *Smith v. Askew*, 48 Ark. 82, 2 S. W. 349; 8 Cyc. 762.

The Constitution has prescribed that the election at which the electors shall vote on the question of a road tax shall be held at the general election for state and county officers. It may have been thought that at an election held at that time a larger vote would be cast and a better and more extended expression of the electors would be obtained. The case at bar is an illustration of the fact that ordinarily at the general election held for state and county officers a larger number of votes is cast than at a special election. In this case there were cast at the general election held for state and county officers in September, 1908, more than 2,000 votes, while at the special election in May, 1909, only 844 votes were cast. But, whatever the reason may have been, the Constitution has in express terms designated the time of holding this election. This provision of the Constitution is therefore mandatory, and must be followed. The act of the General Assembly approved March 26, 1909, which authorized a special election to be held in May, 1909, in St. Francis county for the purpose of voting upon the question of "road tax" (Act 1909, p. 246), contravened this provision of the Constitution, and is therefore invalid. The majority of the electors of St. Francis county did not vote a public road tax at the general election for state and county officers preceding the levy of that tax made by the county court of that county in October, 1909. That tax so levied by the county court was unauthorized, and it was therefore illegal and void. *Worthen County Clerk v. Badgett*, 32 Ark. 496; *Cairo & Fulton R. Co. v. Parks*, 32 Ark. 131; *Hodgkin v. Fry, Collector*, 33 Ark. 716; *Cole, Sheriff and Collector, v. Blackwell*, 38 Ark. 271.

It is urged by counsel for defendants that

the plaintiff was not entitled to the equitable remedy of injunction, because by virtue of section 6896 of Kirby's Digest he had a right to appear before the county court and object to the levy of any specific tax for illegality, and through that procedure he had a full and adequate remedy. But by section 13, art. 16, Const. 1874, it is provided: "Any citizen of any county, city or town may institute suit in behalf of himself and all others interested to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." And by section 3966 of Kirby's Digest it is provided that injunctions and restraining orders may be granted in all cases of illegal or unauthorized taxes and assessments by county, city, or other local tribunals or officers. And under these provisions of the Constitution and the statute a citizen and taxpayer has the right to obtain from a court of equity an injunction against the collection of an illegal or unauthorized tax. *Vaughan v. Bowie*, 30 Ark. 278; *Brodie v. McCabe*, 33 Ark. 690; *Cole, Collector, v. Blackwell*, 38 Ark. 271; *St. Louis Southwestern R. Co. v. Kavanaugh*, 78 Ark. 468, 96 S. W. 409; *Little Rock v. Barton*, 33 Ark. 441; *Dreyfus v. Boone*, 88 Ark. 353, 114 S. W. 718.

The decree of the St. Francis chancery court is affirmed.

## CULLIN-McCURDY CONST. CO. et al. v. VULCAN IRON WORKS.

(Supreme Court of Arkansas. Jan. 24, 1910.)

### 1. REPLEVIN (§ 82\*)—EXCESSIVE DAMAGES.

Plaintiff, on May 4, 1907, leased a steam shovel to defendant's subcontractor for three months, under a contract by which it was to belong to the subcontractor if he made certain payments within the three months, which he failed to do, whereupon, upon October 15, 1907, plaintiff sued to recover the property, and defendant gave bond to retain possession, and it was not surrendered to plaintiff until February 1, 1908, when plaintiff recovered judgment for the shovel and \$1,850 damages, \$400 being awarded by the verdict for damages to the shovel while detained and \$1,250 as rental value. The evidence warranted a finding of damage to the shovel to the extent of \$1,000 and that the rental value was \$15 a day. *Held*, that the verdict was not excessive.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 301; Dec. Dig. § 82.\*]

### 2. SALES (§ 468\*)—CONDITIONAL SALES—TIME TITLE PASSES.

Where a steam shovel was leased for three months for a certain sum, part payable in cash and the remainder in three monthly installments, and the lease provided that on payment of a certain sum within 10 days after the expiration of the lease, and all bills for repairs, etc., the lessor would convey it to the lessee, the absolute title to the shovel would not pass to the latter until he performed all the conditions.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1355; Dec. Dig. § 468.\*]

### 3. SALES (§ 473\*)—CONDITIONAL SALES—BONA FIDE PURCHASER—RIGHTS.

Where a steam shovel was leased to another under a contract to sell and transfer at the expiration of the lease if the lessee performed certain conditions, a subsequent purchaser for value without notice of the conditions attached to the sale acquired no greater rights than the conditional vendee had under his contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1389; Dec. Dig. § 473.\*]

### 4. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In replevin for a steam shovel which plaintiff leased to defendant's subcontractor, the exclusion of evidence of defendant's contract with the subcontractor for the use of the shovel could not prejudice defendant, where the subcontractor had forfeited his right to use the shovel under his contract with plaintiff when defendant contracted with him for its use.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.\*]

### 5. SALES (§ 480\*)—CONDITIONAL SALES—REMEDIES OF SELLER AGAINST THIRD PERSONS—EVIDENCE—ISSUES.

In replevin for a steam shovel leased by plaintiff to defendant's subcontractor for three months under an agreement to transfer it if certain conditions were performed, where the only issues were the subcontractor's forfeiture of the right of possession by noncompliance with his contract with plaintiff, and defendant's nonliability by reason of its contract with another by which the latter was to be liable for the rental value of the shovel after the suit was commenced, evidence that plaintiff's attorney agreed with defendant for the return of the shovel as soon as defendant completed the work it was doing with it, authority to make such agreement not being shown was not admissible, not bearing on any issue.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1444, 1445; Dec. Dig. § 480.\*]

### 6. ATTORNEY AND CLIENT (§ 101\*)—AUTHORITY OF ATTORNEY—COMPROMISE.

Plaintiff's attorney has no authority to compromise with defendant's attorney or release defendant from liability or shift his liability by contracting with another to assume it.

[Ed. Note.—For other cases see Attorney and Client, Cent. Dig. §§ 209, 210; Dec. Dig. § 101.\*]

Appeal from Circuit Court, White County; Hance N. Hutton, Judge.

Action by the Vulcan Iron Works against the Cullin-McCurdy Construction Company. From a judgment for plaintiff, defendants appeal. Affirmed.

Rachels & Johnston and Rose, Hemingway, Cantrell & Loughborough, for appellants. S. Brundidge, Jr., and H. Neely, for appellee.

**McCULLOCH, C. J.** This is an action instituted by the Vulcan Iron Works of Toledo, Ohio, against appellant Cullin-McCurdy Construction Company to recover possession of a steam shovel and damages for its detention. In the construction of the Missouri & North Arkansas Railroad through this

state, Burke & Joseph were contractors and appellant was a subcontractor under them. J. H. Whalen was a subcontractor under appellant, and procured the steam shovel from appellee to use in removing dirt and rock in the construction of the railroad. The contract between appellee and Whalen concerning the steam shovel was in the form of a lease, dated May 4, 1907, and stipulated that appellee leased the shovel to Whalen for a term of three months from the date of delivery for the sum of \$6,000, of which \$2,000 was paid in cash and the balance was payable in three monthly installments, and that, on payment of the additional sum of \$10 within 10 days after the expiration of the lease and all bills for repairs and extra parts ordered, appellee would convey to him the absolute title to the shovel. The effect of the contract was a lease of the shovel by appellee to Whalen on condition that the latter pay the amounts named within a specified time. Under this contract, no title could pass to Whalen before the performance by him of the specified conditions. The contract between Whalen and appellant provided that, in the event the former should fail to complete the work which he contracted to do, then appellant could use the shovel in completing the work. Whalen failed to make the payments stipulated in his contract with appellee for the shovel, and failed to fully perform his contract with appellant, and on October 15, 1907, appellee instituted this action against appellant to recover the shovel which was then in appellant's possession. An order of delivery was issued at the commencement of the action and served on appellant, and the latter elected to retain possession and gave bond in accordance with the statute to perform the judgment of the court in the action. Appellant filed its answer, stating that it laid no claim to the shovel except the right to use the same under its contract with Whalen, and that it had taken possession by replevin against Whalen for the purpose of completing the work specified in the Whalen contract; that since it took possession from Whalen the principal contractors, Burke & Joseph, "took absolute control by force of said steam shovel, and have ever since continuously used and operated same independently and against the will and wishes of the defendant." It is further alleged in the answer that since appellant took possession of the shovel a contract had been entered into between appellee and Burke & Joseph by which the latter were to become responsible for the rental value of the shovel. There was a trial before a jury and a verdict was returned in favor of appellee for the recovery of the shovel and \$1,650 damages, which was divided in the verdict as \$400 for damages to the shovel and \$1,250 rental

value during detention. Judgment was rendered accordingly, and an appeal was taken to this court.

The evidence adduced by appellee was sufficient to establish injury to the shovel to the extent of \$1,000, and that the rental value was \$15 per day; so the amount of the verdict was not excessive. The evidence was sufficient to establish the allegations that Whalen had failed to perform the terms of the lease contract with appellee and forfeited his right to possession of the shovel, and that appellee was entitled to possession. The reservation of title in the form of a lease contract was valid, and no title passed to the vendee until the conditions of the contract were performed. A subsequent purchaser, even for value and without notice of the reservation, could acquire no greater rights than the conditional vendee had under the contract. *Triplett v. Mansur-Tebbetts Imp. Co.*, 68 Ark. 230, 57 S. W. 261, 82 Am. St. Rep. 284, and cases cited. The ruling of the court in refusing to allow appellant to introduce in evidence its contract with Whalen for the use of the shovel was not prejudicial, as the jury found upon sufficient evidence that Whalen had forfeited his right to possession under his contract with appellee.

Error of the court is assigned in the exclusion of testimony offered by appellant to the effect that one of appellee's attorneys in the case, Mr. Denman, of Toledo, Ohio, had entered into an agreement with appellant for the return of the shovel as soon as it completed its work, and had employed a man to take charge of the shovel as soon as it was through with it. The offered testimony was not directed to the issues involved in the case, and for that reason was properly excluded. The only issue aside from the question of Whalen's forfeiture by failing to perform the conditions of the contract was upon the allegation of appellant's answer that appellee had entered into a contract with Burke & Joseph for the latter to become liable for the rental value of the shovel after the commencement of the suit. No testimony was offered directed to this issue, and certainly it cannot be said that the excluded testimony tended to sustain the allegation. There was no testimony offered to show that Denman had any authority to act for appellee further than to prosecute the suit as an attorney, and it was not within the scope of his authority as attorney to compromise with appellant or to release the latter from liability or to shift that liability by making a new contract with another to assume it. *Pickett v. Merchants' Nat. Bank of Memphis*, 32 Ark. 346; *Moore v. Murrell*, 56 Ark. 375, 19 S. W. 973.

No error is found in the record, and the judgment is affirmed.

### HOLBROOK v. NEELY.

(Supreme Court of Arkansas. Jan. 24, 1910.)

#### 1. REPLEVIN (§ 8\*)—TITLE TO SUPPORT ACTION.

Plaintiff must recover in replevin on the strength of his own title.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 55; Dec. Dig. § 8.\*]

#### 2. REPLEVIN (§ 88\*)—ACTION—JURY QUESTION—OWNERSHIP OF PROPERTY.

In replevin for a mare, evidence held to make it a jury question whether plaintiff had title to the mare and a right to recover it, so that it was error to direct a verdict for him.

[Ed. Note.—For other cases, see *Replevin*, Dec. Dig. § 88.\*]

Appeal from Circuit Court, Conway County; J. Hugh Basham, Judge.

Action by S. S. Neely against J. F. Holbrook. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Sellers & Sellers, for appellant. T. G. Malloy and June P. Wooten, for appellee.

HART, J. This is a suit in replevin begun in the justice court by S. S. Neely against J. F. Holbrook to recover the possession of a black mare. Judgment was rendered in favor of the plaintiff, and the defendant appealed to the circuit court. From a judgment rendered against him in the circuit court, the defendant has duly prosecuted an appeal to this court. The only question raised by the appeal is: Did the court err in directing a verdict for the plaintiff?

On the 23d day of July, 1906, G. F. Gilbert executed his note payable on or before October 1, 1906, to J. C. Duncan for \$50 for the purchase price of one white mare. The title to the mare was retained until the note should be paid. The note also contained the following indorsement: "Lien note, Dec. 10, 1906. Transferred to S. S. Neely. His property." Neely says that he paid the purchase price of the mare, and that the above-described note which he calls a mortgage was transferred to him. Gilbert at the time was staying at Neely's house, and knew of the transfer of the note. He was an insurance agent, traveling most of the time, and Neely gave him permission to trade the mare. Gilbert exchanged the white mare for a black mare, and on the 24th day of December, 1906, he turned her over to Neely, who changed the word "white" to "black" in the above-described note. Neely kept her in his possession until Gilbert started on his next trip two or three weeks later. While in Conway county, he became ill and died about the 1st of February, 1907. Dr. J. F. Holbrook took possession of the mare on his account for medical services to Gilbert in his last illness. Neely heard of that fact, and sent his son to demand possession of her, which was refused. On the 11th day of February, 1907, he wrote to Dr. Holbrook, in

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which he said in part: "Your letter of recent date received addressed to S. B. Neely. I wish to say that I have a lien on the mare you have in your possession, which I enclose a copy." Inclosed with the letter was a copy of the note of Gilbert to Duncan and the indorsement thereon above referred to, except that the word "black" was substituted for "white" in the description of the mare. Gilbert stayed at Neely's house except when he was traveling on his insurance business. Neely said he seemed like a father to him, and said that he lent him the horse on the last trip. The above was substantially the testimony of Neely, and was all the evidence adduced at the trial, except that Holbrook testified that he was the defendant and knew Gilbert in his lifetime. Neely was cross-examined at length, and made evasive and contradictory statements as to his title and subsequent possession.

It is now insisted by his counsel that this was due to his ignorance, and to the fact that he did not understand the questions propounded to him, and that no fact or circumstance was developed that in any wise affected his credibility. We cannot agree with that contention. The plaintiff must recover on the strength of his own title. It will be remembered that he was his own witness, and that no other evidence was adduced in his behalf. He claimed at the trial that he gave Gilbert permission to trade the white mare for the black one, and that Gilbert turned over to him the black mare on December 24, 1906. In payment of the note for the purchase money of the white mare, which had been transferred to him on December 10, 1906. On February 11, 1907, he wrote to defendant, asserting that he had a lien on the mare. His counsel insist that he called it a lien because he did not understand the difference between having a lien on the mare for the unpaid purchase money, and retaining title in the mare until the purchase price was paid. But, when he was questioned about this letter on cross-examination, he said: "Q. If you sent this (referring to the letter) for the purpose of showing Dr. Holbrook what claim you had, then this was the claim and all of the claim? A. No, sir; she (referring to the mare) had been turned over to me. Q. Why did you not give him a truthful statement in this rather than send him a letter that would mislead him? A. I just overlooked it and my brother-in-law prepared this." His answers to these interrogatories tend to show that he understood at the time he was testifying the difference between having a lien on the mare and having the title to her. Hence the jury might have inferred that he understood the difference when he wrote the letter, and from the letter might have found that he did not have title to the mare; for, under these circumstances, it cannot be said that no inferences unfavorable to plaintiff's testimony

might have been drawn by the jury, and under the rule announced in *Skillern v. Baker*, 82 Ark. 86, 100 S. W. 764, 118 Am. St. Rep. 52, and *Merchants' Fire Insurance Co. v. McAdams*, 88 Ark. 550, 115 S. W. 175, the cause should have been submitted to the jury.

For the error in directing a verdict for the plaintiff, the judgment is reversed, and the cause remanded for a new trial.

DALE et al. v. W. H. BLAND & CO. et al. (Supreme Court of Arkansas. Jan. 24, 1910.)

1. JUDGMENT (§§ 294, 336\*)—VACATION—NATURE OF REMEDY.

The remedy to vacate or modify a judgment for fraud or mistake in its procurement is by proceeding at law under Kirby's Dig. §§ 3224, 4431, in the court in which it was rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 579, 614, 664, 724; Dec. Dig. §§ 294, 336.\*]

2. JUDGMENT (§ 407\*)—EQUITABLE RELIEF—NATURE OF REMEDY.

A complaint to enjoin the collection of a judgment is demurrable, unless it shows that the plaintiff has no adequate remedy at law either by appeal, certiorari, or application to the court which rendered the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 768-774; Dec. Dig. § 407.\*]

Hart, J., dissenting.

Appeal from Prairie Chancery Court; Jno. M. Elliott, Chancellor.

Action by W. H. Bland & Co. and another against Ida R. Dale and another. From a decree for plaintiffs, defendants appeal. Reversed.

The appellee alleges that Ida R. Dale obtained judgment for \$25 against one Jas. P. Barrett in the justice of the peace court of Prairie county, and had garnishment issued against W. H. Bland & Co.; that Barrett filed a schedule, claiming as exempt all indebtedness due him from Bland & Co.; that same was allowed and supersedeas issued; that Dale then filed certified copy of that judgment with a justice of the peace in Pulaski county; that both members of the firm of Bland & Co. were residents of Prairie county, and in business there; that W. H. Bland, a member of said firm, was served with summons as garnishee, issued by said justice of the peace in Pulaski county, while he was in that county temporarily and for medical attention; that judgment was rendered in said suit against W. H. Bland & Co. for \$83.44; that said summons and said judgment were obtained through the fraudulent representations of Dale and her agent to the justice of the peace as to the amount of the judgment and costs adjudged by the justice in Prairie county, and as to the residence of W. H. Bland; that after judgment was obtained in said suit in Pulaski county Dale sent to Bland & Co. a statement showing that said judgment amounted to \$68.45, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

asking for that amount in full settlement, and that Bland & Co. sent to said Ida R. Dale their check for that amount, and indorsed across the face of it, "Settlement in full of claim debt and cost of you against J. P. Barrett"; that said check was accepted and collected, and that Dale then waited until more than 30 days had elapsed since the date of said judgment in the justice court of Pulaski county, and then filed a transcript of said judgment in the circuit court of Pulaski county and had execution issued and sent to Prairie county to be levied on the property of Bland & Co.; that said execution showed the payment of the \$68.45, but allowed it as a credit and not in full settlement, and showed a balance due of \$14.99 and more costs. The complaint prayed that the temporary restraining order be made perpetual.

The demurrer was as follows:

"First. That the court has no jurisdiction of the subject of this action.

"Second. That the court has no jurisdiction because the amount involved is too small for the court to grant relief prayed.

"Third. That the plaintiff has a full, complete, adequate remedy at law.

"Fourth. That the plaintiff does not state facts sufficient to constitute a cause of action in equity."

The demurrer was overruled. Appellant refused to plead further. The court entered a decree restraining the sheriff from proceeding under the execution, and appellant Dale from collecting the balance claimed by her to be due on the judgment. Appellants seek by this appeal to reverse the decree.

W. T. Tucker, for appellants. J. G. & O. B. Thweatt, for appellees.

WOOD, J. (after stating the facts as above). The appellees do not allege, nor do the facts stated in the complaint show, that they did not have a complete and adequate remedy at law. As was said by us in *Wood v. Stewart*, 81 Ark. 51, 98 S. W. 715: "Appellee's remedy to vacate or modify the judgment for fraud or mistake in its procurement is complete at law by proceeding instituted for that purpose in the court in which it was rendered. Kirby's Dig. §§ 3224, 4431; *Knight v. Cresswell*, 82 Ark. 331 [101 S. W. 754, 118 Am. St. Rep. 74]; *Hunton v. Euper*, 63 Ark. 323 [38 S. W. 517]; *Driggs' Bank v. Norwood*, 49 Ark. 136 [4 S. W. 448, 4 Am. St. Rep. 30]. Unless appellee shows that he has not a full and adequate remedy at law, 'either by appeal, certiorari, application to the court itself which rendered the judgment, or in any other legal and adequate manner,' it is not entitled to relief by injunction." *Wingfield v. McLure et al.*, 48 Ark. 510, 3 S. W. 439. See, also, *Shaul et al. v. Duprey*, 48 Ark. 331, 3 S. W. 363.

The appellee having a complete and adequate remedy at law for the relief it seeks, the court erred in not sustaining the demurrer.

The judgment is therefore reversed, and the cause is dismissed.

HART, J., dissents.

#### THARP v. BARNETT.

(Supreme Court of Arkansas. Jan. 24, 1910.)

##### 1. COURTS (§ 202\*)—APPELLATE JURISDICTION—APPEAL FROM PROBATE COURT.

Under Kirby's Dig. § 1343, authorizing an appeal to the circuit court from a judgment of the probate court by the party aggrieved filing an affidavit and prayer for appeal, and requiring that on the filing of the affidavit the court shall order an appeal, the filing of the affidavit and prayer for appeal are prerequisites to the order granting the appeal by the probate court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 202.\*]

##### 2. COURTS (§ 202\*)—APPELLATE JURISDICTION—APPEAL FROM PROBATE COURT.

Where the circuit court acquired no jurisdiction on appeal from the probate court, the circuit court should dismiss the appeal, but should not render judgment for costs of the proceeding.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 202.\*]

Appeal from Circuit Court, Independence County; Chas. Coffin, Judge.

Petition by Mrs. M. J. Barnett for the removal of John T. Tharp as administrator of Mrs. Eliza Deckard, deceased. From a judgment of the circuit court dismissing an appeal from the probate court directing the removal of the administrator, he appeals. Affirmed in part, and reversed in part.

On the 8th of January, 1909, appellee, as one of the heirs at law of Mrs. Eliza Deckard, deceased, filed a petition in the probate court of Independence county alleging certain facts as causes for the removal of appellant as administrator of the estate of Mrs. Deckard, and praying the court to remove him. The court granted the prayer of the petition, making the following record entry of January 8, 1909, to wit: "It is therefore considered, ordered, and adjudged by the court that said John T. Tharp be and he is hereby removed as administrator of said estate, and the letters of administration heretofore granted him on said estate be and the same are hereby revoked, set aside, and held for naught. It is further ordered that all court costs be adjudged against the estate, and that a certified copy of this order be served upon the said John T. Tharp forthwith. Thereupon the administrator saves his exceptions to the ruling and decision of the court, and asks that the same be noted of record, which is accordingly done, and said administrator then prayed an appeal to the circuit court of Independence county,

which is by the court granted upon the filing of the prayer for appeal and bond required by law."

The appellant on February 17, 1909, filed an affidavit, which, after reciting certain proceedings of the probate court and its order removing appellant, concludes as follows: "That said John T. Tharp, administrator of said estate of Mrs. Deckard, deceased, states on oath that said appeal is taken because he verily believes that he is aggrieved, and is not taken for the purpose of delay or vexation, but that justice may be done." This was signed by appellant and sworn to on the 11th day of February, 1909. A transcript of the record containing the above recitals was filed in the office of the clerk of the circuit court March 18, 1909. The appellee moved the circuit court to dismiss the appeal alleging that the court was without jurisdiction to hear the cause. The court granted the motion, and entered a judgment dismissing the appeal, and adjudging costs in the proceedings against the defendant, and the appellant seeks here to reverse that judgment.

S. A. Moore, for appellant. Oldfield & Cole, for appellee.

WOOD, J. (after stating the facts as above). Appeals are taken from the probate court under the following statute: "Appeals may be taken to the circuit court from all final orders and judgments of the probate court at any time within twelve months after the rendition thereof by the party aggrieved filing an affidavit and prayer for appeal with the clerk of the probate court, and upon the filing of such affidavit, the court shall order an appeal." Section 1348, Kirby's Dig. Under this statute, the circuit court was without jurisdiction; for the probate court made the order granting the appeal before any affidavit was filed. This was premature. The order recites that "the appeal is granted upon the filing of the prayer for appeal and bond required by law." There is no order of the court granting the appeal after the affidavit was filed. The filing of the affidavit is a prerequisite to the granting of the appeal by the probate court, and the affidavit must be filed before the order granting the appeal is made. The statute contemplates that the court rendering the judgment shall pass upon the affidavit and make the order granting the appeal. The clerk of the court has no such power. The court could make no final order granting the appeal until the affidavit and prayer for appeal was filed. "The courts shall order an appeal upon the filing of such affidavit."

The language of the statute indicates that the prayer for appeal shall be included in the affidavit. At any rate, the affidavit and

prayer both must precede the order granting the appeal. The law is analogous to that governing the procedure in appeal from justice to circuit courts and from circuit courts to this court under similar statutes. See the following cases: *Matthews v. Lane*, 65 Ark. 419, 46 S. W. 946; *Merrill Bros. v. Manees*, 19 Ark. 647; *Hanna v. Pitman*, 25 Ark. 275; *Crow v. Hardage*, 24 Ark. 282; *Bank of The State v. Hinchcliffe*, 4 Ark. 444; *Moss v. Ashbrooks*, 15 Ark. 169; *Johnson v. Hodges*, 24 Ark. 597; *Johnson v. Du Val*, 27 Ark. 599; *Walker v. Noll*, 122 S. W. 488. These cases show that the judgment of the circuit court dismissing the appeal is correct. But, the circuit court being without jurisdiction, it was error to render judgment for costs of the proceeding. *Neale v. Peay*, 21 Ark. 94; *Derton v. Boyd*, 21 Ark. 265-268; *McKee v. Murphy*, 1 Ark. 55, 58; *Morrow v. Walker*, 10 Ark. 569.

The judgment is therefore affirmed as to dismissal of appeal, and reversed as to the costs.

#### HUNTER v. STATE.

(Supreme Court of Arkansas. Jan. 24, 1910.)

HOMICIDE (§ 133\*)—INDICTMENT—DATE OF OFFENSE—SUFFICIENCY.

Under Kirby's Dig. § 2234, providing that the statement in the indictment as to when the crime was committed is not material further than to show it was committed before the finding of the indictment except when the time is a material ingredient in the offense, an indictment for murder in the first degree, alleging that the "aid M. H. in the county and state aforesaid on the 30th day of July, A. D. 14.... unlawfully," etc., "and with premeditation, did kill and murder," etc., was sufficient.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 210, 212; Dec. Dig. § 133.\*]

Appeal from Circuit Court, Pulaski County; Robt J. Lea, Judge.

Mandy Hunter was convicted of murder in the second degree, and appeals. Affirmed.

Scipio A. Jones and T. J. Price, for appellant. Hal L. Norwood, Atty. Gen., and W. H. Rector, Asst. Atty. Gen., for the State.

HART, J. Mandy Hunter was indicted in the Perry circuit court for the crime of murder in the first degree. He was granted a change of venue to Pulaski county, and was convicted before a jury of murder in the second degree; his punishment being assessed at a term of seven years in the state penitentiary.

Hunter has duly prosecuted an appeal to this court. The only question raised by the appeal is as to the sufficiency of the indictment. The indictment was returned at the February term, 1905, of the Perry circuit court, and the body of it reads as follows: "The grand jury of Perry county, in the name and by the authority of the state of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Arkansas, accuse Mandy Hunter of the crime of murder in the first degree committed as follows, to wit: The said Mandy Hunter, in the county and state aforesaid on the 30th day of July, A. D. 14.... unlawfully, willfully, feloniously, with malice aforethought, with deliberation and with premeditation did kill and murder one Junion Gilla by then and there shooting him the said Junior Gilla with a pistol then and there loaded with gun powder and leaden ball and then and there had and held in the hands of him the said Mandy Hunter, against the peace and dignity of the state of Arkansas."

Section 2234 of Kirby's Digest provides that: "The statement in the indictment as to the time at which the offense was committed is not material, further than as a statement that it was committed before the time of finding the indictment, except when the time is a material ingredient in the offense." In construing this statute, in the cases of *Conrand v. State*, 65 Ark. 559, 47 S. W. 628, and *Carothers v. State*, 75 Ark. 574, 88 S. W. 585, the court held that an indictment charging the offense in the past tense was not invalid because it alleged that the crime was committed on a future and impossible date. In the *Conrand Case*, at page 563 of 65 Ark., page 629 of 47 S. W., the court said: "No man of common understanding could infer from the indictment that the grand jury intended to accuse the defendant of having committed a crime before it was committed. To accuse one of a crime is to charge that it was committed prior to the accusation. The allegation as to the date of the commission of the offense was a clerical error, apparent on the face of the indictment, and was not calculated to, and did not, mislead the defendant, and did not affect the validity or sufficiency of the indictment or the judgment against him." In the case of *Grayson v. State*, 123 S. W. 389, for the same reason, the court held that the mentioning of no date did not render the indictment invalid.

It is earnestly insisted by counsel for defendant that the rule should not obtain in the present case, because the indictment accuses the defendant of committing the crime at a date when the court had no jurisdiction of the territory in which it was alleged to have been committed. The indictment uses language that shows that the offense is charged to have been committed before the finding of the indictment. The indictment also gives the name of the state and county in which the crime is charged to have been committed, and the court and term thereof at which the indictment was returned. This when read in connection with our statutes on homicide is a sufficient allegation that the offense was committed within the territorial jurisdiction of the court after it became a crime, and before the finding of the indictment. It follows, therefore, from the reasoning of the

authorities, *supra*, that the indictment was valid.

Finding no prejudicial error in the record, the judgment is affirmed.

## POE v. POE.

(Supreme Court of Arkansas. Jan. 3, 1910.)

### 1. DIVORCE (§ 218\*)—ORDER ALLOWING ALIMONY—TEMPORARY ORDER—SETTING ASIDE—DISCRETION OF COURT.

Kirby's Dig. § 2679, authorizes the court in divorce proceedings to allow the wife maintenance and a reasonable attorney's fee. Section 2681 provides that, when the decree is entered, the court shall make an order touching the alimony of the wife as from the circumstances of the parties and the nature of the case shall be reasonable. Section 2682 provides that the court may enforce any decree or order for alimony and maintenance by sequestration of defendant's property, etc. Section 2683 provides that, upon application of either party, the court may make such alterations as to the allowance of alimony and maintenance as may be proper, etc. Plaintiff brought suit for divorce August 22, 1907, and an order was made allowing alimony, attorney's fee, and costs, which order was vacated October 25, 1907, and plaintiff was refused further time to take depositions before the order was set aside. *Held*, that the order allowing alimony, attorney's fees, and costs was a temporary order, and it was not an abuse of discretion to set it aside after defendant had filed his depositions to be read on the final hearing of the cause.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 639; Dec. Dig. § 218.\*]

### 2. DIVORCE (§ 218\*)—ORDER ALLOWING ALIMONY—MOTION TO VACATE—TAKING TESTIMONY.

Nor was it error to refuse to grant plaintiff further time to take testimony on the motion to vacate, since plaintiff had the same time to take depositions on this as upon the divorce issue.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 639; Dec. Dig. § 218.\*]

### 3. DIVORCE (§ 115\*)—CHARACTER OF WIFE—ADULTERY—EVIDENCE.

Where a husband sues his wife for divorce on the ground of adultery, the general character of the wife for unchastity is not in issue, and the adultery must be proved by evidence of actual occurrences of adulterous intercourse.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 372; Dec. Dig. § 115.\*]

### 4. WITNESSES (§ 355\*)—IMPEACHMENT—EVIDENCE—ADMISSIBILITY.

Under Kirby's Dig. § 3138, which provides that a witness may be impeached by showing that his general reputation for truth or immorality renders him unworthy of belief, etc., evidence by a witness in divorce proceedings that, "I know her reputation in N. O. It is bad," was inadmissible for the purpose of impeaching the plaintiff, it being shown that he had found out her reputation from what he had heard others say while he was in N. O. hunting for evidence, and his evidence did not establish the "general reputation for truth or immorality" that rendered plaintiff "unworthy of belief."

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1154-1156; Dec. Dig. § 355.\*]

### 5. APPEAL AND ERROR (§ 644\*)—ABSTRACT OF EVIDENCE—DEFECTS—FAILURE TO OBJECT.

Where no objection is made to the abstract of the evidence, the court on appeal will assume

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the abstract is correct; and where, in divorce proceedings the evidence abstracted by the counsel for appellant was not sufficient to warrant the decree of divorce in favor of appellee, the appellee's complaint should be dismissed for want of equity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2795; Dec. Dig. § 644.\*]

**6. APPEAL AND ERROR (§ 592\*)—ABSTRACT OF EVIDENCE—FAILURE TO MAKE—EFFECT.**

Where, upon appeal, the evidence upon which the court rendered the decree dismissing appellant's complaint is not abstracted, the decree will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2618; Dec. Dig. § 592.\*]

Appeal from Sebastian Chancery Court; J. V. Bourland, Chancellor.

Action for separate maintenance by Mrs. J. S. Poe against O. S. Poe, and action by O. S. Poe against Mrs. J. S. Poe for divorce. The actions were consolidated, and from an order vacating a judgment for temporary alimony and from a decree granting O. S. Poe a divorce, Mrs. J. S. Poe appeals. Affirmed as to order vacating allowance of alimony and decree of divorce reversed, and complaint for divorce dismissed.

John H. Vaughn, for appellant. Ben Cravens, for appellee.

WOOD, J. The action out of which the decree of divorce was rendered in behalf of appellee, O. S. Poe, and from which decree appellant appeals, was commenced by the appellant herein filing in the chancery court of Sebastian county for the Ft. Smith district on August 22, 1907, a bill in equity against O. S. Poe, alleging nonsupport and abandonment, and asking judgment requiring appellee herein to maintain her, and for such alimony and attorney's fee as the court deemed equitable. Thereafter, on the same day, appellee herein filed a suit in said court against the appellant for absolute divorce, and as grounds for such divorce set up desertion, habitual drunkenness, cruel treatment, and adultery on the part of the appellant, to which cause of action appellant filed answer on October 9, 1907, denying all of the allegations alleged in the complaint. Thereafter, on October 16, 1907, appellee herein filed answer to the complaint of appellant for alimony, and asked that said answer be taken as a cross-complaint, and that he be given an absolute divorce from the appellant on the grounds of desertion, habitual drunkenness, cruel treatment, and adultery, all of which he alleged in his said answer and cross-complaint. Thereafter, on October 25, 1907, the court on motion consolidated the two cases above set out, and the issues as thus made were finally submitted to the court on June 8, 1908, and after a full hearing an absolute divorce was granted to O. S. Poe from Mrs. J. S. Poe upon such grounds as were alleged in his cross-complaint.

The appellant, Mrs. J. S. Poe, asks this

court to reverse the judgment of the chancery court, and relies upon three grounds:

First. Because the court made an order on the 25th day of October, 1907, vacating an order made at a former term of the court (August 22, 1907) allowing appellant temporary alimony in the sum of \$25 per month, also \$25 attorney's fee, and \$10 for costs, and also in not allowing appellant to have further time to take depositions before setting aside the order for temporary alimony, attorney's fees, and costs.

Second. Because the court permitted the witness A. B. Poe to testify over the objection of appellant, as follows: "I am a brother of O. S. Poe. I live in Little Rock. After O. S. Poe and Mrs. O. S. Poe commenced these lawsuits, I went to New Orleans to see if I could find evidence in relation to the case. I know Mrs. Poe's reputation in New Orleans, La. It is bad. I hired a detective in Little Rock to go to New Orleans to look up evidence for me. The detective was a friend of mine, and I only paid his expenses. I went to different places in New Orleans, and they told me that Mrs. Poe had a bad reputation. I went to one restaurant, and asked the head waiter if he knew where I could get some women who would go out and have a good time. He told me that Mrs. Poe would go any time. I learned in different places where I went in New Orleans that Mrs. Poe had a very bad reputation, and was said to be a very fast woman."

Third. Because the evidence does not show that the appellee was a resident of the state of Arkansas one year next before the commencement of the action. We will consider the grounds upon which reversal is urged in the order named above.

1. The order allowing alimony, attorney's fees, and costs was a temporary order, and the court did not abuse its discretion in setting it aside after the appellee had filed his depositions to be read on the final hearing of the cause. Nor was there error in refusing to grant appellant further time to take testimony on the motion to vacate the order of a previous term allowing the alimony, attorney's fees, and costs. The appellant had from August 22, 1907, when the order was first made, until October 25, 1907, when it was set aside, to take her depositions on this as well as the divorce issue. Besides, the original order of allowance, as well as the order setting it aside, were both temporary orders subject to final review by the court on the hearing in the proceedings for divorce with which the proceedings for alimony had by consent been consolidated. Sections 2679, 2681, 2682, 2683, Kirby's Dig. The appellant still had from October 25, 1907, till June 8, 1908, to make her proof on the issues. The cause was not finally adjudicated until the latter date, and it appears she had the opportunity and did take all the depositions she

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

desired and besides presented testimony ore tenus.

2. Where a husband sues his wife for divorce on the alleged ground of adultery, the general character of the wife for unchastity is not in issue. Therefore any testimony as to her general reputation for unchastity should have been excluded so far as the same may have been used to establish the alleged adultery of appellant. The testimony of A. B. Poe was not admissible. The alleged adultery of appellant could not be established by evidence tending to show that she had a general reputation for unchastity. That could only be proved by evidence of actual occurrences of adulterous intercourse and not by presumption. *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605; *Washburn v. Washburn*, 5 N. H. 195. See, also, *Humphrey v. Humphrey*, 7 Conn. 116; *Berdell v. Berdell*, 80 Ill. 604. The character of neither party to a divorce proceeding is in issue, and evidence as to it is therefore not admissible. 5 Am. & Eng. Ency. Law, p. 862, and cases cited.

Neither was the testimony of A. B. Poe admissible for the purpose of impeaching appellant as a witness. He "went to New Orleans to see if he could find evidence in relation to the case." He says: "I know her reputation in New Orleans, La. It is bad." But on cross-examination he shows that he only knew that her reputation was bad from what they told him in different places. A. B. Poe did not live and had not lived in the community where appellant resided. He only found out that her reputation was bad from what he had heard others say while he was in New Orleans "to find evidence." This testimony did not establish the "general reputation for truth or immorality" that rendered appellant "unworthy of belief," and was not such testimony as the statute requires for the impeachment of a witness by the method there prescribed. Section 3138, Kirby's Dig. Mr. Greenleaf, concerning the impeachment of a witness by the particular method under consideration, says: "It is not enough that the impeaching witness professes merely to state what he has heard others say, for those others may be but few. He must be able to state what is generally said of the person by those among whom he dwells or with whom he is chiefly conversant; for it is this only that constitutes his general reputation or character, and, ordinarily, the witness ought himself to come from the neighborhood of the person whose character is in question. If he is a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries." 1 Gr. Ev. § 461.

No objection is made by counsel for appellee to the abstract of the evidence as presented by counsel for appellant, under rule 10 of this court. We assume, therefore, that the abstract of appellant is correct. The evi-

dence as abstracted by counsel for appellant is not sufficient to warrant the decree of divorce in favor of the appellee. According to this evidence, appellee's complaint should be dismissed for want of equity.

3. In view of what we have held above, it is unnecessary to consider the third ground urged by appellant for reversing the decree.

The decree is reversed, with directions to the Sebastian chancery court to dismiss appellee's complaint for want of equity. The evidence upon which the court rendered the decree dismissing appellant's complaint is not abstracted, and the decree as to that is therefore affirmed.

#### ST. LOUIS, I. M. & S. R. CO. v. WEATHERLY.

(Supreme Court of Arkansas. Jan. 24, 1910.)

#### 1. RAILROADS (§ 446\*)—INJURIES TO ANIMALS—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a railroad company for killing animals on its track, evidence held sufficient to carry the question of the company's negligence to the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.\*]

#### 2. APPEAL AND ERROR (§ 1002\*)—REVIEW—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence is binding upon the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

#### 3. PLEADING (§ 129\*)—ANSWER—ADMISSION—FAILURE TO DENY.

In an action against a railroad company for killing animals on its track, the complaint alleged that the injury occurred at B. in C. county, and the answer did not deny that the animals were killed at or near the place alleged, but only denied that defendant negligently ran its train of cars against the property of plaintiff while operating its train through the town of B. or elsewhere. Held, that the answer is an admission that the injury to the property occurred in C. county, and that B. was a town on defendant's line of road in that county.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 270-275; Dec. Dig. § 129.\*]

#### 4. RAILROADS (§ 443\*)—INJURIES TO ANIMALS—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence in an action against a railroad company for killing animals on its track held to warrant a finding that the injury occurred in the county alleged in the complaint.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1610; Dec. Dig. § 443.\*]

Appeal from Circuit Court, Crittenden County; Frank Smith, Judge.

Action by James W. Weatherly against the St. Louis, Iron Mountain & Southern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Kinsworthy & Rhoton, G. D. Henderson, and Jas. H. Stevenson, for appellant. Smith & Smith, for appellee.

HART, J. This is an appeal from a judgment against the defendant for damages for killing two mules and injuring two others be-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

longing to the plaintiff. The occurrence happened on the 5th day of October, 1908, near Blanton at the first trestle east of it; and the train was running at the rate of 25 or 30 miles per hour. The engineer testified that the train was composed of about 35 freight cars, and that the air brakes were in good condition. The mules got on the track near the road crossing. When the engineer first saw them, they were coming up the dump 300 feet ahead of the engine. They ran east along the track towards a trestle about 800 feet from where they came on the track. When the engineer saw the mules, he immediately applied the emergency brakes, and endeavored to stop the train. When the engine struck the mules, its speed had been reduced to three or four miles per hour. The first mule was struck before, and the others after, the trestle was reached. The pilot of the engine was about 60 feet from the west end of the trestle when the train stopped. One of the mules was left on the trestle with its legs down in it. The engineer says that he was keeping a lookout, and that the mules came on the track from his side. He did not remember that he sounded the stock alarm, but says that he did blow for the crossing. The fireman says that the mules were grazing when he first saw them. He was ringing the bell for the crossing. He thinks three of the mules came on the track from one side and two from the other. He says they came on the track between the crossing and the trestle, and he called the engineer's attention to the fact when they came on the track. The engineer did not apply the emergency brake until the engine was between the crossing and the trestle. The crossing was about 100 yards from the trestle. The engine had to be backed off of one of the mules when it stopped.

Other witnesses testified that the stock alarm was not sounded, and that they examined the roadbed and found the tracks of the mules on it west of the crossing. The tracks from there to the trestle indicated that the mules were running fast. One of the witnesses said that it was about one-fourth of a mile from where the mules went upon the track to the trestle. The plaintiff said that the marks on the trestle showed that one of the mules was dragged nearly across it after being struck and another one or maybe two hents. The track was level, and the view of the right of way was unobstructed. Had the engineer sounded the stock alarm when he first saw the mules climbing the dump, he might have scared them off.

The testimony of the engineer and fireman is contradicted as to the place the mules came

on the track. The engineer says that it was near the road crossing. The fireman says they got on between the crossing and the trestle, and other witnesses say that the tracks showed that the mules got on the track west of the crossing. The train was running east. The engineer says the mules came on the track 300 feet ahead of him, and ran toward the trestle, 800 feet distant. Other evidence places the distance at one-fourth of a mile. These and the other circumstances adduced in evidence presented a conflict in the testimony, making the submission of the issue of fact proper, and the verdict of the jury is binding upon us.

It is earnestly insisted by counsel for appellant that there is nothing in the record to show that the injury occurred in the county where the suit was brought. The complaint alleges that the injury occurred at the town of Blanton, in Crittenden county, Ark. The answer of appellant does not deny that the mules were killed or injured at or near Blanton in Crittenden county, but only denies that it negligently ran its train of cars against the property of appellee while operating its train through the town of Blanton or elsewhere. This may be taken as an admission of the injury to the property in Crittenden county and that Blanton was a town on appellant's line of road in that county; and only a denial of the negligence of appellant in injuring them. But, if we are mistaken in this, the plaintiff's witnesses all testified that they lived at Blanton. The map of the state of Arkansas, purporting to contain its counties, townships, sections, cities, towns, and villages, distributed for use by appellant, shows that Blanton is a town or village on its line of railroad in Crittenden county, and that its location is several miles distant from the boundaries of the county. It is true that the official postal guide of the United States of December, 1908, being the official monthly supplement to the postal guide of July 1908, shows that Blanton was discontinued as a post office, but the very fact that it was reported as discontinued in December is a recognition that it was a post office before that time. Hence the case does not come within the rule announced in *St. Louis, Iron Mountain & Southern Ry. Co. v. Cady*, 67 Ark. 512, 55 S. W. 929. The proof shows that the injury occurred within a few hundred yards of Blanton. This was sufficient to warrant the jury in finding that the injury occurred in Crittenden county. *Forehand v. State*, 53 Ark. 48, 13 S. W. 728; *St. L., I. M. & S. R. Co. v. Magness*, 68 Ark. 289, 57 S. W. 933; *Wilder v. State*, 29 Ark. 293. The judgment is therefore affirmed.

**GIBSON & DRAUGHN v. LITTLE ROCK & H. S. W. RY. CO. et al.**

(Supreme Court of Arkansas. Jan. 24, 1910.)

**1. CARRIERS (§ 117\*)—CARRIAGE OF GOODS—INJURY TO GOODS.**

A carrier using a car of a refrigerator company for the transportation of perishable goods is under the same obligation to care for them that it would have been had the car belonged to it, and is liable for a loss caused by negligence in failing to keep the drain holes of the car open.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 117.\*]

**2. CARRIERS (§ 177\*)—CARRIAGE OF GOODS—CONNECTING CARRIERS.**

The Hepburn amendment makes the initial carrier liable for an injury to an interstate shipment, but the connecting carrier is also liable if the injury is the result of its negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-803; Dec. Dig. § 177.\*]

**3. CARRIERS (§ 185\*)—CARRIAGE OF GOODS—CONNECTING CARRIERS—PRESUMPTIONS.**

In the absence of proof, it will be presumed that an injury to goods transported by connecting carriers was caused by the last carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 841, 842; Dec. Dig. § 185.\*]

Appeal from Circuit Court, Garland County; W. H. Evans, Judge.

Action by Gibson & Draughn against the Little Rock & Hot Springs Western Railway Company and another. From a judgment for defendants, plaintiffs appeal. Reversed and remanded for new trial.

S. W. Leslie, for appellants. W. E. Hemingway, E. B. Kinsworthy, and Jas. H. Stevenson, for appellees.

MCCULLOCH, C. J. Plaintiffs Gibson & Draughn instituted this action against the Little Rock & Hot Springs Western Railway Company and the St. Louis, Iron Mountain & Southern Railway Company to recover damages by reason of alleged negligence of said defendants in the transportation of a car load of perishable goods, consisting of oranges and other fruits and vegetables from St. Louis, Mo., to Hot Springs, Ark., over the two roads as connecting carriers. The goods were shipped in a refrigerator car, and negligence of the two defendant railroad companies is alleged in failing to properly ice the car or to care for it in other respects while in transit.

The undisputed facts in the case are that the plaintiffs purchased the goods from a produce dealer in St. Louis, and the goods were loaded in a refrigerator car owned by the American Refrigerator & Transit Company, situated on the tracks of defendant St. Louis, Iron Mountain & Southern Railway Company, and that company issued to plaintiffs a through bill of lading to Hot Springs. No other contract with reference to the trans-

portation and care of the goods is shown in evidence except this bill of lading. The car was transported by the Iron Mountain Road over its line and delivered to the connecting carrier, its codefendant, and by the latter transported to Hot Springs. On arrival there it was found that the holes in one of the bumpers of the car used in draining the car of water from melted ice had become clogged up by trash, so that the water would not run through, and, on account of this obstacle, the water had risen a considerable distance up on the sacks of produce in the car, and it appears that the motion of the car had jolted the water all over the produce, causing same to mold. The goods were badly damaged, and were sold at greatly reduced price. There is no evidence as to the quantity of ice in the car or its temperature, so the proof does not sustain the allegation that the car was not properly iced. The evidence was abundant, however, that the damage was caused by allowing the drain holes in the bumpers to become obstructed. Upon this state of the case, the court gave a peremptory instruction to the jury to return a verdict in favor of defendants, which was done, and the plaintiffs have appealed to this court.

The duty of a carrier of freight with respect to the transportation and handling of perishable goods was fully discussed by this court in the recent case of *St. L. I. M. & S. Ry. Co. v. Renfro*, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317, 118 Am. St. Rep. 58, and the principles which control this case are there announced. After stating in general terms the duty of a carrier with respect to such goods, the opinion reads: "It is the contention of appellant that it discharged its duty to appellees when it furnished a refrigerator car, and that the duty of icing the car, under the evidence, devolved upon the American Refrigerator Transit Company, the owner of the car. The contention is unsound, as shown in *N. Y., P. & N. Ry. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 402, 81 Am. St. Rep. 722. It matters not in the case at bar that the refrigerator car belonged to the American Refrigerator Transit Company, an independent contractor. Appellees had no contract with it to furnish cars or to ice them when furnished. Their contract was with appellant to furnish suitable cars; and the evidence was ample to support the verdict that appellant not only undertook to furnish the car, but also to ice the same." In the present case appellees rely upon an alleged distinction between the two cases, in that the evidence in the present one shows that the goods were delivered to the refrigerator company. They rely upon the doctrine announced in some cases that, while it is the duty of the carrier to furnish suitable facilities, yet, where the shipper selects his own vehicle for the shipment of perish-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

able goods, and undertakes to see that the same is properly iced, the carrier has a right to assume that this is properly done. There is no question, however, in this case as to the selection of the vehicle or as to any negligence in the furnishing of suitable facilities. It is not contended that there was any defect in the car, nor does the proof show that plaintiffs entered into any contract with the refrigerator company with reference to icing the car and to caring therefor, or entered into any contract except that expressed in the bill of lading. The case of *N. Y. P. & N. Ry. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462, 81 Am. St. Rep. 722, which is a decision of the Virginia Supreme Court of Appeals, and is cited with approval by this court in the *Renfroe* Case, is almost identical with the present one so far as the question of the carrier's duty to see that the car was properly iced. There the shipper had loaded his fruits into a refrigerator car owned by the refrigerator company, situated on the tracks of the carrier, and the bill of lading was issued by the railway company. The court held that the railway company was liable for damages resulting from the failure to properly ice the car, and in the opinion it is said: "The undertaking of the plaintiff in error (railway company) was to properly care for and safely carry the fruit of the defendant in error, and it is immaterial that the cars in which it was carried were owned by the California Fruit Transportation Company or that such company undertook to ice said cars or to pay for the ice. As between the plaintiff in error and defendant in error, the California Fruit Transportation Company and its employes were the agents of the plaintiff in error. So far as the defendant in error was concerned, the plaintiff in error was under the same obligations to care for the fruit that it would have been had the refrigerator cars belonged to it."

We need not go further than the doctrine here announced to find that the railway company is liable under the proof adduced. While there is no evidence that there was a failure to properly ice the car, as already stated, the evidence abundantly shows that there was negligence in failing to keep the drain holes open.

This was an interstate shipment, and falls within the provision of the act of Congress (Hepburn Amendment) making the initial carrier liable. *St. L. & S. F. R. Co. v. Carr*, 126 S. W. —. The connecting carrier is also liable if the damage resulted from its negligence; and, in the absence of proof on the subject, there is a presumption that the last carrier caused the injury. *St. L., I. M. & S. Ry. Co. v. Coolidge*, 73 Ark. 114, 83 S. W. 333, 67 L. R. A. 535, 108 Am. St. Rep. 21; *K. C. S. Ry. Co. v. Embury*, 76 Ark. 589,

90 S. W. 15; *St. L., I. M. & S. Ry. Co. v. Renfroe*, supra.

The court erred in taking the case from the jury by peremptory instruction.

Reversed and remanded for new trial.

**ST. LOUIS & S. F. R. CO. v. CALDWELL.**  
(Supreme Court of Arkansas. Jan. 24, 1910.)

1. CARRIERS (§ 286\*)—INJURY TO PASSENGER—NEGLIGENCE—DEFECTIVE DEPOT APPROACH.

An approach, which was for many years generally used by passengers in going to and from defendant's depot, ran along the right of way between a spur track, and an unprotected hole 18 feet wide and 12 to 20 feet deep on the property of another; the hole being about 25 feet from the station and 12 feet from the edge of the track. A passenger got off a train in the nighttime at the station, and started along the approach to the street with which it connected, and, in stepping to one side to permit a person with a lantern to pass, fell into the hole, and was injured. *Held*, that the facts warranted a finding of negligence in not protecting the approach by a fence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1145; Dec. Dig. § 286.\*]

2. CARRIERS (§ 347\*)—INJURY TO PASSENGER—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

Whether plaintiff was guilty of contributory negligence was a jury question.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1395, 1402; Dec. Dig. § 347.\*]

3. CARRIERS (§ 286\*)—INJURY TO PASSENGER—DUTY OF CARRIER—APPROACHES.

Railroad companies must keep in a reasonably safe condition all parts of their platforms and approaches thereto to which the public does or would naturally resort and all parts of their station grounds reasonably near the platform where passengers would naturally or ordinarily go to board cars or after alighting.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1145; Dec. Dig. § 286.\*]

4. CARRIERS (§ 306\*)—INJURY TO PASSENGER—DUTY OF LESSEE.

Both under the policy of the statutes and independent thereof, the operating lessee of a railroad must exercise care to protect passengers and others having a right upon its depot premises by keeping such premises and the approaches thereto in a reasonably safe condition.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1249; Dec. Dig. § 306.\*]

5. EVIDENCE (§ 171\*)—BEST EVIDENCE—SECONDARY EVIDENCE—COLLATERAL MATTERS.

In an action against a railroad company for injuries to a passenger by falling into a hole on another's land, adjacent to an approach to the depot, the admission of a certified copy of a deed showing the width of the company's right of way at that point related to a collateral matter, so that it need not be shown that the original was not obtainable before introducing the certified copy.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 460, 528; Dec. Dig. § 171.\*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by J. H. Caldwell against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. F. Evans and B. R. Davidson, for appellant. Mechem & Mechem, for appellee.

MCCULLOCH, O. J. Appellee sues to recover damages resulting from personal injuries received by falling into an unprotected hole or pit in one of the approaches to the railroad station of appellant at the town of Huntington, Ark. He recovered a verdict for damages, and appellant has brought the case here for review.

It is alleged in the complaint that appellant, for several years prior to the time appellee was injured, negligently permitted a large and deep hole or excavation with perpendicular sides to remain open and unprotected on its right of way in close proximity to the principal approach to the station at Huntington; that said approach was along and over the right of way, and was then being used and had for several years been used by the traveling public, with the knowledge and consent of appellant in going to and from the station; that appellee was unacquainted with the approach and hole, and that in debarking from a train and going from the station in the nighttime he followed the lead of other passengers along the approach, and, without negligence, stepped or fell into the hole, and was injured. Appellant in its answer denied all the allegations of the complaint, and pleaded that appellee's injury resulted from his own negligence.

The evidence adduced by appellee was sufficient to establish the following state of facts: At Huntington, Ark., there is a passageway or approach along the railroad right of way parallel with the tracks, running from one of the principal streets to the railroad station. This was openly and generally used by passengers going to and from the station, and had been so used for many years. The tracks and approach were on a high dump. There had originally been a spur track built by a coal mining company from the main track of the railroad to a coal mine; but the mining company had many years before abandoned the track and a part of it had been used by the railroad company as a spur track, running parallel with the main track. The approach runs along between the spur track and the edge of the dump. The hole was made by the mining company, being called a "strip pit," and is 50 to 100 feet wide, and 12 to 20 feet deep, running parallel with the tracks. It is about 75 feet from the station and 12 feet from the edge of the track—the approach or passageway running between. The hole was unprotected, and the side next to the approach was perpendicular. On the night in question, appellee debarked from the passenger train, and started, with other passengers, to go along the passageway to reach the street. It was dark, and he stepped to one side in order to let a man pass who was coming up behind him with a lantern, and in doing so he fell into the pit and sustained personal injury. The evidence was

sufficient to warrant a verdict in appellee's favor.

This court has stated the law on this subject to be as follows: "As a general rule, railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platform, where passengers, or those who have purchased tickets with a view to take passage on the cars, or to debark from them, would naturally or ordinarily be likely to go." *Railway Co. v. Orr*, 46 Ark. 182. See, also, *St. L. & S. Ry. Co. v. Dooley*, 77 Ark. 561, 92 S. W. 789. Appellant was a lessee, operating a leased railroad, and the pit was dug during the holding of its lessor; but this does not affect the question of its liability for negligent failure to exercise care to protect its patrons and passengers and others who have a right to come upon its premises. 1 *Elliott on Railroads*, § 471; volume 3, § 1134. This duty rests upon the operating lessee of a railroad independent of any statute; but it is clearly the policy of our statutes to impose upon such a lessee all the duties imposed on the proprietor. *St. L. & S. F. R. R. Co. v. Hale*, 82 Ark. 175, 100 S. W. 1148.

Appellant relies on *Fordyce v. Russell*, 59 Ark. 312, 27 S. W. 82, and like cases, holding that, in order to hold a railroad corporation liable for damages to adjoining lands resulting from a nuisance created by its predecessor, it must be shown that the last company had done some affirmative act adopting the nuisance, and that the mere failure to remove the nuisance does not create liability. This doctrine cannot, however, be invoked to relieve a railroad company from its duty to protect the public, and particularly its patrons and passengers. Even if appellant had no right to fill the abandoned pit on the property of the mining company, it should have protected the passageway by a fence or railing at the place where it abutted on the pit, so as to guard travelers from the danger. At least, if the exercise of care for the safety of travelers required it, then appellant should have done that, and the jury were warranted in finding that it was negligence not to do so. There was some evidence to the effect that the town authorities constructed the passageway, but it was on the railroad right of way, and that did not absolve the railroad company from its duty to exercise ordinary care in freeing from danger the passageway which was an approach, on its own premises, to the station, and was habitually used by its patrons in passing to and from the station.

The question of contributory negligence was properly submitted to the jury, and the question was one of fact for the jury to decide whether or not appellee was guilty of negligence under the circumstances described.

Appellee was allowed, over appellant's objection, to introduce in evidence a certified copy of a certain deed to the Little Rock & Texas Railway Company, appellant's lessor. This was done to show the width of the right of way, and objection was made on the ground that no foundation was laid for the introduction of the record by first showing why the original deed could not be produced. The deed related to a collateral matter, and did not form the basis of the cause of action, and therefore its introduction did not fall within the rule that secondary evidence should be excluded unless proof is made that the primary evidence was not obtainable. 17 Cyc. 409.

The instructions of the court were in accord with the law as here announced, and we find no error in giving instructions or in the refusal of those requested by appellant.

**Affirmed.**

**ST. LOUIS, I. M. & S. RY. CO. v. TOWNES.**  
(Supreme Court of Arkansas. Jan. 24, 1910.)

**1. CARRIERS (§ 85\*)—CARRIAGE OF FREIGHT—NOTICE OF ARRIVAL OF GOODS.**

Where a carrier is required by the contract of shipment to give notice of the arrival of the cars at the point of destination, there is a corresponding duty on the consignee to put himself in a position to receive the notice; and, where he failed to make arrangements for notice, he impliedly agreed that the carrier should hold the goods until the bills of lading were presented by some one.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 316-321; Dec. Dig. § 85.\*]

**2. CARRIERS (§ 104\*)—REFUSAL TO ACCEPT GOODS—NOTICE TO SHIPPER—EVIDENCE.**

Where, in an action by a shipper for damages from the delay of the carrier in notifying him of the refusal of a third person, to whom the goods had been sold, to accept them, the evidence showed that the property was shipped to the shipper's order with directions to notify the third person, that the third person was duly notified, but refused to receive the goods because damaged, and that the shipper was not promptly notified of such refusal, but the evidence did not show the condition of the goods when shipped, the shipper could not recover.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 104.\*]

**3. APPEAL AND ERROR (§ 938\*)—RECORD—PRESUMPTIONS.**

Where the judge certified in the bill of exceptions that it contained all the evidence, and the clerk omitted some of the writings which were read in evidence, and called for in the bill of exceptions, but none of the omitted writings affected the issues, the court on appeal could not indulge the presumption that the omitted writings contained evidence sufficient to justify the judgment, not sustainable on the evidence in the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3795-3803; Dec. Dig. § 938.\*]

Appeal from Circuit Court, Clark County; Jacob M. Carter, Judge.

Action by J. M. Townes against the St. Louis, Iron Mountain & Southern Railway

Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Kinsworthy & Rhoton and Jas. H. Stevenson, for appellant. B. S. & J. V. Johnson, for appellee.

**MCGULLOCH, C. J.** This is an action instituted by the plaintiff, J. M. Townes, against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for alleged breaches of contracts of carriage of numerous car loads of oats and a car load of bran. All except four car loads were shipments from points in Nebraska and Missouri to Texarkana, Ark., and the four were shipments from Texarkana to Arkadelphia, Ark. The consignments to Texarkana were purchases made by the plaintiff and shipped by his vendors to the shipper's own order, the bills of lading containing directions to "notify J. M. Townes, Texarkana, Ark." Plaintiff resided at Little Rock, and was engaged here in business. He had no place of business nor agent at Texarkana. The bills of lading were sent to a bank in Little Rock, attached to drafts of the several vendors on the plaintiff for the purchase price of the products sold. These purchases and consignments were not all made at the same time, but were scattered through the months of September and October, 1907. As soon as the drafts reached Little Rock, which was usually a day or two after he received the invoices from his vendors, and before the consignments had time to reach Texarkana, plaintiff resold the produce to the Josey Grain Company of Texarkana, and at his request the bank at Little Rock forwarded to a bank at Texarkana his drafts on the Josey Grain Company for the purchase price, with the bills of lading attached. In the ordinary course of transportation, it usually required 10 or 11 days for the cars to reach Texarkana after shipment, and there is no evidence that the cars were not promptly transported to said destination. When they reached there, the agent of the railway company promptly notified the Josey Grain Company of their arrival. Mr. Josey, of the Josey Grain Company, testified that he, in turn, notified plaintiff. Plaintiff denied this, however, and the testimony on this point is conflicting. No notice was given directly by the railroad company to plaintiff. The Josey Grain Company declined to receive the shipment on account of stringency of money matters and dullness of the grain market at that time. The cars remained in the railroad yards at Texarkana, and plaintiff testified that the first intimation he had of the arrival of the cars was on November 23d, when he discovered the fact by accident from the company's claim agent at Little Rock. He made no inquiry for the cars, he says, and was not

in Texarkana during that period, and neither gave directions to the company for the forwarding of notice to him of the arrival of the cars, nor made any arrangements with any one in Texarkana to receive notice for him, further than to forward the bills of lading to the bank attached to the drafts on the Josey Grain Company, which authorized the latter to take up the draft and bills of lading and receive the cars.

Plaintiff claims the right to recover damages on account of the company's failure to notify him of the arrival of the cars, and he attempted to prove damages by reason of loss in weights and depreciation in prices during the delay. It seems clear to us that on this state of facts the plaintiff is not entitled to recover. As the company was required by the terms of the contract to give him notice of the arrival of the cars at Texarkana, there was a corresponding duty devolving on him to put himself in position to receive the notice, so that the same would be available. Any attempt to give him notice at Texarkana would have proved fruitless, for he was not there to receive it; and, before he can complain at the failure of the company to comply with the contract by giving him the notice, he must have first performed the contract impliedly imposed on him to put himself in position to receive the notice. He cannot complain when he has failed to perform his part of the contract, for, when he failed to make arrangements for the carrier to give him notice, he impliedly agreed for the latter to hold the goods until the bills of lading were presented by some one. This is what the law required the carrier to do, and he could expect nothing more. "It is the duty of the consignee," says Mr. Hutchinson, "to be on hand and ready to receive the goods. He cannot absent himself, and thus put it out of the power of the carrier to make a delivery to him, and hold him during his absence to the extraordinary care of the goods required of the carrier. If, therefore, he be absent when the carrier is ready to deliver the goods, and has left no agent known to the carrier to whom delivery can be made for him, or to whom notice can be given of their arrival, the carrier becomes at once a mere warehouseman of the goods." 2 Hutchinson on Carriers, § 723. The Supreme Court of Indiana, speaking on this subject, said: "The doctrine that the carrier's duty to deliver and the consignee's duty to receive are reciprocal, and that each must be maintained, is approved by the plainest considerations of justice, and is necessary to prevent wrong and imposition." *Adams Exp. Co. v. Darnell*, 31 Ind. 20, 89 Am. Dec. 582. The above quotations are taken from discussions of the general question as to when liability as a carrier ceases and that of a warehouseman begins; but the principle is the same

in determining the question of liability of the carrier for failing to give notice where damages are alleged to have resulted from such delay. The four car loads of oats consigned to Arkadelphia were shipped by plaintiff to his own order with directions to notify Arkadelphia Rolling Mills, to whom plaintiff had sold the oats, and that company was duly notified of the arrival of the cars, but refused to receive the oats on account of finding them to be in a damaged condition. Plaintiff was not promptly notified of the refusal of the Arkadelphia Rolling Mills to accept these cars, and he sues to recover demurrage charges during the period of delay, which he was required to pay, and also alleged damage to the oats. The evidence on this branch of the case is not sufficient to show the condition the oats were in when they were shipped, so it was impossible for the jury to determine how much the damage was, if any, caused by the delay. We cannot determine from the verdict how much the jury allowed for this.

Counsel for plaintiff insist that the bill of exceptions does not contain all the evidence, and that for that reason we should indulge the presumption that the judgment is correct and affirm it. The trial judge certifies in the bill of exceptions that it contains all the evidence, but the clerk, in making up the transcript, omits some of the writings which were read in evidence and called for in the bill of exceptions. These omitted writings consisted of orders of the Railroad Commission and matters of correspondence after the alleged damage occurred, and during the period of attempted adjustment, and none of them affect the question of appellant's liability so far as concerns the points necessary to decide in disposing of the case here. The contents of those writings could not affect those questions, so we cannot indulge the presumption that they contained evidence sufficient to establish liability of appellant. *North State Fire Ins. Co. v. Dillard*, 88 Ark. 473, 115 S. W. 154; *Wadly v. Leggett*, 82 Ark. 262, 101 S. W. 720, 118 Am. St. Rep. 70. Other questions raised in the case need not be decided.

Reversed and remanded for new trial.

#### GRAMMER v. BLANSETT.

(Supreme Court of Arkansas. Jan. 24, 1910.)

#### 1. FORCIBLE ENTRY AND DETAINER (§ 4\*)—CIVIL LIABILITY—NATURE AND ELEMENTS.

Under a statute (Kirby's Dig. § 3629) providing that if any person shall enter into or upon any lands and detain or hold the same without right or claim of title, or by such words and actions as have a natural tendency to excite fear or apprehension of danger or frightening, by threats or other circumstances of terror, compel a party to yield possession, the offender shall be deemed guilty of forcible entry and detainer, where, while plaintiff was in the actual pos-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

session of land, fencing and clearing it, and at least prima facie entitled to the possession, defendant approached him in anger, called him names, posted notices upon the land against trespassers and threatened to arrest him, and then, calling to his assistance four or five other men, forcibly took possession of the land by tearing down plaintiff's fence, and inclosing the land with a fence of his own, he was guilty of forcible entry and detainer under the law.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 5-22; Dec. Dig. § 4.\*]

**2. FORCIBLE ENTRY AND DETAINER (§ 29\*)—CIVIL LIABILITY — ACTIONS — EVIDENCE — WEIGHT AND SUFFICIENCY.**

In an action for forcible entry and detainer, evidence held to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 140; Dec. Dig. § 29.\*]

Appeal from Circuit Court, Benton County; J. S. Maples, Judge.

Action by John H. Blansett against John C. Grammer. From a judgment for plaintiff, defendant appeals. Affirmed.

Rice & Dickson and J. A. Rice, for appellant. E. P. Watson and McGill & Lindsey, for appellee.

**BATTLE, J.** This is an action of forcible entry and detainer, which was instituted by John H. Blansett against John C. Grammer in the Benton circuit court to recover possession of certain land. Plaintiff alleges substantially as follows: On the 12th day of January, 1909, he leased from Clementine Boles a certain tract of land and immediately took possession of it, and thereafter fenced with a substantial fence 15 acres thereof, and was clearing the same preparatory to cultivating crops thereon for the year 1909, and was in the open, actual, and exclusive possession of the 15 acres and in constructive possession of the remainder by lease, when the defendant, John Grammer, forcibly took possession thereof by threatening to beat him if he did not deliver it to him, and by abusive language and by entering upon the land and tearing down plaintiff's fences, all of which was done by force consisting of the defendant and four or five other men, who by their numbers and threats intimidated and drove him from the possession, and built a fence around the land, and has since retained possession by force, and damaged him in the sum of \$250. Plaintiff asked for judgment for possession of the land, and for damages.

The defendant answered and denied the allegations in the complaint, and pleaded that E. S. Grammer was the owner of the land.

The jury in the case, after hearing the evidence adduced by the parties and the instructions of the court, returned a verdict in favor of the plaintiff for the land and \$20 damages. Judgment was rendered accordingly, and the defendant appealed.

Plaintiff read as evidence in the trial a

deed executed by the commissioner of state lands of the state of Arkansas, by which the land was conveyed to E. P. Watson, and in which it was shown that the land was sold under a decree of the Benton chancery court in accordance with an act (Laws 1881, No. 83) entitled "An act to enforce the payment of overdue taxes," approved March 22, 1881, and an act entitled "An act to amend section 1 of an act entitled an act to enforce the payment of overdue taxes, approved March 12, 1881," to the state of Arkansas; and read as evidence the deed of E. P. Watson conveying the land to Clementine Boles, and her lease of the land to plaintiff.

The evidence which supported the verdict of the jury tended to prove the following facts: About the 10th day of February, 1909, plaintiff took possession of the land under his lease and cleared and fenced a part of it, and, while he was doing so, the defendant put up notices on the land stating that the land belonged to E. S. Grammer, and that all trespassers would be arrested and prosecuted. "He came up on the land when 'plaintiff' was at work fencing and asked 'him' 'what' 'he' was going to do about it. He told him that 'he' 'thought' his lease was good, and he was going to hold the land and go ahead. He appeared to be angry, and said that any man who would come between a neighbor and a stranger was a cur or no better than a cur pup, or words to that effect, and said he intended to have plaintiff arrested. As he started away, he repeated that a man who would come between a neighbor and a stranger was no better than a cur dog." Shortly after that, while plaintiff was still clearing the land, the defendant and four or five other men entered upon the land and tore down plaintiff's fence, and inclosed it with a fence of his own. The plaintiff, believing that it was dangerous for him to remain and continue his work, went away, and brought this action. The fence constructed by plaintiff on the land and destroyed by the defendant was worth \$20.

The defendant offered the deed of E. S. Grammer as evidence for the purpose of showing that the land belonged to him; but, the deed being void on account of the defective description of the land in the deed, the court refused to allow it to be read.

The defendant does not attack the instructions of the court on this appeal, but we copy one in this opinion to show how the facts were submitted to the jury. The court instructed the jury in part as follows:

"If you find from a preponderance of the evidence that plaintiff was in the actual possession of the land described in the complaint, and that the defendant entered upon said land and by the use of threats and by removing the plaintiff's fence, or by such other words and actions as had a natural tendency

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to excite fear or apprehension of danger on the part of the plaintiff, and to induce him to yield possession of said land, and that by the use of such means defendant did induce the plaintiff to yield up to him such possession, the defendant would be guilty of a forcible entry and detainer, and you will find for the plaintiff. It would not be necessary, to constitute such forcible entry and detainer, that the defendant should actually use force against the person of the plaintiff."

The statutes of this state provide: "If any person shall enter into or upon any lands, tenements or other possessions and detain or hold the same without right or claim of title \* \* \* or by such words and actions as have a natural tendency to excite fear or apprehension of danger \* \* \* or frightening by threats or other circumstances of terror, the party to yield possession, in such cases every person so offending shall be deemed guilty of a forcible entry and detainer within the meaning of this act." Kirby's Dig. § 3629.

"Generally speaking, forcible entry and detainer is a remedy for the protection of the actual possession of realty, whether rightful or wrongful, against forcible invasion, its object being to prevent disturbances of the public peace, and to forbid any person righting himself by his own hand and by violence; and therefore ordinarily the only matters involved are the possession of plaintiff and the use of force by defendant." McGuire v. Cook, 13 Ark. 448; Hall v. Trucks, 38 Ark. 257; Littell v. Grady, 38 Ark. 584; Anderson v. Mills, 40 Ark. 192; Johnson v. West, 41 Ark. 535; 19 Cyc. p. 1124, and cases cited.

In Iron Mountain Railroad Company v. Johnson, 119 U. S. 608, 7 Sup. Ct. 339, 30 L. Ed. 504, it is said:

"The general purpose of these statutes is that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title, or may have the better right to the present possession, but the policy of the law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself in case of that kind by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been obtained," etc.

And again: "If the law was otherwise, force, the exhibition and use of deadly weapons, and threats of personal violence would speedily take the place of lawful and peaceable methods of gaining the possession of property."

The statutes of this state provide in actions like this "the title to the premises in

question shall not be adjudicated upon or given in evidence, except to show the right to the possession, and the extent thereof." Kirby's Dig. § 3648.

In this case the evidence shows that plaintiff was in the actual possession of the land in controversy, fencing and clearing the same, and at least prima facie entitled to the possession. While doing so the defendant approached him in anger, and in effect called him a cur. He posted upon the land notices against trespassers and threats of arrest; and then, calling to his assistance four or five other men, forcibly took possession of the land by tearing down plaintiff's fence and inclosing the same with a fence of his own. Under the most provoking circumstances, he left to him the choice of two evils—to engage in an unequal combat to maintain his possession or yield possession under necessity and bring this action, the course prescribed by law in such cases. The evidence sustained the verdict.

Judgment affirmed.

#### LEIFER MFG. CO. v. GROSS et al.

(Supreme Court of Arkansas. Jan. 24, 1910.)

#### 1. MECHANICS' LIENS (§ 118\*)—STATUTES—COMPLIANCE—NOTICE.

Kirby's Dig. § 4976, provides that persons other than the original contractor shall give 10 days' notice before the filing of a lien, to the owner or agent or either of them, alleging the amount, and from whom it is due. Held that, before a subcontractor can be entitled to a lien for materials furnished, he must give the notice within the time and manner prescribed.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 161; Dec. Dig. § 118.\*]

#### 2. FRAUDS, STATUTE OF (§ 26\*)—ORIGINAL OBLIGATION.

Where plaintiff furnished materials for defendant's building solely on defendant's promise to pay for them if the contractor, who was present during the negotiations, did not, and plaintiff extended credit during the entire transaction only to the owner, and not to the contractor, the agreement was not within the statute of frauds, as a promise to pay the debt of another, but was defendant's original obligation.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 35-42½; Dec. Dig. § 26.\*]

#### 3. MECHANICS' LIENS (§ 118\*)—"SUBCONTRACTORS"—RIGHT TO LIEN—NOTICE TO OWNER.

Where plaintiff furnished materials for defendant's building under a contract with defendant, and not with the contractor, plaintiff was not a "subcontractor" defined by Kirby's Dig. § 4993, to include all persons furnishing work or material, except under contracts directly with the owner, etc., but was an original contractor, and therefore entitled to a mechanic's lien without giving the notice required of subcontractors by section 4976.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 161; Dec. Dig. § 118.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6704-6705; vol. 8, p. 7806.]

#### 4. DAMAGES (§ 189\*)—EVIDENCE—CONTRACT—DELAY IN PERFORMANCE.

Defendant was not entitled to recoup damages for delay in performance of plaintiff's con-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tract to furnish materials for a building, where the only evidence of damage was the testimony of one witness, in the nature of a guess, that defendant suffered between \$300 and \$400 by the delay.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 512; Dec. Dig. § 189.\*]

**5. DAMAGES (§ 122\*)—MATERIAL CONTRACT—DELAY.**

The measure of damages for a material-man's failure to furnish material for the completion of the building within the time is the rental value of the building during the time the owner is deprived of its use by reason of such failure, and not the sum lost by reason of idleness of laborers retained during the delay, and damage to the work done.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 310-315; Dec. Dig. § 122.\*]

**6. DAMAGES (§ 175\*)—BUILDING CONTRACT—DEFECTIVE CONSTRUCTION—EVIDENCE.**

Where it is claimed that a building has been defectively constructed, evidence is admissible to show the specific defects, and the cost of removing and replacing defective materials.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 469-471; Dec. Dig. § 175.\*]

**7. SALES (§ 418\*)—BREACH BY SELLER—DAMAGES—DEFECTIVE BUILDING MATERIALS.**

Where building materials furnished are claimed to be inferior to those contracted for, there may in general be a recovery of the difference between the value of the materials actually furnished and the value which such materials would have had if they had been of the character contracted for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1200; Dec. Dig. § 418.\*]

**8. SALES (§ 441\*)—BREACH BY SELLER—DEFECTIVE BUILDING MATERIALS—EVIDENCE.**

Evidence held insufficient to show the extent of damages sustained by the owner of a building arising out of alleged defective materials sold to him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1283; Dec. Dig. § 441.\*]

**9. SALES (§ 415\*)—BREACH BY SELLER—DAMAGES—BURDEN OF PROOF.**

A buyer of building materials claiming that the materials furnished were defective has the burden of proving the extent of his damage.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1170; Dec. Dig. § 415.\*]

Appeal from Garland Chancery Court; Alphonso Curl, Chancellor.

Action by the Leifer Manufacturing Company against B. Gross and others. From a decree dismissing the complaint for want of equity, plaintiff appeals. Reversed and remanded, with directions.

Downie, Rouse & Streepey, for appellant. Greaves & Martin, for appellees.

**FRAUENTHAL, J.** The plaintiff below, Leifer Manufacturing Company, instituted this suit in the Garland chancery court against the defendant B. Gross upon an account for materials furnished in the construction of a building in the city of Hot Springs, Ark. The account consisted principally of concrete building material or blocks, and amounted in the aggregate to \$1,016.20. It is credited with a payment of \$200, thus leaving a balance of \$816.20, for which

amount judgment is sought. It is alleged in the complaint that the materials were furnished upon a contract made with the defendant, who is the owner of the building; and proper allegations are made therein for having a lien declared upon the building in cases where the materials are furnished by those having contracts therefor directly with the owner. The defendant denied that he entered into any contract with the plaintiff whereby the above materials were furnished. He alleged that he had entered into a contract with one L. W. Rose to construct the building for him, and that said Rose was the contractor for the erection thereof; that if plaintiff furnished any materials for the construction of the building, he furnished them to Rose, the contractor, and not to defendant, and he alleged that no notice was served upon him prior to the filing of the alleged mechanic's lien. He also alleged that the plaintiff had unreasonably delayed the furnishing of the materials, and that the materials furnished were defective and of an inferior quality, and that thereby Rose or the defendant was damaged in a sum largely in excess of the amount sued for. He asked that the claim of plaintiff for a mechanic's lien be dismissed. The chancery court entered a decree dismissing the complaint for want of equity, and the plaintiff prosecutes this appeal from that decree.

The defendant Gross was the owner of a lot in the city of Hot Springs, and had entered into a contract with L. W. Rose by which said Rose agreed to construct a building for him thereon for the sum of \$5,600. The building was constructed of concrete blocks, and the plaintiff furnished the concrete materials set out in its complaint which were used in the construction of the building. The plaintiff contends that he furnished the materials under a contract made therefor directly with the defendant. The defendant contends that the materials were furnished under a contract therefor made by plaintiff with said Rose, the original contractor, and that plaintiff was only a subcontractor. It is conceded by the plaintiff that he did not give the notice required by section 4976, Kirby's Dig. That section provides that: "Every person except the original contractor, who may wish to avail himself of the benefit of the provisions of this act, shall give ten days' notice before the filing of the lien as herein required, to the owner, owners or agents or either of them that he holds a claim against such building or improvements setting forth the amount and from whom the same is due." Under this provision of the law, before a subcontractor can be entitled to a lien upon the building or improvement for the materials furnished by him in its construction, he must give this notice in the time and manner prescribed by this statute. 27 Cyc. 118; Schubert v. Crowley, 33 Mo. 564; Hahn v. Dierkes,

37 Mo. 574; *Faulkner v. Bridget*, 110 Mo. App. 377, 86 S. W. 483.

Section 4993, Kirby's Dig. defines and determines who is an original contractor, and who is a subcontractor within the meaning of the mechanic's lien law. That section provides: "All persons furnishing things or doing work provided for by this act shall be considered subcontractors except such persons as have contracts therefor directly with the owner, proprietor, his agent or trustee." If, therefore, the plaintiff furnished the materials to the contractor, Rose, and under a contract therefor made solely with him, then the defendant would not be liable for the materials; and, inasmuch as it is conceded that the above notice of the filing of the lien was not given, by the plaintiff, he would not in such event be entitled to a lien on the building. But, on the other hand, if the plaintiff entered into a contract with the defendant to furnish the materials by which the defendant became liable therefor, then he would not be a subcontractor, and in such event would be entitled to recover judgment therefor against defendant, and also to a lien on the building. The question is one chiefly of fact.

The only persons who were present when the agreement was made, under which the plaintiff furnished the materials, were George Leifer, the president and manager of the plaintiff, and the defendant and said Rose. When the defendant first employed Rose to construct the building he had determined to construct it of brick; later he decided to construct it of concrete. The plaintiff's place of business and plant were located at Little Rock, Ark., and the defendant Gross, in company with one Shank, in whose opinion as to concrete he seems to have had confidence, visited plaintiff's plant and secured a sample of the concrete, which he took to Hot Springs and had tested. Later Rose saw the plaintiff's manager, and asked as to the prices of the concrete, and thereafter both Rose and defendant saw the plaintiff's manager, at which time the contract was made for furnishing the materials. The plaintiff understood that the defendant was the owner of, and that Rose was the contractor for, the construction of the building.

George Leifer, the plaintiff's manager, testified as follows relative to the contract: "A. In the first place Mr. Rose came down there and asked the prices on stuff, and then Mr. Gross came over with him and made a bargain for the stuff for the house at a certain price. Then there were some extras afterwards that were put on the list. So we shipped the stuff direct to Mr. Gross, just as we understood it was to be. \* \* \* Q. Why was it you shipped them to Mr. Gross, and not to Mr. Rose? A. Because he did all the talking. When he came back, he said that we should ship the stuff over there to him, and he would see that it was paid. That's the reason we shipped to Mr. Gross." "A

\* \* \* Mr. Gross said for us to ship the stuff, and he would pay if Rose didn't. So I shipped the stuff direct to Gross, and looked to him for payment." He further testified that he made the contract with defendant Gross, and furnished the materials, solely upon his credit and his promise to pay therefor. L. W. Rose, testified as follows: "Q. When you and Mr. Gross came over here, was there any contract made by either you or him for the materials? A. Nothing more than Mr. Gross told Mr. Leifer, when he selected the blocks, 'You send the blocks over.' I did not say a word while I was over here to Mr. Leifer later in regard to the business. Mr. Gross did the talking. Q. What contract was made at that time? A. He just told him to send the blocks to my order, and he said, 'If Rose don't pay for them, I will.'" "A. \* \* \* He came over with me and selected the blocks. He said, 'If Rose don't pay for them, I will.' I never said a word to Mr. Leifer any more about the price." The defendant Gross testified that he only selected the kind and color of concrete blocks which he wanted put in the building, and made no contract or agreement of any kind therefor with the plaintiff. He further testified as follows: "Q. Now, in regard to this contract, Mr. Gross, isn't it a fact that you directed the Leifer Manufacturing Company to ship those different blocks in a certain manner? to ship them at a certain time, and that you made a statement to Mr. Leifer that if Mr. Rose didn't pay the bill, that you would pay it? A. It certainly is not a fact that I made any contract with Mr. Leifer for anything. Q. Now, that isn't the question. I asked you if you made that statement to Mr. Leifer that if Mr. Rose made a contract and failed to pay for those building blocks you would pay for them. A. I don't remember that I said that. Q. You don't remember that you didn't? A. I don't think that I did say it. Q. Well, you wouldn't swear to it would you? A. I can swear to it to the best of my recollection that I didn't say it."

The plaintiff shipped the materials at different times by freight from Little Rock to Hot Springs, and in all the bills of lading the defendant Gross is named as the consignee. In its books the plaintiff entered the account for the materials against the defendant Gross; and its manager testified that the materials were furnished upon the credit of defendant, and his promise to pay therefor. We do not think it necessary to further detail the facts and circumstances adduced in evidence in this case. We have carefully examined the testimony, and we are of the opinion that the decided preponderance of the evidence establishes the fact that the contract under which the plaintiff furnished the materials was made between the plaintiff and defendant Gross, and that the plaintiff was induced to furnish the materials solely upon the agreement and promise of defendant to pay for them if Rose did not. According to

the whole transaction, credit was actually given to defendant, and the indebtedness for the materials was against defendant, and as to the plaintiff Gross became originally, and not collaterally, obligated to pay therefor. The agreement did not fall within the statute of frauds. It was solely upon the agreement and promise made by the defendant that the plaintiff furnished the materials; it was not a promise to pay the debt of another, but a promise to pay for the materials which were for the defendant's benefit, and which would not have been furnished had he not agreed to pay therefor, and thus the account became the defendant's own debt. Although Rose was the contractor to construct the building, nevertheless, if defendant made the promise to plaintiff to pay for the materials, and, relying solely on that promise, the plaintiff furnished thereafter the materials, the defendant would be liable therefor upon an original undertaking. 20 Cyc. 182; 20 Am. & Eng. Ency. Law (2d Ed.) 448; *Brown v. Harrell*, 40 Ark. 429; *McTighe v. Herman*, 42 Ark. 285.

The facts in the case of *Long v. McDaniel*, 76 Ark. 292, 88 S. W. 964, are quite similar to the facts in this case. In that case the tenant of the owner of a building made certain repairs therein at his own expense. The owner told the materialman to furnish the materials, and if the tenant did not pay for it he would. Upon said promise the materialman furnished the material. In that case this court held that the materialman was induced to order and furnish the material by the promise of the owner that he would see him paid, and that the promise was an original undertaking on the part of the owner, making him liable for the material. In the case at bar we think that the facts equally, if not more fully, establish the liability of the defendant, by virtue of the promise which we find by the decided weight of the evidence he made to the plaintiff. We are of opinion, therefore, that the finding of the chancellor herein is against the decided preponderance of the evidence; in such event it has been uniformly held by this court that such finding will be set aside. *Chapman v. Liggett*, 41 Ark. 292; *Gist v. Barrow*, 42 Ark. 521; *Nolen v. Harden*, 43 Ark. 307, 51 Am. Rep. 563; *Kelly v. Carter*, 55 Ark. 112, 17 S. W. 706; *George v. Norwood*, 77 Ark. 216, 91 S. W. 557, 113 Am. St. Rep. 143; *Carr v. Fair*, 122 S. W. 659. We are also of the opinion that it is established by the preponderance of the evidence that the plaintiff furnished all the materials set out in his account sued on, and at the prices therein named, that the contract therefor was made with the defendant, and that the materials were shipped to defendant and used in the construction of his building, and that plaintiff filed its lien within the time provided by law.

It is contended by counsel for defendant that the plaintiff by reason of its failure to perform its contract is liable for damages far

in excess of the amount for which it sues, and on this account its complaint should be dismissed for the want of equity. It is urged by defendant that the plaintiff delayed an unreasonable time after the execution of the contract to furnish the concrete blocks, or materials, and that on this account damages were incurred to the amount of \$300 to \$400. It was claimed that this damage arose from the idleness of laborers who had to be retained during the delay, and the damage to the work then done. But the witness making this statement of the damage on account of the delay in shipping the materials named the amount as about \$300 or \$400, and as a general estimate. He did not state the number of laborers that were detained thereby from labor, or any other fact from which it could be definitely said that any damage was actually incurred by the alleged delay. The statement of the witness as to this alleged damage was rather given in the nature of a guess than as definite and certain testimony as to the nature and amount of such damage. And this was the only witness who testified relative to this element of the damages. But, furthermore, this is not the true measure of the damages in event of such delay. "The measure of damages for failure of a materialman to furnish material for completion of a building within a reasonable time is the rental value of the building during the time the owner was deprived of it by reason of such failure." *Long v. Abeles & Co.*, 77 Ark. 150, 91 S. W. 29; *Hooks Smelting Co. v. Planters' Compress Co.*, 72 Ark. 286, 79 S. W. 1052. In the case at bar there was no evidence relative to the rental value of the building or the length of the delay, and therefore no competent evidence upon which to sustain any damages for said alleged delay in furnishing the materials.

It is urged by the defendant that the concrete materials furnished by the plaintiff were defective, and were not of the quality that was agreed upon, and by reason thereof damages were incurred to the amount of from \$300 to \$900. But we do not think that the evidence as to these damages growing out of the alleged defective materials is sufficiently definite and certain to ascertain the amount thereof. In fact there is no competent evidence in the record showing these damages and the amount thereof. There is no testimony showing the extent of this defective material, or the number of defective blocks, or the cost of removing the alleged defective blocks of concrete and of replacing same: there is no testimony showing the difference between the value of the materials as actually furnished and the value of such materials which should have been furnished under the contract. There is no competent testimony adduced in the case by which the amount of this alleged damage can be measured and determined.

Where it is claimed that a building has been defectively constructed, evidence is ad-

missible of the specific defects, and the cost of removing defective materials and replacing same may be shown. 2 Joyce on Damages, § 1890; Healy v. Bulkey (City Ct. Brook.) 10 N. Y. Supp. 702. And where these materials furnished are of a character defective or inferior to that contracted for, there may, as a general rule, be a recovery of damages of the difference between the value of the materials which are actually furnished and the value which such materials would have had if they had been of the character contracted for. 2 Joyce on Damages, § 1389; Twitty v. McGuire, 7 N. O. 501; Laraway v. Perkins, 10 N. Y. 371; 6 Cyc. 113. In the case at bar the only witness who testified to the amount of these alleged damages was F. J. W. Hart, and he stated that his estimates were only approximations. He testified that he had not made a close examination of the house, and that he was unable to say what the damages were with any accuracy. He did not give any competent testimony as to the extent or amount of these alleged damages. And the proof of these damages is not made by any witness in the case. On the other hand, it appears from the evidence of the contractor, Rose, that it was understood and agreed that the plaintiff should be notified if any of the materials was defective, and should have the right and opportunity to replace the same with proper material. This witness testified that whenever the plaintiff was notified that any of the materials was defective it promptly replaced same with proper material.

After a careful examination of the testimony in this case, we are of opinion that there is no competent and satisfactory evidence to sustain any of the allegations of defendant as to the damages claimed by him; and the burden was on the defendant to prove such damages. The plaintiff is therefore entitled to recover of defendant the amount sued for, and to have a lien therefor declared on said building.

The decree of the chancery court is reversed, and this cause is remanded, with directions to enter a decree in accordance with this opinion.

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CHICAGO, R. I. & P. RY. CO. v. MILES.  
(Supreme Court of Arkansas. Dec. 13, 1909.)

For majority opinion, see 123 S. W. 775.

BATTLE, J. (dissenting). The following statement of facts is made by the court: "There was evidence tending to show that the cattle did not reach Brady on the day specified because of the negligent delay in shipment by appellant and connecting carriers; that but for such delay the cattle would have passed the place en route, and have been delivered before the unprecedented floods came that washed away a bridge, which thereafter rendered it impossible to

deliver the cattle at the place of destination in time for the auction sale. The testimony on behalf of appellant tended to show that the cattle would have reached their destination on the Saturday morning of the day that the auction sale took place but for the fact that a certain bridge was washed away by unprecedented floods, which delayed their transportation for several days."

It is stated in the opinion of the court: "The court in effect told the jury that, even if the cattle would have reached Brady in time for the auction sale but for the act of God, still if they were negligently delayed before reaching the obstruction, and but for such negligent delay would have passed beyond the point of obstruction before the obstruction occurred, the appellant would be liable." This court sustained this instruction.

I think that the "unprecedented floods" were the proximate cause of the loss sustained by appellee, and that the appellant was not liable for losses on account of delay which was not the proximate cause.

Wharton says: "A negligence is the juridical cause of an injury when it consists of such an act or omission on the part of a responsible human being, as in ordinary, natural sequence immediately results in such injury. Such, in fact, we may regard as the meaning of the term 'proximate cause,' adopted by Lord Bacon in his maxims. The rule, as he gives it in Latin, is, 'in jure non remota causa sed proxima spectatur,' which he paraphrases as follows: 'It were infinite for the law to consider the causes of causes, and their impulsions one of another, therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking for any further degree.'" Wharton on Negligence (2d Ed.) § 73.

Chief Justice Cockrill, speaking for this court, in Railway Company v. Neel, 56 Ark. 279, 287, 19 S. W. 963, 965, said: "In actions of this description the injury complained of must be shown to be the direct consequence of the defendant's negligence. This is the only practical rule which can be adopted by courts in the administration of justice. It is not enough that the act charged may constitute one of a series of antecedent events without which, as the result proves, the damage would not have happened." Hoadley v. Transportation Co., 115 Mass. 304, 15 Am. Rep. 106. The rule is illustrated by a variety of cases, and is sustained by an unquestioned line of authority. Little Rock Railway Co. v. Talbot, 47 Ark. 97, 14 S. W. 471; Martin v. Railway, 55 Ark. 510, 19 S. W. 314; St. Louis, etc., Railway v. Commercial Insurance Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154; Dubuque Wood Co. v. Dubuque, 30 Iowa, 176.

In Atchison, T. & S. F. R. R. Co. v. Stanford, 12 Kan. 377 (15 Am. Rep. 362), Justice Valentine said: "In law proximate and remote causes and effects do not have reference

to time, nor distance, nor merely a succession of events, or to a succession of causes and effects. A wrongdoer is not merely responsible for the first result of his wrongful act, but he is also responsible for every succeeding injurious result which could have been foreseen by the exercise of reasonable diligence as the reasonable, natural, and probable consequence of his wrongful act. He is responsible for any number of injurious results consecutively produced by impulsion, one upon another, and constituting distinct and separate events, provided they all necessarily follow from the first wrongful cause. Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, but if they are such as might, with reasonable diligence, have been foreseen, the last result, as well as the first, and every intermediate result, is to be considered in law as the proximate result of the first wrongful cause. But, whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequence would not have happened, then such injurious consequence must be deemed to be too remote to constitute the basis of a cause of action."

Wharton on Negligence says: "Even when the rule is that *casus* must be 'meritable' to be a defense, the tendency of authority is to treat as inevitable such disasters caused by storms and sudden extremes of temperature as could not have been averted except by an intensity of diligence beyond that which is usually exerted by a common carrier who brings to the duties in question experience and capacity adequate to their discharge." He gives many illustrations of this rule. Wharton on Negligence (2d Ed.) § 558.

After giving many illustrations of what constitute concurring causes, he says: "At the same time it has been ruled that, when a loss is attributable to a peril from which the carrier is by law exempt, liability is not imposed on him by the fact that the goods would not have been exposed to the peril but for his negligent delay." *Ib.* § 559.

In *Rodgers v. Missouri Pacific Railway Co.*, 75 Kan. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416, the "plaintiff sued the railroad company for the value of a car load of corn. The right to recover was predicated upon the defendant's negligence. The corn was delivered to the company at Frankfort on May 22, 1903, for transportation and delivery to the plaintiff's agent at Kansas City, Mo. The loaded car stood on the track at Frankfort until May 28th, when it was hauled to its destination only to be overtaken and destroyed by the unprecedented flood of May 30, 1903, before it was delivered by the defendant. The delay was

protracted through the negligent omission of the company to move the car. The flood was an act of God." The court, after a review of authorities at great length, said: "The court is of the opinion that the negligent delay of a carrier in moving goods intrusted to it for transportation, not so unreasonable as to amount to a conversion, will not render it liable for the loss of such goods after they have been carried to their destination, if they are destroyed by an act of God before delivery." The authorities referred to in the opinion are here cited.

In *Morrison v. Davis & Co.*, 20 Pa. 171, 57 Am. Dec. 695, goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by the defendant delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood. *Railroad Company v. Reeves*, 10 Wall. 190, 19 L. Ed. 909; *Denny v. New York Central R. Co.*, 13 Gray (Mass.) 481, 74 Am. Dec. 645.

In *Martin v. Railway Company*, 55 Ark. 510, 19 S. W. 314, the defendant contracted with a compress company to transport all cotton brought by its owners to the warehouse of that company in Little Rock to its compress in Argenta but neglected to do so until a large quantity of cotton accumulated at the warehouse and in an adjoining street, and caught fire and destroyed plaintiff's cotton. He sought to recover of the defendant the value of his cotton so destroyed. This court said: "The mere failure of the defendant to perform its contract with the compress company was in no wise the juridical cause of the fire. There was no direct connection between the neglect of the defendant to furnish transportation according to the contract and the fire. The failure to furnish cars was one of a series of antecedent events without which as the result proves the fire probably would not have happened, for, if the cotton had been removed, there might have been no fire. But it was not the direct and proximate cause, and did not make the defendant responsible for losses caused by the fire. *St. Louis, etc., R. Co. v. Commercial Ins. Co.*, 139 U. S. 223, [11 Sup. Ct. 554, 35 L. Ed. 154]."

In *James v. James*, 58 Ark. 157, 23 S. W. 1099, appellees delivered to the appellant cotton which he agreed to gin on the following Monday. He failed to do so, and on the following Thursday the cotton was destroyed by fire. This court held that the failure to gin the cotton within the time agreed was not the proximate cause of its destruction. Justice Wood, delivering the opinion of the court, said: "True, we might say if the cotton had been ginned on Monday, and carried away on Tuesday, it would not have been burned on Thursday. To use language similar to that employed \* \* \* in the

case of *Martin v. Railway Co.*, 55 Ark. 521, [19 S. W. 314], the failure to gin on Monday 'was one of a series of antecedent events without which the loss would not have occurred, but such failure was in no sense the proximate cause of the loss.'"

In *Martin v. Railway Company* and *James v. James*, cited above, there was no causal relation between the negligence charged and the loss sustained. The delay in the first two cases did not produce the fire, and the delay in the last case did not produce the flood. In the first two the delay was not the juridical cause of the fire, and in the last it was not the juridical cause of the flood. The fires and flood were not the consequences of the delay. They were unconnected with and independent of the delay. The delay was no more the concurring cause with the fire in causing loss in the two cases than it was with the flood in causing the loss in the case at bar. All that can be said in the two cases in this connection is that, if there had been no delay, the fire would not have destroyed the cotton, and the flood would not have prevented the delivery of the cattle in time, and so it might be said that if Miles had shipped his cattle at an earlier day they would have been delivered in time, and he would have incurred no loss. But this we have seen is not sufficient.

The total loss of the cotton and the loss sustained in the market value of the cattle do not determine the proximate cause. As the opinion of the court seems to say or imply in distinguishing the case at bar from the two cases in which cotton was destroyed by fire, the damages or the extent of them did not produce the proximate cause, but the proximate cause produced the damages.

For the reasons given, I dissent from the opinion of the court.

SPEAR MINING CO. et al. v. T. J. SHINN & CO. et al.

(Supreme Court of Arkansas. Jan. 10, 1910.)

1. APPEAL AND ERROR (§ 906\*)—REVIEW OF DISCRETIONARY ACTION—CONTINUANCE.

Exercise of the trial court's discretion in denying an application for a continuance will not be reviewed unless manifestly abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 936.\*]

2. CONTINUANCE (§ 26\*)—PREPARATION FOR TRIAL—TAKING DEPOSITIONS—DILIGENCE.

Plaintiffs completed taking their testimony on May 22, 1908; their only witnesses being active members and officials of certain corporations alleged to have been merged in defendant S. Mining Company. After plaintiffs had finished taking their depositions, defendants gave notice that they would take depositions at a distant point within the state on June 6th following, but failed to do so. No further efforts were made to take depositions until the meeting of the court on September 21, 1908, when defendants applied for a continuance to enable them to take their testimony. *Held*, that the ap-

plication was properly denied because of defendants' want of diligence.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 87, 88; Dec. Dig. § 26.\*]

3. APPEAL AND ERROR (§ 187\*)—OBJECTIONS NOT RAISED AT TRIAL—DEFECT AS TO PARTIES.

A defect of parties plaintiff not raised at the trial either by demurrer or answer cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1184–1189; Dec. Dig. § 187.\*]

4. CORPORATIONS (§ 550\*)—ENFORCEMENT OF TRUST FOR CREDITORS—PARTIES PLAINTIFF—JOINDER.

Where an insolvent corporation's property was turned over to other corporations, including defendant, under an agreement that the corporations should pay the insolvent's creditors a certain amount of its indebtedness, and the total amount of the insolvent's indebtedness was greater than the amount assumed by the corporations, a bill by certain of its creditors on behalf of themselves and all others who might join in the action seeking to recover judgment on their several debts and to enforce the agreement was in the nature of a creditors' bill to obtain relief which could not be had at law, and hence all or any number of the creditors could join as complainants on behalf of themselves and all others who might join in the suit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2197; Dec. Dig. § 550.\*]

5. CORPORATIONS (§ 445\*)—ASSETS—TRANSFER—DIFFERENT CORPORATIONS—LEGAL IDENTITY.

Transfer of the assets of one corporation to another does not constitute a legal identity, and hence, if one corporation becomes a bona fide owner of the assets or of any property of another corporation, it does not thereby become liable for the debts of the latter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1784; Dec. Dig. § 445.\*]

6. CONTRACTS (§ 187\*)—CONTRACT FOR BENEFIT OF ANOTHER.

Creditors of a corporation, which had transferred its assets to another corporation in consideration of the latter's promise to pay a portion of the transferring company's debts, were entitled to sue the purchasing company on such agreement under the rule that one may maintain an action on a promise made to another if the promise is founded on a consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 800–803; Dec. Dig. § 187.\*]

7. CORPORATIONS (§ 550\*)—TRANSFER OF ASSETS FOR BENEFIT OF CREDITORS—CREDITORS' SUIT—EXTENT OF RECOVERY.

Where two corporations, defendants, successively obtained all the property of the F. Company with knowledge that the latter was largely indebted to certain creditors, and in consideration of the property defendants agreed to pay debts of the F. Company to the extent of \$1,100, which defendants had not done when suit was brought by creditors of the F. Company to enforce the agreement on behalf of themselves and other joining creditors, the total claims of the joining creditors against the F. Company being less than the amount which defendants had agreed to pay, the creditors were entitled to recover against all three corporations the amounts of their debts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2197; Dec. Dig. § 550.\*]

Appeal from Newton Chancery Court; T. H. Humphreys, Chancellor.

Action by T. J. Shinn & Co. and others against the Spear Mining Company and others. Judgment for complainants, and defendants appeal. Affirmed.

Pace & Pace, Davis & Pace, and Hamlin & Seawell, for appellants. G. J. Crump (Mitchell & Trimble, of counsel), for appellees.

FRAUENTHAL, J. The plaintiffs below, T. J. Shinn & Co., the Boone County Hardware Company, and Charles Hill, were creditors of the Flynn Mining Co., a domestic corporation; and they instituted this suit in the Boone chancery court on behalf of themselves and all other creditors of said corporation, who might join with them in the action, seeking to recover judgments for their several debts against all the defendants below. These defendants are the said Flynn Mining Company, and the Spear Mining Company, which is a domestic corporation, and the Spear Realty Company, which is also a domestic corporation, and certain individuals who were officers of the Flynn Mining Company. In their complaint the plaintiffs set out the several debts due by the Flynn Mining Company to each of them, and they alleged that the stockholders and officers of the three corporations, who are defendants, were the same; that each corporation was succeeded by and merged into the others; that the Flynn Mining Company became largely indebted to various creditors and turned over all its properties and assets to the two other corporations and in effect went out of existence. They alleged that the two latter corporations upon taking and receiving said property and assets agreed to pay the liabilities of the Flynn Mining Company, and that these two corporations had failed to pay said liabilities or to account for said property and assets so received by them. They sought to discover these assets and to enforce the agreement made by the two latter corporations to pay the indebtedness of the Flynn Mining Company by recovering judgments for their debts against these two latter corporations as well as against the Flynn Mining Company. They also alleged that the individual defendants had by legal contract entered into by them bound themselves and became liable for said indebtedness of the Flynn Mining Company. No other creditors of the Flynn Mining Company joined in this suit, and the total amount of the indebtedness due by the Flynn Mining Company to all the plaintiffs was \$823.71. The individuals who were made defendants herein filed no answer or other pleading, and judgment by default was rendered against them.

The three corporations filed separate answers, which were substantially the same in their denials and allegations. They admitted that the Flynn Mining Company was indebted to the plaintiffs as alleged in the

complaint, but denied that the stockholders and officers of the three corporations were the same, or that the Flynn Mining Company was merged in the two latter corporations. They alleged that the Spear Mining Company had purchased from the Flynn Mining Company all its properties at the price of \$1,100, and had assumed and agreed to pay that amount only of the indebtedness of the Flynn Mining Company; that it had paid out a portion of said purchase price; and that it was willing and ready to pay into court the balance of said purchase money. They denied that the two latter corporations had assumed all the liabilities of the Flynn Mining Company, or that they were responsible therefor; and they alleged that the three corporations were distinct and separate organizations.

The testimony of the plaintiffs was taken by depositions, and they finished taking their testimony on May 22, 1908. After this the defendants notified the plaintiffs that they would take the depositions of their witnesses on June 6, 1908, but they did not do so. About September 5, 1908, the attorney of the defendants sent by mail to the attorney of the plaintiffs certain interrogatories to which he requested him to append cross-interrogatories, in order that the testimony of the witnesses of the defendants could be taken thereon. The attorney of the defendants claimed that these were not returned to him in time to take the depositions of the defendants' witnesses before the day upon which the court in which the case was pending convened. That court convened on September 21, 1908, and the case was called for trial in that court on September 23, 1908. On that day the defendants moved the court to continue the trial of the case upon the ground that they had not taken any testimony and in order that they might do so. In this motion they set out the names of the witnesses whose depositions they desired to take and what they expected to prove by them. The court overruled the motion to continue the case.

The plaintiffs took the testimony of John A. Bunch, who was the treasurer of the Flynn Mining Company, and of J. C. Bunch, who was a member of the Spear Mining Company and the secretary of the Spear Realty Company; and these two parties had been actively engaged in the management of these respective corporations. From their testimony it appears that, with a few exceptions, the three corporations were formed and composed of the same individuals, and were in effect under the management of the same persons; and that the place of business of each corporation was at Yardell, Ark. The Spear Mining Company was the owner of certain mining property, consisting of land, buildings, and machinery, which was used in mining zinc, lead, and other minerals. On January 30, 1904, it leased the

land and fixtures to the Flynn Mining Company for a term of 10 years in consideration of certain royalties which should be paid to it from the operation of the mine. The Flynn Mining Company acquired certain personal property and conducted its mining operations until August 4, 1904, when it turned over to said Spear Mining Company all its properties and assets and said lease. On that date the Flynn Mining Company was indebted to various creditors in sums aggregating \$2,000. The personal property of the Flynn Mining Company was estimated on that date to be of the value of \$1,100, and all this property was turned over to the Spear Mining Company upon the agreement made by the latter corporation that it would assume and pay off that amount of the indebtedness of the Flynn Mining Company. The Spear Realty Company was incorporated on October 6, 1904, and took over all the assets of the Spear Mining Company and the property which had been received by the latter corporation from the Flynn Mining Company; and it took said property with the understanding and agreement that "the Spear Realty Company was to settle the indebtedness of the Flynn Mining Company to the extent of \$1,100." John A. Bunch, the treasurer of the Flynn Mining Company, testified that the said corporations had not paid said \$1,100 in liquidation of the indebtedness of the Flynn Mining Company and had not accounted therefor.

The chancery court rendered a decree in favor of the plaintiffs for their said debts and against the three corporations, and from that decree said defendants prosecute this appeal.

1. It is urged by the defendants that the chancery court erred in refusing to continue the case. It has been uniformly held by this court that a motion for a continuance is addressed to the sound discretion of the trial court, and that this court will not attempt to control that discretion unless it has been manifestly abused.

In the case of *Watts v. Cohn*, 40 Ark. 114, it is said: "Questions as to trials or continuance of causes rest so much in the sound discretion of the trial court that it must be a very capricious exercise of power or a very flagrant case of injustice that the appellate court will interpose to correct."

In the case of *Puckett v. State*, 71 Ark. 62, 70 S. W. 1041, this court said: "Continuances are largely in the discretion of the court, and that discretion will not be controlled unless there is a manifest abuse of it." And in that case the court held that the continuance was correctly refused because proper diligence had not been shown to obtain the testimony desired. *Magruder v. Snapp*, 9 Ark. 108; *Hunter v. Gaines*, 19 Ark. 92; *Stillwell v. Badgett*, 22 Ark. 164; *Wilde v. Hart*, 24 Ark. 599.

In the case at bar the plaintiffs completed

taking their testimony on May 22, 1908. The only witnesses whom they introduced, by whom they proved the connection and agreements between the three corporations and what became of the properties of the Flynn Mining Company and the insolvency and retirement from business operation of that corporation, were the active members and officials of these corporations, who resided at the place of business of the corporations. The defendants in their motion for continuance stated that they desired to take testimony relative to these same matters and of a contradictory nature of certain persons who were members of the corporations and who resided at Little Rock, Ark., a great distance from the place of business of these corporations. After the plaintiffs had finished taking their depositions, the defendants gave notice to plaintiffs that they would take the depositions of these persons at Little Rock on June 6, 1908. The attorney of plaintiffs went to Little Rock on that day to take these depositions; but the defendants did not take the depositions, and no reason is assigned why same were not taken. They had from that date further until September 21, 1908, the time of the meeting of the court, in which to take their testimony and prepare for trial, and they do not show any good reason why this was not done. They waited until September 5, 1908, before making any effort to take the depositions, and they did not then act with due diligence. The defendants have not shown reasonable diligence in taking the depositions of their witnesses. Furthermore, the testimony of members and officials of these corporations was taken in the case. Under the circumstances, therefore, of the case, we do not think that there was any manifest abuse of discretion on the part of the chancery court in refusing the continuance.

2. It is urged by defendants that there was a defect in the parties plaintiffs, that this suit was instituted by parties whose claims are separate and distinct, and on this account that there is a misjoinder of parties plaintiffs. The defendants did not in the court below raise the question of defect of parties either by demurrer or answer, and it cannot therefore be raised for the first time in this court. *Eagle v. Beard*, 33 Ark. 497; *Chrisman v. Jones*, 34 Ark. 73; *Less v. English*, 75 Ark. 288, 87 S. W. 447.

Furthermore, this was a bill by several creditors of an insolvent corporation whose properties had been turned over to other corporations upon an agreement, and in effect in trust, that these latter corporations would pay to the creditors of said insolvent corporation a certain amount of its indebtedness. The total indebtedness of the insolvent corporation was greater than the amount assumed by the latter corporations, and therefore all the creditors, had they joined in this suit, could only have been paid proportion-

ate amounts of their debts out of this fund. One of the objects of the bill was to discover the assets of the debtor corporation and to obtain an accounting from the corporations who had assumed to pay to the extent of said assets the liabilities of the debtor corporation. It was in the nature of a creditors' bill seeking to obtain a relief that could not effectively be had at law; all the creditors of said debtor corporation had a community of interest in the subject of this action and in the relief demanded, and they could be joined, under such circumstances, as plaintiffs. 30 Cyc. 115. In such a suit all creditors may unite, or any number of creditors may bring the action on behalf of themselves and all such creditors who may join in the suit. 5 Ency. Plead. & Prac. 391; 4 Pomeroy's Equity Jurisprudence, § 1415; 12 Cyc. 36; Jackson v. McNabb, 39 Ark. 111; Senter v. Williams, 61 Ark. 189, 32 S. W. 490, 54 Am. St. Rep. 200.

3. It is contended that the three corporations were distinct and separate entities and were not liable therefore for the indebtedness of each other. The mere transfer of the assets of one corporation to another does not constitute a legal identity between them, and, if one corporation becomes the bona fide owner in a lawful mode of the assets or of any property of another corporation, it does not thereby become liable for the debts of the latter corporation. Memphis Water Co. v. Magens, 15 Lea (Tenn.) 37; Tawas, etc., R. R. Co. v. Circuit Judge, 44 Mich. 479, 7 N. W. 65; Bruffett v. Great Western R. R. Co., 25 Ill. 353; 10 Cyc. 287; Worthen v. Griffith, 59 Ark. 562, 28 S. W. 286, 43 Am. St. Rep. 50.

But in the case at bar the property of the debtor corporation was conveyed successively to the two latter corporations, and in consideration thereof these two latter corporations agreed to discharge a certain amount of the liabilities of the debtor corporation. The weight of modern authority holds that one may maintain an action on a promise made to another for his benefit, if such promise is founded upon consideration. 3 Page on Contracts, § 1307; Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855. And especially is this true where the one who makes the promise receives property and in consideration thereof agrees to discharge a debt in favor of another. 3 Page on Contracts, § 1314. And so one corporation may become liable for the debts of another corporation where it has in express terms or by reasonable implication assumed the payment of the liabilities of the debtor corporation. 10 Cyc. 287.

In the case at bar there is sufficient evidence to sustain the finding that the Spear Mining Company and the Spear Realty Company successively obtained all the property of the Flynn Mining Company and at the

time knew that it was largely indebted to various creditors, and in consideration of said property they agreed to pay the indebtedness of the Flynn Mining Company to the extent of \$1,100; and there is sufficient testimony to support the finding that these two corporations have not done this. All the property of the Flynn Mining Company was transferred to the two corporations successively in effect in trust for the payment of \$1,100 of the indebtedness of the former corporation; and to that extent the two latter corporations are indebted to the creditors of the former corporation. The total amount of the debts of the creditors in this suit who are seeking to obtain the satisfaction of their claims is less than the amount which these two corporations assumed to pay. The plaintiffs are therefore entitled to recover from all three corporations the amounts of their debts.

The decree is affirmed.

#### SOUTHERN ANTHRACITE COAL CO. v. BOWEN et al.

(Supreme Court of Arkansas. Dec. 13, 1909.)

##### 1. ACTION (§ 57\*) — CONSOLIDATION OF ACTIONS.

Two causes, wherein two employes sued for injuries received at the same time by the fall of a cage in a shaft of a mine, were consolidated. The cause of action alleged in each case grew out of the same state of facts, and the defenses alleged in each were the same, though the evidence in support of the defenses of contributory negligence and assumed risk differed in the two cases. The issues raised by the pleadings were precisely the same, and the court, after the evidence was in, by correct instructions might have prevented any confusion in applying the doctrine of contributory negligence and assumed risk as applicable to the respective plaintiffs. *Held*, that the causes were properly consolidated.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 57.\*]

##### 2. TRIAL (§ 41\*)—RECEPTION OF EVIDENCE—EXCLUSION OF WITNESSES—DISCRETION OF COURT.

Under the statute providing that on request the judge may exclude from the courtroom any witness of the adverse party, it is within the court's discretion to exclude witnesses, and there is no error in overruling a motion to exclude unless it appears prejudice resulted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 101-105; Dec. Dig. § 41.\*]

##### 3. TRIAL (§ 133\*)—ARGUMENT OF COUNSEL—OPENING STATEMENT—WITHDRAWAL OF OBJECTIONABLE MATTER.

Where counsel for employes suing for injuries in a coal mine remarked in their opening statement that "the owners are not the ones that are liable," it was only tantamount to a declaration that defendant expected to prove it was not the one who was liable for injuries sustained by plaintiffs, and the remarks were not prejudicial in themselves, so that a ruling withdrawing them and instructing the jury not to consider them removed any possible prejudice.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**4. MASTER AND SERVANT (§§ 286, 288, 289\*)—SUIT FOR INJURIES—QUESTIONS FOR JURY.**

In a suit for injuries to employes in a coal mine, evidence held to present a question for the jury as to negligence, contributory negligence, and assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050, 1068-1132; Dec. Dig. §§ 286, 288, 289.\*]

**5. MASTER AND SERVANT (§§ 280, 281\*)—SUIT FOR INJURIES—EVIDENCE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.**

Evidence held to show that an employe injured in a coal mine did not assume the risk, and was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 981-996; Dec. Dig. §§ 280, 281.\*]

**6. TRIAL (§ 260\*)—INSTRUCTIONS—REJECTION OF PRAYERS.**

Error cannot be predicated on the rejection of prayers for instructions, where the prayers granted covered such of the rejected prayers as were correct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**7. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION OF CHARGE AS A WHOLE.**

Each instruction must be read as a whole, and when it refers to some other part of the charge, or when words are used in some instructions that are correctly defined in others, the other parts of the charge and the other instructions must be considered in determining whether the particular instructions are correct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

**8. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION AND EFFECT OF CHARGE AS A WHOLE.**

If the various instructions given separately present every phase of the case, as a harmonious whole, there is no error in a particular instruction failing to carry qualifications explained in others.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

**9. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION AND EFFECT OF CHARGE AS A WHOLE.**

In consolidated cases of injuries to two employes by the fall of a cage in the shaft of a mine, the court charged that it was the master's duty to furnish a reasonably safe place to work, and to find for plaintiffs if while in defendant's employ they were ordered to go down the shaft to loosen the cage, and they obeyed, and while at work it fell and injured them without their fault, and the injury was due to defendant's negligent failure to securely fasten the cage by the attached wire cable, or by other sufficient means. Held that, considering the instruction as a whole and with other instructions given for defendant correctly telling the jury it was negligent if, under the evidence, it failed to exercise ordinary care, it was not open to objection as making the master the insurer of the servant's safety.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

**10. MASTER AND SERVANT (§ 293\*)—ACTION FOR INJURIES—INSTRUCTIONS—SAFE PLACE TO WORK.**

The charge failed, however, to recognize the difference in the relations of the two plaintiffs to defendant, the evidence for defendant tending to show that one plaintiff was vice principal in the matter of making the place safe for their descent, and practically told the jury their

rights under the evidence were the same, and hence was misleading and prejudicial to defendant as to its defense to the claim of that plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.\*]

**11. TRIAL (§ 296\*)—INSTRUCTIONS—CONSTRUCTION AND EFFECT OF CHARGE AS A WHOLE.**

In consolidated cases of injuries to two employes, due to the fall of a cage in the shaft of a mine, instructions charged that before the jury could consider the defense of contributory negligence, defendant must show that plaintiffs, or either of them, were guilty of negligence directly contributing to the injury, without which it would not have occurred; that such negligence consisted in doing or failing to do something a reasonably prudent person would not do or omit doing; that if plaintiffs, or either of them, did anything at the time of injury or failed to do something they should have done, that would have been done by such a person, situated as they were, which brought about the injury or contributed to it, they would be guilty of such negligence, and to find for plaintiffs if the injury was the direct result of defendant's negligent failure to securely fasten the wire cable that held the cage, and plaintiffs were not guilty of contributory negligence as defined. Held that, considered alone, they erroneously charged in effect that contributory negligence of either plaintiff or both would defeat recovery, but that read with another instruction directing a verdict for the plaintiff not guilty of negligence, they recognized there might be a finding of contributory negligence by one plaintiff and not by the other, thus leaving room to consider evidence of a difference in their relations to defendant. In that one was vice principal and so might have been prejudicial to plaintiffs but not to defendant, but that they did not cure error as to defendant in another instruction which failed to recognize such difference.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 296.\*]

**12. TRIAL (§ 295\*)—INSTRUCTIONS—CONFLICT.**

The rule requiring instructions to be taken together requires that they should not be so conflicting as to confuse or mislead the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

**13. TRIAL (§ 248\*)—ABSTRACT INSTRUCTIONS.**

The practice of announcing correct general principles of law, without applying them to particular phases of the evidence, is not to be commended.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 582, 583; Dec. Dig. § 248.\*]

**14. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—ABSTRACT INSTRUCTIONS.**

Prejudicial error cannot be predicated on instructions announcing correct principles of law, where they were based on evidence in the case to which they were applicable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

**15. MASTER AND SERVANT (§ 291\*)—SUITS FOR INJURIES—INSTRUCTIONS.**

In consolidated cases of injuries to two employes due to the fall of a cage in a coal mine, an instruction that the master's duty to provide a safe place to work cannot be delegated, and he cannot escape liability by leaving its discharge to another if there is a failure to provide a reasonably safe place to work was erroneous and prejudicial to defendant, because it ignored evidence tending to prove it was the duty of one of the plaintiffs to fasten the wire rope, but it was not misleading as to the other plaintiff, as

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to whom there was no evidence that it was his duty to fasten the rope.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 291.\*]

**16. MASTER AND SERVANT (§ 293\*)—SUITS FOR INJURIES—INSTRUCTIONS.**

The instruction in that it told the jury without qualification that it was the master's duty to provide a reasonably safe place to work also conflicted with other instructions given at defendant's request that it was not an insurer of the tools and instrumentalities furnished plaintiffs, that the law required defendant to use ordinary care to provide its employes with reasonably safe appliances, and plaintiffs could not recover if it used such care in fastening the rope as a person of ordinary prudence would use, considering the danger; that if the usual and ordinary way of securing it was to clamp it as described in the evidence, and it was secured at the time better than ordinarily, and if the person whose duty was to fix it used ordinary care, there could be no recovery.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.\*]

**17. MASTER AND SERVANT (§ 211\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

If a master deputed to a servant the duty of making secure a wire rope supporting a cage which fell in the shaft of a mine and injured him, and he neglected to perform such duty, he assumed the risk of injury from his negligence in failing to do so, and the master is not liable.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 211.\*]

**18. TRIAL (§ 284\*) — INSTRUCTIONS — WAIVER OF ERROR.**

Error in an instruction is waived by asking for a modification thereof which does not cover the error.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 284.\*]

Appeal from Circuit Court, Pope County; Hugh Basham, Judge.

Separate actions by W. R. Bowen and by W. B. Thrasher against the Southern Anthracite Coal Company. The cases were tried together, and, from a judgment for plaintiffs, defendant appeals. Affirmed in the Bowen Case, and reversed in the Thrasher Case.

Appellees were carpenters and in the employ of appellant in and about its coal mine. The mine was operated by a shaft, separated into two divisions by a wooden partition. Two cages were used to hoist the coal and to let down and hoist men and material. To these cages wire ropes were attached, and the ropes passed over a drum, and the cages were propelled up and down by an engine. They were so arranged that one went up while the other went down. On October 15, 1907, as the cage on the north division of the shaft was coming up with a car of coal it toppled over within about 20 feet of the top, and the coal falling back down the shaft displaced the timbers below and caused the descending car in the south division to stick in the shaft about 40 feet from the bottom. Appellees went down to unfasten this cage, and while they were on the cage same fell with them to the bottom and they were seriously injured. They each filed separate com-

plaints against appellant in which they allege among other things the following: "That the general manager then in charge of said mine carelessly and negligently, and without proper and reasonable care for the safety of plaintiff, caused said wire rope attached to said hung cage to be fastened and held in an insufficient and dangerous way—that is to say, only by means of clamping wire rope at the top of said shaft by fastening and bolting together timbers with said rope between. The said wire rope was one inch in diameter and worn very slick and smooth and was also oily. And the said timbers used as clamps were oak and pine with a small iron clamp above. This plaintiff objected to the manner in which the wire rope was being fastened, or clamped, and suggested to said general manager that it should be tied to a large timber 12x13, which was bolted and fastened to other timbers, being a part of the foundation of the engine, which manner of fastening said rope was practicable and feasible. But this suggestion by plaintiff was not adopted by the general manager in charge of said mine, but the other manner or mode of fastening said rope by means of clamping it as above explained was ordered by said general manager, stating that it was sufficient and would be safe. Whereupon said general manager ordered and directed plaintiff to go down to the hung cage then fastened and replace and adjust all timbers and to loosen and unfasten said cage. In obedience to said order plaintiff and his co-employes (naming them) went down to said cage thus hung and in order to adjust the timber and said cage, it became necessary for plaintiff and co-employes to get onto said cage that was fastened. And after getting upon said cage and loosening it, and readjusting the timbers which were holding it, said cage became loose and all obstructions removed, and on account of the careless and insufficient manner in which said wire rope had been clamped or fastened, and without fault upon the part of plaintiff, the weight of the said cage, together with the weight of said two men jerked the rope through between said two timbers and fell with great force and velocity to the bottom of said shaft, from which fall plaintiff was seriously and permanently injured." There was the further allegation in one of the complaints that the defendant was negligent in failing to furnish said cage with, and attach thereto, sufficient spring catches to prevent the consequence of cable breaking or the loosening or disconnecting of the machinery attached to said cage. The injuries received by the respective complainants were described in their complaints. Appellee Bowen laid his damages at \$5,000, and appellee Thrasher laid his damages at \$20,000. The appellant answered the respective complaints denying all the material allegations, and setting up the defenses of injury by fellow servants,

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

contributory negligence, and assumed risk. The causes were consolidated over appellant's objection, and the jury returned a verdict in favor of appellee Thrasher for \$5,000, and in favor of appellee Bowen for \$500. Judgment was entered in favor of each appellee for the amount of the verdict obtained by him, and this appeal has been duly prosecuted. Other facts are stated in the opinion.

Read & McDonough, for appellant. W. L. Meade and Davis & Pace, for appellees.

WOOD, J. (after stating the facts as above).

1. The causes were of "a like nature" and "relative to the same question." The cause of action alleged in each case grew out of the same state of facts. The defenses alleged in each were the same, although the evidence in support of the defenses of contributory negligence and assumed risk in the Thrasher Case was different from that in the Bowen Case. The injury to each was caused at the same time and by the same agency, proceeding from the same source. The appellees had to rely upon the same evidence to support their alleged causes of action. The issues raised by the pleadings were precisely the same, and the court, after the evidence was in, by correct instructions, might have prevented any confusion in the application of the doctrine of contributory negligence and assumed risk as applicable to the respective plaintiffs. The causes here were certainly as appropriate for consolidation as any of the following where it was approved: *St. L., I. M. & S. R. Co. v. Broomfield*, 83 Ark. 290, 104 S. W. 133; *American Insurance Co. v. Haynie*, 120 S. W. 825. See, also, *Mahoney v. Roberts*, 86 Ark. 130, 110 S. W. 225.

2. Under the statute providing that "if either party require it the judge may exclude from the courtroom any witness of the adverse party," it is within the discretion of the court to exclude witnesses from the courtroom. Where the court overrules a motion to exclude, there is no error unless it appears that some prejudice resulted. No prejudice is shown here. *St. L., I. M. & S. R. Co. v. Pate*, 118 S. W. 260.

3. Counsel for appellees in the opening statement to the jury said: "The owners are not the ones that are liable." The court removed any possible prejudicial effect of such remarks by withdrawing them and instructing the jury not to consider them. This was only tantamount to a declaration that appellant expected to prove that it was not the one who was liable for any injuries sustained by appellees. The remarks were not prejudicial in themselves. The ruling of the court withdrawing them and instructing the jury not to consider them removed any possible prejudicial inference that the jury might otherwise have drawn from them. *Little Rock & Ft. Smith Ry. Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. 505; *K. C. S. R. Co. v. Murphy*, 74 Ark. 256, 85 S. W. 428; *Carpenter*

*v. Hammer*, 75 Ark. 347, 87 S. W. 646. The remarks were not of such prejudicial nature that the effect could not be removed by instructions of the court to disregard the remarks.

4. The testimony on behalf of appellees tended to show that the wire rope attached to the cage that was fastened in the shaft was clamped between two pieces of oak timber, held together by bolts. The rope was fastened in this way at the top of the shaft. The purpose in so securing it was to prevent the cage from falling after the men had gone down and unfastened it. The rope was clamped in this manner under the directions of the manager and general superintendent. Both were present. Thrasher suggested a method of fastening the rope which he regarded as more secure, but the manager did not adopt his suggestions, but proceeded to have the rope fastened in the manner indicated. While the rope was being fastened appellees were called away, and when they were called back, and were directed by the manager to go down to unfasten the cage, they made no further examination of the manner by which the rope was fastened at the top. Thrasher and Bowen obeyed the orders of the general manager and superintendent to go down and unfasten the cage. They went down without inspecting the manner in which the rope was fastened, "because the mineowner directed it, he was a practical man and a miner, and the other man (the superintendent) had been around shafts all his life," and appellees went down in the shaft because they "supposed it was safe." When they got down to the cage it appeared to them to be necessary to get on the cage that was fastened in order to get same loose. They therefore, got on the cage and unfastened it. When it was set free it immediately dropped to the bottom of the shaft. The wire rope was oily and slick and the clamps did not grip it tight enough to hold it, so as to prevent its slipping through and letting the cage fall. There was testimony tending to show that the cages were originally provided with "catches" which were designed to stop the cage and hold it in place should the cable give way. These "catches" were forced into the timber when the cage dropped by means of a spring. One leaf of the spring had been removed prior to the accident, and this had a tendency to weaken the spring. The catches did not work on the day of the accident. The catches or stays would not work except when the weight of the cage tightened the rope, but when the cage fell the rope slipped through and never became taut at all. Thrasher suggested to the manager that the wire rope should be fastened by clamping it to the top timbers. It should have been fastened to a 12x12. A kink could then have been placed in the wire rope which would have made it secure, but these suggestions by Thrasher were not followed, the

manager directing it to be done in the manner first above indicated.

The testimony on behalf of appellant tended to prove that it was a part of Thrasher's duty to fasten the rope, that he was the head carpenter, having supervision of the carpenter work in general, and that Bowen was working under him. It was his duty if a cage was caught in a shaft to release it and to take what help he needed. Thrasher was directing the work. There was no other one to do the work except Thrasher. Thrasher was the judge as to whether a rope was safe when clamped in the manner it was done that day. "If the clamping had been done sufficiently tight it would have held the cage." Thrasher had charge of the men that were fixing the rope that day, and had fixed it that way before and never objected to fixing it that way on the day of the accident and did not suggest any other way to fix it. The above is, in substance, what the evidence tended to prove in support of the respective contentions.

We are of the opinion from the evidence in the whole record that it was a jury question as to whether the appellees sustained injuries through the negligence of appellant. It was also a question for the jury as to whether appellee Thrasher had assumed the risk, or whether he was guilty of contributory negligence. The uncontroverted evidence showed that Bowen did not assume the risk and was not guilty of contributory negligence. The rulings of the court on the prayers for instructions offered by appellant were correct. The prayers granted covered such of the rejected prayers as were correct. The appellant complains at the ruling of the court in giving among others the following instruction 3:

"I charge you that it is the duty of the master to furnish a servant a reasonably safe place in which to work, and in this case, if you find that the plaintiffs, W. B. Thrasher and W. R. Bowen, were on October 15, 1907, in the employ of the defendant, the Southern Anthracite Coal Company, and while so engaged were ordered by the defendant to go down in the shaft of the mine of the defendant to unfasten or unloosen the cage that was hung on the south side of said shaft, and the plaintiffs in obedience to said order went down into said shaft, and while at work upon said cage the same fell with them and injured them, without fault on their part, and that said injury was occasioned because the defendant had negligently failed to securely fasten said cage by means of the wire cable attached to it, or by other good and sufficient means, you will find for the plaintiffs and assess their damages at such a sum as you believe, under the law and evidence, will compensate them for the injuries they received."

II. "I charge you that it is the duty of a servant to obey all reasonable orders given him by the master."

III. "The court instructs the jury that before the defendant can ask the jury to consider the defense of contributory negligence, that it must show that the plaintiffs, or either of them, were guilty of negligence that directly contributed to the injury and that without such negligence on their part the injury would not have occurred, and the law requires this to be proven by a preponderance of the evidence in this cause, and unless so proven, you are instructed not to consider it."

IV. "The court instructs the jury that contributory negligence means negligence that contributed to the injury—and it consists in doing something that a reasonably prudent person would not do or in failing to do something that a reasonably prudent person would do, and in this case if you find that the plaintiffs, or either of them, did anything at the time they were injured or failed to do something that they should have done, that would (not) have been done by a reasonably prudent person, situated as they were, and that their actions as above set forth brought about the injury or contributed to it, they would be guilty of contributory negligence."

IV½. "The court instructs the jury that if you find the injury was the direct result of the negligent failure of the defendant to securely fasten the wire cable that held the cage and that plaintiffs were not guilty of contributory negligence as defined in these instructions, you will find for the plaintiff."

V. "The court instructs the jury that if you find that either of the plaintiffs were guilty of contributory negligence such as will defeat his cause of action and the other not, you may return a verdict in favor of the one that was not guilty of negligence."

VI. "It is only when the danger or risk of injury from obedience to the commands of the master is so apparent to the servant as to render it under the circumstances unreasonable and imprudent for him to obey the master's orders and he then voluntarily obeys and is injured, that he is guilty of contributory negligence."

VII. "In obeying the commands of the master, the servant does not assume any risk occasioned by the negligence of the master, unless he has knowledge of such negligence and the danger incident thereto, and he with such knowledge accepts the risk and takes his chances, then in that event he cannot recover."

VIII. "I charge you that the duty resting on the master to provide a reasonably safe place for his servants to work is a duty that he cannot delegate to another, and the master cannot escape liability by leaving to another the discharge of that duty if there is a failure to provide a reasonably safe place for his servant to work."

The defendant moved the court to modify said instruction No. 8 as follows: "But if the defendant delegated the duty to Thrasher and Bowen, or either of them, to make the place safe, then it was their duty or the

duty of the one upon whom was imposed that obligation so to do."

IX. "You are further instructed that one of the charges of negligence in plaintiffs' complaint is that defendant failed to furnish the cage with, and attached thereto, sufficient spring catches to prevent the consequence of the cable breaking, and if you believe that defendant was negligent in not furnishing said catches sufficient for the purpose, and that such negligence was the cause of the injury, without fault on the part of the plaintiff, you will be authorized to find for the plaintiff."

Appellant contends specifically that prayer No. 1 was erroneous because the same made it the positive duty of the master to furnish a safe place to work, and in effect made the master the insurer of the servants' safety, and further because said instruction confused the right of recovery of both plaintiffs, and submitted the question to the jury upon the theory that each plaintiff might recover upon the same testimony. When the first part of instruction No. 1 that defines the master's duty as to providing a safe place for the servant is read in connection with the part that tells the jury that the defendant is not liable unless it "had negligently failed to securely fasten said cage by means of the wire cable attached to it," etc., the instruction cannot fairly be construed as making it the absolute duty of appellant to provide appellees a safe place. While the instruction tells the jury that it is the duty of the master to provide a reasonably safe place for the servant, it also tells them that before the master can be held liable for his failure to perform that duty, it must be established that his failure was negligent. Then when we look to the 4th and 11th instructions given at the instance of appellant, we see that the court has correctly told the jury that the defendant was negligent, if under the evidence it failed to exercise ordinary care. Instructions 4 and 11 are as follows:

(4) "The defendant is not an insurer of the tools and instrumentalities furnished the plaintiffs. The law requires that the defendant use ordinary care to provide its employes with reasonably safe appliances, and if the defendant used such care in fastening the rope as a person of ordinary prudence would use, considering the danger, plaintiffs cannot recover."

(11) "If the usual and ordinary way of securing said rope was to clamp same as described in the evidence, or if it was secured at this time better than was ordinarily done, and if the person whose duty it was to fix said rope used ordinary care in fixing same, then there can be no recovery and the jury will find for the defendant."

Each instruction must be read as a whole, and all of its parts must be considered in determining its meaning, and when refer-

ence is made in one instruction to some other part of the charge, or when words are used in some instructions that are correctly defined in others, the other parts of the charge referred to and the other instructions must be considered in determining whether or not the particular instructions under consideration are correct. The rule is well stated in *St. Louis S. W. R. Co. v. Graham*, 83 Ark. 61, 102 S. W. 700, 119 Am. St. Rep. 112, as follows: "It is generally impossible to state all the law of a case in one instruction. If the various instructions given in a case separately present every phase of the law, as an harmonious whole, there is no error in a particular instruction failing to carry qualifications which are explained in others." And counsel cite some of our later cases that support the rule. *La. & Arkansas Ry. Co. v. Ratcliffe*, 88 Ark. 524, 115 S. W. 396; *St. L. I. M. & S. R. Co. v. Day*, 86 Ark. 104, 110 S. W. 220; *Southern Cotton Oil Co. v. Spotts*, 77 Ark. 458, 92 S. W. 249; *Blair v. State*, 69 Ark. 558, 64 S. W. 948; *St. L. I. M. & S. R. Co. v. Baker*, 67 Ark. 531, 55 S. W. 941; *Brinkley Car Works & Mfg. Co. v. Cooper*, 75 Ark. 325, 87 S. W. 645; *Arkadelphia Lumber Co. v. Posey*, 74 Ark. 377, 85 S. W. 1127.

Instruction No. 1 when considered as a whole, and in connection with the other instructions mentioned supra, is not open to the particular objection now under consideration. The instruction however fails to recognize the difference developed by the evidence, in the relations of Thrasher and Bowen to appellant. The evidence on behalf of appellant tends to show that Thrasher was a vice principal in the matter of making the place safe for the descent of himself and co-employees into the mine. According to appellant's evidence that was his duty. The undisputed evidence shows that Bowen had no such duty to perform. He was not the foreman of the carpenter work, but worked under Thrasher. Under the evidence, therefore, the jury might have found that Thrasher was not entitled to recover because it was his duty to make the wire rope secure, and that he assumed the risk of not doing so, or was guilty of contributory negligence if he failed to do so, and made unsafe descent when he knew, or by the exercise of ordinary care should have known, that the wire rope was insecurely fastened. But this evidence that might have defeated him, if believed by the jury, would entitle Bowen to recover, unless he knew or should have known of Thrasher's negligence, if he was negligent. The instruction ignored the evidence showing the difference in the relation of the respective plaintiffs to appellant. The effect of the instruction was to tell the jury that if appellant had no defense to Bowen's claim under the evidence, neither did it have to Thrasher's. It practically told the jury that their rights under the evidence were the same. This was confusing, mis-

leading, and prejudicial to appellant as to the claim of Thrasher. For appellant under the evidence may have had a complete defense to Thrasher's claim and yet have been liable to Bowen.

Instructions 3, 4, and 4½, when considered in connection with each other, tell the jury in effect that the contributory negligence of either one, or both, of the appellees, if established by a preponderance of the evidence in the case, would defeat recovery. Under these instructions the contributory negligence of one of the appellees would defeat recovery by the other although that other might himself be free from contributory negligence. But when these are read in connection with No. 5, it is clear that the court meant to tell the jury that if both defendants were guilty of contributory negligence they could not recover, and that if one was guilty of contributory negligence and the other not that the finding might be for the one that was free from such negligence. The instructions as thus framed might have been prejudicial to appellees but not to appellant. The instructions recognize that there may be a finding of contributory negligence on the part of one of the appellees, and not on the part of the other, thus leaving room for the jury to consider the evidence tending to show the difference in the relation that the appellees sustained to the appellant. But in this respect they were in conflict with instruction No. 1.

While it was not prejudicial error to give these instructions in the form presented, they do not cure the error of the court in giving instruction No. 1. The rule we have announced, *supra*, requires that the instructions when taken together should not be so conflicting as to confuse or mislead the jury not giving them a certain guide to follow in making their verdict. When presented from the conflicting view points of the respective parties litigant, the above instructions are well calculated to mislead the jury. The error is in giving instruction No. 1 and others that while not prejudicial to appellant are in direct conflict with it. The instructions cannot be reconciled, and instruction No. 1 should not have been given. *St. L., I. M.*

& S. R. Co. v. Beecher, 65 Ark. 64, 44 S. W. 715; *St. L., I. M. & S. R. Co. v. Luther Hitt*, 76 Ark. 224, 88 S. W. 911; *Grayson-McLeod Lumber Co. v. Carter*, 76 Ark. 69, 88 S. W. 597; *Miller v. Nuckolls*, 77 Ark. 64, 91 S. W. 759, 4 L. R. A. (N. S.) 149, 113 Am. St. Rep. 122. Instructions Nos. 2, 6, and 7 announce correct general principles without applying them to the particular phases of the evidence. This practice is not to be commended. But we find no prejudicial error in this under the evidence in this case. For these instructions were doubtless based upon the evidence tending to show that Thrasher and Bowen were directed by the master to go down in the shaft and unfasten the cage.

Instruction No. 8 was erroneous and prejudicial to appellant so far as Thrasher is concerned because it ignored the evidence tending to prove that it was the duty of Thrasher to fasten the wire rope. If appellant deputed to Thrasher the duty of making the wire rope secure, and he neglected to perform this duty, he assumed the risk of injury from his negligence in failing to discharge the duty imposed on him, and the master is not liable to him for the injury resulting. *St. L., I. M. & S. R. Co. v. Harper*, 44 Ark. 524. If Thrasher was appointed to make the wire rope secure, he assumed the risk of not doing so in a prudent and skillful manner. *Murch Bros. Cons. Co. v. Hays*, 88 Ark. 292, 114 S. W. 697. See, also, *Ry. Co. v. Torrey*, 58 Ark. 217, 24 S. W. 244.

The instruction was also in conflict with instructions Nos. 4 and 11 given at the request of appellant in that it told the jury without qualification that it was the duty of the master to provide a reasonably safe place, etc., for his servants to work. Appellant waived any error in this respect, however, by asking for a modification which did not include this. As to Bowen, there was no evidence to show that it was his duty to fasten the wire rope. The instruction was not misleading as to him.

There being no prejudicial error in the record as to Bowen's claim, the judgment in his case is affirmed. As to Thrasher the judgment is reversed, and the cause remanded for new trial for error in instructions mentioned.

## CHENOWETH v. SUTHERLAND.

(Kansas City Court of Appeals. Missouri.  
Jan. 24, 1910. Rehearing Denied  
Feb. 7, 1910.)

1. TRIAL (§ 156\*)—DEMURRER TO EVIDENCE.  
In passing on a demurrer to evidence, the case as made by plaintiff's evidence, leaving out mere contradictions of that evidence, unless it be contradicted in such way as shows that it could not be true, must be looked to; and, though plaintiff's own testimony be opposed by that of some of his witnesses, he may go to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 355; Dec. Dig. § 156.\*]

2. EVIDENCE (§ 471\*)—OPINIONS—QUESTIONS CALLING FOR CONCLUSION.

An answer to questions on cross-examination is not subject to objection that it would be stating a conclusion, where the conclusion would be merely that the foreman told witness that he should use pinch bars, and that he would go and get them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471; Witnesses, Cent. Dig. §§ 833-835.]

3. EVIDENCE (§ 471\*)—OPINIONS—QUESTIONS CALLING FOR CONCLUSION.

An inquiry, on cross-examination, calculated to draw out an answer as to the simplest specific fact, should not be cut out on objection that a statement of a conclusion is called for.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471; Witnesses, Cent. Dig. §§ 833-835.]

4. WITNESSES (§ 275\*)—CROSS-EXAMINATION.

Plaintiff, on cross-examination as to the foreman directing that an engine be moved by pinch bars which he would go and get, having stated that he did not hear the foreman say that, defendant was entitled to further ask: "Are you prepared to say \* \* \* that you heard all he said, or that you did not hear."

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 967-975; Dec. Dig. § 275.\*]

5. WITNESSES (§ 330\*)—CROSS-EXAMINATION.

Allowing plaintiff to cross-examine defendant's witness with a view of showing that, though present, he did not testify at former trials, witness not being interested, his character not being assailed, and nothing appearing tending to show anything calling on him to vindicate himself, was improper, and tended to prejudice the jury.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 330.\*]

6. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURING ERROR.

It cannot be said that the prejudicial effect of allowing plaintiff, by cross-examination of defendant's disinterested witness, to show that, though he was present, he did not testify at former trials was removed by plaintiff's counsel announcing that he presumed the whole thing was immaterial, and the court telling the jury to entirely disregard the whole line of questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053; Trial, Cent. Dig. § 977.]

Appeal from Circuit Court, Jackson County; Herman Brumback, Judge.

Action by David T. Chenoweth against A. G. Sutherland. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

See, also, 129 Mo. App. 431, 107 S. W. 6.

Warner, Dean, McLeod & Timmonds, for appellant. Rush L. Fisette and Bird & Pope, for respondent.

ELLISON, J. This action is for personal injury, in which plaintiff prevailed in the trial court. Several of defendant's servants were engaged in removing the main part or body of an engine out of a building. They were under the charge of defendant's foreman, who directed it to be put upon a low-wheeled push car and wheeled out of the building to a pile of I-beams upon which it was to be placed. A derrick was at the I-beams for the purpose of removal of the engine from the car. In attempting to remove it, one of the wire ropes connected with the operation of the derrick broke and fell upon plaintiff's head, inflicting a wound causing, as he alleges, a painful and permanent injury. This is a second appeal; the first will be found reported in 129 Mo. App. 431, 107 S. W. 6, where it will be seen the case was remanded for another trial. We refer to that report for a detailed statement of the facts, a large part of which is applicable to the present record. At the trial from the result of which this appeal was taken, it was plaintiff's theory, as it was before, that he was working in the manner directed by the foreman when the rope broke. It was defendant's theory that he was at that time working in violation of the foreman's orders; that the foreman feared to test the derrick with the weight of the engine, and so expressed himself to the men, saying that he would go to a place near by and get some crowbars with which they would "pinch" it on skids over onto the pile of I-beams.

It is strongly insisted that plaintiff failed to make a case for the jury, and that the judgment should be reversed outright on that ground. But most of the argument to that end includes only a part of the evidence. It is familiar law that in passing on a demurrer to evidence we should look to the case as made by the evidence in plaintiff's behalf, and leave out of consideration mere contradictions of that evidence, unless it should be contradicted in such way as shows that it could not be true. More than this, if the evidence given by a plaintiff, as a witness in his own behalf, should be opposed by that of some one or more witnesses introduced by him, that fact would not have the effect of preventing the jury from believing and acting upon his testimony and rejecting that of his other witnesses. When we give regard to the evidence of the plaintiff, as he related it in his own behalf, we find that he acted in the manner of his work under the orders of the foreman, who stood by and told the men what to do in removing the engine from the car—that is, they were to use the derrick in raising the front end

and putting skids under, and thus get it over to the I-beams—and that he (plaintiff) was at the rear end assisting to push, after it was thus raised. It is true he stated that he did not see the foreman during the moments they were working; that he supposed he was still there, but did not know. We conclude that a case was made for the jury, and pass to defendant's objections to the manner of the trial and the result.

It is our conclusion that defendant was deprived of substantial legal rights of high character by the breadth of meaning which the court and plaintiff's counsel gave to the word "conclusion" as applied to the questions propounded to plaintiff's witnesses on cross-examination. It is true that facts should be stated by a witness, and not his deductions or conclusions thereon. But it must be remembered that nearly everything one states in detailing his knowledge of things is, in some sense, his conclusion, and care should be taken not to allow an objection, put under the form that a statement of a conclusion is asked for, to cut out an inquiry, on cross-examination, calculated to draw out an answer as to the simplest specific fact. It was a part of defendant's case that the foreman wanted the engine moved off the car by "pinching" with crowbars. And, of course, he desired to elicit an admission to that effect from plaintiff's witnesses. With that view he asked one of plaintiff's witnesses, who was plaintiff's fellow workman, and engaged with him at the time he was hurt, these questions: "Q. The plan announced to you men by your foreman of doing this work of removing this engine from the car to the pile of I-beams was by the use of pinch bars which we would go and get; isn't that true?" "Q. The foreman did tell you men that the method which would be used in moving that engine over there was by the use of pinch bars?" "Q. The foreman, before he went away after the pinch bars, did tell you men that the work of moving the engine over from the push car to the pile of I-beams would be by the use of the pinch bars, did he not?" An answer was objected to on the ground that it would be stating a conclusion, and the objection was sustained. The conclusion would have been that the foreman told them they should use pinch bars, and that he would go and get them. The only conclusion in answer to such question would be that he concluded the foreman said it because he heard him say it. In one instance a question was not allowed to be answered that the foreman told the men not to raise the engine too high. By this and many similar rulings defendant was greatly hampered in the legitimate and valuable right of cross-examination. The refusal of an answer to some of the questions along the line indicat-

ed, and not here set out, perhaps did not work harm, but many of them did, among others, the action on the testimony of Stanley as set forth in a bill of exceptions at a former trial. Again, in cross-examining plaintiff himself as to the foreman giving directions that they would move the engine by pinch bars which he would go and get, he stated that he did not hear the foreman say that, and then defendant asked him: "Are you prepared to say to the jury that you heard all he said, or that you did not hear him?" On this important issue it is apparent that defendant should have been allowed an answer to the question, addressed, as it was, to the plaintiff himself.

Again, plaintiff asked defendant's foreman, who was a witness for defendant, several questions with a view of ascertaining that, though he was present, he did not testify at former trials. The witness was not interested in the case, his character had not been assailed, and nothing appears tending to show anything calling upon him to testify in vindication of himself. After spending some time in such questions, and the defendant fruitlessly objecting thereto, plaintiff's counsel announced: "I presume the whole thing is immaterial." Then the court said to the jury "to entirely disregard the whole line of questioning." But we regard the proceeding as improper. The effect was to prejudice the jury, and the subsequent direction of the court in all probability did not remove that impression.

It is earnestly insisted that the verdict was so excessive as to show such prejudice on the part of the jury as to disqualify them as proper judges of the rights of the parties. It was for \$7,000, and in our opinion grossly excessive. The trial court partially remedied this by requiring a remittitur to be entered reducing the judgment to \$4,500, which we think still far in excess of what it should be. The verdict was for \$2,500 at the first trial. At the second trial it was for \$2,000, which was set aside by the court trying the case at that time, on the ground that a demurrer to the evidence should have been sustained. Plaintiff has been engaged at hard labor for practically all the time since he was hurt. He has removed to the state of Washington, and while there has performed labor of such character as tends strongly to show an able-bodied man. We are not unmindful that in unliquidated damages it is the province of the jury to fix upon the amount. At the same time the courts retain a corrective hand, and have the right, and it is their duty, to see that judgment for an unconscionable sum should not be rendered.

The judgment is reversed, and cause remanded. All concur.

## ROSE v. KANSAS CITY.

(Kansas City Court of Appeals. Missouri.  
Jan. 24, 1910. Rehearing Denied  
Feb. 7, 1910.)

## 1. MUNICIPAL CORPORATIONS (§ 821\*)—INJURIES—DEFECT IN STREETS—QUESTIONS FOR JURY.

In an action against a city for injuries to a woman who on alighting from a street car stepped on a loose brick in the street, the question whether she was guilty of contributory negligence in wearing shoes with very high heels, only about an inch wide at the bottom, was for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1754; Dec. Dig. § 821.\*]

## 2. MUNICIPAL CORPORATIONS' (§ 822\*)—INJURIES—DEFECT IN STREET—INSTRUCTIONS.

In an action against a city for injuries to one who stepped on a loose brick in the street when alighting from a street car, an instruction as to whether the street was reasonably safe for "travel" was not erroneous.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1758; Dec. Dig. § 822.\*]

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.

Action by Emma N. Rose against Kansas City. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John T. Harding, City Counselor, Ben R. Estill, and Hunt C. Moore, Associate City Counselors, for appellant. L. A. Laughlin and Frank P. Walsh, for respondent.

ELLISON, J. This action is for personal injury alleged to have been received by plaintiff while alighting from a street car by stepping on a loose brick in a disordered part of one of defendant's streets, whereby she sprained her ankle and fell and injured her hip. She prevailed in the trial court. The case was in this court at another time and will be found reported in 125 Mo. App. 231, 102 S. W. 578, to which we refer for information. On the former trial she recovered a verdict for \$7,500. Of this \$3,000 was remitted and judgment entered for \$4,500. That judgment was reversed as will be seen by the report just referred to. On the last trial, from the result of which this appeal is taken, the verdict and judgment was for \$2,500.

Defendant contends that a demurrer to the evidence should have been sustained on the ground that plaintiff was careless in stepping from the car into the hole in the street, and that she was wearing very high and narrow heeled shoes, known as "French heels." An examination of the evidence has satisfied us that the demurrer was properly refused. The heels were described as being very high and only about one inch wide at the bottom. We do not feel justified in declaring that wearing such character of shoes was negligence as a matter of law.

We think the circuit court took the proper view in submitting it to the jury to say whether, under the circumstances disclosed, it was negligence in fact.

Defendant asked two instructions having for their purpose the submission of such question. They were properly refused, since in our opinion the first one was too broad, and the second, while not so objectionable, had its place well enough filled by one given by the court of its own motion. In the latter the court left it to the jury to say whether shoes with such heels were not reasonably safe to be worn on reasonably safe streets. Considering that the jury had the benefit of this instruction, there is no good ground for saying error was committed in the refusal of those offered by defendant.

In an instruction for plaintiff the expression is used, "whether the street was reasonably safe for travel," when plaintiff, as was stated at the outset, was injured by stepping onto the street off of a car. Defendant seems to consider that the word "travel" might be taken to mean striding along the street instead of the fact of stepping onto it. We think we ought not to adopt defendant's view. When does one begin to travel upon a street? We think he begins when he takes his first step. In stepping off a street car onto the street, the first step of travel is taken, and a liability may accrue for an injury received in that step as well as any subsequent one. Of course, circumstances should govern the care one should exercise in different parts of their course of travel, and it may well be that one should be more careful in stepping from a car than when engaged ordinarily in going along or across a street. But the jury's attention was properly called to the situation in which plaintiff was, and the act she was performing in getting upon the street, and we see no cause to interfere.

The damages cannot be said to be excessive. They were in the first trial, where, as already stated, they were reduced by \$3,000, leaving a judgment for \$4,500. But now a more conservative jury has placed them at \$2,500, and with that sum we are content.

The judgment is affirmed. All concur.

## HURR et al. v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.  
Jan. 24, 1910. Rehearing Denied  
Feb. 7, 1910.)

## 1. ATTORNEY AND CLIENT (§ 150\*)—ATTORNEY'S COMPENSATION—EFFECT OF COMPROMISE OF ACTION.

The client as long as he acts in good faith, without intent to defraud his lawyers, has the right to compromise and settle his cause of action without the consent of his lawyers, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes  
124 S.W.—67

the amount of their fees will be liquidated by such settlement.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 354-357; Dec. Dig. § 150.\*]

**2. ATTORNEY AND CLIENT (§ 150\*)—ATTORNEY'S LIEN.**

Where plaintiff's attorney was entitled to 50 per cent. of any recovery and defendant settled with plaintiff, for \$400, and the contract of settlement provided that such sum was the entire consideration, and that the consideration was contractual and defendant paid over the entire sum to plaintiff, it was liable to the attorney for \$200.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 354-357; Dec. Dig. § 150.\*]

**3. EVIDENCE (§ 419\*)—PAROL EVIDENCE—CONTRADICTION—CONSIDERATION.**

Oral evidence was not admissible to contradict or vary the term of the written contract of settlement as to the consideration thereof; the settlement agreement having treated the consideration as contractual, and not a mere recital.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1922; Dec. Dig. § 419.\*]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Proceedings by Laura M. Hurr and others against the Metropolitan Street Railway Company to enforce an attorney's lien for unpaid fees. From a judgment in favor of petitioners, defendant appeals. Reversed and remanded, with directions.

John H. Lucas, F. G. Johnson, and Chas. N. Sadler, for appellants. Jas. C. Rieger, S. M. Carmean, and J. W. Garner, for respondents.

**JOHNSON, J.** This is a proceeding to enforce an attorney's lien for unpaid fees. The petitioners, Rieger and Carmean, were employed by plaintiff Laura M. Hurr to prosecute an action in tort against the defendant railway company. They took the case on a contingent fee of 50 per cent., brought suit, and prosecuted it in the circuit court. A trial resulted in a verdict and judgment for plaintiff in the sum of \$900, and defendant appealed to this court. While the cause was pending on appeal, the parties, without the knowledge or consent of the petitioners, compromised and settled the judgment for \$400, and pursuant to agreement the appeal was dismissed. Afterward the attorneys filed their petition to establish and foreclose their lien.

The settlement contract was reduced to writing and signed by the parties. It is as follows: "Know all men by these presents, that we, Laura M. Hurr and Ellis Hurr, her husband, of Kansas City, Missouri, for the sole consideration of the sum of four hundred and  $\frac{9}{100}$  dollars to us paid by the Metropolitan Street Railway Company, the receipt of which is hereby acknowledged, do hereby release and forever discharge said Metropolitan Street Railway Company, its

successors and assigns, from all actions, causes of actions, suits, controversies, claims and demands whatsoever for or on account of injuries received to the person or damages caused to the property of the signer hereof, or either of them, and especially on or about the 23d day of July, 1904, on the Fifteenth street line near Fifteenth and Woodland Ave., in Kansas City, Mo.; and being especially in full satisfaction and settlement of the judgment rendered in the case of Laura M. Hurr v. Metropolitan Street Ry. Co., No. 20379, on January 17, 1906, in the circuit court of Jackson county, Missouri, the general description herein, however, to control the specific one, and all other claims on the part of either of the parties hereto of whatsoever nature or description. It is expressly understood and agreed that said sum of four hundred and  $\frac{9}{100}$  dollars is the sole consideration of this release, and the consideration stated herein is contractual, and not a mere recital; and all agreements and understandings between the parties are embodied and expressed herein." The court found the issues for the petitioners, and fixed the amount of their lien at \$400.

It is not claimed that this compromise was tainted with any kind of fraud. By the express terms of the written contract, the consideration of \$400 paid to plaintiff is made to release and satisfy the entire cause of action, and is agreed to be contractual. Certainly plaintiff will not be heard to attack or in any manner to impugn this contract. *Tate v. Railway*, 131 Mo. App. 107, 110 S. W. 622. And, in the absence of fraud, the attorneys of plaintiff have no higher or better rights than their client, and are bound by her contract of settlement to the same extent as she is bound.

In the case of *Curtis v. Railway*, 118 Mo. App. 341, 94 S. W. 762, much relied on by the petitioners, the compromise agreement contained no stipulation making the consideration paid the plaintiff contractual, and the proof showed the defendant agreed, in addition to the sum paid the plaintiff, to pay her attorney's fees. We held that the whole proceeds of the settlement consisted not alone of the sum paid the plaintiff, but of that sum plus an equal amount due her attorneys under the terms of her contract with them. In the present case, not only does the written contract speak in the most positive terms of the sum paid plaintiff in compromise as the sole consideration for the full release of the entire cause of action, but there is nothing in the oral evidence to contradict this contract—if it were permissible to contradict it. Plaintiff, introduced as a witness by the petitioners, would not say defendant agreed to pay her lawyers. She went no further than to say that defendant's agents told her that her lawyers had a lien for their fee. We hold, however, that oral testimony is

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

wholly incompetent to contradict or vary the terms of the written contract which, as we have stated, treats the consideration as a contractual subject, and not a mere recital.

Recent decisions in this state construing the attorney's lien law, with one accord, hold that the client, as long as he acts in good faith, without intent to defraud his lawyers, has the right to compromise and settle his cause of action with or without the consent of his lawyers, and the amount of their fees will be liquidated by such settlement. *Laws* 1901, p. 46 (Ann. St. 1906, §§ 4937—1, 2); *O'Connor v. Transit Co.*, 198 Mo., loc. cit. 641, 97 S. W. 150, 115 Am. St. Rep. 495; *Curtis v. Railway*, 118 Mo. App., loc. cit. 352, 94 S. W. 762; *Taylor v. Transit Co.*, 198 Mo. 715, 97 S. W. 155; *Boyle v. Railway*, 184 Mo. App. 71, 114 S. W. 558; *Boyd v. Mercantile Co.*, 135 Mo. App. 115, 115 S. W. 1052; *Abbott et al. v. Railway* (Mo. App.) 119 S. W. 964; *Wait v. Railroad*, 204 Mo. 503, 103 S. W. 60; *Yonge v. Transit Co.*, 109 Mo. App. 235, 84 S. W. 184.

The contract of the petitioners with plaintiff, their client, entitled them to 50 per cent. of the proceeds of her settlement with defendant. The entire proceeds consisted of the sum of \$400 paid plaintiff, and the lawyers were entitled to receive \$200 from their client as their share of the proceeds. In paying all the settlement money over to plaintiff, defendant did not and could not escape liability on account of the lien. The learned trial judge erred in fixing the amount of the lien at \$400, and the judgment is reversed and the cause remanded, with directions to enter judgment for the petitioners for the foreclosure of their lien in the sum of \$200. All concur.

#### OSTMANN v. BRUERE.

(Kansas City Court of Appeals. Missouri.  
Jan. 24, 1910.)

DISTRICT AND PROSECUTING ATTORNEYS (§ 10\*)  
—OFFICIAL CONDUCT—CIVIL LIABILITY.

Plaintiff, having been adjudged guilty of resisting an officer in the service of an execution, sued the prosecuting attorney for damages, alleging that he maliciously overdid his part in securing her conviction in that he browbeat and assaulted her with intemperate, vulgar, and unnecessarily severe cross-examination. *Held*, that plaintiff's remedy for such alleged misconduct was by objection and exception in the criminal prosecution, and that she could not maintain a civil action for damages.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Dec. Dig. § 10.\*]

Appeal from Circuit Court, Boone County; A. D. Burnes, Special Judge.

Action by Katie Ostmann against Theodore C. Bruere. Judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Clopton and W. H. Rothwell, for appellant. C. W. Wilson, T. F. McDearmon, and Theo. C. Bruere, for respondent.

JOHNSON, J. The petition is in two counts, but reference need be made to but one since the issues attempted to be raised in each cover the whole case. The action is for compensatory and punitive damages, and its gravamen is that defendant, as prosecuting attorney of St. Charles county, maliciously misused and abused his office to the humiliation and pecuniary injury of plaintiff. Defendant demurred on the ground that the petition fails to state a cause of action. The demurrer was sustained, plaintiff refused to plead further, and the cause is here on her appeal. The petition is as follows: "For her second amended petition filed by leave of court, plaintiff for her first cause of action says that prior to the 5th day of December, 1904, defendant, Theodore C. Bruere, had been elected and had qualified as prosecuting attorney for the county of St. Charles, state of Missouri. That for a long time prior to the said date plaintiff had been a resident of said county. That defendant as prosecuting attorney of said county contriving and intending to injure and oppress plaintiff, wickedly, mischievously, willfully, and maliciously and without just cause did abuse and misuse the powers of his office, conferred upon him by law, by filing on the 10th day of December, 1904, with a justice of the peace in the city of St. Charles, an information charging plaintiff with willfully and unlawfully obstructing, resisting, and opposing a constable in serving an execution held by the constable on the property of Henry Ostmann. Plaintiff says that defendant as prosecuting attorney caused plaintiff to be arrested under a warrant issued on said information, and defendant was required to give bond for her appearance; that plaintiff had said prosecution removed by a change of venue to the court of Justice Perkinson, where on the 23d day of January, 1905, defendant again appeared to prosecute plaintiff under the charges aforesaid, and in furtherance of his aforesaid wicked, mischievous, willful, and malicious abuse and misuse of the powers conferred on him by statutes of the state and by tricks and artifice and undue influence, which tricks and artifice and undue influence consisted in defendant browbeating the plaintiff and by fierce, intemperate, and unofficial cross-examination of the plaintiff, and in asking her and compelling her to answer questions which answer contained vulgar and disgusting language, the words of which are unfit to be stated in this petition, and for that reason are not inserted here; and by improperly appealing to the justice to find plaintiff guilty, caused and procured said justice of the peace to find plaintiff guilty as charged in said information and to impose a fine of ten (10) dollars on plaintiff, and that the costs of said prosecution be taxed against her. Plaintiff says

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that in due time she perfected her appeal to the circuit court of the county of St. Charles and on the 15th and 16th days of September, 1906, plaintiff was again put upon her trial before a jury in said circuit court; that defendant again appeared to prosecute her and in pursuance of his aforesaid wicked, mischievous, willful, and malicious abuse and misuse of his office, and by repeating the tricks and artifices aforesaid, and by undue influence over the minds of the jury, and by appealing to the prejudices of the jury, and by his misconduct in his argument before the jury, caused and procured a verdict of guilty and the assessment of a fine against plaintiff of \$100 and the costs of the prosecution. Plaintiff says that in due time she filed her motion for a new trial and in arrest of judgment in said case, which motions were resisted by defendant and they were overruled. That she appealed from the judgment of the circuit court in said case to the St. Louis Court of Appeals and gave a supersedeas bond, and the court entered an order that defendant in said case (who is plaintiff here) was allowed until the 1st day of August, 1906, to file her bill of exceptions. Plaintiff says that, because the court stenographer was unable to write up the report of the evidence in said case within said time, defendant Bruere and counsel for plaintiff in this case, agreed that the time for filing said bill of exceptions be extended ten (10) days; that on the 31st day of July, 1906, she caused to be delivered to defendant, Theodore C. Bruere, her bill of exceptions, and said Bruere then promised plaintiff's attorney that he would examine said bill of exceptions and forward it to the judge of the circuit court of St. Charles county in time to be signed by the judge and filed with the clerk of the court. That defendant Bruere in furtherance of his aforesaid wicked, mischievous, willful, and malicious purpose, by an abuse and misuse of the powers of his office to injure and oppress plaintiff, held and retained said bill of exceptions until when transmitted to the judge of said circuit court at his place of residence said bill of exceptions did not reach said judge in time to be by him signed and remitted to the clerk of the circuit court of St. Charles to be filed by him within the time limited by the order of the court. Plaintiff says she was advised by her counsel and had good reason to believe that she had been aggrieved by the judgment of the court, and that said judgment would be reversed by the appellate court; but plaintiff says that said Court of Appeals refused to consider said case on its merits because the bill of exceptions had not been filed in time. Plaintiff says that the cost of the transcript of the evidence in said case was \$42, which she paid; that the clerk's fee for a copy thereof to be put in the record on appeal to the

Court of Appeals was \$49.30 which she paid; and that that amount of the fine and costs amounted to \$163.15, which she paid. Plaintiff says that by reason of the premises she has been greatly humiliated and shamed; that she has been actually damaged by reason of said prosecution in the sum of \$500 for which she prays judgment, and by reason of the wicked, mischievous, willful, and malicious abuse and misuse of the powers of his office by defendant, plaintiff has been damaged in the sum of one thousand (\$1,000) dollars as punitive damages, for which sum plaintiff prays judgment."

This petition is so glaringly bad that it is difficult to regard it seriously. There is no averment that plaintiff was innocent of the offense of which she was convicted. The facts alleged show not only the existence of probable cause for the prosecution, but that the guilt of plaintiff has been judicially established, and there is no charge of fraud in the procurement of the judgment as that term is understood in legal parlance. There is an absence of the essential elements of a cause of action for malicious prosecution. *Boogher v. Hough*, 99 Mo. 183, 12 S. W. 524; *Ruth v. Transit Co.*, 98 Mo. App. 1, 71 S. W. 1055; *Jordan v. Railroad*, 105 Mo. App. 446, 79 S. W. 1155; *Stubbs v. Mulholland*, 168 Mo., loc. cit. 47, 67 S. W. 650. This is conceded by plaintiff, and she seeks to base her action on the ground that defendant maliciously overdid his part in securing her conviction. Stripped of adjective epithets, the charge of plaintiff is that in the trials of the criminal case defendant browbeat her and assaulted her with an intemperate, vulgar, and unnecessarily severe cross-examination. If that is so, plaintiff had her remedy, and her only remedy in that case. She should have rejected to such reprehensible conduct, and if the court would not sustain her objections and hold defendant within proper bounds, she should have excepted and brought her exceptions to the Court of Appeals. Everything of which she complains was a matter of exception in that case and cannot be made the subject of an independent suit. It was plaintiff's own fault that she failed to preserve her exceptions, and she cannot be suffered to escape the rightful consequences of her own neglect by what, in effect, is a palpable attempt to reopen a case finally adjudicated. The petition states no cause of action.

Affirmed. All concur.

#### BRODERICK v. HARTMAN.

(Kansas City Court of Appeals. Missouri. Jan. 24, 1910.)

#### 1. COMPROMISE AND SETTLEMENT (§ 2\*)—WHAT CONSTITUTES.

Where defendant sold plaintiff 20 tons of hay, by sample, warranting it to be as good as

the sample, and when plaintiff found that some of it was of poor quality, and that the quantity was short, defendant gave him some more to make up the deficiency, and said that, if he found any of it faulty, he would make it right with him, this did not constitute a settlement barring plaintiff's right to recover for the value of the hay that was worthless.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 1-4; Dec. Dig. § 2.\*]

**2. SALES (§ 90\*)—REMEDIES OF BUYER—ACTIONS FOR BREACH OF WARRANTY—DEFENSES.**

Nor did it amount to a new agreement, so that plaintiff's action for breach of warranty as to the quality of the hay should have been based on it, and not on the original contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 253; Dec. Dig. § 90.\*]

**3. COMPROMISE AND SETTLEMENT (§ 2\*)—NATURE—REMEDIES OF BUYER—SETTLEMENT OF CLAIM.**

Where plaintiff purchased defendant's right to possession to a certain farm, together with the crop thereon, and, after finding that some of the crop had been removed, defendant agreed with him to allow him a certain discount for the deficiency, this settlement barred the plaintiff's right to recover for the value of the crop taken away.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 1-4; Dec. Dig. § 2.\*]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Action by G. W. Broderick against Boyd Hartman. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

J. M. Hull and M. T. January, for appellant. Scott & Bowker and H. M. Poage, for respondent.

**BROADDUS, P. J.** This suit was begun in a justice's court where it was tried and judgment had, and appealed to the circuit court. In the circuit court plaintiff amended his petition.

There are three counts in the amended petition. In the first it is alleged that on or about the 17th day of October, 1907, plaintiff purchased from defendant 20 tons of prairie hay located in a barn on the Reem's farm at the price of \$7.50 per ton; that he bought it by sample which was first-class hay, and that defendant represented that the said 20 tons was of the same kind and quality; and that, relying upon the representations of defendant, he then and there paid him for said hay the sum of \$150, but that he afterwards discovered that about 12 tons of it was rotten and full of weeds. He asks judgment for \$90 on account of said worthless hay. In his second count plaintiff alleges that on said 17th day of October he purchased the possession of the Reem's farm from defendant paying him therefor and for crops growing thereon the sum of \$1,000; that at that time defendant falsely represented to plaintiff that none of the corn had been gathered and taken from the field, but

that 25 shocks were taken and removed from the field to plaintiff's damage in the sum of \$55. The third count alleges that after he had bought and paid defendant for said possession defendant appropriated and carried away 25 shocks of fodder of the value of \$5 for which he asks judgment. He asks for a judgment in the gross sum of \$150. At the close of the trial the court indicated that it would sustain defendant's motion for a direction to the jury to find for defendant on each count in his petition, whereupon plaintiff took a nonsuit. After the necessary preliminaries, the plaintiff took an appeal.

The evidence showed that plaintiff became the owner of the Reem's farm on which the defendant was the tenant in possession. On the 7th day of October, 1907, the plaintiff bought from defendant 20 tons of prairie hay at \$7.50 a ton, and paid him therefor \$150, its total value. At about the same time he bought defendant's right to possession of the farm, and the crop of corn thereon and a few head of stock at the price of \$1,000, paying him at the time \$100 in cash. Later plaintiff discovered that some of the corn had been gathered since his purchase, and that some of the hay was rotten and full of weeds, and that there was about three tons less than the amount he had paid for. On the 30th of November, according to plaintiff's statements, the parties met at the farm at which time it was in plaintiff's possession. The defendant then and there agreed to and did let plaintiff have three tons of Timothy hay to make up said deficiency, and said to plaintiff that, if he should find in feeding the hay that any of it was damaged, "to take it out, and he would do what was right about it." On the same day the parties had a settlement in reference to the corn that plaintiff claimed had been taken since he purchased it. Defendant in the settlement allowed plaintiff \$20 for deficiency. We believe that plaintiff was not entitled to recover on the second and third counts of his petition. The evidence shows as to matters included in said counts that they were adjusted on the 30th of November, as stated.

But we believe plaintiff's evidence was sufficient to entitle him to go to the jury on his first count. There was no adjustment as to defective hay, and it was the understanding of the parties that that matter was to be left open for future settlement. It was left to plaintiff to ascertain in the future how much of the hay was damaged, and defendant was to do what was right about it. This was not an adjustment nor a new contract. In fact, it was no contract at all. It was merely an understanding between the parties, at most, that defendant would account for defective hay he delivered to plaintiff under his original contract, which he would be obliged to do in any event. Respondent's contention is that, as plaintiff sued

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on the original contract, he could not recover on another and different cause of action (Wonderly v. Christian, 91 Mo. App. 158), and that, "where there has been a settlement between the parties, the cause of action must be based upon the settlement, and not upon the original cause of action embraced in the settlement." Worden v. Houston, 92 Mo. App. 371; McCormick v. Transit Co., 154 Mo. 191, 55 S. W. 253; Wonderly v. Christian, supra.

But, as before stated, the action is properly based upon the original contract of sale. Reversed and remanded. All concur.

### TEEPEN v. TAYLOR.

(Kansas City Court of Appeals. Missouri.  
Jan. 24, 1910. Rehearing Denied  
Feb. 7, 1910.)

#### 1. ADJOINING LANDOWNERS (§ 7\*)—NEGLIGENCE AFFECTING ADJOINING LAND—ACT OF GOD.

An act of God will protect one from liability for injury to adjoining property by the falling of a wall of a burnt building, but he must prove facts bringing the cause of the injury within that term.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. § 56; Dec. Dig. § 7.\*]

#### 2. ADJOINING LANDOWNERS (§ 7\*)—NEGLIGENCE AFFECTING ADJOINING LAND.

The owner of a wall of a burnt building must use every means to ascertain and secure its safety that an ordinarily prudent man would use in a like situation, and the mere fact that he is advised and believes that it is safe will not relieve him from liability for injury to adjoining property.

[Ed. Note.—For other cases see Adjoining Landowners, Cent. Dig. § 56; Dec. Dig. § 7.\*]

#### 3. ADJOINING LANDOWNERS (§ 7\*)—NEGLIGENCE AFFECTING ADJOINING LAND.

In case of injury to adjoining property by the falling of a wall of a burnt building, it will be presumed that it was unsafe, and the burden is on the owner to exculpate himself.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. § 56; Dec. Dig. § 7.\*]

#### 4. EVIDENCE (§ 472\*)—OPINION EVIDENCE—MATTERS IN ISSUE—NEGLIGENCE.

It is improper to ask a witness whether certain acts constituted negligence.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 472.\*]

Appeal from Circuit Court, Jackson County; W. O. Thomas, Judge.

Action by John W. Teepen against L. G. Taylor. From a judgment for plaintiff, defendant appeals. Affirmed.

E. Wright Taylor and Joseph S. Rust, for appellant. Geo. R. Allen, J. W. Dana, and Noyes & Heath, for respondent.

ELLISON, J. This is an action for damages alleged to have been caused to plaintiff's residence and furniture therein by a falling wall, which had been standing on defendant's property. The plaintiff prevailed in the trial court.

It appears that the property of plaintiff and defendant adjoined. On plaintiff's was his residence, and on defendant's a brick livery stable. In January, 1906, a fire destroyed the livery stable, but there remained standing a long and high brick wall next to plaintiff's property. The wall was left standing and unsupported, except at the ends where portions of end walls remained. Defendant intended to rebuild the stable. In about four weeks the wall toppled over onto plaintiff's property, and damaged it greatly. The defense is that the wall was blown down by a windstorm of such unprecedented severity as to properly be designated the act of God, as that term is known to the law, and that defendant believed it to be safe. While the act of God would protect defendant, yet such facts should be shown as to bring the cause of the injury within that term, and we do not think it was done in this case. The wind blew down the wall, but the evidence shows that, while it was of some severity, yet it was not such as should not have been expected to occur, and which frequently did occur. It is clear that the class of storm shown in evidence was not of such extraordinary character as to permit it to be designated as the act of God, and we will therefore leave out of further consideration that part of the contention between the parties.

The record discloses that defendant considered that, if he was advised and believed the wall was secure and safe enough to be left standing, then he should not be held liable for consequences resulting from his mistake. This was an erroneous theory. We said of a like contention in Orr v. Bradley, 126 Mo. App. 146, 103 S. W. 1149, that it was not what the owner of the wall believed from advice of an architect; that "that was not a proper way to dispose of the question whether defendant was negligent. The question was one for the jury, who were to judge of his conduct as measured by that of an ordinarily prudent man in the same circumstances." That statement of the law is supported by Cork v. Blossom, 162 Mass. 330, 38 N. E. 495, 26 L. R. A. 256, 44 Am. St. Rep. 362, Beidler v. King, 209 Ill. 302, 70 N. E. 763, 101 Am. St. Rep. 246, and Steppe v. Alter, 48 La. Ann. 363, 19 South. 147, 55 Am. St. Rep. 281. An owner of property, of course, has a right to erect a building upon it, but he must so use his own as not to injure his neighbor. He is not an insurer of his neighbor, and therefore is not liable for hidden defects in his structure that examination, care, and prudence would not disclose. So if, as in this case, he leaves standing a wall remaining from his burnt building, intending to use it as part of a new structure, though it may have been a part of a thoroughly secure building, yet he must see to it that in

its less supported condition and its probable injury, more or less, from the fire, it is safe. He must use every endeavor to see that it is safe, or that it is made safe, that a prudent and careful man would use in a like situation, having in view all the time the dangerous character of such a structure unless it is made secure. It is therefore apparent that the belief or good faith of the owner, or his reliance upon what others told him, is not the sole criterion by which the question shall be decided. The standard is: What would a careful and prudent man, in such situation, in charge of such a dangerous agency, have done? *Cork v. Blossom*, supra; *Beldler v. King*, supra; *Steppe v. Alter*, supra.

What we have written covers all proper question made of the instructions. Those offered by defendant, and modified by the court over his protest, were properly altered. The effect of those given for the plaintiff was that in the wall falling upon plaintiff's property it would be presumed that it was unsafe, and that the burden was upon defendant to exculpate himself; one of the instructions so stated in terms. This we think was proper, and is supported by *Turner v. Haar*, 114 Mo. 335, 21 S. W. 737, *Scharff v. Construction Co.*, 115 Mo. App. 157; 92 S. W. 126, and the authorities above cited. It is not inapt to say that defendant destroyed plaintiff's property through an agency maintained by him; and, if there exists any reason absolving him from the duty of compensation, he should bring it forward and make it known.

We have stated above that we did not consider the proof was sufficient to make a question whether there was an act of God. But the court, in liberality towards defendant, submitted the matter in proper form to the jury, and we would accept the verdict even though the evidence in defendant's behalf had been of greater strength.

It is urgently insisted that errors were made to defendant's prejudice in the rulings on evidence, and defendant has furnished us samples of the character of evidence offered. It consists greatly in effort to substitute the judgment of the defendant and of the witnesses for that of the jury. This is true both as to the questions concerning the nature of the wind and the character of the wall. The record discloses a continuous effort by counsel, resisted by the court, to have (in effect) the defendant and his witnesses, instead of the jury, decide the question whether he was culpable. We think the rulings were based upon abundant authority. 2 *Jones on Evidence*, p. 830, lays down the following rule: "Whatever liberality may be allowed in calling for the opinions of experts or other witnesses, they must not usurp the province of the court and jury by drawing those conclu-

sions of law or fact upon which the decision of the case depends. Hence it would be improper to inquire whether, in view of the testimony given, a party had acted negligently or prudently, or with ordinary care, or whether certain acts constituted negligence." And this is supported by a long line of decisions in the Supreme and appellate courts of this state, many of which will be found in plaintiff's brief.

There were a number of other suggestions made why the judgment should not stand, including an objection to the measure of damages; but an examination of each of them leaves us without any reason to suppose the jury did not fully understand the case under proper direction from the court, and hence we affirm the judgment. All concur.

### WATKINS v. THOMAS.

(Kansas City Court of Appeals. Missouri. Jan. 24, 1910.)

#### 1. BROKERS (§ 54\*)—COMMISSIONS.

To entitle a broker to recover for commissions it is not necessary that there be a written contract between the vendor and the vendee, it sufficing if the broker secure a purchaser willing and financially able to buy on the proposed terms.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.\*]

#### 2. EVIDENCE (§ 20\*)—JUDICIAL NOTICE.

The court takes judicial notice of the custom that authority to a broker to sell land carries with it the obligation to furnish an abstract of title.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 24; Dec. Dig. § 20.\*]

#### 3. BROKERS (§ 57\*)—AUTHORITY TO SELL LAND —WAIVER OF CONDITIONS.

Though the taking of notes payable on or before maturity was a technical variation from authority to sell on time at a specified rate of interest, the vendor waived his right when on seeking time for delivery of possession he wrote to his broker that everything else would be all right.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 66; Dec. Dig. § 57.\*]

Appeal from Circuit Court, Moniteau County; William H. Martin, Judge.

Action by O. G. Watkins against W. C. Thomas. Judgment for plaintiff, and defendant appeals. Affirmed.

Moore & Williams, for appellant. R. M. Embry, for respondent.

**BROADDUS, P. J.** This action is to recover a commission alleged to be due from defendant to plaintiff for the sale of defendant's lands.

The defendant was the owner of a large tract of land in Texas, situated in Sherman county. The plaintiff is a resident of the state of Iowa, and defendant resides in California, Mo. In February, 1907, plaintiff went to Dalhart, Tex., and became the local man-

ager of what was known as the Tuttle Land Company. The defendant having seen some of the circulars of the Tuttle Land Company, and being desirous of selling his Texas land, on May 27, 1907, wrote plaintiff a letter in which he requested to know if plaintiff would list his land on the condition that if plaintiff sold it before he did the plaintiff would receive the commission; and asking him what his commissions were. On May 27, 1907, plaintiff in answer wrote defendant that: "We would be glad to handle your land," and asking price, description, and stating that "it would be better that defendant put a net price on his land, as we have to pay our agents in the north \$1.00 to \$1.50 per acre and we want about five per cent. commission."

On May 29, 1907, the defendant wrote to plaintiff as follows: "In reply to your letter of May 27th, my land in Sherman county, Texas, consists of the following (here follows description) a total of 7,533 acres. If you think I can sell this land outright at six dollars per acre \$15,198 cash, balance in one, two, three, and four years, six per cent, I will come to Dalhart and talk with you. I am offering this land at a low price considering the land and improvements. Please write me at once." On May 31st plaintiff wired defendant as follows: "Can close your land at \$8.00 per acre, patent bases, less five per cent. commission, subject to ten days to approve land one thousand dollars forfeit, \$4,000, on approval of abstract, \$5,000, in six months, balance in one, two, three and four years, interest six per cent. Wire answer." On the same day he wrote defendant repeating his telegram, adding if the proposition was not accepted to give him 30 days on the land on terms given in his letter of the 29th instant. On June 1st, defendant wrote to plaintiff declining the offer, and stating that he expected to be in Dalhart next week. On June 3d, plaintiff wired defendant as follows: "Have sold your land and signed contract on terms stated in letter of May 29th—One thousand dollars deposited here in First National Bank. Send abstract to be extended." On the same day he wrote defendant inclosing a copy of the contract of sale and stating that: "This is according to the terms stated in your letter of the 29th, with 25 cents per acre added as my commission. I have deposited the original contract with the First National Bank, Dalhart, Texas, and the \$1,000, is held in escrow by the bank, until you can get abstract extended, the title approved and the papers turned over. You can make out a deed to George T. Parr, and send it to the bank here with instructions. My commission of 25 cents per acre will be \$1,883.25. This you can authorize the bank to pay to me." The contract complies with the terms contained in defendant's said letter of May 29th, except it provides that the deferred notes for the unpaid purchase money are made payable on or be-

fore maturity, while the terms stated in the letter strictly construed imply that they are to be payable at maturity.

The defendant testified that he did not keep a copy of his letter of May 29th, and that he did not get the letter and contract mailed to him at California by plaintiff. He arrived in Texas on the 5th of June, and he admits that the letter could have gotten to his home before he left for Texas. The testimony was conflicting as to whether the contract of sale was executed on the 1st or 3d day of June. But that matter is of no importance as of either date, as plaintiff's telegram and letter were of the latter date. Defendant testified that on his arrival in Texas he was unable to obtain an examination of his letter of May 29th in order to ascertain what the terms of his proposal were, and that he did not succeed in getting to see the contract. It is admitted that plaintiff's memory was uncertain, and the inference is unavoidable that he did see the contract soon after his arrival in Texas on the 5th of June. He had been informed by plaintiff's telegram of June 3d that it was in the bank at Dalhart. And on June 6th he telephoned to plaintiff as follows: "Can't well turn land over till Jan. 1st, 1908, on account of cattle and partner. Every thing else all right." On the same day he wrote plaintiff as follows: "My partner in cattle met me here yesterday and I find that I can't well give possession of the land before Jan. 1st, 1908, but will make the effort and will try to do so sooner. Answer. I hope this will not interfere with the deal and will proceed with the papers as soon as I hear from you." On June 8th, plaintiff wired defendant: "Make out papers to give possession Jan. Will arrange later." On the same day defendant wrote plaintiff with a view of leasing the land from the purchaser for the next year for grazing sheep. Other correspondence occurred between the parties which had no particular bearing on the questions at issue. Mr. Leslie, plaintiff's attorney, prepared a deed conveying the land to the purchaser, in which it was stipulated that possession was not to be given until January 1, 1908; the notes for the deferred payments should be made payable at maturity; that the purchaser assume an incumbrance of a mortgage to the state of Texas of over \$4,000; and also pay the taxes for the current year. The proposed purchaser refused to accept the deed as tendered and the sale was not consummated. It is admitted that Parr was willing and financially able to carry out the terms of the contract. The jury returned a verdict for plaintiff, and defendant appealed from the judgment.

It is contended by defendant that the written contract did not bind defendant unless he ratified it in writing. That it was not enforceable under the statute of frauds is also contended. The position might be right, if this was a proceeding to compel defendant to

convey the land under the provisions of the statute, but it is not applicable to this case. It was not necessary that there should have been any writing whatever. All that was required was that plaintiff had secured a purchaser who was willing and able financially to buy on the proposed terms. *McCormick v. Henderson*, 100 Mo. App. 647, 75 S. W. 171, and cases there cited. This view of the law was embodied in the instructions of the court to the jury, and the finding was conclusive of that question. The letters, telegrams, and telephone messages in evidence we think justified the verdict.

The defendant asked the court to instruct the jury as follows, which the court refused: "The jury are instructed that the letter from defendant Thomas to plaintiff, date May 29, 1907, did not authorize the plaintiff to stipulate for him, that he, defendant, would furnish an abstract of the title to said land for the benefit of George T. Parr, the alleged purchaser, nor agree to take four vendor's lien notes for \$7,500, each due on or before 1, 2, 3, and 4 years from date at six per cent., the legal effect of which would be to make said notes payable at the option of the maker Parr, and if you find from the evidence that the alleged contract made by the plaintiff contained such stipulations, then the same was void, and your finding will be for defendant." There is nothing in the letter requiring defendant to furnish an abstract of title to the land, and if the instruction had been given it would have amounted to a direction to the jury to find a verdict for the defendant. Is it possible that the authority to sell contemplated that the agent would find any one who would be willing to buy without first learning that defendant had title, and how could one know that he had such title unless he had an abstract to so show? The court takes judicial notice of the custom in such cases that the authority to sell carries with it the obligation to furnish such abstract. Besides defendant recognized that it was his duty to furnish it by so doing. The authority to take notes for deferred payments payable at or before maturity was strictly speaking a technical variation from the terms of the authority to sell on, "one, two, three and four years," at six per cent. But it was in accordance with the usual custom. However that may be, defendant waived the obligation when he was asking to delay the date for his surrendering the possession of land in his message to plaintiff the 6th of June that "Everything else was all right." The court placed fairly before the jury defendant's side of the case in the instructions given. Other instructions offered and refused were properly refused.

The insistence of defendant that the purchaser should assume the liens on the land for the taxes for the year, and that to the state for over \$4,000, and that he should re-

tain possession until the 1st of January, 1908, were outside of the terms upon which he had authorized plaintiff to make the sale. And as we have seen he waived the right of option in the purchaser to pay the notes on or before maturity. Such insistence seems to us preposterous and is suggestive of bad faith on his part; and that it was inspired for the purpose of avoiding a sale of his lands and not because plaintiff had violated his authority. If there were any errors committed by the court, and we do not believe there was, the judgment is so manifestly for the right party that it ought to be affirmed.

It is so ordered. All concur.

### ADAMS v. BROWN.

(Springfield Court of Appeals. Missouri. Jan. 8, 1910. Rehearing Denied Feb. 7, 1910.)

#### 1. ANIMALS (§ 79\*)—INJURY TO OTHER ANIMALS—DOGS—LIABILITY.

By statute the owner or keeper of a dog is made liable for all damages from its killing or maiming other domestic animals.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. § 277; Dec. Dig. § 79.\*]

#### 2. ANIMALS (§ 83\*)—INJURY TO OTHER ANIMALS—DOGS—LIABILITY.

Under the statute making the owner or keeper of a dog liable for all damages from its killing or maiming other domestic animals, defendant is liable for such acts of a dog if it was kept at his home by him, or by his sons living with him as part of his family, with his knowledge and consent.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 293-296; Dec. Dig. § 83.\*]

Error to Circuit Court, Phelps County; L. B. Woodside, Judge.

Action by Frank Adams against Leander Brown. Judgment for plaintiff. Defendant brings error. Affirmed.

Jones Bros. and C. H. Shubert, for plaintiff in error. Watson & Holmes and Lorts & Breuer, for defendant in error.

COX, J. Adams sued Brown before a justice of the peace in Phelps county for damages on account of a dog, of which it is charged Brown was the keeper, having wrongfully chased, bit, maimed, and killed the sheep of the plaintiff. Change of venue was taken to another justice, trial had, and verdict for plaintiff for \$5. Defendant appealed to the circuit court, where another trial was had, and a verdict for plaintiff for \$3. After the filing and overruling of proper motions and the filing of bill of exceptions, the defendant, Brown, brings the case here by writ of error.

The errors assigned are that the evidence will not support the verdict, and the court erred in its instructions to the jury. Counsel for plaintiff in error have, with very commendable industry, searched the books for precedents to sustain their position, and

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have cited us to cases from Massachusetts, New Hampshire, Maine, Michigan, Iowa, Kentucky, New York, and Connecticut, all of which are authorities of very high standing, and entitled to great respect; but, in determining the issues before us, the things that must control are the statute under which this action is brought, the evidence offered at the trial, and the instructions given to the jury by the court. The statute makes the owner or keeper of a dog liable for all damages that may result from said dog killing or maiming sheep or other domestic animals. We have carefully read all the evidence preserved in this record, and have concluded that it was sufficient to send the case to the jury either upon the theory that the defendant was the owner or the keeper of the dog. The instructions on the part of the plaintiff told the jury that, if they believed that a dog owned by defendant, Brown, killed sheep belonging to plaintiff, Adams, they should find for the plaintiff. They also told the jury that, if a dog killed sheep belonging to plaintiff, and that said dog was kept at defendant's home by himself, or by his sons who lived with him as a part of his family, with his knowledge and consent, then he would be liable for the acts of said dog in killing the sheep. On the part of defendant the jury were instructed that if the dog simply came on defendant's premises voluntarily, and was not kept there, at the time alleged, by the consent of defendant, he would not be liable for the dog's acts. These instructions, we think, fairly declared the law; and, after a careful examination of the evidence, we have reached the conclusion that it was sufficient to warrant the jury in finding that plaintiff's sheep were killed by a dog that either belonged to Brown, or of which Brown was the keeper.

With this view of the case, there is nothing left for us to do but to affirm the judgment, and it is so ordered. All concur.

#### PAYNE v. KING.

(Kansas City Court of Appeals. Missouri. Jan. 24, 1910.)

#### 1. CHATTEL MORTGAGES (§ 45\*)—VALIDITY—MISTAKE IN MAKER'S NAME.

Where a chattel mortgage was properly signed, that the name of the grantor, "Rudert," appeared in the body of the instrument as "Rudolf," did not invalidate the mortgage; the same precision not being required in conveyances of personality as in conveyances of realty.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 86; Dec. Dig. § 45.\*]

#### 2. CHATTEL MORTGAGES (§ 150\*)—FILING—COPY—SUFFICIENCY.

Though Rev. St. 1899, § 3404 (Ann. St. 1906, p. 1936), provides that, where a copy of a chattel mortgage is filed, it must be a true copy, where the true name, "Rudert," of the mortgagor appeared in the filed copy, that in the original copy it was incorrectly written

"Rudolf" in the body of the instrument did not invalidate the filing so as to render it inoperative to impart constructive notice.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 252; Dec. Dig. § 150.\*]

#### 3. CHATTEL MORTGAGES (§ 173\*)—REPLEVIN BY MORTGAGEE—QUESTION FOR JURY.

In replevin by a chattel mortgagee against a purchaser from the mortgagor, a verdict for plaintiff was improperly directed where there was evidence to support a finding that the mortgagor resided in a different county from the one in which the mortgage was filed at the time the mortgage was executed.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 173.\*]

#### 4. JUDGMENT (§ 253\*)—CONFORMITY TO PETITION—AMOUNT DEMANDED.

A judgment assessing a greater value than that claimed in the petition is erroneous.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 443, 444; Dec. Dig. § 253.\*]

#### 5. CHATTEL MORTGAGES (§ 173\*)—REPLEVIN BY MORTGAGEE—DAMAGES.

Since, in a controversy between a special lienholder and a stranger to the lien, no more than the actual value of the property may be recovered, where, in an action between a chattel mortgagee and a purchaser of the property, there was no evidence of the value of the property at the time of the trial, it was error to assess the value as the amount of the purchase price secured by the mortgage and remaining unpaid and due from the mortgagor.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 325; Dec. Dig. § 173.\*]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Action by S. R. Payne against A. J. King. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

A. J. King and M. T. January, for appellant. O. C. Lawson and D. M. Gibson, for respondent.

JOHNSON, J. Plaintiff sued in replevin to recover a piano which he alleges in the petition is of the value of \$200. He claims a special interest in the property under a chattel mortgage executed by Mr. and Mrs. J. B. Rudert to secure the payment of a promissory note on which a remainder of \$210 is due, and asks judgment for a return of the property and for damages in the sum of \$25. He did not give a replevin bond and the possession of the property remained in defendant, who claims to be its owner under a bill of sale executed by Mrs. Rudert. In obedience to a peremptory instruction, the jury returned a verdict for plaintiff, in which the value of the piano was assessed at \$210, and on this verdict the court entered judgment that plaintiff "have and recover of and from defendant A. J. King the possession of the personal property described in his petition, to wit, one Ludwig piano, No. 58,336, or, at the election of plaintiff, the value thereof, to wit, \$210, together with his costs in this behalf expended," etc. Defendant appealed.

The evidence discloses that plaintiff, who

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is in business in Sedalia, sold the piano to Mr. and Mrs. Rudert in July, 1906, for \$300 on the installment plan. The vendees, who were living in Sedalia, gave their note for the purchase price, and, to secure its payment, executed their chattel mortgage conveying the piano. Plaintiff filed a copy of the mortgage with the recorder of deeds of Pettis county. Subsequently the Ruderts made payments on the note aggregating \$90. They moved from Sedalia to Nevada, and took with them their personal effects, including the piano, which they stored in a warehouse. The evidence of defendant tends to show that he became an innocent purchaser of the piano at Nevada for a valuable consideration, without actual notice of the existence of the mortgage. There is no evidence to show the value of the property at the time of the trial.

Point is made by defendant that the mortgage is invalid because it fails to state the name of the grantors. The name appears in the body of the instrument as Rudolf, instead of Rudert, but the instrument is properly signed, and we regard this discrepancy as an obvious inadvertence that should not be allowed to defeat the validity of the mortgage. Defendant would apply the rule relating to conveyances of real property. *McFadden v. Rogers*, 70 Mo. 421; *Houx v. Batteen*, 68 Mo. 84; *Golden v. Tyer*, 180 Mo. 193, 79 S. W. 143. But the same precision is not required in conveyances of personalty, and, since it is manifest no one could have been misled by the mistake, we hold it to be harmless. In the copy of the mortgage filed in the office of the recorder of deeds, the name of the grantors appears as Rudert. This variance between the original instrument and the filed copy is claimed by defendant to invalidate the filing and to render it inoperative to impart constructive notice. The statute (section 3404, Rev. St. 1899 [Ann. St. 1906, p. 1936]) does provide that where a copy of the chattel mortgage is filed it must be a true copy, and we are willing to concede, for argument, that Rudolf and Rudert are not *idem sonans*, but, as we consider the variance in the names a mere clerical error, we hold it immaterial in all respects, and find that there was a substantial compliance with the statute.

But the court erred in peremptorily instructing the jury to return a verdict for plaintiff. The evidence supports a reasonable inference that the mortgagors at the time of the execution of the mortgage did not reside in Pettis county. If they did not so reside, the mortgage was not filed in the proper county, for the statute requires such instruments to be filed in the county where the mortgagor resides. The place of residence of the grantors should have been treated as an issue of fact for the jury to decide.

The verdict and judgment are erroneous

with respect to the assessment of the value of the property for several reasons. First. The petition alleges the value to be \$200, while the verdict and judgment place it at \$210. A judgment assessing a greater value than that claimed in the petition is erroneous. *Pope v. Salsman*, 35 Mo. 362. Second. There is no evidence in the record to show the value of the piano at the time of the trial of the cause. In such cases the value of the property at the time of the trial is the value to be assessed in the verdict. *Oil Co. v. Drug Co.*, 84 Mo. App. 76; *Chapman v. Kerr*, 80 Mo. 158; *Kirkendall v. Hartsock*, 58 Mo. App., loc. cit. 240; *White v. Storms*, 21 Mo. App. 289.

The court and jury evidently assumed the value to be the amount of the purchase price remaining unpaid. They were not justified in indulging such presumption. "In a case where the defendant has the property in possession and fails in his defense, there should be a finding of the value and of damages for in such case the prevailing party has the right of election to take the property or its value." *Dillard v. McClure*, 64 Mo. App. 488; section 4476, Rev. St. 1899 (Ann. St. 1906, p. 2454). And in a controversy between a special lienholder and a stranger to the lien no more than the actual value of the property may be recovered at the plaintiff's option, no matter what may be the amount of the incumbrance.

On account of the errors noted, the judgment is reversed, and the cause remanded. All concur.

#### PHELPS v. JONES.

(Kansas City Court of Appeals. Missouri.  
Jan. 24, 1910. Rehearing Denied  
Feb. 7, 1910.)

#### 1. SALES (§ 36\*)—SUIT FOR PRICE—FAILURE TO READ CONTRACT—BASIS FOR DEFENSES.

In a suit against a buyer for the price, defenses predicated on his failure to read the written contract, which he claimed did not express the real agreement, were properly rejected where it appeared he was an intelligent person, able to read and write, and experienced in business, and his only excuse for not reading it was that he was in a hurry.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 36.\*]

#### 2. APPEAL AND ERROR (§ 1010\*)—REVIEW—FINDING OF COURT IN LAW CASE.

In a law case, a finding of fact by the trial court supported by substantial evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

#### 3. SALES (§ 38\*)—RESCISSION BY BUYER—FRAUDULENT REPRESENTATIONS.

For a buyer to be entitled to rescind for fraudulent representations he must prove misrepresentations of material facts were made to him with intent to deceive; that he believed them true and relied on them as an act of or-

inary prudence; and that they influenced his action.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65-77, 85; Dec. Dig. § 38.\*]

**4. SALES (§ 38\*)—RESCISSION BY BUYER—FRAUDULENT REPRESENTATIONS.**

That a gas machine would produce refuse to be removed in some way was a material fact, misrepresentation as to which is a ground for rescission by a buyer.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 38.\*]

**5. SALES (§ 41\*)—CAVEAT EMPTOR—APPLICATION OF RULE.**

The rule of caveat emptor does not obtain where the parties do not stand on an equal footing, as where a machine sold is a scientific device the seller knows all about, and the buyer does not, and is compelled to rely for his information on the seller, in which case, the seller must apprise him of all material facts of purely scientific cognizance, and the concealment of material facts is of itself a misrepresentation.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 84; Dec. Dig. § 41.\*]

**6. SALES (§ 38\*)—FRAUDULENT REPRESENTATIONS — FAILURE TO DISCLOSE MATERIAL FACTS.**

The seller must disclose all material facts of which he knows the buyer is ignorant, and there may be fraud in concealing material facts and circumstances as well as in direct misrepresentation if the buyer is knowingly suffered to act under a delusion.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 69-72; Dec. Dig. § 38.\*]

Appeal from Circuit Court, Livingston County; Francis H. Trimble, Judge.

Action by A. S. Phelps, Jr., doing business as the New England Manufacturing Company, against R. W. Jones, begun in justice court. From a judgment for defendant in the circuit court, on appeal from a justice's court, plaintiff appeals. Affirmed.

Kitt & Taylor, for appellant. F. Sheetz & Son, for respondent.

**JOHNSON, J.** This suit was brought before a justice of the peace to recover the purchase price of a gas machine sold and delivered by plaintiff to defendant. The defense is a rescission of the contract of sale, which was in writing, on the ground of fraud. A jury was waived in the circuit court, and the trial there resulted in a judgment for defendant. Plaintiff appealed.

Defendant admits he signed the contract on which the action is founded, but says he did not read it, and contends that it does not express the real agreement made by the parties. The court properly rejected the defenses predicated on defendant's failure to acquaint himself with the contents of the instrument. He is an intelligent farmer who can read and write and who is experienced in the transaction of business. The only reason he gave for not reading the contract before signing it is that he was in a hurry. This is no excuse in law. *Breeders Co. v. Wright*, 134 Mo. App. 717, 115 S. W. 470. We eliminate from the case, as did the trial

court, all of the defenses, except the contention that defendant was induced to enter into the contract by false and fraudulent representations of plaintiff respecting the merits of the subject of the transaction.

Facts and circumstances in evidence pertinent to this defense thus may be stated: An agent of plaintiff called on defendant at his residence and solicited him to install therein a machine to manufacture acetylene gas for illuminating purposes. Gas is produced in such machines by the chemical action of water on carbide. Fifty pounds of carbide are placed in a tank with 50 gallons of water, and this quantity of material is supposed to generate gas during a period of 3 months or more. The agent had a model of the machine which he operated in a darkened room with entire success. The model had no drain from the tank and the deception which it is claimed the agent practiced consisted of the impression he purposely made on the mind of defendant that a drain was not necessary, because the union of water and carbide in the proportions stated would result in the final consumption of both. He did not make a direct statement to this effect, but in addition to exhibiting a model without a drainage device, he answered defendant's question, "Does the water and carbide finish out of the machine at the same time?" by saying, "Yes, fifty gallons of water will run fifty pounds of carbide." In the course of the conversation the agent asked defendant if he had a trench in the cellar where the machine would be installed. Being answered in the negative, the agent hastily remarked: "That will be all right." Afterward, in filling out the contract, he wrote the word "no" after the word "drain" in the descriptive items.

It is conceded the action of water on carbide does not greatly diminish the quantity of material in the tank, and that when chemical activity ceases there remains approximately 50 gallons of waste—a sort of whitewash—which must be removed either by drainage or by the laborious use of buckets. We agree with the trial court in the finding of fact that the agent, without resorting to direct falsehood, cunningly and artfully contrived to create in defendant's mind the impression that the generation of gas ultimately destroyed its creative elements and left no refuse. We do not overlook the answer of defendant in his testimony to the effect that the agent stated that 50 gallons of water and 50 pounds of carbide "would run me three or four months before I would have to take it out." We accept at par that answer, which is in the nature of an admission, despite the insistence of counsel for defendant that in some way it was interpolated in the record. But in the light of all the facts and circumstances before us (some of which we have not stated), we approve the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

finding of the court that defendant had no knowledge when he signed the contract that there would be refuse from the tank that would have to be removed in some manner. The finding is supported by substantial evidence, and, this being a law case, it will be treated as the verdict of a jury. *McClanahan v. Payne*, 86 Mo. App. 289; *McCormick v. Moore*, 134 Mo. App. 675, 114 S. W. 40; *Brewing Co. v. St. Louis*, 209 Mo., loc. cit. 609, 108 S. W. 1. Did deception of this character justify a rescission of the contract by defendant? To be entitled to rescind a contract on the ground of fraudulent representations, the vendee must prove (1) that false representations of material facts were made to him with the intent to deceive; (2) that he believed them to be true; (3) that his reliance upon them was an act of ordinary prudence; and (4) that they influenced his action. *Wannell v. Kem*, 57 Mo. 478; *Funding & Foundry Co. v. Heskett*, 125 Mo. App. 516, 102 S. W. 1050.

It cannot well be denied that the fact of whether or not the machine would produce refuse to be removed in some way was material and that its importance was recognized by the agent of plaintiff. His artfulness in anticipating and allaying any suspicion in the mind of defendant demonstrated his realization that were the truth known to defendant, the sale could not be accomplished. The rule of caveat emptor which requires parties to a contract to deal at arm's length does not obtain where the parties do not stand on an equal footing. *Cahn v. Reid*, 18 Mo. App. 130; *Lelcher v. Keeney*, 110 Mo. App. 299, 85 S. W. 920; *Barnard v. Duncan*, 38 Mo. 186, 90 Am. Dec. 416; *Lumber Co. v. Dent*, 121 Mo. App. 113, 98 S. W. 814. The parties here did not stand on equal ground. The machine was a scientific device. Plaintiff knew all about it. Defendant, a plain farmer, did not know and could not be expected to probe intelligently into things of expert knowledge. He was compelled to rely on plaintiff for information respecting such things, and it was the duty of plaintiff to apprise him of all material facts of purely scientific cognizance. In such cases the concealment of material facts is of itself a misrepresentation. "The vendor must disclose all material facts of which he knows the vendee to be ignorant. There may be fraud in suppressing and concealing material facts and circumstances, as well as in direct misrepresentation, if the other party is knowingly suffered to deal under a delusion." *Barnard v. Duncan*, supra.

It cannot be said as a matter of law that defendant failed to measure up to the standard of ordinary care in suffering himself to be deceived by the statements and conduct of the agent. The characterization of his conduct is presented by the evidence as an issue of fact, and, since we are sat-

isfied that the finding of the court on this fact is supported by substantial evidence, we shall not disturb it. A shrewder man than defendant might have made a more thorough inquiry into scientific facts, but we think the court, as a trier of fact, might well conclude that he acted as an ordinarily careful and prudent person would have acted in his situation. We approve the judgment of the trial court that the sale was procured by false and fraudulent representations; further, we find the point urged by plaintiff that in rescinding the sale defendant did not offer to restore the status quo is not well taken.

The judgment is affirmed. All concur.

### STROUP v. THOMAS.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910. On Motion for Rehearing, Feb. 7, 1910.)

#### 1. APPEAL AND ERROR (§ 635\*)—RECORD—ABSTRACT—CONTENTS.

Where appellant's abstract contained neither the refused instructions complained of nor so much of the record as was necessary to a full and complete understanding of all the questions presented to the court for decision, as required by Court of Appeals rule 15, and the judgment was valid on its face, it will be affirmed.

[Ed. note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2776-2782; Dec. Dig. § 635.\*]

#### 2. APPEAL AND ERROR (§ 907\*)—FINDINGS—REVIEW.

In the absence of testimony in the record showing that the court's finding is against the evidence, all presumptions in its favor will be indulged on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2911; Dec. Dig. § 907.\*]

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

Action by George, W. Stroup against Joseph Thomas. Judgment for plaintiff, and defendant appeals. Affirmed.

Ed. J. Shuck, for appellant. Shuck & Cunningham, for respondent.

COX, J. Replevin for possession of one-third of crop of hay grown on section 12, township 29, range 4, Shannon county. Action before justice of peace, trial had, and verdict for plaintiff. Defendant appealed to circuit court, where trial was had by the court, and plaintiff again prevailed and defendant has appealed to this court.

This appeal is taken by the short form, and error is assigned as follows: That the finding of the court was against the evidence and the law, and that the court erred in refusing instructions asked by defendant. Appellant's abstract fails to comply with rule 15 of this court, in that it does not "set forth so much of the record as is necessary to a full and complete understanding of all questions presented to this court for deci-

sion." The matters set forth in this abstract are wholly insufficient to enable us to intelligently pass upon the questions raised by the assignment of errors. The errors assigned are that the finding of the court was against the evidence, and that the court refused instructions asked by defendant.

No refused instructions are printed in the abstract, nor is the bill of exceptions printed therein; hence there is nothing properly before us except the judgment of the court below, which is valid on its face, and it will therefore be affirmed. All concur.

#### On Motion for Rehearing.

Appellant contends, as an excuse for the condition of his abstract and brief in this case, that he did not know the rules of this court, and, like the fiddler at the dance who did not want to be shot, has done the best he could. In view of this situation, we have again gone through what record he has presented to us to see if we could ascertain what the merits of this appeal are.

By a recurrence to the transcript of the judgment filed with the clerk of this court, we find that the court rendered the following judgment: "George W. Stroup, Plaintiff, v. Joseph Thomas, Defendant. Replevin. Now, on this day, this cause coming up for trial, come the parties, plaintiff and defendant, and announce ready for trial, and, the court sitting as a jury, the matters and things in issue are submitted to the court for trial and determination, and, after hearing the facts and circumstances as adduced in evidence, the court doth find the issue for the plaintiff, that at the time of the institution of this suit the plaintiff was owner and entitled to the possession of one-third the hay crop in question, of the value of thirty-five dollars, that defendant unlawfully retained such hay, and the court assesses plaintiff's damages at ten dollars. The court further finds that the hay in question was a part of the consideration for the retransfer of land in question, and was not claimed as rent by plaintiff. It is therefore ordered and adjudged by the court that plaintiff have and recover said hay to the value of thirty-five dollars, together with ten dollars damages in the premises."

The only testimony adduced at the trial which is presented here by appellant's abstract is as follows: Plaintiff testified: "I told him that I would give up all the papers he had given for that 80, and I would claim part of the crop that year." Plaintiff's testimony again on cross-examination: "Q. You were to get the land back? A. Yes, sir. Q. He was to get whatever papers you held against him at that time, and you were to assume the \$75 school fund mortgage? A. Yes, sir." Defendant's testimony: "Q. What did you receive for that land? A. All the

papers I had made him for this land back and I was to give him, a third of the hay crop and third of the corn." From the statement of appellant's counsel, we learn that plaintiff had sold some land to defendant. Defendant was unable to pay for it, and he and plaintiff made an agreement by which the land was to be deeded back to plaintiff. Plaintiff was to surrender the notes of defendant, and defendant was to pay plaintiff one-third of the hay and corn crop raised that year. Appellant now contends that the relation of landlord and tenant existed between plaintiff and defendant, and that as the hay in question had not been divided, and the plaintiff's part thereof set apart to him, he could not maintain replevin for it.

The court who tried this case and who heard the testimony found the fact to be, and so recites in his judgment, that plaintiff's title to the property in controversy came to him as a result of the contract in relation to the transfer of the land, and that he did not claim it as landlord. In the absence of testimony which shows that the court's finding was against the testimony, all presumptions in its favor are to be indulged, and construing the testimony which we have above quoted, and which is all there is before us, in the light of the presumption which obtains in favor of the correctness of the judgment of the court below, even that testimony tends to support the finding of the court rather than to contradict it.

This being true, there is but one thing to do, and that is to affirm the judgment, and it is so ordered, and the motion for rehearing overruled. All concur.

**BRADY v. SPRINGFIELD TRACTION CO.**  
(Springfield Court of Appeals. Missouri. Jan. 3, 1910. Rehearing Denied Feb. 7, 1910.)

#### 1. CARRIERS (§ 280\*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

A carrier must exercise the utmost care for the safety of its passengers that would be used by very cautious persons under the same circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1087; Dec. Dig. § 280.\*]

#### 2. CARRIERS (§ 287\*)—INJURY TO PASSENGERS—TAKING UP PASSENGERS.

A street car must stop a sufficient length of time to give passengers an opportunity to board it and reach a place of safety, and, where under the circumstances it is necessary for a passenger to reach a seat and be seated in order to be safe from danger when the car is to start, the car must stop until the passenger has been seated.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1159; Dec. Dig. § 287.\*]

#### 3. CARRIERS (§ 314\*)—INJURIES TO PASSENGERS—ACTION—PETITION.

A general allegation in a petition in an action for injuries to a passenger on a street car that the car was started before the passenger

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had time to be seated, and that injury resulted therefrom, states a cause of action.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1275½; Dec. Dig. § 314.\*]

#### 4. CARRIERS (§ 314\*)—INJURIES TO PASSENGERS—ACTION—PETITION.

A petition in an action for injuries to a street car passenger that the carmen negligently started the car with a sudden jerk and in such manner as to violently throw the passenger, who had not taken a seat, against the side of a seat, sufficiently charges negligence in the operation of the car without charging that the jerk was an extraordinary or unusual one.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1275½; Dec. Dig. § 314.\*]

#### 5. CARRIERS (§ 280\*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

What is required of a carrier in the performance of its duties to use proper care for the safety of its passengers depends in a given case on the facts thereof, and not on the common practice of the carrier.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1085, 1087; Dec. Dig. § 280.\*]

#### 6. CARRIERS (§ 316\*)—CARRIAGE OF PASSENGERS—NEGLIGENCE—RES IPSA LOQUITUR.

Proof that a street car was negligently started with a sudden jerk before a passenger had taken a seat in such a manner as to violently throw the passenger against the side of a seat made a prima facie case of actionable negligence, provided the passenger used due care.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1286; Dec. Dig. § 316.\*]

#### 7. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

In an action for injuries to a street car passenger, the error in permitting a witness to testify that a physician who had visited the passenger without being sent for by her stated at the time of his visit that he was the physician of the road was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4153; Dec. Dig. § 1050.\*]

#### 8. EVIDENCE (§ 128\*)—DECLARATIONS—PERSONAL INJURIES—ADMISSIBILITY.

A physician in describing the result of an examination of a patient sustaining a personal injury may give statements of the patient made to him in the course of the examination which relate to the condition of the patient at the time and which give the physician information proper for him in determining the condition of the patient, but statements made by the patient relating to his past condition or to the circumstances surrounding the injury or the manner in which he received it are inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 383-387; Dec. Dig. § 128.\*]

#### 9. CARRIERS (§ 281\*)—INJURIES TO PASSENGERS—CARE AS TO ENFEEBLED PERSON.

Where an old lady in an enfeebled condition boarded a street car, the conductor who had watched her was negligent in giving a signal to start the car before she had had a reasonable time in which to take a seat, rendering the railroad liable for injuries sustained to her by being thrown against the side of a seat by the starting of the car.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1093; Dec. Dig. § 281.\*]

#### 10. APPEAL AND ERROR (§ 1060\*)—HARMLESS ERROR—MISCONDUCT OF COUNSEL.

Where, in an action for injuries to a street car passenger, the verdict rendered for her was the only proper verdict, and the damages awarded were not excessive, the misconduct of

her counsel in calling the jury's attention in his argument to the fact that the passenger was an old lady and had nothing, and was supported by a son compelled to work in a railroad shop, and that the defendant was a corporation able to employ the best counsel, was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4185; Dec. Dig. § 1060.\*]

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by Mary Brady against the Springfield Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff sued for damages on account of an injury she claims to have received while a passenger on defendant's street car in the city of Springfield. Recovered damages below for \$1,200, and defendant has appealed. The material parts of the petition on which the case was tried are as follows: "That on or about the 18th day of September, in 1907, the said defendant, while operating a street railroad as aforesaid mentioned on said Commercial street, accepted the plaintiff as a passenger on board one of its cars, and that as she was in the act of taking her seat, and while she was standing in said car, the agents, servants, and employes of said defendant negligently and suddenly started said car before the plaintiff had time to be seated therein, and negligently started said car with a sudden jerk and in such a manner as to violently throw plaintiff against the side or end of the seat in said car which injured her as follows, to wit: That two short ribs on the left side of the plaintiff, to wit, the tenth and eleventh, were fractured, and that she was greatly wounded and bruised on and along her spinal column, and was bruised and injured internally, and that her kidneys were affected—that the agents, servants, and employes of the defendant knew plaintiff's position in said car or by the use of reasonable diligence could have known it."

The evidence shows: That plaintiff and two other passengers boarded defendant's car at the corner of Springfield avenue and Commercial street. That at this point the car makes a curve turning from Springfield avenue into Commercial street, and the grade is a little upgrade. The conductor was standing on the rear platform, and watched the plaintiff board the car. The motorman was at the front end of the car, and started the car upon a signal given by the conductor from the rear. When the car started, it started with a "jerk" as the witnesses described it, and as a result of this "jerk" the plaintiff, who was not yet seated, was thrown into a seat, and, as she claims, injured by striking the end or back of the seat. One of the other passengers was seated before the car started. The other one was at the end of the seat ready to sit down, and the starting of the car also

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

threw her into the seat, but did not injure her. The plaintiff was 69 years of age, walked with a cane, and was helped on to the car by one of the fellow passengers. The evidence of the conductor and motor-man discloses the fact that at this point, there being a curve in the track and an upgrade, that, in order to start the car, it was necessary to turn on considerable power, and that the car could not be started without a "jerk" without danger of injury to the car.

Delaney & Delaney, for appellant. Hamlin & Seawell, for respondent.

COX, J. (after stating the facts as above). Appellant assigns as error: (1) The petition does not state a cause of action. (2) That the court erred in admitting hearsay evidence. (3) That the court erred in refusing to sustain a demurrer to the testimony. (4) Improper remarks of plaintiff's counsel in addressing the jury in his closing argument.

As to the sufficiency of the petition, appellant contends that it is not negligence to start a car before a passenger has had a reasonable time to be seated. Nor does the allegation that the car was started with a "jerk" show any negligence. Carriers of passengers in discharging their duty to such passengers must use the utmost care for their safety that would be used by very cautious persons under the same circumstances. *Hite v. Railway*, 130 Mo. 133, loc. cit. 139, 31 S. W. 262, and other cases cited. This is the settled law of this and other states. What acts on the part of the servants and employes of a carrier will properly discharge this duty in a given case must depend upon the circumstances of that case. It is the duty of the street car company to hold the car a sufficient length of time to give passengers an opportunity to board it and reach a place of safety. *Maguire v. Railroad*, 103 Mo. App., loc. cit. 475, 78 S. W. 838; *Stoddard v. Railroad*, 105 Mo. App. 512, 80 S. W. 33; *Dougherty v. Railroad*, 81 Mo., loc. cit. 330, 331, 51 Am. Rep. 239. And, if it be necessary for the party boarding the car to reach a seat and be seated in order to be safe from danger when the car is to start, then it is the duty of those in charge of the car to hold it until the person has been seated. Whether this is necessary or not will depend upon the circumstances of the case. It is not true that the parties in charge of a street car have the right, under all circumstances, to start the car before the passenger has been seated. This question must depend upon the facts in each case, and hence a general allegation in a petition that the car was started before the plaintiff had time to be seated and that injury resulted therefrom states a cause of action.

It is also contended that the allegation

that the servants of defendant "negligently started said car with a sudden jerk, and in such a manner as to violently throw plaintiff against the side or end of the seat of said car," is not sufficient as a charge of negligence in the manner of starting the car. It is contended that it should have been charged that the "jerk" was an extraordinary or unusual jerk, and that, in the absence of this allegation, no negligence is charged, even though a party might be thrown down and severely injured by said "jerk." It will be noticed that this charge is not merely that defendant started the car with a "jerk," but the charge is that defendant "negligently started the car with a sudden jerk and in such a manner as to violently throw the plaintiff down." We think this allegation sufficient. We do not think that a person injured by being thrown down in a street car by the manner of the starting of the car must, before he can recover, allege and prove in addition to the fact that the car was "negligently started with a sudden jerk and in such a manner as to violently throw him down," that such jerk was a greater one than usually accompanied the starting of such cars. To so hold would be to say that, if it were a common practice of the defendant in starting its car to do so with such a jerk as to violently throw down passengers who had not yet secured seats, then any one who might be injured in a fall caused thereby could not recover. This is not the law. It is the duty of all carriers of passengers on street and all other railways to use proper care for the safety of their passengers. What this duty will require of the carrier in a given case depends upon the facts of that case, and not upon the common practice of the carrier. It would have been better pleading perhaps to have charged that the car was negligently started with a jerk of unnecessary force. Then whether the jerk was necessary in order to start the car at all would be a matter of proof, but our conclusion is that an allegation which charges that a car was negligently started with a sudden jerk and in such a manner as to violently throw plaintiff against the side or end of a seat, and by reason thereof injury resulted to her, is sufficient, and the proof of these facts will make a *prima facie* case if the plaintiff was using due care on her part. Our conclusion is that the petition was sufficient, and that point must be ruled against the defendant.

The next assignment of error is that the court erred in admitting hearsay testimony, and in this our attention is called to two classes of testimony. One is that certain witnesses were permitted to testify that Dr. James, who had visited the plaintiff without being sent for by her, stated on the occasion of his visit that he was the physician of the defendant. While this was im-

proper, this was as far as that testimony went, and whether Dr. James was or was not a physician in the employ of defendant could not affect any issue in this case, nor can we see how the defendant could be injured by this statement; hence this error was harmless.

Dr. Tucker who was called to visit plaintiff after this injury, in testifying as to the condition in which he found her, was permitted to repeat some statements made by her to him in response to questions asked her by him during the examination. It is claimed that this was hearsay and self-serving, and should have been excluded. It was held in this state in the case of *Gartside v. Insurance Company*, 76 Mo. 446, 43 Am. Rep. 765, that such statements could not be admitted in evidence, but this case was overruled by the case of *Groll v. Tower*, 88 Mo. 249, 55 Am. Rep. 858, and the latter case was followed in the case of *Squires v. City of Chillicothe*, 89 Mo. 226, 1 S. W. 23, and it has since that time been the settled law of this state that such testimony is admissible. Hence there was no error in admitting this testimony. The rule is that a physician in describing the result of an examination of a patient may give statements of the patient made to him in the course of the examination which relate to the condition of the patient at the time and which give the physician information proper for him to have in determining the condition of the patient, but statements made by the patient which relate to her past condition or to the circumstances surrounding the injury or the manner in which she received it are not admissible. In this case nothing was admitted which violates the rule.

Defendant demurred to the testimony in this case, and now contends that the evidence does not show any negligence on the part of defendant, or that it was in any way liable. This evidence shows this plaintiff to have been an old lady in an enfeebled condition, which fact the conductor knew or ought to have known, for he watched her board the car; that the car was started before she had time to be seated; that the conductor knew that when the car was to be started unusual force would have to be applied to it. Under these circumstances, the conductor must be held to have known that the starting of this car before plaintiff was seated would likely injure her, and for him under these circumstances to give the signal and have the car started before plaintiff had had a reasonable time in which to be seated was negligent and the demurrer to the testimony was properly overruled.

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The last assignment of error is that the counsel for plaintiff used improper remarks in addressing the jury in his closing argument. The remarks were as follows: "This corporation looks ahead and employs the best counsel in Southwest Missouri, keeps him on a standing salary and when this poor old woman, 69 years old, who hasn't got anything and her boy supports her and his family, and works over the hot iron in the blacksmith shops of the Frisco Road, and they want to come into court here— " Defendant's counsel here objected, and asked the court to reprimand counsel for plaintiff. The court, addressing counsel for plaintiff, said: "You must be careful, Mr. Hamlin, and keep within the record." Counsel for defendant, not being satisfied with this admonition, insisted that the court should reprimand the counsel in more severe terms, which the court refused to do. Those remarks of plaintiff's counsel were improper. Counsel in making an argument to a jury ought to confine himself to the issues in the case and the evidence which tends to support them. In this case he ought not to have called attention to the fact that this old lady had nothing, that she was supported by her son who was compelled to work over the hot iron in the shops of the Frisco Road, and that the defendant was a corporation who was able to employ the best counsel in Southwest Missouri. These were all matters about which the jury had no concern, and which they had no right to consider in arriving at a verdict in this case. The trial courts ought to be careful to see that attorneys on either side of a case do not violate the rule in these matters. It does not necessarily follow, however, that every case in which an attorney trespasses the rule in this respect shall be reversed. If this were a close case on the evidence or the damages assessed were unreasonably high, or there were anything in the case to indicate that the verdict was the result of those remarks of counsel rather than a fair consideration of the testimony, we should not hesitate to reverse this case upon that ground, but, after a careful consideration of the record in this case, we conclude that the only proper verdict that could have been rendered was a verdict for the plaintiff, and that the damages assessed, when considered in the light of the testimony relating to the extent of plaintiff's injury, are not excessive, and we therefore have reached the conclusion in this case that the remarks of counsel for plaintiff, improper as they were, did not affect the result.

The judgment is for the right party, and will therefore be affirmed.

**JACKSON COUNTY v. SCHMID et al.**  
(Kansas City Court of Appeals. Missouri.  
Jan. 24, 1910. Rehearing Denied  
Feb. 7, 1910.)

**1. INTOXICATING LIQUORS (§ 178\*)—PENALTIES—NATURE OF REMEDY.**

Rev. St. 1899, § 3017 (Ann. St. 1906, p. 1728), imposing a penalty for selling liquors to a drunkard after notice by his wife not to do so, is not a penal statute, but is highly remedial, and should be liberally construed.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 197; Dec. Dig. § 178.\*]

**2. INTOXICATING LIQUORS (§ 179\*)—PENALTIES—GROUNDS OF ACTION—SALE TO DRUNKARD—"NOTICE."**

The word "notice," as used in Rev. St. 1899, § 3017 (Ann. St. 1906, p. 1728), imposing a penalty for selling liquors to a drunkard after notice from his wife not to do so, is synonymous with information, intelligence, or knowledge, and oral notice to the managing agent of the dramshop keeper is sufficient.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 179.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4839-4844; vol. 8, p. 7733.]

**3. PRINCIPAL AND AGENT (§ 177\*)—NOTICE TO AGENT.**

A principal is affected with knowledge of all material facts of which the agent receives notice while acting in the course of his employment and within the scope of his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 670-679; Dec. Dig. § 177.\*]

**4. INTOXICATING LIQUORS (§ 179\*)—PENALTIES—GROUNDS OF ACTION—SALE TO DRUNKARD—"NOTICE."**

A notice, given under Rev. St. 1899, § 3017 (Ann. St. 1906, p. 1728), imposing a penalty for selling liquor to a drunkard after notice from his wife not to do so, need not state that the person is a drunkard, when the reason for the notice is known to the seller.

[Ed. Note.—For other cases see Intoxicating Liquors, Dec. Dig. § 179.\*]

**5. INTOXICATING LIQUORS (§ 179\*)—PENALTIES—GROUNDS OF ACTION—"HABITUAL DRUNKARD."**

An "habitual drunkard," as used in Rev. St. 1899, § 3017 (Ann. St. 1906, p. 1728), imposing a penalty for selling to such a person after notice from his wife not to do so, is a person given to inebriety or the excessive use of intoxicating drinks to the extent that he has lost the power or will, by frequent indulgence, to control his appetite.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 179.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3202-3204.]

Appeal from Circuit Court, Jackson County; W. A. Powell, Judge.

Action by Jackson County, on the relation of Stella Farley, against John Schmid and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions to enter judgment for plaintiff.

Aleshire, Hardin & Gundlach, for appellant. F. V. Kander and Olney Burrus, for respondents.

**JOHNSON, J.** This suit is prosecuted by a married woman against a dramshop keep-

er and his bondsmen to recover damages for the sale of intoxicating liquor to her husband, an habitual drunkard. The petition is in four counts, but two were dismissed at the trial and the verdict was rendered on the remaining two, viz., the first and the fourth. Afterward the court sustained a motion for a new trial filed by defendant, on the ground of "error in giving instructions for plaintiff and in refusing instructions for defendant." Plaintiff appealed from the order and judgment granting a new trial.

Defendant was a licensed dramshop keeper, in business at Sheffield, near Kansas City, but lived on a farm about two miles from his dramshop. The evidence of plaintiff tends to show that on account of ill health, defendant spent most of his time on the farm, and intrusted the management of the dramshop to his son; that the husband of plaintiff was an habitual drunkard, who spent much of his time and wages in defendant's dramshop; that plaintiff went to the place while her husband was there drinking, and orally notified the defendant's son, who was there in charge of the business, not to sell her husband liquors, and that afterwards, on the occasions alleged in the first and fourth counts of the petition, sales of intoxicating liquors were made to the inebriate husband, despite the notice.

The evidence of defendant differs in important respects from that of plaintiff, but the questions of law we are called upon to decide require us to consider the facts in the light most favorable to plaintiff. The part of the instructions given at the request of plaintiff which the court at the hearing of the motion for a new trial found to be erroneous is as follows: "If they [the jury] believe from the evidence \* \* \* that Stella Farley verbally notified the defendant or John Schmid, his son, if they find from the evidence he was his agent in charge of his said saloon, \* \* \* not to sell, give away, or otherwise dispose of to the said William S. Farley any intoxicating liquors, and that afterwards the said John Schmid, or his agents in charge of his saloon and dramshop \* \* \* did sell," etc. The question in controversy is whether or not oral notice to the managing agent in charge of defendant's business was notice to defendant within the meaning of section 3017, Rev. St. 1899 (Ann. St. 1906, p. 1728). The material portion of that statute is that: "Any dramshop keeper \* \* \* selling, giving away or otherwise disposing of or suffering the same to be done about his premises, any intoxicating liquors to any habitual drunkard after such dramshop keeper \* \* \* shall have been notified by the wife \* \* \* not to sell \* \* \* to such person \* \* \* shall forfeit and pay to such wife \* \* \* for every such offense a sum not less than fifty nor more than five hundred dollars to be recovered by

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

the party entitled to sue by civil action. \* \* \* A notice given under this section shall be deemed a continuing notice to the person notified."

Defendant invokes the rule that "where the statute requires notice without prescribing the method of service, personal notice is intended" (Ryan v. Kelly, 9 Mo. App. 386; Doyle v. Railway, 113 Mo., loc. cit. 285, 20 S. W. 970; City v. Gallie, 49 Mo. App., loc. cit. 397), and points to the case of *Elke v. McGrath*, 100 Ky. 537, 38 S. W. 877, decided by the Court of Appeals of Kentucky, as an authority directly in point. We find the Kentucky statute differs from ours in phraseology and meaning. There the wife is required to give a formal written notice to "the person so selling prior to the offense complained of." Our statute does not say that the notice shall be written, nor does it specifically provide that it shall be given to the person making the sale. Though it provides for a penalty, the statute is not of the class called penal. *Edwards v. Brown*, 67 Mo. 377. It is highly remedial, and we think should be reasonably, even liberally, construed, in order that due effect may be given the beneficent intent it clearly expresses. *Pettis Co. v. De Bold*, 136 Mo. App. 265, 117 S. W. 88. The words "notified" and "notice" as employed in this statute are not to be considered as in any degree technical, but as synonymous with information, intelligence, knowledge. *Wile v. Town of Southbury*, 43 Conn. 53. The word "notice" does not necessarily imply notice given in writing. The meaning to be given it by the courts is to be controlled largely by the context, and by the purpose of the enactment. An oral notice given the agent who sold, or allowed the liquor to be sold, was notice to the principal. "The duty of an agent to inform his principal of all material facts is a duty which the law conclusively presumes that the agent has performed, and a principal is therefore affected with knowledge of all material facts, of which the agent receives notice or acquires knowledge while acting in the course of his employment, and within the scope of his authority, although the agent does not inform his principal thereof." 31 Cyc. 1587. Under this rule, the presumption should be indulged that defendant received the notice, and, as a matter of fact, the evidence of plaintiff shows that he did receive it. The point that the notice is insufficient is purely technical—too technical to defeat what appears to be a meritorious cause of action.

The first instruction asked by the defendant required the jury to find that plaintiff notified defendant "*that her husband was an habitual drunkard*, and not to sell or give to William Farley any intoxicating liquors," etc. The court gave the instruction, after striking out the words we have itali-

cized. The statute (section 3017) does not require the wife to do more than to notify the dramshop keeper not to sell her husband intoxicating liquors. A case might be imagined where, in justice to the dramshop keeper, the warning should be accompanied by a statement of the reason for giving it; but, in the present instance, defendant's agent could not fail to know the reason. Plaintiff's husband made defendant's saloon his loafing place; he was a wage-earner, and when he drew his money, he spent practically all of it at defendant's bar, leaving his wife and children in want. When plaintiff went to the dramshop to find her husband, and told defendant's son not to sell him any more liquor, the son knew the reason, and it would be a mockery of justice should defendant be suffered to escape liability on the ground that plaintiff failed to state that her husband was an habitual drunkard. Defendant asked the court to instruct the jury "that the term 'habitual drunkard' as used in these instructions is a person given to inebriety or the excessive use of intoxicating drinks to the extent that he has lost the power or will, by frequent indulgence, to control his appetite for it to such an extent that he becomes intoxicated as often as the temptation is presented by his being in the vicinity where intoxicating liquors are sold." The court struck out the italicized part of the instruction, and gave it as so modified. The instruction as given sufficiently defines the term "habitual drunkard." *Ishler v. Ishler*, 81 Mo. App. 567; *Glenn v. Glenn*, 87 Mo. App. 377; *Page v. Page*, 43 Wash. 293, 86 Pac. 582, 6 L. R. A. (N. S.) 914, 117 Am. St. Rep. 1054. We quote with approval the definition of the term in *Page v. Page*, supra: "To be an habitual drunkard a person does not have to be drunk all the time, nor necessarily incapacitated from pursuing, during the working hours of the day, ordinary unskilled manual labor. One is an habitual drunkard, in the meaning of the divorce laws, who has a fixed habit of frequently getting drunk. It is not necessary that he be constantly or universally drunk, nor that he have more drunken than sober hours. It is enough that he have the habit so firmly fixed upon him that he becomes drunk with recurring frequency periodically, or that he is unable to resist when the opportunity and temptation is presented."

Other points are made, but we shall dispose of them by saying the case was fairly tried, without substantial error, and that a new trial should not have been granted. Accordingly the judgment is reversed, and the cause remanded, with directions to enter judgment for plaintiff on the verdict in accordance with the views expressed. All concur.

**McCORMICK v. STEPHENS et al.**

(Kansas City Court of Appeals. Missouri.  
Jan. 24, 1910.)

**1. JUDGMENT (§ 213\*)—RENDITION—NOTICE.**

The rule, that an agreement that a case shall abide by the decision of another case does not entitle the party in whose favor the decision is claimed to be to a judgment without notice to his opponent, does not apply where the parties have submitted the cause and the court has taken it under advisement; but, in such case, the court may render judgment without notice to the parties.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 213.\*]

**2. JUDGMENT (§ 210\*)—RENDITION.**

Where the court agreed to hold a submitted case under advisement until the decision in another case, it was not compelled to wait until notified of the latter decision by formal mandate before rendering judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 210.\*]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by F. P. McCormick against Sarah A. Stephens and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Harry B. Walker and Ball & Ryland, for appellant. W. F. Allen and Jas. E. Trogdon, for respondents.

JOHNSON, J. This action is to enforce the lien of certain special tax bills. A trial to the court without the aid of a jury resulted in a judgment for defendants, and the cause is here on the appeal of plaintiff. The tax bills were of the same issue as those involved in the case of McCormick v. Moore, 134 Mo. App. 669, 114 S. W. 40. and, since the issues made by the pleadings and evidence are the same in the two cases, our opinion in the Moore Case settles every question now before us except one of practice.

It is contended by plaintiff that the judgment was prematurely rendered and should be set aside as irregular. Facts pertinent to this contention are as follows: The record shows the case was tried and submitted to the court January 17, 1907, and was taken under advisement, and that on December 7, 1908, the following judgment was entered of record: "Now on this day come parties by their respective attorneys, and this cause heretofore having been tried and previously by the court taken under advisement, and the court now being fully advised in the premises, and by agreement of parties the jury having been previously waived in this cause, and on argument of counsel, the court finds the issues in favor of the defendants. It is therefore considered, ordered, and adjudged," etc. Afterward, on December 10, 1908, plaintiff filed his motion for a new trial, which was overruled, and on January 5th he filed a motion (also over-

ruled) "to set aside the judgment for irregularity." The alleged irregularity consists of the fact that the trial court rendered judgment without notice to plaintiff or his counsel and before the mandate was issued by this court in McCormick v. Moore. It is contended by plaintiff that, when the court took the case under advisement, the announcement was made that it would not be decided until after the final decision in McCormick v. Moore, and, in support of this contention, counsel point to a colloquy between the court and counsel at the conclusion of the trial and to the minutes of the judge's docket. The colloquy was as follows: "The Court: Now, in this case my decision is to be withheld until— Counsel for Defendants: The case of McCormick v. Moore, No. 25,221, which is now on appeal." The minutes referred to were as follows: "Jury waived. Case tried. Decision to await the determination of McCormick v. Moore, No. 25,221 in Court of Appeals." The judgment in McCormick v. Moore was affirmed June 29, 1908. The motion for rehearing filed by plaintiff went over the summer vacation and was not passed on until December 7, 1908, at which time it was overruled. On the same day, counsel for defendants appeared before the circuit court, and that court, without notice to plaintiff, entered the present judgment. The next day a motion to certify to the Supreme Court was filed in the Court of Appeals in McCormick v. Moore, and that motion was still pending when the appeal was taken in this case. Afterward the motion to certify was overruled and a mandate was issued.

Plaintiff invokes the rule applied by the St. Louis Court of Appeals in Schaeffer v. Slegel, 7 Mo. App. 542, that "an agreement that a case shall abide by the decision of another case does not entitle the party in whose favor the decision is claimed to be to a judgment without notice to his opponent." Arguendo, we concede the soundness of this rule, but say it has no application to cases such as the present, where the parties have tried and submitted the cause and the court has taken it under advisement. In such cases, the court may render judgment without notice to the parties, since constructively they are present in court. "A party properly brought into court is chargeable with notice of all subsequent steps taken in the cause down to and including the judgment, although he does not, in fact, appear and has no actual notice thereof." 29 Cyc. 1116. The announcement that judgment would be withheld until the decision of the Moore Case did not impose any additional duty on the court nor give plaintiff a right to be notified.

We do not agree with plaintiff that the court rendered judgment in advance of the

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

time stated in the announcement. It is manifest both parties understood the court to announce that it would hold the submitted case under advisement until it knew the views entertained by the higher tribunal respecting the companion case. The court waited until the motion for a rehearing was overruled, and that was as long as he stated he would wait. It was not contemplated he should wait until notified of the decision in the Moore Case by formal mandate. We think effect should be given the manifest intention of the parties, and that no violence was done such intention by the action of the court in giving judgment. Plaintiff has had his day in court. There is no constitutional question in this case. *Paving Co. v. O'Brien*, 128 Mo. App. 285, 107 S. W. 25.

The judgment is affirmed. All concur.

#### MCCORMICK v. ALLENDORPH et al.

(Kansas City Court of Appeals. Missouri. Jan. 24, 1910.)

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by F. P. McCormick against Hattie L. Allendorph and others. From the judgment, plaintiff appeals. Affirmed.

Harry B. Walker and Ball & Ryland, for appellant. Aleshire, Hardin & Gundlach, for respondents.

JOHNSON, J. For the reasons stated in *McCormick v. Stephens* (decided at this term) 124 S. W. 1076, the judgment in this case is affirmed. All concur.

#### CROUCH v. KANSAS CITY SOUTHERN RY. CO.

(Kansas City Court of Appeals. Missouri. Jan. 24, 1910.)

DAMAGES (§ 112\*)—MEASURE OF DAMAGES—INJURY TO LAND.

In an action for destruction of plaintiff's meadow from fire set by defendant's negligence, where the roots of the grass were killed so that it would have to be re-seeded, the measure of damage was the rental value of the land and the cost of re-seeding.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 281-283; Dec. Dig. § 112.\*]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

Action by Lucy E. Crouch against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed. Case transferred to the Supreme Court.

Cyrus Crane and H. C. Clarke, for appellant. Scott & Bowker, for respondent.

BROADDUS, P. J. This is an action for damages for the destruction of plaintiff's meadow, alleged to have been destroyed by fire set by the negligence of defendant. The petition is in three counts covering three

distinct fires. The jury returned a verdict in favor of plaintiff and defendant appealed. The petition alleged, and the evidence showed, that the fire completely destroyed the roots of the grass, and it is so conceded by defendant. The court instructed the jury that the measure of plaintiff's damages was the rental value of the land and the cost of re-seeding. The question raised on the appeal is one of law.

This court has decided that the measure of damages in such cases is the rental value of the land and the cost of re-seeding. *Adam v. Railroad*, 122 S. W. 1136; *Knight Bros. v. Railroad*, 122 Mo. App. 88, 98 S. W. 81; *Doty v. Railroad*, 136 Mo. App. 254, 116 S. W. 1126; *Mattis v. Railroad*, 138 Mo. App. 61, 119 S. W. 998. The St. Louis Court of Appeals holds otherwise: That the damage in such cases is to the land itself, and that the measure for such damage is the difference between the value of the land with the crop standing and growing thereon and its value after the destruction of the crop. *Wiggins v. Railroad*, 119 Mo. App. 492, 95 S. W. 311; *Wiggins v. Railroad*, 129 Mo. App. 369, 108 S. W. 574; *Carter v. Railroad*, 128 Mo. App. 57, 106 S. W. 611.

In *Railroad v. Jones*, 59 Ark. 105, 26 S. W. 595, it is held that: "The measure of damages is the cost of re-seeding and the rental value until it is restored." And it is so held in *Railroad v. Hixon*, 110 Ind. 225, 11 N. E. 285, and in *Vermilya v. Railroad*, 66 Iowa, 606, 24 N. W. 234, 55 Am. Rep. 279. Where the damage was to forest trees which were part of the realty the Supreme Court holds that the measure was the difference between the value of the trees before the fire and after the fire. *Atkinson v. Railroad*, 63 Mo. 367. In *Matthews v. Railroad*, 142 Mo. 645, 44 S. W. 802, the property destroyed was a barn. It was held that the measure of damages was the value of the barn at the time it was burned. It will be seen that in these two cases although the property destroyed was a part of the realty itself, the court determines the damage to be the value of the thing destroyed, without reference to its effect upon the inheritance.

If the rule in such cases is to govern—that the measure of damages is the difference between the value of the land before and after the destruction—a tenant under a lease for two years whose meadow suffers total destruction the first year of such lease would have no remedy whatever, *damnum absque injuria*. If the owner of a tract of land comprising 1,000 acres should suffer a small loss to one of his meadows, it is not probable he would have any redress for his loss whatever; because of the insignificance of his loss of the market value of so great a body of land would not be affected thereby, and yet he would be put to the trouble and expense of re-seeding in order to restore his meadow.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The question is important for the reason that it is one that will in all probability continue to arise, and should in our opinion be settled by the Supreme Court. In the meantime we adhere to our former decisions, and affirm the action of the lower court. All concur. Ordered transferred to Supreme Court.

### WEBSTER v. BERRY.

(Springfield Court of Appeals. Missouri. Jan. 10, 1910. On Petition for Rehearing, Feb. 7, 1910.)

#### 1. APPEAL AND ERROR (§ 671\*)—ABSTRACT OF RECORD—SUFFICIENCY.

The abstract of the record not showing that the bill of exceptions was filed by a proper order of court duly entered of record, or was authenticated by being signed by the judge, is insufficient to allow consideration of such bill, as such defects cannot be supplemented by anything in the bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

#### 2. APPEAL AND ERROR (§ 580\*)—ABSTRACT OF RECORD.

The requirement of the statute, as well as of the rules of court, that appellant shall file an abstract of the entire record, cannot be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2574; Dec. Dig. § 580.\*]

Appeal from Circuit Court, Barton County; B. G. Thurman, Judge.

Action by Jesse Webster against James Berry. Judgment for plaintiff. Defendant appeals. Affirmed.

J. S. Davis, for appellant. Oscar B. Elam, for respondent.

NIXON, P. J. This case in its peregrinations reminds us of the much traveled Homeric hero who was buffeted and baffled on many climes and shores. The appellant was sued in his own neighborhood before a justice of the peace, the result being a mistrial. He filed an affidavit against the inhabitants of the township. Thereupon, the case took another turn into another township, where, more fortunately for the plaintiff in the result, the jury returned a verdict against the defendant. From this, the defendant appealed. He then filed an affidavit against the judge of the circuit court, and the case was transferred from Barry county to Barton county, where a jury again rendered a verdict against the defendant. From that judgment, he took an appeal to the Kansas City Court of Appeals, and the case has been transferred to this court. Owing to the defects hereinafter referred to in the abstract, and his failure to comply with the rules, the appeal must be somewhat summarily disposed of.

The respondent in his brief and argument calls our attention to the fact that the abstract of the record in this case wholly fails to comply with the requirements of the rules

of this court. The only showing in the abstract of the record in this case as to the filing of the bill of exceptions is as follows: "Jesse Webster, Plaintiff, v. James Berry, Defendant. Record entry shows that the bill of exceptions in this case was filed with the clerk of the Barton county circuit court on the 18th day of October, 1909." It is apparent that this entry does not show that the bill of exceptions was signed by the judge, or that it was filed by the proper order of court duly entered of record, and that it does not show whether it was filed in term time or in vacation. This is not sufficient as has been ruled in many cases both in the Supreme Court and the Appellate Courts of this state. It is essential that the abstract of the record itself should show that it was filed by a proper order of court duly entered of record. *Clay v. Union Wholesale Pub. Co.*, 200 Mo., loc. cit. 673, 98 S. W., loc. cit. 577. It was further essential that it should show that the bill of exceptions was authenticated by being signed by the judge. *Harris v. Wilson*, 190 Mo. 412, 97 S. W. 591; *Everett v. Butler*, 192 Mo. 564, 91 S. W. 890; *Novinger v. Quincy, O. & K. C. R. Co.*, 131 Mo. App. 337, 111 S. W. 515. None of the defects of the abstract could be supplemented by anything that the bill of exceptions itself might contain. There is no showing that the bill of exceptions was filed in obedience to any order of court duly entered upon the record, or that it was signed by the judge, and consequently it does not comply with the rules in regard to abstracts.

Nothing is left upon the record proper, except the petition in this case. As this was an appeal from a trial first had in a justice of the peace court, in which great indulgence is shown towards formality in pleading, an examination of the petition as a whole reveals that while it is irregular and inartistic, and not in compliance with the strict rules of pleading in courts of record, it does sufficiently state a cause of action under the liberal practice in justice of the peace courts.

The judgment is accordingly affirmed, and the appeal dismissed. All concur.

#### On Petition for Rehearing.

We have again, with patience, gone over the abstract of the record in this case in order to guard against any mistake that might have been committed, and to assure ourselves that no injustice has been done the appellant in the opinion heretofore delivered. We are fully confirmed in the correctness of our previous ruling, and also find other fatal defects in the appellant's abstract of the record. It is with reluctance that we summarily dispose of cases; but when the motion is made by the opposite party, and not only our rules but the statute as well requires that the appellant shall file "printed abstracts of the entire record," we have no discretion, but are required to dismiss the appeal. The law as to ab-

tracts is as binding as the law of contracts, and must be impartially enforced as a rule of action governing appellate courts. Notwithstanding that it may seem harsh to the members of the bar who represent the losing party, it is yet indispensable to the prompt transaction of business in appellate courts. The experience of the Supreme Court and of all appellate courts is graphically expressed by Justice Lamm in *Pennowsky v. Coerver*, 205 Mo., loc. cit. 137, 103 S. W. 542: "A bill of exceptions is what its very name imports—a receptacle for exceptions—and is not a fit legal vessel to hold matter belonging to the record proper; hence a recital in such bill cannot be held evidence of such matter, *secundum artem*. \* \* \* With patience, line upon line, and precept upon precept, we have steadily pointed out what the 'record proper' is, and the mandatory requirements of statutes and of appellate rules calling for an abstract of the record proper, as such. Over and over again it has been pointed out that no part or parcel of the record proper has lot or place in the bill of exceptions; and if put into such bill, and left out of the abstract of the record proper, it is fatal infirmity. In saying so, our yea has been yea—our nay, nay, to the crossing of a 't' and the dotting of an 'i.' Peradventure, by continued iteration and reiteration, this bread cast upon the waters will return to us in many days in the form of orderly obedience to positive law, so that the unhappy result to our brethren of the bar of a case riding off on anything short of its merits will come to an end, or grow small by degrees. So mote it be."

The motion for rehearing is denied. All concur.

**TUCK v. SPRINGFIELD TRACTION CO.**  
(Springfield Court of Appeals. Missouri. Jan. 10, 1910. Rehearing Denied Feb. 7, 1910.)

**1. PLEADING (§ 406\*)—PETITION—SUFFICIENCY AFTER ANSWER.**

Where, in an action for injuries in a collision between defendant's street car and the vehicle in which plaintiff was riding, the petition, not only charged negligence generally, but set out in what the negligence consisted in a manner sufficient to apprise defendant of the particular and special negligence on which liability was sought to be established, it was sufficient after answer, though it might have been subject to a motion to make more specific.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1369; Dec. Dig. § 406.\*]

**2. TRIAL (§ 29\*)—MISCONDUCT OF JUDGE—MATERIALITY.**

A casual remark by the trial judge during the introduction of evidence in an injury case as to whether plaintiff's counsel was receiving a contingent fee for prosecuting the same, that it "was probably the usual fee," was immaterial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80, 81; Dec. Dig. § 29.\*]

**3. APPEAL AND ERROR (§ 1002\*)—VERDICT—REVIEW.**

A verdict based on conflicting evidence sufficient to sustain the same will not be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

**4. NEGLIGENCE (§ 136\*)—QUESTION FOR JURY.**

The existence of negligence is a fact to be proved, and whether negligence or care exists in a given case is peculiarly and exclusively for the jury's determination.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

**5. TRIAL (§ 126\*)—MISCONDUCT OF ATTORNEY.**

Plaintiff's attorney in argument accused defendant's attorney of not trying the case fairly, saying that he had objected and objected all through the case, and asked the court to reprimand plaintiff's attorney. On objection being made and overruled, plaintiff's attorney continued by stating that defendant's attorney had tried bluffing from the start, and had been unfair. Again on objection, plaintiff's attorney was permitted to proceed with reprimand. *Held*, that such argument was highly reprehensible and deserved an immediate reprimand.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 308; Dec. Dig. § 126.\*]

**6. APPEAL AND ERROR (§ 1060\*)—REVIEW—PREJUDICE—MISCONDUCT OF ATTORNEY.**

Argument of an attorney to the jury, though reprehensible and improper, and permitted without the sustaining of an objection or reprimand by the judge, was not ground for reversal, where it appeared on the whole case that the judgment was for the right party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.\*]

Appeal from Circuit Court, Greene County; A. H. Wear, Special Judge.

Action by Price Tuck by his next friend, J. N. Tuck, against the Springfield Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This was an action for damages commenced in the circuit court of Greene county. The part of the petition charging negligence is as follows: "That on the 15th day of February, 1908, the said Price Tuck, accompanied by his brother, Claude Tuck, were driving a team of horses and buggy, north on said Boonville street, and, at the intersection of Calhoun street, while they were driving along and using due care and caution on their part, the servants, agents and employes of defendant negligently, carelessly, and recklessly ran, managed, and controlled a car of the defendant, which was going north on said Boonville street, being car No. 73. That it ran into and struck the said Price Tuck without signal or warning, and he was thrown to the ground and dragged for some 40 or 50 feet along said street, by said car, and was injured as follows: That two of the bones of his foot were broken; the leaders of his left foot were torn loose from his heel; that his face was lacerated, bruised, and torn; his body was bruised, and he was injured in his back, limbs,

and head and injured internally; that he suffered great and excruciating pain of mind and body, and that the injuries are permanent, and that he was and is damaged in the sum of \$4,000."

The answer of the defendant is a general denial. The accident complained of in plaintiff's petition, occurred on a drizzly afternoon in February, 1908, on Boonville street in Springfield, Mo., and was caused by the collision of a car belonging to the Springfield Traction Company, the defendant in the court below. Price Tuck, with his brother Claude, had started home in a two-horse top buggy and were driving north on Boonville street, close to and parallel with defendant's street car track. The buggy top was up and and the curtains down. There was a small lookout glass in the rear curtain which was clouded by the mist according to the testimony. The evidence is that they looked out from time to time to see whether there was any car behind them. The result of the collision—which took place between Center and Calhoun streets by a car going in the same direction as that taken by the plaintiff—was that the four wheels of the buggy were broken to pieces—every spoke broken out—the buggy was turned over on the horses, and the team and buggy were dragged about 50 feet. The evidence for the plaintiff tended to show that the gong was not sounded, or, if it was, that it was so out of repair and in such a condition that it could only be heard a short distance from the car; that just before the car started on this trip parties were seen working at the gong underneath the car. The evidence of some of the witnesses for the plaintiff tended to show that the car never slacked up at all until it struck the buggy. The evidence for the defendant tended to show that the motorman only saw the team a short while before the car struck the buggy—at a distance of about 40 or 50 feet; that the front part of the car did not come in contact with the buggy.

The motorman testified that before he came up with the buggy he was ringing the gong and threw the power off and that the car was "drifting"; "and when I got even with the team, I released the brake and put on the power." He stated that the team was in safety when the front of the car passed; that there was no fender on the car. "I don't know whether they backed in to me or not. The front end was in the clear and they were driving along after the car struck. I guess they began to run when the step of the car struck the buggy. At that time I was running 8 or 9 miles an hour. At that speed I could stop in about 30 feet. As I crossed Calhoun street, the team was driving along the east side of the track and about 40 or 50 feet north of me. They were not quite to the blacksmith shop. The accident happened along about the shop. I don't remember a team hitched to a tele-

phone pole north of this shop; I don't remember if I saw it. I saw them drive in towards the track, but I don't know whether they drove around this team or not. At the time they drove towards the track, I must have been 50 feet behind them and was running 8 or 9 miles an hour, and had the slack up and the car under control. The brakes were in good shape. They drove around whatever that was and then started on up the street and I ran up to the side of them and the front end of the car cleared the buggy. I took it for granted that it was all right and turned on my power to go on."

Another witness for the defendant testified that he was on the car, and that just as the motorman got opposite the driver of the buggy, he tapped the gong once and looked at them, and that at this time, the car was clear in front. "As he tapped the gong, he threw on his power and turned his brake loose." That the left horse's nose was almost up to the window at this time. "It seems to me that the boys—when the motorman tapped the gong was the first indication they had that the car was there. The horses kind of jumped a little and moved as though the lines had been loose, and the driver grabbed them to hold the team and jerked the horses and pulled them right up to the car."

Other witnesses for the defendant testified that they heard the gong ringing for a considerable distance before the car struck the buggy; also that before the car reached the buggy, the horses were "cutting up," and that just before the car struck, the horses were reined in towards the car. There was a judgment for the plaintiff for \$600, from which the defendant prosecutes this appeal.

Delaney & Delaney, for appellant. D. W. Davies, O. T. Hamlin, and J. T. Devorss, for respondent.

NIXON, P. J. (after stating the facts as above). 1. One of the grounds assigned as error in this case is that the petitioner is not sufficient, and that the allegations are too general to authorize a recovery. It is to be noted that no objection was made to the petition until after answer had been filed, and that the objection then only went to the introduction of evidence. While some objection may be justly made to the form of the petition as not being very artistic, it is sufficient to apprise the defendant of the acts complained of, and upon which its culpability rested. It is true that the petition is not very specific, but generality in the charge of negligence is not a fatal objection after the filing of an answer. *Foster v. Missouri Pacific Ry. Co.*, 115 Mo., loc. cit. 177, 21 S. W., loc. cit. 919; *Conrad v. De Montcourt*, 138 Mo. 311, 39 S. W. 805; *Durham v. City of Bolivar*, 106 Mo. App. 601, 81 S. W. 463; *Mack v. St. Louis, K. C. & N. R. Co.*

77 Mo. 232; *Shaw v. Missouri Pacific Ry. Co.*, 104 Mo. 648, 16 S. W. 832. It is also noted that this petition is not alone confined to a general charge of negligence, but it sets out in what the negligence consists in a manner sufficient to apprise the defendant of the particular and special negligence upon which defendant's liability was sought to be established. It specifically charges that the servants of the defendant negligently ran a car of the defendant and struck the plaintiff without any signal or warning. This would be a sufficient statement in the absence of any attack by a motion to make the petition more specific. If the defendant was in any doubt as to the particular nature of the charge made, the law has provided an ample remedy by which the defendant would have been enabled to ascertain the particulars and would have been enabled to prepare its defense. But the defendant seemed satisfied and was able to make a very complete defense, and only brought to the attention of the court the defect, if any, in the petition, after the trial had in fact commenced. This is a practice not to be commended. We find that the petition was entirely sufficient to sustain the verdict.

2. Some complaint is made about a certain remark of the trial judge during the introduction of evidence. Evidence was being introduced as to whether plaintiff's counsel was receiving a contingent fee for the prosecution of the case, and the trial judge made the casual remark that it was probably the usual fee. We think that the attempt to raise this trivial objection to the magnitude of an assignment of error is an illustration of a gigantic effort to make a mountain out of a molehill.

3. The further objection is urged that there was no proof sufficient to warrant a verdict as to the negligence of the defendant. We think this view cannot be seriously entertained when the evidence is examined in this case. There is abundant evidence tending to show the liability of the defendant, and that the plaintiff was exercising proper care at the time the accident occurred. The evidence, it is true, was conflicting. In such cases, we cannot invade the constitutional right of trial by jury. The weighing of the evidence and the credibility of the witnesses is committed by law to the jury. The existence of negligence is a fact to be proved, and whether negligence or care exists in a given case is peculiarly and exclusively for the jury to determine. *Cook v. Missouri Pacific Ry. Co.*, 19 Mo. App. 329; *McPheeters v. Hannibal & St. J. R. Co.*, 45 Mo. 22; *Yarnell v. St. Louis & K. C. & K. Co.*, 75 Mo., loc. cit. 583; *Burger v. Missouri Pacific Ry. Co.*, 112 Mo. 238, 20 S. W. 439, 34 Am. St. Rep. 879.

4. Some objection is also made to the instructions given in this case. Upon the most careful examination, we find that such ob-

jection is untenable and that the trial judge in this case gave the defendant all the instructions it was entitled to, and that no just criticism can be made on that account.

5. The only question remaining of sufficient magnitude to deserve attention relates to the remarks of D. W. Davies, attorney for the plaintiff, during the trial of this case. It is claimed that the remarks and conduct of Mr. Davies in his argument to the jury are without precedent and that the judge trying the case should not have allowed such conduct to go unchallenged. Among other statements made by Mr. Davies, the following language was used: "Mr. Delaney has not tried this case fair and does not want the facts to come out. At the start he commenced objecting and objected all through the case, and all through the case was asking the court to reprimand us. Mr. Delaney objected to every question we asked. That is his defense. He objected and objected and objected. It is an outrage—that kind of an examination—and ought not be tolerated in this state or any other state." Mr. Delaney then said: "Your honor, we object to such argument. We had a right to object to evidence and we ask the court to so state to the jury." The court declined, whereupon Mr. Davies, continuing, said: "Mr. Delaney is still objecting. Then we put back on the stand a man who saw them working on the gong, trying to get it to ring before he started. What does that mean? Mr. Delthrow says that they were working on it trying to get it to ring. He got down and looked under the car and was working on it, and there is the time that the other side was objecting. They did object to it and it went in and it is before the jury right now and you can't bluff anybody off the track in this case. You have tried it all the way through. You tried it from the start. At the very outset of the case, you tried it. You have tried to be unfair." Over the objection and exception of counsel for defendant, counsel for plaintiff was allowed to proceed without restraint, admonition, or reprimand.

We have made these quotations as examples of the language the trial judge allowed the attorney for plaintiff to use before the jury. It is unnecessary for us to say that such remarks and conduct are reprehensible in the highest degree, and that the court should not only have admonished the attorney to desist, but, if he continued, should have reprimanded him, and if this did not prove sufficient, should have punished him for contempt of court. One of the first duties of the judge of a trial court is to preserve order and require that the attorneys as well as other persons should, by their behavior, show a decent respect for the court and for the opposing counsel. We quote with approval in this connection the language of Judge Gantt in the case of

**Haynes v. Town of Trenton**, 108 Mo., loc. cit. 133, 18 S. W. 1003. He said: "The disposition of this court is to permit the greatest latitude in the argument of a cause to a jury. But its disposition to trust largely to the discretion of the trial courts must not be construed that we will, on that account, tolerate the clear disregard of a litigant's right to have his cause heard and tried according to the law of the land. The conduct of counsel for plaintiff in making these and similar statements cannot be excused. Counsel will not be permitted to wring verdicts from juries by statements extraneous to the record, and rely upon our disinclination to interfere."

And in this case we have to say that error was committed; but while we find that such was the case, upon a careful consideration we have concluded that outside of the objectionable remarks and conduct of counsel the verdict of the jury was for the right party, and, as we are prohibited from reversing cases unless there was error in the trial court materially affecting the merits of the case, we have decided that although the remarks were exceedingly objectionable and should have received at the hands of the trial judge the severest condemnation, yet, on that ground alone, the verdict being for the right party, we cannot reverse the judgment, and the same is accordingly affirmed. All concur.

#### PITMAN v. BALL.

(Springfield Court of Appeals. Missouri. Jan. 3, 1910. Rehearing Denied Feb. 7, 1910.)

##### 1. EVIDENCE (§ 113\*)—RELEVANCY—VALUE.

The actual value of a mining lease is not shown by evidence of what a subsequent lease on the same tract brought on a sale four or five years later.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. § 113.\*]

##### 2. APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting testimony of witnesses who appeared before the trial judge will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

##### 3. LIMITATION OF ACTIONS (§ 43\*)—ACCRUAL OF CAUSE OF ACTION.

The statute of limitations does not begin to run until the right to sue has accrued.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 217-219; Dec. Dig. § 43.\*]

##### 4. LIMITATION OF ACTIONS (§ 58\*)—LIABILITIES OF STOCKHOLDERS FOR UNPAID STOCK SUBSCRIPTIONS—ACTIONS.

Where a creditor of a corporation had no right of action against a stockholder for an unpaid stock subscription until the insolvency and dissolution of the corporation, and the creditor kept his account against the corporation alive by reducing it to judgment, an action against the stockholder for the unpaid stock subscription

brought within five years after the insolvency and dissolution of the corporation was not barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 58; Corporations, Cent. Dig. §§ 1084-1093.]

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by L. Pitman against James Ball. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action by respondent against appellant as a stockholder of the Investors' Mining Company to recover a judgment obtained on a debt due from Investors' Mining Company to respondent, alleging and claiming that appellant had subscribed for \$12,500 of the stock of said company and had not paid for same. The answer was a general denial and plea of five-year statute of limitations. In 1899 George Wright and defendant James Ball had secured mining leases covering 40 acres of land near Webb City. July 26, 1899, Wright, Ball, and three other parties formed a corporation. The articles of incorporation recited a paid-up capital stock of \$100,000, divided into 1,000 shares of \$100 each, of which defendant Ball was the owner of 125 shares, which would make his part of the capital stock \$12,500. As a matter of fact no money was paid in at the time of the formation of the corporation, but the mining leases held by Ball and Wright were the only capital of the corporation. There was an understanding that the other parties, Garner, Hammett, and Watson, were to furnish money to erect mills and pay expenses until the mines should become self-supporting, but there was no agreement as to how much they were to furnish. They did furnish means to erect a mill at a cost of \$13,000. The mines were operated for awhile, but in 1902 their property was disposed of and the corporation dissolved. During the time they were running they became indebted to various parties; among others the plaintiff. The plaintiff also purchased accounts against the corporation from various other parties, brought suit thereon, and obtained judgment November 21, 1902, against the Investors' Mining Company for \$2,188.90. Included in this judgment was an account of the Jasper County Supply Company which had been assigned to plaintiff. The itemized statement of this account shows the date of the last charge to have been June 1, 1899. Upon this account there was a credit by cash of \$2.60, dated April 9, 1900. This suit was begun by plaintiff March 25, 1905. There was a trial. The court found that defendant owed more than \$3,000 on his stock, and rendered judgment for plaintiff for \$2,845.55. Defendant has appealed.

McReynolds & Halliburton and W. J. Owen, for appellant. H. W. Currey and F. L. Forlow, for respondent.

COX, J. (after stating the facts as above). Defendant assigns as error the action of the court in excluding certain testimony; that the finding of the court is contrary to the evidence under the law, and the refusal of the court to give one instruction asked by defendant.

1. The contention of defendant is that his stock in the corporation was fully paid up; that his interest in the mining lease at the time the corporation was formed had an actual value equal to or in excess of the face of his stock, \$12,500. At the trial defendant offered to prove that in the latter part of 1903 or the early part of 1904 the parties who at that time held a lease upon the same land covered by the lease when this corporation was organized had sold his lease for \$80,000. On objection of plaintiff that the time was too remote from the time of the organization of this corporation, and that it had no tendency to show the actual value of the property at the time the corporation was organized, this offer was rejected and objection sustained. We do not think the court committed error in excluding this testimony. A sale of a lease upon the same land four or five years after the date of the formation of this corporation would in our judgment throw no light upon the question as to the actual value of the lease held by Wright and Ball in 1899.

2. It is next contended by defendant that the finding of the court is against the weight of the evidence; that the cause should be reversed for that reason. The evidence shows that Wright and Ball paid nothing for the lease which they obtained, and which formed the capital stock of the corporation at the time it was organized. It further shows that mining operations upon this tract after the organization of the corporation were not successful. The corporation became insolvent and dissolved in 1902. One witness testified that in his judgment the lease had no market value in 1899, while several other witnesses testified that it did have a value of from \$25,000 to \$40,000. The trial judge saw the witnesses, was in a better position to weigh their testimony than we are, and we defer to his finding upon that question.

3. The instruction asked by defendant which was refused by the court is as follows: "The court declares the law to be that, if the defendant when he subscribed for stock in the Investors' Mining Company subscribed for and took it as fully paid, then the statute of limitations began to run in his favor as against any claim made on him for unpaid capital stock, whether made by said corporation or a creditor of said corporation from the date defendant's subscription was delivered to the company, and, if the court believes from the evidence that defendant's subscription to the capital stock of the Investors' Mining Company was made and delivered to and received by said company as fully paid stock more than five years before

the commencement of action, then this action is barred by the statute of limitations, and the finding must be for the defendant." This instruction declares the law to be that, if parties should form a corporation alleging their capital stock to be fully paid when it is not, no creditor of the corporation could have any right of action against the stockholders after the expiration of five years from the time of the formation of the corporation. This would seem a strange doctrine indeed, and we cannot give it our sanction. Nor are we cited to any authorities which sustain this position. Appellant in his brief makes the point that the account of the Jasper County Supply Company, which was assigned to plaintiff, and which went into and formed a part of the judgment which he obtained against the corporation of which defendant was a stockholder, accrued more than five years before the commencement of the present action, and for that reason the judgment against the corporation, which he now seeks to recover from this defendant, was barred by the statute of limitations. To sustain this position we are cited to the cases of *McGinnis v. Barnes*, 23 Mo. App. 413; *McGinnis v. Kortkamp*, 24 Mo. App. 378. In those cases *McGinnis* held the obligations of a defunct corporation, and brought suits against *Barnes* and *Kortkamp* to recover his debt on the ground that they were stockholders, and had not paid their capital stock in full. The action was brought more than five years after the dissolution and insolvency of the corporation, but within five years after the maturity of the debt which he sought to collect. The court held that under the facts in those cases the right of the creditor to sue the stockholders did not accrue at the dissolution of the corporation but accrued at the maturity of his debt. Hence the statute of limitations in those cases did not begin to run until the maturity of the debt. From this the appellant argues that the maturity of the debt starts the statute of limitations to running, and hence no one could be sued upon that debt after the expiration of five years.

We do not agree with this position nor do we understand that the decisions referred to sustain it. On the other hand, our conclusion is that in this case, like all others, the statute of limitations does not begin to run until the right to maintain an action has accrued. In this case the plaintiff had no right of action against defendant as a stockholder for unpaid subscription to stock in the corporation until its insolvency and dissolution in 1902, and plaintiff having kept his account against the corporation alive by reducing it to judgment, and having begun the present action within five years after it accrued against the defendant, his action is not barred.

The judgment is affirmed.

NIXON, P. J., concurs. GRAY, J., not sitting.

**MEEKS et al. v. CLEAR JACK MINING CO.**  
(Springfield Court of Appeals. Missouri. Jan. 8, 1910. Rehearing Denied Feb. 7, 1910.)

**1. CONFUSION OF GOODS (§ 12\*)—RIGHT OF ACTION—REPLEVIN.**

Where ore belonging to one was mingled with ore mined by him with knowledge that it belonged to another, so that the same could not be separated, the latter could maintain replevin for all of it.

[Ed. Note.—For other cases, see Confusion of Goods, Dec. Dig. § 12;\* Replevin, Cent. Dig. § 15.]

**2. MOTIONS (§ 13\*)—ORAL MOTIONS—REDUCTION TO WRITING.**

Under Rev. St. 1899, § 640 (Ann. St. 1906, p. 660), providing that all motions shall be accompanied by a written specification of the reasons on which they are founded, etc., a party failing to put a motion in writing, after the request of the court so to do, may not complain of its denial.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 8; Dec. Dig. § 13.\*]

**3. PARTIES (§ 96\*)—CHANGE—OBJECTIONS—WAIVER.**

A defendant in replevin, who did not save his exceptions to the overruling of an objection to an amended petition, changing the parties plaintiffs, and who, after the overruling of the objection, filed his answer and proceeded to trial, waived the error, if any, committed by the court, which had permitted the amended petition to be filed more than two years before.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 175; Dec. Dig. § 96.\*]

**4. REPLEVIN (§ 48\*)—REDELIVERY OF PROPERTY TO DEFENDANT.**

Where, in replevin, the cause was called for a second trial on the merits after the filing of an amended petition, omitting parties named in the original petition as plaintiffs, including the one who had made the affidavit on which the bond was given and the writ issued, and adding others as plaintiffs, and the parties were ready, and the witnesses had been summoned to testify at the trial, which was to be had after a change of venue, the court properly denied the motion to postpone the trial until the property had been redelivered to defendant.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 179; Dec. Dig. § 48.\*]

**5. REPLEVIN (§ 4\*)—PROPERTY SUBJECT TO REPLEVIN—ORE.**

An owner of land from which ore has wrongfully been taken by another may replevy it.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 23; Dec. Dig. § 4.\*]

**6. DEPOSITIONS (§ 96\*)—ADMISSIBILITY—EFFECT OF AMENDMENT AS TO PARTIES.**

A deposition, taken at a time when a person is not a party to the action, cannot be used against him after he has been made a party by an amended petition, but it is admissible as against one who was a party at the time it was taken.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 278; Dec. Dig. § 96.\*]

**7. MINES AND MINERALS (§ 71\*)—OWNERSHIP OF ORE—LICENSEES.**

Where a lessee in a mining lease posted, as provided by Rev. St. 1899, § 8766 (Ann. St. 1906, p. 4068), rules stating that no interest in ore should be acquired by persons mining the same, and that all ore should remain the absolute property of the lessee, the persons mining under the lessee were licensees only, and had

no interest in the ore, or any right to the possession of the land from which the same was taken.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 198, 199; Dec. Dig. § 71.\*]

**8. REPLEVIN (§ 8\*)—TITLE AND RIGHT TO POSSESSION OF PLAINTIFF.**

Replevin can only be maintained by one having a general or special interest in the property replevied.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 45; Dec. Dig. § 8.\*]

**9. MINES AND MINERALS (§ 58\*)—LEASES—VALIDITY.**

An owner of land may confer by lease the right to remove a portion of the leased premises, or of sand or gravel found on the surface thereof, as well as to remove stone, coal, zinc, or lead found either on the surface or beneath it.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 168, 169; Dec. Dig. § 58.\*]

**10. MINES AND MINERALS (§ 62\*)—LEASES—RIGHTS ACQUIRED.**

A lease for mining purposes for a specified period, which reserves to the lessor all the uses of the land described not inconsistent with proper mining, and which provides that the lessee may erect on the land buildings and machinery necessary for the purpose of mining and preparing the ore for market, and that he shall pay as rent a royalty on the gross market price on ore mined, etc., gives to the lessee the right to the possession of the ore in the ground, and after it has been cleaned, and the landlord has no interest therein, and no right to interfere with the lessee's possession thereof.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 176; Dec. Dig. § 62.\*]

**11. EXECUTORS AND ADMINISTRATORS (§ 130\*)—POSSESSION OF REAL ESTATE BY ADMINISTRATOR—STATUTES.**

Rev. St. 1899, § 130 (Ann. St. 1906, p. 379), providing that the administrator shall not control the real estate of the deceased unless the probate court shall, on being satisfied that it is necessary to rent the same to pay the debts, make an order requiring the administrator to take possession of and rent the same, etc., provides for the administrator renting the real estate when an order of the probate court is made therefor, and when such order is made, the administrator is in full charge of the real estate, with the right to sue for and recover the same to the same extent that the decedent might have done.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 537-540; Dec. Dig. § 130.\*]

**12. EXECUTORS AND ADMINISTRATORS (§ 329\*)—LEASE OF PROPERTY—INTEREST IN MINE—STATUTES—"RENT."**

Under Rev. St. 1899, § 130 (Ann. St. 1906, p. 379), authorizing the probate court, on being satisfied that it is necessary to rent the real estate for payment of debts, to order the administrator to take possession of and rent the same, etc., the probate court may order the administrator of a decedent owning a mine to lease the same for the purpose of obtaining money with which to pay debts; for the word "rent" means a compensation for the use of lands demised, and is treated as a profit issuing out of the land, and rent may be in the form of royalty.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1350; Dec. Dig. § 329.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6087-6091.]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**13. PARTNERSHIP (§ 213\*)—PLEADING—EXISTENCE—DENIAL—VERIFICATION.**

Where the petition in replevin alleged that parties named composed a firm which was the owner of the property sued for, and there was no affidavit filed denying the existence of the firm, as alleged, and there was nothing to show that one of the persons so named had assigned his interest by proper assignment duly recorded, the objection that such person was not a proper party plaintiff could not be sustained.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 409; Dec. Dig. § 213.\*]

**14. APPEAL AND ERROR (§ 1028\*)—HARMLESS ERROR.**

The judgment for the right party, rendered in proceedings recognized by law, will not be disturbed for mistakes and errors not material to the issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4084; Dec. Dig. § 1028.\*]

Appeal from Circuit Court, Barton County; Samuel Davis, Acting Judge.

Action by J. A. Meeks and others against the Clear Jack Mining Company and another. From a judgment for plaintiffs, the named defendant appeals. Affirmed.

This case was sent from Jasper county on change of venue to Barton county in the Twenty-Sixth judicial circuit; but the bill of exceptions recites that the case was tried by Samuel Davis, judge of the Fifteenth judicial circuit, acting as judge of the Twenty-Sixth.

James J. Hitt and Halbert H. McCluer, for appellant. Thomas & Hackney, for respondents.

GRAY, J. On the 18th day of November, 1903, there was filed in the office of the clerk of the circuit court of Jasper county, Mo., a petition and affidavit in replevin, in which J. A. Meeks, M. G. Branch, administrator, M. G. Branch, Mary A. Cobb, A. L. Johnson, Thomas Morgan, Harry Tambllyn, R. E. Sanford, and Corrie Cole were named as plaintiffs, and appellant and F. O. Chesney, defendants. The affidavit was made on a separate paper, and signed and sworn to by Harry Tambllyn. A bond was given, and the writ of replevin issued, and under it the sheriff took the property from the defendants and delivered it to the plaintiffs. On the 15th day of February, 1904, the defendants applied for and obtained a change of venue, and the cause was transferred to Barton county, Mo., where it was tried. On the 12th day of September, 1904, the plaintiffs filed an amended petition in the Barton county circuit court, in which the names of Harry Tambllyn, R. E. Sanford, and Corrie Cole were omitted, and the following names added: Allen M. Cobb, Cynthia M. Page, J. A. Gaddis, and Eli C. Gaddis. On the same day the defendants filed an answer to the amended petition. On September 13, 1904, the plaintiffs filed a reply, which was a general denial. There was a trial on September 13,

1904, before a jury, in the Barton county circuit court, but the result thereof we do not know. The cause came on again for trial November 6, 1907, resulting in a judgment in favor of the plaintiffs, from which the Clear Jack Mining Company appealed.

After the jury was impaneled to try the case in 1907, the defendants objected to further proceedings until an order had been made directing the original plaintiffs, who filed the affidavit and furnished the bond, to return the property, for the reason that the amended petition omitted some of the original parties and substituted others therefor. The court, before passing upon this motion, asked counsel to put the same in writing. This was not done, and the court ordered the trial to proceed.

The evidence disclosed the fact that the appellant, Clear Jack Mining Company, was mining for lead and zinc ore on a tract of land adjoining a tract upon which the plaintiffs, or a part of them at least, had a mining lease. It was claimed by the plaintiffs that they owned the mining lease, and had a right to mine the land; that the defendants wrongfully and knowingly entered upon their tract of land, and removed the ore therefrom. The appellant claimed that if any ore did come from the land of the plaintiffs, it was not taken knowingly or intentionally, and that it mined other parts of its own land, and all ores were mixed and run together so that it was impossible to separate or distinguish the ore that came from plaintiffs' land from the appellant's land. As above stated, the tracts were adjoining, and shafts had been sunk, and mining carried on underground. The appellant had cut a drift from its land, extending east under the land on which plaintiffs claimed to have the lease.

The evidence shows that underground surveys had been made previous to the time the ore in controversy had been loosened from its natural state in the ground and hoisted to the surface and cleaned for market. These surveys were made by the county surveyor and his deputy, and at the time the appellant had a ground boss in charge of its underground working; that this ground boss knew when these surveys were made, and knew that the appellant was cutting across the line and taking ore from land in which it had no interest. The evidence shows that the president of the appellant company knew these surveys were being made, but made no inquiry of his ground boss, and took no steps to ascertain where the true lines were. The said ground boss testified that the president of the appellant company cautioned him to be careful about the employment of hands and get men who would not afterwards be employed by the respondents. The preponderance of the evidence shows that the ore in controversy was taken from this leased land of respondents. While the appellant had

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

some testimony that only about half of the ore came from this land, yet the undisputed fact is that, as soon as this suit was instituted, the appellant shut down its mine, and did not operate any more. Its action in so doing can only be explained upon the theory that, as soon as it was stopped from wrongfully taking the ore from the adjoining land, it had none to mine.

The fact that the president of the company knew that these surveys were being made, and took no steps to ascertain the line between the land of his company and the adjoining land, shows that he had every reason to believe that his company was taking something that did not belong to it. It is a well-known fact in all the mining district that disputes often arise as to the true boundary line between the different mining rights, and that the county surveyor is sent for to make his survey and establish the true line, and a mistake by even one foot in ascertaining or establishing the true line may mean a loss of quite a sum of money. So when the county surveyor came to make the surveys between the two tracts in controversy, the fact that the president of the appellant company did not take steps to ascertain and determine the true line between the parties shows that he must have known that his company was already over the line, mining where it had no right to. Under these circumstances, if some ore belonging to the appellant was mingled with the ore of plaintiffs, so that the same could not be separated, the plaintiffs had the undoubted right to maintain a replevin for all of it. *Blurton v. Hansen*, 135 Mo. App. 548, 116 S. W. 474; *Cobbey on Replevin*, § 405; *Tootle v. Buckingham*, 190 Mo. 183, 88 S. W. 619; *Wingate v. Smith*, 20 Me. 287; *Jenkins et al. v. Steanka*, 19 Wis. 126, 88 Am. Dec. 675; *Jones on Chattel Mortgages*, § 481.

It is claimed that the court committed error in proceeding with the trial before an order had been made to return the property because of the change in the parties plaintiffs. There are several reasons why the court committed no error in this respect. First, the court requested counsel to put the motion in writing, and it was not done. *White v. Railroad*, 202 Mo. 539, 101 S. W. 14; *Rev. St. 1899*, § 640 (*Ann. St. 1906*, p. 660). The court, more than two years before, had permitted the amended petition to be filed. Objections were made to it by the defendants, and they afterwards filed their answer and proceeded to the trial. Whatever error the court committed in overruling the objections to this amended petition was waived by defendants not saving and filing their bill of exceptions thereto. *White v. Railroad*, 202 Mo., loc. cit. 557, 101 S. W. 14. The parties waited for over two years after this amendment was made, and, after trial had taken place on the amended petition, and they had announced ready for another trial, and the jury was impaneled, then objected

to the court proceeding with the case until the property had been redelivered to them. The suit was commenced in Jasper county, and a trial was then about to be held in another county. The litigants were ready, and witnesses had been taken from their ordinary avocations to testify at this distant place. It seems to us that the court was justified in overruling the motion upon this ground alone. In this connection, it will not be overlooked that in making the objections counsel for appellant conceded that after the property had been returned, then the suit, as between the new parties, might proceed in the ordinary course; the possession of the property awaiting final result of the suit, unless a new affidavit and bond were given. The cause was then called for trial on the merits, and, independently of the affidavit and bond, as the petition stated a good cause of action, no objection on account of the insufficiency or failure to have a proper affidavit and bond interfered with the trial upon the petition that both parties had announced ready for. *Keim v. Vette*, 167 Mo. 389, 67 S. W. 223; *Oxley Stave Co. v. Whitson*, 34 Mo. App., loc. cit. 628.

What we have just said applies to the action of the court in permitting the amended petition to be filed. This was done in September, 1904, and an answer was filed and trial had, and no exceptions to the action of the court in permitting such amendment ever saved by bill of exceptions. And no complaint was ever made until the parties had announced ready for trial, and then the objection was not made that the amended petition could not be filed changing the parties plaintiffs, but only that further proceedings in the cause should cease until the property had been returned. If there is anything left of the law of waiver, then certainly, under the undisputed facts of this case, the appellant waived all of its rights to complain of the action of the court in permitting parties plaintiffs to be changed.

The fact that the ore at one time was a part of the real estate, and that when it was in the ground in its natural state, it was mixed with dirt and rock, and had to be loosened and carried to the surface and cleaned and prepared for market, does not deprive the owner of the land from which it was taken of the right to replevin it from the wrongful taker. *Cobbey on Replevin*, § 354; *Baker v. Campbell*, 32 Mo. App. 529; *Johnson v. Elwood*, 53 N. Y. 431; *Blurton v. Hansen*, 135 Mo. App. 548, 116 S. W. 474.

The action of the court in permitting certain depositions to be read is assigned as error. The amended petition as above stated, was filed on September 12th, and the depositions were taken on the same day and filed on the 13th. The testimony does not show whether they were taken before or after the petition had been amended adding new parties. The first trial was on September 13th, and the depositions were taken and

used in that trial without objection. It is true that depositions, taken at a time when a person is not a party to the suit, cannot be used against that person after he has been made a party. In this case nothing of the kind was admitted. There is nothing to show that the depositions were taken before the amended petition was filed, and in any event the person now raising the objection was a party to the suit at the time the depositions were taken, and as to such party, the depositions were admissible. *Hendricks v. Calloway*, 211 Mo. 538, 111 S. W. 60.

It is urged that the evidence shows that the Bailey Mining Company had permitted other persons to mine on the tract of land from which respondents claim appellant took the ore, and that such persons were interested in the possession of the ore; and, as they were not made parties to this suit, the plaintiffs have not shown themselves to be the absolute owners of the property, and therefore not entitled to maintain replevin. The Bailey Mining Company, after it acquired the lease from the owner of the fee, posted rules and regulations, as provided in section 8768, Rev. St. (Ann. St. 1906, p. 4068), stating the terms upon which persons would be permitted to mine upon the company's property. These rules and regulations were offered in evidence, and among them we find the following: "No right, title or interest in or to any land, ores or minerals, shall be acquired or owned by persons so mining, and it is hereby expressly stipulated that all ores or minerals, whether the same remain in the ground or be severed or removed therefrom are and shall remain, in any event, the absolute property of said company, and the money paid to miners is not, and shall not, in any event, be considered as price paid for minerals or ores, but is, and in every event shall be, only compensation for labor and services rendered by the said miners in working said mining lease." Under the law and these rules the persons mining under the Bailey Mining Company were licensees only, and had no interest in the ore, or any right to the possession of the land from which the same was taken. *Chynowitch v. Granby Mining & Smelting Co.*, 74 Mo. 173; *Lytle v. James*, 98 Mo. App. 337, 73 S. W. 287; *Rochester v. Gates City Mining Co.*, 86 Mo. App. 447; *Lowe v. Amer. Zinc Co.*, 89 Mo. App. 680. It will be noticed that the rule above quoted provided "that all ores or minerals, whether the same remained in the ground or be severed or removed therefrom, are and shall remain in every event the absolute property of said company." The statute authorizes a rule of this kind, and it becomes the contract between the parties. The parties mining under these rules having agreed that the ore in the ground, as well as that severed, remained the absolute property of the Bailey Mining Company, they have no right to the

property such as to maintain replevin therefor.

It is next claimed that the court should have sustained the demurrer to the evidence, for the reason that the plaintiffs' claim to the ore is derived through the mining lease offered in evidence, and that this mining lease does not pretend to convey any specific quantity, nor does it convey any ore only such as may be found in the mines, and the plaintiffs, never having mined the ore in question, or any portion thereof, had no title thereto, and were not entitled to the possession thereof. This is an important point in the case. If, under the terms of the lease, the Bailey Mining Company had no interest in the ore, then that company, or the members thereof, cannot maintain an action of replevin, as this action can only be maintained by a person having a general or special interest in the property replevied. *Gartalde v. Nixon*, 43 Mo. 138. The said mining lease contained the following provisions: "That the party of the first part in consideration of the sum of one dollar to him in hand paid, and of the performance by second parties of the terms and conditions hereof, does by these presents demise and lease unto said second parties their heirs, personal representatives and assigns, the following described land in Jasper county, Missouri, to wit: The south half of the southeast quarter of the northwest quarter of section eight (8), and also the east half of the southwest quarter of the northwest quarter of section eight (8), in township twenty-nine (29), of range thirty-two (32). \* \* \* This lease is for mining purposes only, and all uses of said land not inconsistent with thorough and proper mining thereof as herein required are hereby reserved to the party of the first part. Said party shall at all times have the right to go upon said land and into all shafts and drifts therein, to see that the terms of this lease are complied with. Second parties shall have the right to erect and place on said lands all buildings and machinery necessary or proper for the purpose of mining and draining said land and preparing the ores for market thereon, and to remove same at the expiration of this lease, except timbers and other things necessary to support the ground and prevent same from caving or falling in. Second parties shall pay as rent or royalty 7 per cent. of the gross market price of all ores, minerals and other valuable substances mined from said land, said royalty to be due and payable whenever any ores or minerals or other valuable substances are sold. Subject to the full performance in good faith, of all the terms and conditions hereof this lease shall be and remain in force for the term of twenty years from this date. Any failure by second parties, their heirs, personal representatives or assigns, in good faith to carry out and perform any of the terms and conditions hereof, shall end and determine this

lease and the first party may so declare and re-enter upon said premises and take and hold complete possession thereof." The lease was properly acknowledged and filed for record in the office of the recorder of deeds for Jasper county, Mo. It will be noticed at once that the lease is not only made to the second parties, but to their heirs, personal representatives, and assigns, and that it is not a sale of the ore, but an absolute lease of the real estate for the term of 20 years. The lease contemplates that the lessees shall mine the ore and sell it, and out of the proceeds pay the royalty or rent of 7 per cent.

In *Kirk v. Mattier*, 140 Mo. 23, 41 S. W. 252, in an opinion by Judge Gantt, the court held that: "An instrument that demised and leased a certain tract of ground for mining purposes only, for a period of 10 years, and gave to the second party the right to possession and to erect gates and other necessary buildings thereon, is held to be a lease, and not a license"—and the court held the grant to dig and mine the zinc and lead ore on the land for the period specified therein was a lease of the land, so denominated and so understood, and that it was such an interest in the real estate that in a proper case ejectment would lie for the land, and the estate acquired thereby. In that case, as here, it was urged that the instrument was a mere mining license, and to that claim the court said: "We cannot agree to such a view. By every test known to the law this instrument is a lease." The St. Louis Court of Appeals, in *Hobart v. Murray*, 54 Mo. App. 249, while holding that such an instrument was not a lease because it had no determining period, yet it was held to be more than a license to mine, and that case is an authority supporting respondents' view of this point. In *Austin v. Mining Co.*, 72 Mo. 535, 37 Am. Rep. 446, our Supreme Court declares the rule to be that such an instrument, while it is not an absolute grant of the ore in the land, yet when the lessee has entered, the estate becomes vested in him, and he is then possessed, not of property in the land itself, but of the term for years. In *Lacey v. Newcomb*, 95 Iowa, 287, 63 N. W. 704, the Supreme Court of Iowa declared that an agreement, whereby a party had the exclusive right to mine coal under certain land for 20 years, and to use in connection with the mine five acres of the surface of the land to erect buildings thereon, and to build and operate railroads and flow water thereover, for a certain royalty per ton of coal mined, payable as rent for all the privileges granted, created the relation of landlord and tenant. It is said in *Heywood v. Fulmer*, 158 Ind. 658, 32 N. E. 574, 18 L. R. A. 491: "A lease may not only confer upon the lessee the right to the occupancy of the leased premises, either generally for the time limited, or for some specific purpose, or in some specific manner, or the right to occupy and

cultivate and to remove the products of cultivation, but it may confer upon him the power to occupy and remove a portion of that which constitutes the land itself. Familiar and common examples of such leases are those authorizing the lessee to quarry and remove stone, to open mines and remove ores, minerals, or to sink wells for procuring petroleum and natural gas. The power to execute leases for such purposes, and the fact that the instrument by which such interest in land is granted may be in all essential particulars a lease will not be questioned." Manifestly there can be no valid reason why a lease may not confer upon the lessee the right to remove a portion of the soil or of sand and gravel found upon the surface of the land leased, as well as to remove stone, coal, zinc, and lead found either upon the surface or beneath it.

By reading the instrument it will be noticed that it confers present rights; it is assignable; it is for a fixed period; it provides for a regular rental, and the right to mine is exclusive in the lessees for the period fixed in the lease; the rent or royalty is, by express terms, payable at certain times, and we are satisfied that under the provisions of this instrument, and during the 20-year period named therein, no one but the lessees and their assigns had any right to mine said premises or any part thereof. These things being true, it must be conceded that the lessees had the right to the possession of the ore in the ground, and after it had been cleaned, and that the landlord had no interest therein, and had no right to interfere with the tenant's possession thereof. *Lacy v. Weaver*, 49 Ind. 373, 19 Am. Rep. 683; *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312; *Daniels v. Brown*, 34 N. H. 454, 69 Am. Dec. 505; *Cobbey on Replevin*, § 28; *Coan v. Mole*, 39 Mich. 454. Where, by the terms of the lease, the tenant is to thresh the wheat crop and to deliver to the landlord a certain share in the bushel, the tenant has the right to possession of the wheat, and may maintain replevin therefor, even against the landlord. *Cunningham v. Baker*, 84 Ind. 597; *Cobbey on Replevin*, § 36.

Appellant has called our attention to *Boone v. Stover*, 66 Mo. 435; *Rochester v. Gate City Mining Co.*, 86 Mo. App. 447; *Chitwood v. Lanyon*, 93 Mo. App. 225; *Arnold v. Bennett*, 92 Mo. App. 156. The three cases above cited from the Courts of Appeals are all cases where the parties were mining under rules and regulations, and, as we have said, the relation of landlord and tenant did not exist therein, but the parties mining were simply licensees. In *Boone v. Stover*, above cited, the court held the parties licensees because the contract under which they mined required them to deliver weekly all mineral raised on the land to the party under whom they were mining. They were not authorized to sell or dispose of the ore, but simply to mine and turn it over. The other case relied on by ap-

pellant is *Austin v. Huntsville Coal Co.*, 72 Mo. 535, 37 Am. Rep. 446, and by a reading of that case it will be seen that it is not an authority for the appellant, but is clearly against it.

From a careful reading of the authorities above cited, and others, we are of the opinion that the instrument is a lease, and that by its terms the relation of landlord and tenant was created. The lease was dated July 7, 1898, and therefore there was an unexpired term of 15 years when the alleged wrong was committed. The mining by the appellant had shown that valuable ore was along the west line of respondents' property, and there can be no doubt but what, within the term of the lease, the respondents, or their assigns or leasees, would have removed the ore. These things all being considered, we are of the opinion that the right to maintain the action of replevin for the ore was in the leasees at the time this suit was instituted.

Another assignment of error is that the administrator of R. H. Branch was not an owner of the property, or had any interest therein; that upon the death of R. H. Branch his interest vested in his heirs, and not in the administrator. There was introduced in evidence an order of the probate court of Jasper county, made in 1901, directing the administrator to take possession of the real estate and rent it. Section 130, Rev. St. 1899 (Ann. St. 1906, p. 379), provides that: "No administrator shall rent or control real estate of the deceased, unless the probate court shall be satisfied that it is necessary to rent said estate for the payment of debts, and make an order of record, requiring such administrator to take possession of and rent the same, and upon such order, the administrator may prosecute and maintain any action for the recovery of such real estate in the same manner and with like effect as the intestate might have done in his lifetime." This section of the statute not only provides for the administrator renting the property, but seems to place him, when the order is made, in full charge thereof, with the right to maintain any action for the recovery of the same that the intestate might have maintained in his lifetime. This is the construction placed upon the statute by the Supreme Court. *Hall v. Bank*, 145 Mo. 418, 46 S. W. 1000. The petition alleged in this case that the administrator and the other parties named composed a copartnership known as the Bailey Mining Company, and that this company was the owner of this ore. There was no affidavit filed denying the existence of the copartnership, as alleged. The appellant has argued in his printed brief, and at the oral hearing of the case in this court, that the statute in regard to administrators renting the real estate should only be construed to mean farm rentals, or rentals for business and residence purposes, and not to include the right to lease for mining purposes. The Supreme Court of Iowa, in *Lacey v. Newcomb*, above

cited, in construing the word "rent," says: "Now our statute allows the landlord a lien for 'rent.' Rent has been defined to be a 'certain profit issuing yearly out of lands and tenements.' Rent is a compensation for the use of lands demised, and is treated as a profit issuing out of the land and tenements. 2 Woods, Landl. & Ten. § 445. 'A royalty payable upon the stone or ore taken from the land, or upon brick made from the earth thereon, is held to be a rent that may be distrained for, although the soil is gradually exhausted, and the royalty is not paid out of the renewing produce of the land.' 2 Woods, Landl. & Ten. 445. 'Rent may be in the form of royalty.' We have held rent to be a 'certain profit, either in money, provision, chattels, or labor issuing out of lands and tenements, in retribution or return for their use.' *Merritt v. Fisher*, 19 Iowa, 357." In *Raynolds v. Hanna* (C. C.) 55 Fed. 799, it was held that no technical form of words was necessary to create a lease, and that it was not material that the rent to be paid on the lease was called "royalty," which was, perhaps, the more appropriate word where rental was based upon the quantity of coal or other mineral to be taken from the mine. It has also been held that an agreement between the owner of the stone quarry and another person that the latter should work the quarry and sell the stone and pay a part of the proceeds to the owner creates the relation of landlord and tenant. The authorities are well collected in *Lacey v. Newcomb*, and the reasoning of that case is sound, and there is no reason for holding that, if a man dies owning a sand bank, stone quarry, coal or zinc mine, our statute does not authorize the probate court to order the administrator to lease the same for the purpose of obtaining money with which to pay the debts. The renting of the same for a year or two might provide sufficient money with which to pay all the debts, and thereby preserve the fee for the heirs or legatees.

Finally the appellant asserts that J. A. Gaddis was not a proper party plaintiff, as the evidence shows he had no interest in the property. In addition to the fact that it was alleged in the petition that he was a member of the copartnership known as the Bailey Mining Company, and the answer did not deny the same as required by the statute, it cannot be said from the evidence that he had no interest. There were assignments of certain interests in the lease, and one of those was an assignment of an undivided one-eighth interest to J. A. and Eli C. Gaddis. This assignment was filed for record in the office of the recorder of deeds of Jasper county, Mo., on the 7th day of October, 1898, and at the time the suit was commenced, the record interest of said J. A. Gaddis still stood just as it did when this assignment was filed for record. It is true the testimony showed that he had made some arrangements with others of the plaintiffs to collect his royalty and look

after his interest, but there was no assignment of record, or otherwise offered in evidence, showing that he had transferred the interest he acquired in the lease by proper assignment duly recorded. And when respondents were trying to show the terms of this arrangement, appellant's counsel objected because it was shown to be in writing, and parol testimony was not proper, and the court sustained the objection.

As said in the former part of this opinion, the merits of the controversy are with the plaintiffs. The appellant mined where it had no right to, and at this time makes no serious claim to the ore, but simply contends that the plaintiffs ought not to recover because of certain technical objections to their title and their method of procedure. When the equities of a cause are with a certain party, it should be the duty of the court to try to decide the cause in favor of the party thus really entitled to the victory. Of course this means that persons must pursue the lines of procedure authorized and recognized by law in securing their just demands, and to ignore these methods that experience has shown to be wise and necessary provisions, mistakes and errors will be made, but after a careful examination of all the objections made by the appellant, we are satisfied that no errors material to the issue were committed by the trial court; and, the judgment being for the right party, we will not disturb it.

It is therefore ordered that the judgment of the trial court be affirmed. All concur.

#### WILLS et al. v. FORESTER et al.

(Springfield Court of Appeals. Missouri. Jan. 10, 1910. On Motion to Modify Judgment, Feb. 7, 1910.)

##### 1. GOOD WILL (§ 5\*)—SALE—CONSIDERATION

A contract for the sale by a retail lumber dealer of his stock of lumber and his good will, which recites that, in further consideration of the purchase, he agrees to refrain from engaging in the retail lumber business within a specified territory and for a specified time, shows a consideration sufficient to support his agreement not to engage in such business.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. § 2; Dec. Dig. § 5.\*]

##### 2. INJUNCTION (§ 61\*)—RESTRAINING BREACH OF CONTRACT—CONDITIONS IN CONTRACT FOR SALE OF GOOD WILL.

Where a party agrees for a consideration not to engage in a given business for a certain time in a given territory, a violation entitles the party injured to injunctive relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 121-123; Dec. Dig. § 61.\*]

##### 3. INJUNCTION (§ 59\*)—RESTRAINING BREACH OF CONTRACT—STIPULATION FOR DAMAGES—INTENTION OF PARTIES.

Whether a contract stipulating that, in case of any violation of the agreement, the party so violating it acknowledges his indebtedness to the other in a specified sum, limits the remedy of the party injured to an action at law, or whether he is entitled to injunctive relief, depends on the

intention of the parties deducible from the contract and the surrounding circumstances.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 128; Dec. Dig. § 59.\*]

##### 4. DAMAGES (§ 78\*)—CONTRACTS—LIQUIDATED DAMAGES.

Where a contract not to engage in a rival business in a particular locality within a specified time provides for the payment of a stipulated sum on a breach, the amount is regarded as liquidated damages and not as a penalty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 160; Dec. Dig. § 78.\*]

##### 5. INJUNCTION (§ 59\*)—RESTRAINING BREACH OF CONTRACT—LIQUIDATED DAMAGES.

A contract by a retail lumber dealer for the sale of a stock of lumber, together with his good will, which stipulates that the seller will not engage in the lumber business within specified territory within a specified time, and that in case of any violation of the agreement by him, he acknowledges himself indebted to the buyer in a specified sum, makes the specified sum liquidated damages, but does not give the seller the option of paying the liquidated damages to re-enter the business, but the buyer is entitled to injunctive relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 128; Dec. Dig. § 59.\*]

##### 6. INJUNCTION (§ 59\*)—RESTRAINING BREACH OF CONTRACT—STIPULATION FOR LIQUIDATED DAMAGES.

Where liquidated damages were provided for in case of a breach of contract, and it appears that the intention was to give the party the alternative to perform or pay, the breach will not be enjoined; but where the contract is absolute, and cannot be construed as meaning that the party shall have the right to do the prohibited acts or pay the sum named, an injunction lies to restrain it whether the sum to be paid is regarded as liquidated damages or not.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 128; Dec. Dig. § 59.\*]

##### 7. INJUNCTION (§ 61\*)—RESTRAINING BREACH OF CONTRACT—ENGAGING IN COMPETING BUSINESS.

A retail lumber dealer sold his stock of lumber and good will, and agreed not to engage in the lumber business within a specified time and locality, and violated the agreement by re-entering the business. The evidence showed that there was not any possible way whereby the buyer could determine his loss arising from the seller re-entering the business. *Held*, that equity could alone afford adequate relief to the buyer, and he was entitled to an injunction restraining the seller from engaging in such business.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 121-123; Dec. Dig. § 61.\*]

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

Action by J. W. Wills, Sr., and another, partners under the firm name of Wills Lumber Company, against J. J. Forester and another, partners under the firm name of Forester & Powell Lumber Company. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

This was an action for an injunction to restrain the respondents from operating and conducting a lumber yard in the city of St. James, Phelps county, Mo., in violation of a written agreement executed by the parties

appellant and respondent on the 28th day of May, 1906, in which respondents bound themselves "to refrain from engaging in the general retail lumber business in the city of St. James, Missouri, for a period of fifteen years from the date of this contract."

The evidence and admissions of respondents establish the fact that after having entered into said contract, whereby they sold and delivered their business to appellants, they opened and began to operate a lumber yard in St. James contrary to the terms of said agreement, as competitors of appellants, and advertised the fact in a newspaper published in said city, and were engaged in such competitive lumber business at the time of and prior to the commencement of this suit. Among other defenses, it was claimed "that the contract was in restraint of trade," which clause in the answer was on motion stricken out by the trial court. The pleadings presented the issue, and the findings of the trial court were presumably based upon a statement in the contract stipulating that in case of "any violation of the agreement by the parties of the first part (respondents) they hereby acknowledge themselves indebted to the said parties of the second part, either collectively or singly, in the sum of one thousand dollars."

The judgment of the trial court was for the respondents, dismissing the bill and giving judgment for costs with an order of execution. The evidence necessary to a better understanding of the case is set out in the opinion.

Jones Bros. and C. H. Shubert, for appellants. Watson & Holmes, for respondents.

NIXON, P. J. (after stating the facts as above). The evidence in this case clearly shows that the reason appellants purchased the Forester & Powell lumber business was "that the trade that came to St. James was not sufficient to support two lumber yards upon a reasonable basis." It is also shown that the \$1,000 mentioned in the contract to be paid in case of breach had never been paid by respondents to appellants at the time of the institution of this suit. Upon the sale being completed, the respondents delivered their business to appellants in accordance with their contract. Appellants took possession about the 28th day of May, 1906, and continued to operate the business up to the time of and after the institution of this suit in August, 1908. It appears that some time about the 1st of July, 1908, the respondents opened a lumber yard in the city of St. James in their own name and went into business again. They kept for sale about the same class of goods and stock usually kept in a general retail lumber business and the same class of goods that they sold to appellants. They continued in the business from the 1st of July, 1908, until after the institution of this suit and are still engaged in said business.

1. The consideration named in the contract was sufficient to support the agreement of the respondents not to engage in the general retail lumber business at St. James for a period of 15 years, and was legal and binding and not against public policy. *Angelica Jacket Co. v. Angelica*, 121 Mo. App. 226, 98 S. W. 805; *Gill v. Ferris*, 82 Mo. 156; *Vandiver v. Robertson & Son*, 125 Mo. App. 307, 102 S. W. 659.

2. Under the decisions of the courts of this state, where parties agree for a consideration not to engage in a given business for a certain time in a given locality, like the contract in this case, a violation entitles the parties injured to injunctive relief by equity. This has been long and uniformly held to be the law in this state and an injunction is the proper remedy to restrain the violation of such a contract. *Angelica Jacket Co. v. Angelica*, supra; *Gill v. Ferris*, supra; *Gordon v. Mansfield*, 84 Mo. App. 387.

3. The respondents have pleaded a clause in their contract which recites that the damages for its violation are stipulated, and respondents contend that therefore the jurisdiction of a court of equity to grant injunctive relief is ousted by the very terms of the contract itself. This is the principal question for consideration in this case. For the purpose of bringing into review and under inspection the most prominent provisions of the contract, they may be sectionalized, so as to bring out in stronger light the controlling question to be discussed and decided in this case.

(1) The property purchased by the appellants is specifically described in the contract as follows: "The said parties of the second part have this day purchased of the parties of the first part their entire stock of lumber, consisting of doors, windows, moulding, paints, oils, shingles, lath, lumber, both rough and dressed, lime, cement, etc., together with their influence and good will." It is to be noted that by the terms of this contract, the appellants purchased not only the tangible merchandise in the stock of lumber, but also the intangible property—the respondents' influence and good will in the business—a material asset, and deemed of such value to the business as to be inserted in the contract of sale and transferred with the stock of lumber.

(2) Another clause of the contract is as follows: "In further consideration of the above purchase, the said parties of the first part agree to refrain from engaging in the general retail lumber business in the city of St. James, Phelps county, Missouri, for a period of fifteen years from the date of this contract, either directly or indirectly, by person, corporation, individual or clerk." No language could be used that would more clearly embody the intention of the parties to the contract. It was unmistakably the intention to prevent the respondents from engaging in the general retail lumber business

in the city of St. James for a period of 15 years, so plainly expressed as not to admit of two constructions. The contract is unequivocal, unconditional, and absolute in its terms. Yet, in violation of the prohibitions of this contract, the respondents soon after turning over the business and after having received a full consideration for the lumber and merchandise and also for their influence and good will, commenced to assist in operating the lumber yard of J. M. Clark & Son in the city of St. James, and in July, 1908, set up for themselves a general retail lumber business in the same town. J. W. Steen stated as a witness that he was the publisher of the St. James Journal, a newspaper published in St. James. "I know J. J. Forester and W. H. Powell; they are in the retail lumber business. Mr. Forester authorized me to put an advertisement in my paper of July 17, 1908, and similar notices have been carried in my paper nearly every week down to the present time." Appellants then introduced the St. James Journal of July 17, 1908, in which appeared the following advertisement: "Forester & Powell Lumber Co. We have bought the lumber stock of J. M. Clark & Son. Have ordered and in transit eight cars of lumber and all kinds of building material. We bought on the lowest market that has existed for several years. Our prices are lower than those of any competitor in the county. The grades of our lumber are the very best. Come and get prices." J. J. Forester, one of the respondents, testified: "Mr. Powell opened up our lumber yard as stated in the complaint some time in July, 1908, and I assisted in operating the lumber yard of J. M. Clark & Son after the contract now in suit was made. Mr. Powell and I are still running the lumber yard at St. James and it is our intention to continue to run it."

(3) The respondents in their answer set up the only substantial defense offered in this case—a clause in the contract which provides that for "any violation of the above agreement by said parties of the first part, they hereby acknowledge themselves to be indebted to said parties of the second part, either collectively or singly, in the sum of one thousand dollars, to be paid on demand or collected as any other civil case by suit as upon an open account." The effect of this provision of the contract is the storm center of the controversy in this suit, and it is the only feature of the case upon which the trial court could have entered a judgment for the respondents. The question presented is: What effect does the contract for stipulated damages have to oust the equitable jurisdiction to enjoin a breach by the respondents? The argument of the respondents is stated in their brief as follows: "If the provisions in this contract for the sum therein stipulated upon breach of said contract was intended by the parties as stipulated damages, then appellants are remitted to their action at law to recover their dam-

ages and equity will not aid them by way of injunction." The question thus presented is of first impression so far as the appellate courts of this state are concerned, but it has been a vexed question, much labored, in other jurisdictions, and there are some conflicts in courts of last resort that are irreconcilable. The question at the bottom of this inquiry is to ascertain what was the intention of the parties appellant and respondent, deducible from the four corners of the contract and the surrounding circumstances at the time it was entered into. As we have seen, the language of the contract is that for any violation of the agreement by the respondents, they bound themselves in the sum of \$1,000 "to be collected by suit," etc. Such provision of the contract for the payment of this sum of money upon a breach of the contract was evidently intended by the parties as stipulated damages, and it is so claimed by respondents in their brief. Tested by the rules stated by the text-writers and the authorities, the sum named in this contract is unquestionably liquidated damages. "Where a contract is not to engage in a rival business in a particular locality, or engage in trade or practice a profession within designated limits, and a provision is made for the payment of a stipulated sum on a breach, the general tendency of the cases is to treat such amount as liquidated damages and not as a penalty." 19 Am. & Eng. Ency. Law, 420. "The fact that a contract is for the performance of a single act or condition is regarded by the courts as favoring the construction that a stipulated sum to be paid on nonperformance is to be regarded as liquidated damages rather than as a penalty." 19 Am. & Eng. Ency. Law, 405.

In the case of *Jaquith v. Hudson*, 5 Mich. 123, it is said: "When A. and B. entered into an agreement, in and by which it was provided 'that said A. agrees to sell, and by these presents does sell and convey, unto the said B., his heirs and assigns, all his right, title, and interest in the stock of goods now owned by the firm of A. and B., together with all the notes, etc.; and that the partnership that has existed between A. and B. is hereby dissolved; and that the said A., by these presents, agrees that he will not engage in the mercantile business in T. for himself, or for or in connection with any other one, for the space of three years from this date, upon the forfeiture of one thousand dollars, to be collected by said B. as his damages.' Held, that this forfeiture relates only to the agreement not to engage in business, and that the sum mentioned as stipulated and ascertained damages, is to be recovered on a breach of that agreement, and is not a penalty." Also, in *May v. Crawford*, 150 Mo. 504, 51 S. W. 693, our Supreme Court, in determining whether a provision in a contract for the payment of money upon a breach of the contract was a penalty or liquidated damages, after reviewing at length the authorities bearing upon

the question, said: "The sum of the whole matter is that where the contract is one touching a legal subject-matter, the parties sui juris and the damages for a breach can be computed with certainty by definite rules, the courts will construe it to be a penalty; but where from the nature of the contract the damages cannot be calculated with any degree of certainty, or any attempt to get the actual damage would be difficult, if not vain, or where 'the exact damage is not susceptible of definite ascertainment' or where the acts to be done or omitted 'are not measurable by any exact pecuniary standard,' and the intention of the parties 'is plain and palpable,' and the amount stipulated in the contract as the damages to be recovered is not 'disproportionate to the probable damages,' the courts will construe it to be liquidated damages."

Tested by these rules and the principles announced by the text-writers, the sum named in the contract in question is undoubtedly liquidated damages and not a penalty. The language of the contract is not ambiguous as to the intention of the parties to make the \$1,000 liquidated damages, and the circumstances under which it was made are not disputed; these are the controlling features in settling its interpretation. *Wilkinson v. Colley*, 184 Pa. 35, 30 Atl. 286, 28 L. R. A. 114. But it does not follow because the provision in this contract is for liquidated damages and the parties have agreed upon a fixed sum in case of breach, that the jurisdiction of a court of equity is necessarily ousted. While there are some courts of last resort that hold this view, they are opposed to the general weight of authority. *Wilkinson v. Colley*, supra; *Harris v. Theus*, 149 Ala. 133, 43 South. 131, 10 L. R. A. (N. S.) 204, 123 Am. St. Rep. 17; *Ropes v. Upton*, 125 Mass. 258; *Diamond Match Co. v. Roeber*, 108 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; *Zimmerman v. Gerzog*, 13 App. Div. 210, 43 N. Y. Supp. 339; *Reynolds v. Dreyer*, 12 Misc. Rep. 368, 33 N. Y. Supp. 649; *McCurry v. Gibson*, 108 Ala. 451, 18 South. 806, 54 Am. St. Rep. 177; *Heinz v. Roberts*, 135 Iowa, 748, 110 N. W. 1034; *Saintier v. Ferguson*, 1 Macn. & G. 286; *Howard v. Woodward*, 10 Jur. N. S. 1123; *Bird v. Lake*, 1 Hem. & M. 111; *Up River Ice Co. v. Denler*, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; 22 Cyc. 869, 870.

Thus, reason and authority show that contracts with a stipulation like that in the present case which provide for a remedy at law, do not oust equity of its jurisdiction. The remedy at law for damages and the remedy in equity for specific performance are not exclusive of each other, but are cumulative. The determining criteria as to the ouster of equity jurisdiction comes, in its last analysis, to the intention of the parties to be gathered from the agreement itself in each particular case. As was said in the case of *Diamond Match Co. v. Roeber*, supra:

"It is, of course, competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default; and that this should be the exclusive remedy. The intention in that case would be manifest that the payment of the penalty should be the price of nonperformance, and to be accepted by the covenantee in lieu of performance. *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400, 405." See, also, *Ropes v. Upton* and *Zimmerman v. Gerzog*, supra. The fact that the damages are liquidated does not of itself change the rule. It is a question of the real intention of the parties to be deduced from the whole instrument and the surrounding circumstances, and if it appear from these that the performance of the contract was intended, and not merely the payment of damages in case of its breach, the agreement will then be enforced by specific performance. In *Long v. Bowring*, 33 Beav. 585, which was an action in equity for the specific performance of a covenant, there being also in that agreement a clause for liquidated damages, the court said: "All that is settled by this clause is that if they (the injured parties) bring an action for damages the amount to be recovered is (the liquidated damages of) one thousand pounds, neither more nor less."

The agreement in the case at bar was that the parties of the first part (respondents) bound themselves in case of "any violation of this contract" to pay \$1,000. This provision does not give the respondents the right at their option, on payment of the liquidated damages of \$1,000, to re-enter the general retail lumber business. It is not an alternative provision giving the respondents the right, upon payment of the \$1,000, to avoid the provision of their contract that they will not re-enter the business, and it cannot be construed to mean that the respondents are given the right to do the acts prohibited; but the sum named is merely as a security for the performance and observance of the terms of the agreement to refrain from engaging in the general retail lumber business at St. James. In the language of the parties themselves, the sum named is for a violation of the contract, and had it been the intention to give the respondents the right to pay the \$1,000 as the equivalent for re-entering the business, it would then not have been a violation of the contract, but a part of it. From the language of the instrument, as well as the acts, understanding, and surroundings of the parties, we conclude that the contract cannot be construed as meaning that the respondents should have the right to re-enter the general retail lumber business at St. James upon the payment of the \$1,000.

Upon a review of all the authorities, the rule in this class of cases most in harmony with justice and the prevailing current of decisions of courts of last resort is well stated in the following language: "If liquidated damages are provided for in case of a breach,

and it appears that the intention was to give the party the alternative to perform or pay, the breach will not be enjoined. Where the contract is an absolute one, and cannot be construed as meaning that defendant shall have the right to do the prohibited acts on paying the sum named, an injunction will be granted to restrain him, whether or not the sum to be paid be regarded as liquidated damages." 22 Cyc. of Law and Procedure, 870.

The appellants testified without objection at the trial that the opening up of the lumber business by respondents had very seriously affected their business; that it had cut their trade in two; and that it would be very difficult to estimate the exact damage they had suffered thereby. It appears that respondents at first operated the lumber business of J. M. Clark & Son at St. James, but afterwards purchased the same. C. W. Clark, a witness for appellants stated: "But to what extent the business of appellants was injured would be hard to say. I think I could calculate somewhere near it; something like one-half I presume would be a rough estimate. The sales would average about two thousand or twenty-five hundred dollars a month while they were in business and you might naturally suppose with them out of the business it would be nearly double that amount." J. W. Wills testified: "I don't think there could be any possible means whereby we could figure our loss arising from the opposition caused by the defendants conducting a rival business. It would be impossible to figure the trade we might receive in six or twelve months from now or to figure on the prevailing price of the market now and twelve months hence, and from the fact that rises in the market make variations, therefore it looks that it would be impossible to figure out what the actual damage would be."

The evidence conclusively shows that respondents have been guilty of a flagrant violation of their agreement under circumstances that greatly aggravate their offense. We believe under the evidence in this case and the nature of the contract entered into between the parties that equity alone can afford adequate relief to appellants for the persistent violation by respondents of their agreement and consequent damage to the appellants' business during the 15 years they were to refrain from the business, and that therefore equity should enforce the performance of respondents' agreement by injunction. It is therefore ordered that the decree of the court below finding the issues for the respondents be reversed, and that appellants' bill be reinstated. It is further ordered that an injunction be issued in said case restraining respondents, directly or indirectly, by person, corporation, individual, or clerk from engaging in or continuing in

the general retail lumber business in the city of St. James, Phelps county, Mo., for a period of 15 years commencing on the 28th day of May, 1906, and ending on the 28th day of May, 1921, and that the appellants recover all costs of suit. All concur.

#### On Motion to Modify Judgment.

**PER CURIAM.** The respondents having presented to this court their motion to modify the judgment herein, and it appearing that the contract between the parties provided that the respondents should not engage in the general retail lumber business in the city of St. James, Phelps county, Mo., for a period of 15 years commencing on the 28th day of May, 1906, and ending on the 28th day of May, 1921, or until the appellants shall cease to conduct a general retail lumber business at St. James, Phelps county, Mo., it is therefore ordered that the judgment heretofore rendered be amended so as to read as follows: It is therefore ordered that the decree of the court below finding the issues for the respondents be reversed, and that appellants' bill be reinstated. It is further ordered that an injunction be issued by the circuit court of Phelps county, in said case restraining respondents, directly or indirectly, by person, corporation, individual, or clerk from engaging in or continuing in the general retail lumber business in the city of St. James, Phelps county, Mo., for a period of 15 years commencing on the 28th day of May, 1906, and ending on the 28th day of May, 1921, or until the appellants shall cease to conduct a general retail lumber business at St. James, Phelps county, Mo., and that the appellants recover all costs of suit. All concur.

#### HUTTIG-McDERMID PEARL BUTTON CO. et al. v. SPRINGFIELD SHIRT CO. et al.

(Springfield Court of Appeals. Missouri. Jan. 10, 1910. Rehearing Denied Feb. 7, 1910.)

#### 1. REPLEVIN (§ 126\*)—BOND—SUMMARY JUDGMENT.

Rev. St. 1890, c. 56, § 4474 (Ann. St. 1906, p. 2453), authorizing summary judgment without process or notice against plaintiff in replevin and his sureties, refers to and is conditioned on the statutory bond having been taken and delivered to and approved by the sheriff, as provided by section 4465.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 126.\*]

#### 2. EVIDENCE (§ 54\*)—BOND—APPROVAL BY SHERIFF—PRESUMPTION.

From the fact that a sheriff seized goods in a replevin suit, it cannot be presumed that he approved the bond, as is necessary under Rev. St. 1890, c. 56, § 4465 (Ann. St. 1906, p. 2450), to make it the statutory bond; the bond being in fact indorsed as approved by the clerk of court, presumptions having no place in the presence of actual facts, and it being necessary

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in order to presume that it was approved by him to first presume it was delivered to him, thus basing one presumption on another, which is not permissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 74; Dec. Dig. § 54.\*]

### 3. JUDGMENT (§ 525\*)—RECITAL AS EVIDENCE.

The recital in the nunc pro tunc judgment in replevin against the sureties on plaintiff's bond, as well as against plaintiff, of the property being in the possession of plaintiff at the office of its attorney, H., one of the sureties, is not evidence against him of being such attorney; the record failing to show he was present when the judgment was entered.

[Ed. Note.—For other cases, see Judgment Cent. Dig. § 982½; Dec. Dig. § 525.\*]

### 4. APPEARANCE (§ 8\*)—WHAT CONSTITUTES.

The appearance before the referee in replevin of H., one of the sureties on the replevin bond, as attorney for plaintiff in replevin, and his defense of the proceedings against his client in objecting for his client to the jurisdiction of the referee to enter judgment against the sureties, is not of itself such an appearance as to authorize, without process, entry of judgment against the sureties; the bond being only a common-law bond.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 23-41; Dec. Dig. § 8.\*]

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Replevin by the Huttig-McDermid Pearl Button Company and another against the Springfield Shirt Company and another. From the judgment against plaintiffs and the sureties on its bond, they appeal. Reversed.

On the 21st day of December, 1906, the appellant the Huttig-McDermid Pearl Button Company instituted a suit in replevin in the Greene county circuit court against the Springfield Shirt Company, a corporation, for the possession of a quantity of pearl buttons purchased by the said shirt company from the appellant. Shortly after the suit was instituted, the shirt company was declared a bankrupt and a trustee in bankruptcy was appointed. A replevin bond was executed by the appellant which is as follows (formal parts omitted):

"The Huttig-McDermid Pearl Button Company, as principal, and Jno. Kelley and O. T. Hamlin, as securities, acknowledge ourselves to owe and stand indebted to Springfield Shirt Company, the defendant, in the sum of eighteen hundred and fifty dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents. This obligation to be void upon the following conditions: That if the plaintiff shall duly prosecute the above entitled action, and that if the property be delivered to him, he shall return the same to the defendant, if return thereof be adjudged, and shall pay to the defendant such sum as may, for any cause growing out of the order that may be issued in said action, be recovered against the plaintiff, and shall pay all costs and damages that may be adjudged against

him, otherwise to remain in full force and effect in law.

"The Huttig-McDermid Pearl Button Co.,

"By O. T. Hamlin, Atty.

"O. T. Hamlin. [Seal.]

"Jno. Kelley. [Seal.]

"Approved this 21st day of December, 1906,

"T. A. Nicholson, Clerk,

"By S. A. Reed, D. C."

Under the writ of replevin, the sheriff seized a large quantity of buttons as the property of appellant, in addition to those described in the petition and writ. The question to be determined was the value of the buttons illegally taken and which belonged to the respondent. The case was referred to G. W. Goad with authority to hear and determine the matters in issue. He afterwards made his report to the court in which he made the following recommendation: "I further recommend that defendants have and recover judgment against the plaintiff and his sureties on the replevin bond for return of the property hereinbefore last described, or for the assessed value thereof, to wit, \$168.72, at the election of defendant, and for \$1.00 damages for the taking and detention thereof, and for his cost that accrued herein subsequent to the appointment of the referee herein. It is contended by plaintiff that summary judgment should not be rendered against the sureties on the replevin bond for the reason said bond was approved by the clerk of this court instead of being approved by the sheriff. It was the duty of the sheriff to approve said bond and indorse his approval thereon, which indorsement was not made by said sheriff. However, the bond being in statutory form, and seizure made thereunder, the presumption is raised that said bond was approved by the sheriff. Therefore I hold that plaintiff's contention ought not be sustained."

On the 23d day of November, 1907, the court rendered the following judgment (formal parts omitted): "Now on this day come parties, plaintiff and defendant in the above cause, and said cause having been submitted to G. W. Goad, referee, and the said referee having filed his report, the court having examined and fully heard said report and being fully satisfied in the premises and that said report is just and correct, it is ordered, considered, and decreed by the court that said report be in all things confirmed and approved; \* \* \* and defendants elect to take assessed value of goods, \$168.00, and the court doth find the amount due and owing from the plaintiff to the defendant on the account herein sued on to be the sum of \$168.00 as debt and damages. It is therefore ordered, adjudged and decreed by the court that the defendant have and recover of and from the plaintiff, the Huttig-McDermid Pearl Button Company, a corporation, the sum of \$168.00 as debt and

damages aforesaid assessed by the court, together with all costs in this suit laid out and expended for which execution may issue."

On the 7th day of November, 1908, the respondent filed a motion to correct the judgment, nunc pro tunc. The motion, after referring to the recommendation of the referee in his report, proceeds as follows: "That the sureties on said replevin bond were and are O. T. Hamlin and John Kelley. That on the 23d day of November, 1907, the court rendered judgment herein approving and confirming the report of said referee and against the said plaintiff and said O. T. Hamlin and John Kelley for the sum of one hundred and sixty-eight dollars, and the same being the assessed value of said property, and which defendants elected to take instead of the said property, together with the said costs. That by mistake and misprision of the clerk of the court in writing and making the record entry of said judgment, and said entry thereof as recorded by said clerk did not and does not now show the real judgment so recorded, in that it fails to show any judgment against the said sureties, O. T. Hamlin and John Kelley. Wherefore, these defendants move the court by its order and judgment to make and cause to be made a record entry, now for then, correctly setting forth and stating the judgment actually rendered, and showing that the said judgment was rendered against said O. T. Hamlin and John Kelley, as was the fact."

Upon the hearing of said motion, the court entered a nunc pro tunc judgment of which the following is a part: "The court further finds from the evidence that the clerk did not enter upon the records of the court the judgment in fact rendered by the court in that he did not enter up judgment against the said sureties, O. T. Hamlin and John Kelley, and the said defendants are entitled to have said judgment entered against said sureties. Wherefore, it is by the court considered, ordered and decreed, now for then, that the plaintiff have and recover of and from the defendants the pearl buttons described in plaintiff's petition and which were and are in its possession, together with the costs accruing up to the time of the appointment of said referee. It is further considered, ordered, adjudged and decreed, now for then, that the said defendants have and recover of and from the said Huttig-McDermid Pearl Button Company and O. T. Hamlin and John Kelley the sum of \$168.00 and as of the date of November 23, 1907, the same to bear interest from November 23, 1907, at the rate of six per cent. per annum, together with all costs accruing after the appointment of the referee herein, for all which execution may issue."

The plaintiffs below have perfected their appeal from this judgment.

Hamlin & Seawell, for appellants. J. P. McCammon, for respondents.

NIXON, P. J. (after stating the facts as above). The one paramount and burning question in this case is whether the trial court had jurisdiction at its September term, 1908, to render judgment against O. T. Hamlin and John Kelley, the sureties on the replevin bond. At no place in the record does it appear that any process was served upon the sureties requiring them to appear, nor does it appear that any notice was served on them that the motion to correct the judgment nunc pro tunc had been set for hearing or requiring them to appear, or that either of the sureties entered an appearance at the hearing of the motion. If, therefore, the court had jurisdiction over the sureties to enter the nunc pro tunc judgment against them, it must have acquired such jurisdiction at the time the case was heard before the referee, unless it shall appear that the said Hamlin and Kelley were sureties on a statutory replevin bond and not on a common-law bond. If, in the consideration of this case, the conclusion is reached that the replevin bond was not a statutory bond, but a common-law bond, then the numerous other questions that have been argued by learned counsel need not be considered.

Section 4464, Rev. St. 1899, c. 56 (Ann. St. 1906, p. 2449), concerning replevin, provides that upon filing the affidavit by the plaintiff set out in section 4463, Id., the court, judge, or clerk in vacation shall make an order requiring the defendant to deliver the property specified in the affidavit to the sheriff, and requiring the sheriff, if the same be not delivered to him, to take the same from the defendant and deliver it to the plaintiff. The next succeeding section (4465) provides that the sheriff shall not receive or take such property until the plaintiff should deliver to him a bond executed by two or more sufficient sureties, the same to be approved by the sheriff. An examination of the text of the bond set forth in the statement herein will show that it conforms to the standard forms of replevin bonds in use in this state; that is, the conditions are those that are provided for in the statutes. Section 4474, Id., provides that on the contingency that the plaintiff fails to prosecute his action with effect and without delay and shall have the property in his possession, and the defendant in his answer claims the same and demands return thereof—which are the conceded facts in this case—then a judgment shall be entered against the plaintiff and his sureties that he return the property taken or pay the value so assessed at the election of the defendant, and pay the damages assessed for the taking and detention of the property and costs of suit. Undoubtedly, section 4474, in authorizing a judgment against plaintiff and his sureties, without process, refers to a bond taken in accordance with the preceding section in the same chapter—section 4465; and the replevin bond authorizing a summary

judgment by the court without process or notice as provided in this last section refers to the statutory bond which shall have been delivered to and approved by the sheriff as is specifically provided for in section 4465. The question then recurs, Was the replevin bond of appellant herein such a bond as is provided for in this section, and was it delivered to and approved by the sheriff?

The rule is well established in this state by many authorities that a statutory bond not duly executed or not conditioned as required by law may yet be sustained as a common-law bond. *State ex rel. v. O'Gorman*, 75 Mo. 370; *State ex rel. v. Sappington*, 67 Mo. 529; *Waterman v. Frank*, 21 Mo. 108. It was held in the case of *Wooldridge v. Quinn*, 49 Mo. 425, that a bond given by the defendant in a replevin suit conditioned for the delivery of the property to the sheriff instead of to the plaintiff does not conform to the statutes, and hence does not authorize a judgment under the statutes. In the present case, the following entry appears on the bond: "Approved this 21st day of December, 1906. T. A. Nicholson, Clerk, by S. A. Reed, D. C." It appears from this that the clerk approved the bond and not the sheriff as required by law. In the case of *State, to Use, v. Finke*, 66 Mo. App. 238, it was held that where the clerk of a circuit court who had taken an attachment bond and thereon issued the writ of attachment, he had no power to subsequently take another bond even though the first one failed to contain a condition prescribed by the statute. But it is further held that the latter bond, though not containing the indorsement or approval of the clerk, was valid as a common-law bond, and might be enforced by proper process. Also, in the case of *Williams v. Coleman*, 49 Mo. 325, it is held that a bond given under the third provision of section 48 of the attachment act (*Wagn. Stat. 191*), if approved by the judge in vacation, may not be good under the statute, but is nevertheless a valid common-law bond. Those authorities seem to establish the rule that a delivery to and approval of a replevin bond by the sheriff is necessary to constitute a statutory bond under the replevin act, and that a bond not in compliance with the statute will not authorize a summary judgment against the sureties.

But the respondents in this case contend that in order to constitute an approval of the sheriff of the replevin bond, it was not necessary for him to indorse his approval on the bond; that he, as a matter of fact, did receive the bond in question and seized the property under it, and that we therefore have the right to presume that he discharged his official duty and properly approved the bond. We are cited to the case of *Whitman Agricultural Ass'n v. National Ry., etc., Ass'n*, 45 Mo. App., loc. cit. 93, 94, in support of this contention. That was an attachment bond

on which the clerk did not indorse his approval. The opinion, however, recites that he did in fact receive the bond and issued the writ of attachment, and the case holds that the indorsement of approval on the bond is but evidence of approval and not the only evidence. This case is cited to support the contention that the sheriff's approval of the replevin bond should be presumed from the fact that he seized the property of plaintiff under it. That case will, however, on examination, be found not to be applicable to this case. We are not left to rely upon any presumption in the case under consideration. It appears patent on the very face of the bond that the sheriff did not take or approve it, but that it was taken and approved by the circuit clerk who had no authority either to take or approve it under the statutes concerning replevin. If there had been no actual indorsement of approval by any one, then the evidence of approval might be sustained by the presumption that the law attaches to the official acts of the sheriff. Presumptions have no place in the presence of actual facts. As was said in the case of *Mockowik v. Kansas City, St. J. & C. B. R. Co.*, 196 Mo. 550, 94 S. W. 256: "Presumptions may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts." The "sunshine of actual facts" as to the approval of this bond is written across its very face—"Approved this 21st day of December, 1906, T. A. Nicholson, Clerk, by S. A. Reed, D. C." There is no room left for a presumption. Again, in order to maintain respondents' contention, we have to base one presumption upon another. We have to presume, in the first place, that the replevin bond was delivered to the sheriff, and then we have to presume from that delivery and the sheriff's official action that he approved the bond. Presumptions must be based on facts, and one presumption cannot be based upon another. 16 Cyc. 1051.

But it is further contended by respondents that O. T. Hamlin was attorney for the Huttig-McDermid Pearl Button Company and that he entered his appearance before the referee at or before the time when the referee recommended judgment against the button company and its sureties on the replevin bond. The only evidence we find in the record as to O. T. Hamlin being attorney for the button company is in the nunc pro tunc judgment hereinbefore set forth, in which, after enumerating the property illegally taken under the writ of replevin, recites that all of said property was then in appellants' possession "at the office of appellants' attorney, O. T. Hamlin, Esq." As the record fails to show that O. T. Hamlin was present at the time the nunc pro tunc judgment was entered, this recital certainly was not binding on him. As we have seen, the report of the referee recommends judgment against the appellant, the Huttig-McDermid Pearl Button

Company and its sureties; but, so far as his report shows, the question as to whether the replevin bond was a statutory bond or a common-law bond was not determined by him in the presence of O. T. Hamlin. And even though the record were otherwise, the appearance before the referee of O. T. Hamlin as attorney for his client, the Huttig-McDermid Pearl Button Company, and the defense of the proceedings against such client in objecting for his client to the jurisdiction of the referee to enter judgment against the sureties, would not, of itself, be such an appearance as to authorize the referee, on the strength of such appearance, without process, to enter judgment against O. T. Hamlin and John Kelley in case the replevin bond did not conform to the statute and was only a common-law bond. The distinction has been long and uniformly made in this state between a general and a special appearance. The rule is that a general appearance waives the service of process and confers jurisdiction, while a special appearance or an appearance for a special purpose does not waive process. Where an appearance is made for the purpose of objecting to jurisdiction because of the absence of process, such appearance does not as a rule give the court jurisdiction of the person. 3 Cyc. 527. Though a party has appeared in court for one purpose, he may not be considered in court for any other purpose or for all purposes. *Anderson v. Brown*, 9 Mo. 648.

We therefore conclude on a survey of this case that the bond was not a statutory bond, and that the referee had no authority to recommend a summary judgment against the sureties on the bond; and, further, that the nunc pro tunc judgment entered by the circuit court upon the referee's report giving judgment against the sureties on the bond was without jurisdiction. The judgment is accordingly reversed. All concur.

#### HUTCHINS-HANKS COAL CO. v. WALNUT LAND & COAL CO.

(Kansas City Court of Appeals. Missouri.  
Jan. 24, 1910.)

##### 1. CHATTEL MORTGAGES (§ 258\*)—POWER OF SALE—EXECUTION.

Power of sale contained in a chattel mortgage, in order to pass title to the purchaser, must be strictly followed.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 533; Dec. Dig. § 253.\*]

##### 2. CHATTEL MORTGAGES (§ 249\*)—JOINT MORTGAGEE—JOINT OR SEPARATE DEBTS—FORECLOSURE.

Where a chattel mortgage is given to secure separate debts of two or more mortgagees, each mortgagee may enforce his rights in his own name; but, if the mortgage is not given to secure a separate indebtedness, a foreclosure by one of the mortgagees only is invalid, since, if the prop-

erty is forfeited by a single default, it is forfeited to the mortgagees jointly.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 249.\*]

##### 3. CHATTEL MORTGAGES (§ 295\*)—FORECLOSURE—EFFECTS—WAIVER.

Where a chattel mortgagee joined with one of the mortgagees in purchasing property on foreclosure, the mortgagee waived any right that he had to question the proceedings, having thereby lost his equity of redemption.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 581; Dec. Dig. § 295.\*]

##### 4. CHATTEL MORTGAGES (§ 267\*)—FORECLOSURE—JOINT MORTGAGEES—INTEREST.

Where an entire debt secured by a chattel mortgage was owing to one of several mortgagees, the others, having no real interest in the property, could not complain of foreclosure proceedings.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 267.\*]

Appeal from Circuit Court, Bates County; Chas. A. Denton, Judge.

Action by the Hutchins-Hanks Coal Company against the Walnut Land & Coal Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Silas W. Dooley, for appellant. J. S. Francisco, for respondent.

BROADBUD, P. J. The plaintiff's action is based upon a bill of sale whereby defendant, in April, 1905, sold to plaintiff certain personal property, used in mining operations, for the consideration of \$500. The bill of sale contained the following clause: "The said grantor covenants that said property is free from incumbrance, and that it has the lawful right to sell and dispose of the same, and that it will warrant and defend the title thereto against all claimants whatever." Plaintiff alleges that at the time said bill of sale was executed there was a chattel mortgage on said property, given by D. L. Hughes to defendant and to F. J. Tygard and H. H. Haverly to secure certain advances made and to be made by them to the said Hughes. The mortgage provides that the property shall remain in the possession of the mortgagee until default be made, and that, "upon taking possession of said property, or any part thereof, either in case of default or as above provided, the said parties above named, or their legal representative, may proceed to sell the same, or any part thereof, at public auction, to the highest bidder for cash at Foster, Mo., in the \_\_\_\_\_ of \_\_\_\_\_, county of Bates, and state of Missouri, first having given five days' public notice of the time, terms, and place of sale, and property to be sold," etc. The debt was not paid when due, and Haverly, one of the mortgagees, took possession of all the property, advertised the same for sale, and sold it to himself and Hughes, the mortgagee. Upon the conclusion of plaintiff's testimony the court directed a verdict for the defendant. From the judgment plaintiff appealed.

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The principal question raised is whether the sale made by Haverly of the mortgaged property was valid? If not, the judgment of the court must be sustained. It is well-established rule of law in this state that powers conferred in a mortgage, in order to pass title to the purchaser, must be strictly followed. *Stewart v. Brown*, 112 Mo. 171, 20 S. W. 451; *Schanewerk v. Hoberecht*, 117 Mo. 22, 22 S. W. 949, 38 Am. St. Rep. 631; *Pollham v. Reveley*, 181 Mo. 622, 81 S. W. 182. Under this rule, if the mortgage was not given to secure separate indebtedness of each of the mortgagees, the foreclosure by one of them would be invalid. "Where a mortgage is given to secure separate debts, each mortgagee may enforce his rights in his own name. If by the mortgage the whole property is forfeited by a single default, it is forfeited to the holders of the mortgage jointly." *Herman on Chattel Mortgages*, § 143. This seems to be a correct interpretation of the law. But it is insisted that the mortgage debt was not divisible; that the interests of the mortgagees were not separate. This is true, and therefore, under the rule, Haverly had no power individually to foreclose.

But it seems to us that the court in its conclusion left out of consideration one important feature of the case. Notwithstanding Haverly was not authorized in his individual capacity to foreclose the mortgage, his act was ratified by the mortgagor. When he bought in the property at the sale with the consent of Hughes, the mortgagor, who joined him in the purchase, it was a waiver on the part of Hughes of any and all defects in the proceedings so far as he was concerned, and he thereby lost his equity of redemption. The other mortgagees, if not satisfied with the sale, have their remedy against Haverly, or perhaps against the property itself. But so far as the property is concerned it is lost to the plaintiff. The title has failed by reason of a prior incumbrance.

There is another fact to be stated which we think has a bearing in the case, viz.: Haverly testified that the debt for which he bid in the property was \$420, and was owing to him, and mentioned no other. The amount of the consideration stated in the mortgage was \$500, but it was expressed that this sum was for what had been advanced and for future advances. We therefore think we are safe in saying that the whole debt was owing to Haverly. If such debt was owing to Haverly, the other mortgagees had no real interest in the property, and are in no position, either at law or in equity, to complain of the foreclosure proceedings. We believe that all parties are estopped from denying the legality of the sale. The defendant certainly is. The only important issue in the case was whether the title had failed by reason of the foreclosure proceedings.

It follows, from what has been said, that the cause should be reversed and remanded; and it is so ordered. All concur.

#### STATE v. HUME.

(Kansas City Court of Appeals. Missouri. Jan. 24, 1910. On Motion for Rehearing, Feb. 7, 1910.)

#### INTOXICATING LIQUORS (§ 200\*)—UNLAWFUL ISSUANCE OF PRESCRIPTION FOR INTOXICATING LIQUORS—INFORMATION.

An information charging a physician with unlawfully issuing a prescription for intoxicating liquors, in violation of Rev. St. 1899, § 3050 (Ann. St. 1906, p. 1750), which is so framed that, while it charges that the intoxicating liquors were to be used as a beverage by the person who obtained the prescription, it does not connect the physician with the knowledge of that fact or with the purpose or intent of the liquor being so used, is fatally bad.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 200.\*]

Appeal from Circuit Court, Boone County; Nick M. Bradley, Special Judge.

Charles Hume was convicted of unlawfully issuing a prescription for intoxicating liquors, and he appeals. Reversed.

W. H. Rothwell, for appellant. L. T. Searcy, F. G. Harris, and H. D. Murry, for the State.

ELLISON, J. This prosecution was begun by an information charging defendant, a physician, with unlawfully issuing a prescription for intoxicating liquors, in violation of section 3050, Rev. St. 1899 (Ann. St. 1906, p. 1750). The defendant was convicted.

The conviction was not warranted. No offense was charged in the information. The innocence of the defendant should have been negatived. The charge is so framed that while it charges the intoxicating liquor was to be used as a beverage, and not a medicine, by the man who obtained the prescription, it does not connect defendant with a knowledge of that fact, or with a purpose or intent of its being so used. If an indictment should charge that a physician issued a prescription to a person for intoxicating liquor "to be used" as a beverage, it might very well be said, thus closely connected, that that is charging that the physician issued it for the purpose of its being used to get the liquor as a beverage. But here the matter of the charge of issuing the prescription is so disconnected from the use to which the liquor is to be put by the party obtaining it that, while the latter is well charged with the unlawful and guilty knowledge and intent, the physician is not included with him. The case cannot be distinguished from *State v. Umphrey*, 40 Mo. App. 327, where a similar charge was held insufficient. As was said by Norton, J., in *State v. Davis*, 126

Mo. App. 235, 238, 102 S. W. 1103, a case not altogether like this, yet on the same subject, a "distinction is observed and must be taken by the court in administering its [the statute's] provisions, between the contemplated use of the prescription and the contemplated use of the liquor after it is procured." See, also, *State v. Mitchell*, 28 Mo. 562, and *State v. McAdoo*, 80 Mo. 216.

The judgment is reversed. All concur.

#### On Motion for Rehearing.

**PER CURIAM.** A rehearing is asked on the ground that we have overlooked the case of *State v. Anthony*, 52 Mo. App. 507, decided by the St. Louis Court of Appeals. We did not overlook that case. We did not refer to it, for the reason that we did not consider it was applicable to the point made in this case. The indictment in that case is for the same offense as that charged in the information in this case, but they are not otherwise alike.

The motion is overruled.

#### STATE v. STEEL.

(Kansas City Court of Appeals. Missouri. Jan. 24, 1910.)

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

C. L. Steel was convicted of crime, and he appeals. Reversed.

J. B. Journey, for appellant. Lee B. Ewing, Pros. Atty., for the State.

**ELLISON, J.** This case is like that of *State v. Hume* (decided at this term) 124 S. W. 1099, and is governed by what is there ruled.

The judgment is reversed. All concur.

#### STATE v. HUME.

(Kansas City Court of Appeals. Missouri. Jan. 24, 1910. Rehearing Denied Feb. 7, 1910.)

Appeal from Circuit Court, Boone County; Nick M. Bradley, Special Judge.

Charles Hume was convicted of crime, and he appeals. Reversed.

W. H. Rothwell, for appellant. L. T. Searcy, F. G. Harris, and H. D. Murry, for the State.

**ELLISON, J.** This case is like that of *State v. Hume* (No. 9,167, decided this term) 124 S. W. 1099, and is governed by what we there ruled.

The judgment is reversed. All concur.

#### STATE v. CONWAY (three cases).

(Kansas City Court of Appeals. Missouri. Jan. 24, 1910. Rehearing Denied Feb. 7, 1910.)

Appeals from Circuit Court, Boone County; R. S. Ryors, Special Judge.

A. M. Conway was convicted of three violations of law, and he appeals. Reversed.

Webster Gordon, for appellant. Searcy & Harris, for the State.

**ELLISON, J.** These cases are like that of *State v. Hume* (decided this term) 124 S. W. 1099, and are governed by what is there ruled.

The judgments are reversed. All concur.

**STATE ex rel. ABBOTT et al. v. ADCOCK et al., State Board of Health.**

(Supreme Court of Missouri. Feb. 2, 1910.)

#### 1. PHYSICIANS AND SURGEONS (§ 5\*)—LICENSE TO PRACTICE—STATUTES—CONSTRUCTION.

Under Laws 1907, p. 359, § 1, requiring an examination before the State Board of Health of applicants for license to practice medicine, and providing that the applicants must furnish satisfactory evidence of having received diplomas from some reputable medical college, one presenting himself before the board for examination must prove to its satisfaction the reputableness of the college from which he graduated; the question of what medical colleges are reputable being for the determination of the board.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Dec. Dig. § 5.\*]

#### 2. PHYSICIANS AND SURGEONS (§ 5\*)—LICENSE TO PRACTICE—STATUTES—CONSTRUCTION.

A rule of the State Board of Health authorized by Laws 1907, p. 359, § 1, to examine applicants for license to practice medicine, on their furnishing proof of the reputableness of the medical college from which they are graduates, which provides that all medical colleges which conform to the standards specified in a schedule of minimum requirements shall be deemed reputable and their graduates shall be admitted to the examination of the board for license, undertakes to require all medical colleges to adopt such standards as will prove their reputableness in all cases, and thereby remove that burden from each applicant for a license, but does not provide that a graduate from any other medical college shall not be examined, provided he furnishes proof of the reputableness of such college.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Dec. Dig. § 5.\*]

#### 3. PHYSICIANS AND SURGEONS (§ 5\*)—LICENSE TO PRACTICE—STATUTES—CONSTRUCTION.

A construction of such rule as a notification in advance to all persons who might present themselves for examination for license that the board will examine no one except those presenting a diploma from one of the medical colleges which has adopted the standard is illegal, and is no bar to the right of a graduate of another medical college to prove that the college is reputable within the statute, but, until he furnishes such proof, the board is under no obligation to examine him.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Dec. Dig. § 5.\*]

#### 4. EVIDENCE (§ 83\*)—PRESUMPTIONS—PERFORMANCE OF OFFICIAL DUTY.

The law presumes that public officers will perform their duties when any matter is legally presented to them for action, notwithstanding general declarations previously made to the contrary.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 105; Dec. Dig. § 83.\*]

#### 5. CONSTITUTIONAL LAW (§ 42\*)—STATUTES—VALIDITY—RIGHT TO QUESTION.

It is only where a statute relied on in a particular case as conferring or withholding some legal right that the court or litigants can question its validity, and the invalidity of a statute is no excuse for one's refusal to perform a duty imposed by a valid law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 39; Dec. Dig. § 42.\*]

#### 6. MANDAMUS (§ 14\*)—CONDITIONS PRECEDENT—DEMAND AND DEFAULT.

Mandamus will not issue commanding an inferior court or ministerial body to act until it is first established by evidence that the court

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

or body has been legally requested to act, and that it has illegally declined to do so.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 44-46; Dec. Dig. § 14.\*]

**7. MANDAMUS (§ 87\*)—LICENSES OF PHYSICIANS—EXAMINATION—REFUSAL OF STATE BOARD TO GIVE—REMEDY.**

Where an applicant for a license to practice medicine possesses the qualifications prescribed by Laws 1907, p. 359, § 1, regulating the practice of medicine, and shows the facts to the State Board of Health, authorized to examine applicants, and the board arbitrarily refuses to examine him, he may by mandamus compel the board to act.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 87.\*]

Lamm, J., dissenting.

In Banc. Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Mandamus by the State of Missouri, on the relation of James Wesley Abbott and others, against J. A. B. Adcock and others, constituting the State Board of Health, to compel the board to examine relators as to their qualifications to practice medicine. From a judgment making the alternative writ permanent, defendants appeal. Reversed and remanded, with directions to dismiss petition.

This was a proceeding in mandamus instituted in the circuit court of the city of St. Louis at the June term thereof, 1908, by relators against respondents and appellants to compel them to examine them touching their qualifications and fitness to practice medicine and surgery in the state of Missouri. An alternative writ was issued and duly served upon respondents, who, in due time, filed their return thereto. A trial was had, which resulted in findings for relators, and a judgment making the alternative writ of mandamus theretofore issued permanent, etc. After taking proper steps in that direction, respondents duly appealed the cause to this court.

In order to properly understand the issues joined and the legal propositions presented to us for determination, it will be necessary for us to set out the pleadings filed in the case.

The petition was as follows (formal parts omitted):

"The state of Missouri, at the relation of James Wesley Abbott, Charles Horace Cul- lers, Elmer Lee Cox, William S. Clarenbach, John Ulysses Day, Claude Emerson Duvall, Francis Howard Emmons, Florence Ourat Egers, Emily Statella Eluesmleir, Orion As- bury Grantham, William Gregory Gunn, Joseph Taylor Griest, William Watson Haven, William Francis Hager, Louis Phillip Habig, Charles Louis Mosley, Jr., Martin Mehrle, Nina Henry Maynard, Edna Jane Miller, Amalie Marie Napier, Mary Myrtle Ozias, Nicholas John Pippert, Peter Alois Pfeffer, George Earl Paullus, Bert Byrd Par- rish, Leslie Cornelius Randall, Oda Lavin-

la Seabaugh, Howard Workman, and Hugh Benjamin Waters, complains of the defend- ants, J. A. B. Adcock, A. H. Hamel, Ira W. Upshaw, W. S. Thompson, R. H. Goodler, J. T. Thatcher and Frank J. Lutz, constituting the State Board of Health of Missouri, and says that defendants now, and at all the dates hereinafter mentioned were, the duly appointed and acting members of the State Board of Health of Missouri, and constitute said board, and as such board it is their duty, among other things, to examine all qualified persons who appear before such board at such time and place as the said board may direct, to determine the fitness of such persons to engage in the practice of medicine and surgery in this state.

"Relators state that the Barnes University of St. Louis, Mo., was on the 11th day of June, 1892, and is now, a body corporate and politic, organized under and by virtue of the laws of the state of Missouri, regulating the incorporation of benevolent, religious, scientific, and educational institutions, and that said Barnes University, in accordance with the provisions and requirements of its charter of incorporation and the laws of this state, ever since its incorporation has been engaged and is now engaged in the teaching of medicine and surgery, and those sciences, the knowledge of which are necessary and proper for a full and adequate understand- ing of the science of medicine and surgery in all its scope and meaning.

"Relators state that they are citizens of the state of Missouri, and that on the 9th day of May, 1906, they and each of them were duly graduated by the Barnes Uni- versity aforesaid, and that on the 9th day of May, 1908, relators and each of them re- ceived a diploma from said Barnes Uni- versity, and that thereupon they and each of them became, and ever since have been, and now are, graduates of medicine from said institution.

"Relators state that at the time of their matriculation in said university, about four years ago, they were advised by reputable physicians and surgeons in whose judgment they had confidence that the said Barnes University was a reputable school of medi- cine, of high standing in the community where it is situate and elsewhere, and that relators, and each of them, relied upon the information thus secured, and therefore en- tered said university and took up the course of study therein prescribed, and relators state that during all the period of their course of study at said institution they believed that the said Barnes University was a reputable institution, and further believed they would be accorded the same rights by the defend- ant board as graduates of other reputable medical colleges in this state. And relators now charge the fact to be that said institu- tion is reputable; that its curriculum is

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

well selected and thorough, its instructors and lecturers among the best; and that the course therein required to be pursued by its students is as thorough as that of any other institution of like kind in this state or elsewhere.

"Relators state that on the — day of —, 190—, defendants appointed Prof. R. C. F. Dunhaupt as official examiner of defendant board of the city of St. Louis to act in the place and stead of the county school commissioners of the various counties throughout the state, and that, by said appointment and authority then and there vested in him by said board its interpretation and construction of the laws of this state, it became the duty and right of the said Dunhaupt to examine into the scholastic attainments of such persons as might appear before him for that purpose, and to certify to said board whether or not such persons satisfactorily passed an examination before him equivalent to a grade from an accredited high school, state normal school, college, university, or academy.

"Relators state that they did appear before the said Dunhaupt and underwent an examination before him upon all branches then and there submitted to them, and received from the said Dunhaupt a certificate certifying that they and each of them had satisfactorily passed an examination before him, and had procured a grade upon such examination equivalent to a grade from an accepted high school, state normal school, college, university, or academy.

"Relators further state that on or about the — day of May, 1908, they and each of them executed and filed with the defendant Board of Health the regular official form of application for examination provided by said board, wherein they requested to be examined by said Board of Health at the St. Louis University, in the city of St. Louis, Mo., on the 1st, 2d, and 3d days of June, 1908.

"Relators further state that they and each of them attached to said application and delivered to defendant, in connection with said application for examination, the sum of \$15, that being the usual, customary, and regular fee required by said Board of Health from all persons desiring to take a medical examination before said board; that said applications, and each of them, were accompanied by the certificate of the said Dunhaupt, certifying that the scholastic attainments of the relators, and each of them, were satisfactory, and that in said examination relators, and each of them, had obtained a grade equivalent to a grade from an accredited high school, state normal school, college, university, or academy, and that said application was accompanied by a diploma issued to the respective relators by the said Barnes University, and relators state that said application was also accompanied by the affidavits of the said Dunhaupt, showing the

grade and proficiency of each of the relators actually shown, and fairly and justly earned by each of said applicants upon said examination before the said Dunhaupt, and that said application was also accompanied by a certificate of graduation of each of the relators from an accredited high school, state normal school, college, university, or academy.

"The relators further state that the defendant board found the certificates of the said Dunhaupt to be genuine and essential in particulars, and such as is customary and universally acted upon and accepted by said board, and that relators were the persons named in the respective certificates, and that each of the said diplomas issued to each of the relators by the said Barnes University, and presented to the defendants herein, were found by the said defendants to be genuine diplomas, and that relators are the same persons whose names appear in said respective diplomas, and that relators were the rightful owners and holders thereof and the persons named therein.

"Relators further state that they complied in all particulars with all the usual and customary requirements exacted by said board, but, that notwithstanding relators' compliance therewith, defendants returned said filing fee to relators, and to each of them, but retained their applications, which said applications are now on file among the records of the defendants.

"Relators allege that defendants then and there arbitrarily and oppressively advised relators that they would not be allowed or permitted to take an examination before the defendant board for the purpose of procuring a license to practice medicine in this state, and defendants assigned as an alleged reason for their refusal to permit relators to be examined that said Barnes University was not 'an accredited school by the Missouri State Board of Health.'

"Relators further state that on the morning of the 1st day of June, 1908, and prior to the beginning of the examination of applicants before said board, for the purpose of procuring certificates entitling them to practice medicine and surgery in this state, the relators, and each of them, presented themselves before the defendant board, then being in session at the St. Louis University in the apartment where the said board was preparing to hold an examination, and relators then and there notified defendants that they were there for the purpose of being examined by said board in order that said board might determine their fitness to engage in the practice of medicine and surgery in this state, and that in the event they passed a sufficient and satisfactory examination that they be delivered a certificate under the hand of said board authorizing the relators, and each of them, to engage in the practice of their chosen profession.

"Relators state that on said 1st day of

June they were ready, willing, and able to furnish, and then and there did offer to furnish, to said board satisfactory evidence of the qualifications of each of the relators to said defendants of their preliminary qualifications, to wit, certificates of graduation from an accredited high school, state normal school, college, university, or academy, and a certificate from the said Dunhaupt certifying that they, and each of them, had satisfactorily passed an examination before him equivalent to a grade from an accredited high school, state normal school, college, university, or academy, and that relators were also ready and willing to furnish, and able to furnish, a certificate of graduation to each of said relators from an accredited high school, state normal school, college, university, or academy, and were then and there ready and willing to furnish, and offered to furnish, said defendant board satisfactory evidence of having received diplomas from the said Barnes University as aforesaid; and relators also offered to comply with all the requirements of the law made necessary as a condition precedent to their examination by said board, and offered to, and were able to, comply with all the usual, ordinary, and customary requirements heretofore made by said board, but relators allege that after defendants had proceeded with the examination for the space of one day of the persons who then and there appeared before them, including relators, for the purpose of undergoing an examination to determine whether or not they were capable and fit to receive a certificate from said board for the purpose of enabling them to practice medicine and surgery in this state, that said board on the second day of said examination then and there directed, ordered, and commanded all the graduates of the said Barnes University to withdraw from the room where said examination was about to be commenced and conducted, and the defendant board then and there announced that the relators, and each of them, would not be permitted or allowed to take said examination, and in the event that the relators or any of them should refuse to leave the room, and should insist on taking said examination, that their papers would not be graded or considered by said board, but would be thrown out into the waste basket, and that thereupon the relators, over their protest, and in violation of their rights, were forced and compelled by defendants to withdraw from said room, and were then and there and thereby deprived and denied the privilege of taking the examination before said board.

"Relators, on their information and belief, state that defendants, without authority or color of law, have devised and promulgated a set of rules and regulations as a standard of equipment, and a method of instruction and laboratory work which the defendants arbitrarily and oppressively insist must be complied with by said Barnes University, be-

fore its graduates are entitled to undergo an examination before said board, and before said board will consider the same to be a reputable medical college. But relators state that said board did not notify said Barnes University, or the board of trustees, or faculty thereof, or these relators, of such rules, regulations, and requirements, and failed and arbitrarily refused to allow said Barnes University and its board of trustees and faculty an opportunity to show said board what its equipment and teaching facilities were and are; that relators had been registered as regularly matriculated students of said university, and of the medical department thereof, for a period of over four years, and defendants could have easily obtained access to said registration and have informed the relators, and each of them, as to any action upon its part with reference to its estimate of the standing of said Barnes University, but the said defendants failed and neglected to do so.

"Relators state that Barnes University aforesaid is a reputable medical college of this state; that its curriculum requires a course of four years' attendance before graduation therefrom; that it is provided with a corps of experienced, proficient, and learned and profound lecturers, teachers, and instructors, and is also provided with such apparatus as is necessary for the successful teaching and exemplification of the science of medicine and surgery; and that in all of its departments the said institution compares favorably with, and is, and has been equal to, the best institution of the kind in this and other states, and the said university for 15 years last past has been recognized by the various State Boards of Health of Missouri as being a reputable medical college, and has been recognized by defendants individually and as a board as being reputable and thorough in all respects.

"Relators allege that they, and each of them, demanded of the defendants as such State Board of Health of Missouri the right and privilege of forthwith undergoing an examination upon all the subjects embraced by the laws of the state, touching their qualifications in medicine and surgery, in order that said board might determine whether relators, and each of them, possessed the requisite knowledge and qualifications to obtain a license to practice medicine and surgery in accordance with the law of this state, but that defendants and each of them wrongfully, unreasonably, oppressively, arbitrarily, and without color of authority, refused, and still wrongfully, unreasonably, oppressively, and arbitrarily, and without any cause refuse, to allow the relators, or any of them, to appear before said Board of Health, and then and there undergo an examination before said board, in order that said board might determine whether or not they were entitled to engage in the practice of medicine and surgery in this state.

"Relators further allege that they, and each of them, cannot practice medicine or surgery in this state unless and until their competency to engage in that profession has been submitted to and passed upon by said board, and that, by the refusal of the defendants to permit the relators to undergo such an examination, they have suffered, and are suffering, irreparable wrong and injury, and are entirely without a remedy for the redress of their wrongs without the interposition and intervention of this court by its writ of mandamus, directed to said defendants, and each of them, commanding and directing the performance and discharge of their duty under the law of this state.

"Wherefore, relators pray this honorable court to issue its writ of mandamus directing and commanding the defendants, as the State Board of Health of Missouri, to forthwith permit the relators, and each of them, to appear before said board and undergo the usual examination accorded to other applicants before said board, touching the relators' qualifications to practice the science of medicine and surgery in this state, and that this honorable court will frame and issue such writ or writs as may be found necessary and expedient to cause said board to do that which in justice and right ought to be done in the premises."

The alternative writ followed the petition, and was in the ordinary form, and, after service thereof had upon the respondents, they filed the following return (formal parts omitted):

"Comes now J. A. B. Adcock, A. H. Hamel, Ira W. Upshaw, W. S. Thompson, R. H. Goodier, J. T. Thatcher, and Frank J. Lutz, constituting and comprising the State Board of Health of the State of Missouri, and for their joint and separate return to the writ of mandamus heretofore issued in this cause say that the relators ought not to have a peremptory writ of mandamus herein, for the following reasons, to wit:

"(1) The defendants state and say that they have no information or knowledge as to the truth of the statements and allegations set forth and contained in relators' petition and the alternative writ herein, and therefore deny generally each and every allegation therein set forth and contained, except that they admit that they were at all times therein mentioned, and now are, duly appointed, qualified, and acting members of the State Board of Health of the State of Missouri, and constituting and comprising said board.

"(2) Defendants further state and say: That the Barnes University and Medical College, from which relators profess to have been graduated and hold diplomas, was and is not a reputable medical college of four years' requirements, as provided and required by the said Board of Health in their schedule of requirements adopted July 11, 1907, and defined in section 3 of 'An act to regulate the practice of medicine, surgery,

and midwifery, and to prohibit treating the sick and afflicted without a license, and to provide penalties for the violation thereof, of the Acts of 1907, state of Missouri.'

"(3) That on July 11, 1907, the defendants herein, in pursuance of a report of a committee of said Board of Health, duly authorized and appointed to investigate as to the equipments and facilities for teaching of the various medical colleges throughout the state, provided and adopted a schedule of minimum requirements as a standard by which medical colleges should be rated and classified as accredited and reputable, and whose students, after being graduated therefrom, should be admitted to the examination of the said State Board of Health for licenses to practice medicine and surgery in the state of Missouri, and further provided and directed that any and all medical colleges in meeting the requirements of said schedule should be given until October 1, 1907, in which to supply and provide such deficiencies, and to bring their said schools or institutions up to the standard required, and that each and every medical college so notified complied with the requirements therein specified, save and except the Barnes University and Medical College, and that the Barnes University and Medical College was by authority of the said State Board of Health on the 22d day of July, 1907, duly notified and apprised of its deficiencies in said behalf, and requested to provide the facilities necessary and required to bring said institution up to the standard as provided by said board. That said Barnes University and Medical College, through its officers and agents, ignored said request, and failed and refused to obey the instructions of said State Board of Health, and to supply and provide the necessary facilities by way of equipments, laboratory work, and clinical instructions, and have wholly ignored the same. That thereafter, on October 28, 1907, the said Barnes University and Medical College was again duly notified and reminded of its failure to supply the deficiencies in laboratory equipments as required by said State Board of Health, and given until November 21, 1907, in which to comply with said rules and requirements, and was duly notified that unless said deficiencies be supplied within said time said university and medical college would not be accredited, and its students not be entitled to examination for licenses to practice medicine and surgery in the state of Missouri. That said schedule or standard was reasonable, fair, and proper and the requirements made upon said Barnes University and Medical College were reasonable, just, and proper, and were not oppressive upon said institution, and could have been supplied and provided with but little difficulty and expense to said institution. That each and every other medical college in the state of Missouri complied with said schedule, standard, and requirements save and except

the said Barnes University and Medical College.

"Defendants further state: That said institution again ignored and disregarded the requests of the said State Board of Health, and failed and refused to comply with the same. That said requirements so made of the Barnes University and Medical College as aforesaid, and the schedule and standard adopted by the said State Board of Health, were such as the said State Board of Health had authority under the law to require, make, and provide, and that it was the duty of the said Barnes University and Medical College to comply with the same and to conform its said curriculum to the standard prescribed, and it was the duty of the said State Board of Health to refuse to recognize the said Barnes University and Medical College as an accredited and reputable medical college and to examine its students after graduation, upon its failure to comply with the same and conform to the standard prescribed. And the defendants further state that the authority to determine what was, and is, an accredited and reputable medical college in this state was conferred upon them by the Legislature and the laws of this state; that they have investigated the matter in question, and have determined, as they have a right under the law to do, that the said Barnes University and Medical College was not, and is not, an accredited and reputable college within the meaning of said law. This being true said decision is final, and not subject to review by this court.

"Wherefore defendants say by reason of the premises plaintiffs should not have peremptory writ herein but that the same should be denied and the costs hereof taxed against the plaintiffs."

Upon July 27, 1908, relators filed in said court in said cause (omitting caption and signatures) the following reply:

"Comes now plaintiffs, and, for their joint and separate reply to the return of defendants made herein to the writ of mandamus heretofore issued in this cause, say that said return constitutes no defense, and sets forth no reason why a peremptory writ of mandamus should not go herein. For another and further reply plaintiffs deny each and every one of the statements and allegations set forth and contained in said return. For another and further reply, plaintiffs say that defendants have without authority or color of law devised, adopted, and promulgated the schedule of requirements referred to in defendants' return herein, and that defendants have arbitrarily and oppressively devised and promulgated said schedule of requirements and made the same the standard by which medical colleges in this state shall be rated and qualified as reputable within the meaning of section 3 of 'An act to regulate the practice of medicine, surgery and midwifery, and to prohibit the treatment of

the sick and afflicted without a license, and to provide penalties for the violation thereof,' as amended in the Acts of 1907, state of Missouri, and that because, in the opinion of said State Board of Health, said Barnes University has failed to comply with the requirements of said schedule, said State Board of Health has arbitrarily and oppressively refused to allow plaintiffs to be admitted to the examination of said State Board of Health for licenses to practice medicine and surgery in the state of Missouri, in direct violation of their authority and duties, under the law of the state of Missouri made and provided in such cases. For further reply plaintiffs specifically deny that said State Board of Health did on or about the 22d day of July, 1907, or any time subsequent thereto, duly notify and apprise said Barnes University of said schedule and requirements, or that it had adopted any schedule of requirements at all to determine whether said Barnes University was a reputable college within the meaning of said act. Plaintiffs further state that the laboratory apparatus and equipment of said Barnes University was equal to or greater than that prescribed in said schedule of requirements adopted by said State Board of Health, and that in all other respects—the length of term, method of instruction, and the other requirements entitling its students to a diploma—said Barnes University complied with, equalled, or exceeded the requirements contained in said schedule adopted by said board. And plaintiffs further aver, and charge the fact to be, that other persons were admitted by the State Board of Health to take its examination for the purpose of procuring licenses to practice medicine and surgery, which said persons held diplomas from medical colleges which had not complied with said requirements of said schedule so adopted by said board. Plaintiffs further state that at the time said schedule was adopted and promulgated by said board they, and each of them, had already entered upon their fourth year of study in said Barnes University, and that the requirements, as set forth in said schedule, relate to instructions given during the first three years of the course of medicine in said Barnes University, and that in this respect the course of study in said Barnes University conforms with that of all other reputable medical colleges, and that said State Board of Health has for a great many years, up to and including June, 1907, permitted the graduates of said Barnes University to take its said examinations for the purpose of procuring licenses to practice medicine and surgery, and plaintiffs further aver, and charge the fact to be, that the laboratory equipment and facilities for teaching medicine and surgery in said Barnes University were better during the session which closed in May of 1908 than any previous session of said college. Plaintiffs further state that a large

number of them have been admitted to examinations by the state board of other states, and received licenses to practice medicine and surgery in said state."

The facts of the case are comparatively few, and practically undisputed, and they are substantially as follows: On and prior to the institution of this suit the Barnes University, an institution of learning, was duly organized and incorporated under the laws of the state of Missouri, and was authorized, among other things, to teach and instruct persons in the science of medicine and surgery. During the same time appellants constituted the State Board of Health, having been duly appointed and qualified as such, and were acting in that capacity during that time. Relators were regularly graduated from the medical department of said university of the class of 1908, and each held a diploma issued therefrom in the manner and form provided for by its charter and by-laws. Subsequently thereto each of the relators in proper time and in due form filed his application for an examination by said board, to be held on the 1st, 2d, and 3d days of June, 1908, touching his qualifications to practice medicine and surgery in this state, as provided for by the act of 1907 (Laws 1907, p. 360), accompanied by a certificate from Prof. Dunhaupt, the official examiner of said board, showing he possessed the requisite scholastic attainments, together with a deposit of the proper license fee of \$15. That prior thereto, to wit, on July 11, 1907, said board formulated and adopted the schedule of minimum requirements as a standard by which medical colleges should be rated and classified as accredited and reputable as referred to in the petition, and whose students, after being graduated therefrom, should be admitted to the examination of the said Board of Health for licenses to practice medicine and surgery in this state, and provided, further, that all such colleges should have until October 1, 1907, in which to comply with said minimum requirements, and to bring their said schools up to said standard. All medical colleges of the state complied with said requirements except said Barnes University. On July 22, 1907, after an investigation made, but before the date fixed, said board notified said university of its failure to comply with said standard. Either for a valid or invalid excuse said notice was ignored by said university. On October 28, 1907, said university, still neglecting to bring its standards up to the requirements of the board, was again notified of said deficiency, and was again requested to bring its medical department up to said standard on or before November 21, 1907, and notified that, unless it did so, it would not be so accredited, and its diplomas would not entitle its students to an examination for licenses to practice medicine and surgery in this state. Said school again declined to comply with

said requirements, which will be noticed during the course of the opinion. There is no pretense that the standard fixed by the board was arbitrary or unreasonable, or unjust, or oppressive.

In pursuance to their applications filed for examination, as before stated, relators appeared before said board in the city of St. Louis on said 1st, 2d, and 3d days of June, 1908, and requested that they be given the examination, as provided for by said act of 1907, but none of them offered any evidence whatever to said board tending to show that the medical department of said Barnes University was a reputable medical college as provided for by said act. Thereupon the Board of Health declined to examine any of them, and returned to them their said diplomas, certificates, and license fees. This suit is predicated upon those facts.

E. W. Major, Atty. Gen., and Jas. T. Blair, Asst. Atty. Gen. (Morton Jourdan, of counsel), for appellants. Jos. G. McIntyre and C. D. Corum, for respondents.

WOODSON, J. (after stating the facts as above). 1. Counsel for appellants insists that the judgment of the trial court is erroneous, for the reason that relators furnished no evidence to the Board of Health tending to show that Barnes University was a reputable medical college at the time they graduated therefrom, as required by section 1 of an act approved April 4, 1907 (Laws 1907, p. 359). Said section in so far as it is material to the propositions involved in this case, reads as follows:

"All persons desiring to practice medicine or surgery, in this state, or to treat the sick or afflicted, as provided in section 1 of this act, shall appear before the state board of health at such time and place as the board may direct, and shall there be examined as to their fitness to engage in such practice. All persons appearing for examination shall make application, in writing, to the secretary of said board thirty days before the meeting. They shall furnish satisfactory evidence of their preliminary qualifications, to wit: A certificate of graduation from an accredited high school or state normal school, college, university or academy, a certificate from the county school commissioner, certifying that they have satisfactorily passed an examination equivalent to a grade from an accredited high school, or state normal school, college, university or academy. They shall also furnish evidence of having received diploma from some reputable medical college of four years' requirements at the time of graduation." By reading that section of the act it will be seen that it requires three things of each applicant who desires to be examined, touching his qualifications to practice medicine and surgery in this state, namely: First, that he shall make application in writing to the secretary of the board 30 days before the meeting thereof; second, that he furnish to the

board satisfactory evidence of his scholastic qualifications as therein provided for; and, third, that he shall also furnish to the board satisfactory evidence of having received a diploma from some reputable medical college of four years' requirements at the time of his graduation. While the act mentioned does not undertake to state what medical colleges are or what are not reputable within the meaning thereof, by clear implication it leaves that question for the determination of the Board of Health. This is made manifest by the act requiring the proof of reputableness to be furnished to the board when the applicant presents himself for examination, and by withholding from the board the authority to issue the license until such satisfactory evidence is furnished. There is no pretense in this case that relators or any of them furnished or offered to furnish any evidence whatever tending to show that the Barnes University, the one from which they had graduated and from which they held their diplomas, was a reputable medical college within the meaning of that act. In our opinion the language of this act is susceptible of no other construction than it placed the burden upon the relators, when they presented themselves for examination before the board, to prove to its satisfaction by satisfactory evidence the reputableness of Barnes University, and especially the medical department thereof. In the consideration of a similar statute to ours, the Supreme Court of Wisconsin, in the case of *State ex rel. v. Crittenden*, 112 Wis., loc. cit. 584, 88 N. W. 592, used this language: "The learned circuit court erred in holding, as it seems to have done, that every time a person presents himself before the board as a candidate for a state license to practice dentistry, tenders his dollar, presents his diploma, and makes proof of the statutory requisites for the granting of his application, other than that of the reputability of the school graduating him, it is the duty of the board to make an original investigation of and determination as to that subject by direct evidence of the character of the school at the time of the candidate's graduation, regardless of whether any evidence on the question is tendered by him or any request is made for such investigation. The burden in such case is on the candidate to demonstrate the reputability of his alma mater, not on the board to establish or disprove it. If relator had accepted the burden and offered proof to show that his alma mater was reputable, doubtless the board would have received and considered it in connection with all other information in its possession. Where the facts are so easily ascertainable as they were in this case, \* \* \* assuming, as we must, that the board would be actuated \* \* \* by the single desire to deal justly, \* \* \* lapse of time after one investigation sufficient to allow a new class of graduates to come from

the school would secure a reinvestigation if it was requested, accompanied by a reasonable showing of a material change in regard to the matters in which it was found deficient upon the previous investigation."

The Wisconsin statute simply left the reputableness of the applicants' alma mater to the examining board, and did not, as does this act, expressly require the applicant for a license to furnish satisfactory evidence thereof to the Board of Health. See *Laws Wis. 1901*, p. 418, c. 306. And in reference to a similar question the Supreme Court of Ohio said: "Nor do we find any provision which makes it the duty of the board to determine in advance of an application for a certificate to practice medicine whether a person holds a diploma from a medical institution of the proper standing. It is only when a diploma is presented upon such application that the action of the board can be invoked." *State ex rel. Med. Col. v. Coleman*, 64 Ohio, loc. cit. 387, 60 N. E. 571 (55 L. R. A. 105). The Ohio statute, like the one in Wisconsin, merely submitted the question of reputableness to the board, without requiring the candidate for examination to furnish any evidence. That fact adds force to those rulings when we apply them to the case at bar, for the reason that our statute in express terms places the burden of satisfying the Board of Health of the reputableness of the school of which he is a graduate. If that was all that there is in this case, then we could properly reverse the judgment, remand the cause, quash the alternative writ of mandamus, and direct the circuit court to dismiss the suit; but that is not all that is presented by the record, and presented by counsel for determination.

2. If we correctly understand the position of counsel for relators, they do not controvert the soundness of the conclusions reached in the previous paragraphs, but contend that "under the laws of this state the State Board of Health has no authority to adopt and promulgate fixed rules and regulations as the standard by which the various medical colleges of this state will be adjudged reputable or nonreputable within the meaning of the statute relating to the practice of medicine and surgery. The word 'reputable' as applied to medical colleges means reputation, and must be proven in the same way." The following authorities are cited in support of that contention: *State ex rel. v. Lutz*, 136 Mo., loc. cit. 639, 38 S. W. 323; *Illinois State Board v. People ex rel.*, 123 Ill. 227, 13 N. E. 201; *State ex rel. v. Crittenden*, 112 Wis., loc. cit. 584, 88 N. W. 587; *People ex rel. v. Ill. State Board*, 110 Ill. 180. In our opinion counsel for relators misconceive the meaning and object of the rules and regulations adopted by the Board of Health fixing the standards by which various medical colleges would be adjudged reputable within the meaning of the act under

consideration. That rule simply provides that all medical colleges, wherever located (and not simply those situate in this state), which should on or before October 1, 1907, conform to the standards specified in the schedule of minimum requirements adopted by the board on July 11, 1907, "should be rated and classified as accredited and reputable, and whose students, after being graduated therefrom, should be admitted to the examination of the State Board of Health for licenses to practice medicine and surgery in the state of Missouri," without being required to furnish other proofs of reputableness, and thereby save each of them the time, cost, and expense of furnishing the proofs required of them by said act. In other words, the board, by said rules, undertook to require all medical colleges to adopt such standards as would establish and prove their reputableness in all cases, and thereby remove those burdens from each student who applied for a license, as provided by said act. But said rules of the board do not provide that no graduate from any medical college which had not conformed to those requirements should not be examined touching his qualifications to practice said professions. This construction of that rule seems to have been adopted subsequent to the origin of this controversy, and not prior thereto. Evidently the framers thereof entertained no such idea, for there is no such intention expressed in the rule itself. Neither the rule nor the board is responsible for this erroneous construction. In our opinion, since the act left it to the board to pass upon the reputableness of all medical colleges whose graduates applied to it for examination, and to determine the character of the evidence by which said fact was to be established, said rules were not only reasonable and just, but were also wise and proper. All medical colleges and their students were thereby notified in advance as to what would satisfy the board as to the reputableness of each college. The diploma alone from all colleges which had adopted those standards would entitle the holder thereof to take the examination without further ado. Otherwise many students might innocently be induced to attend colleges which were not, in fact, reputable, and consequently said students would thereby be prevented from establishing their reputableness. In all such cases a great hardship would be visited upon all such graduates, but under these rules of the board no injustice could be done to any college or graduate thereof. And, beyond that, the adoption of said standards by the board, and if the colleges will only conform thereto, the direct tendency thereof would be to uplift and better medical instruction, place her institutions of learning upon a higher plane, and reduce the practice of medicine and surgery to a more perfect science, all of

which would result in great good to suffering humanity.

But suppose, for argument's sake, we are in error in our views before expressed regarding the meaning and object of said rules of the board establishing said standards, and that it was the intention of the board to thereby notify, in advance, all persons who might present themselves for examination for licenses to practice medicine and surgery that it would examine no one except those who presented a diploma from some one of the medical colleges which had adopted said standards. Still that would no more excuse the applicant for examination from tendering to the board such evidence as he might have tending to prove that his alma mater was a reputable school within the meaning of said act than would the adoption of a rule by a judge upon the bench, promulgated a year in advance, to the effect that on and after a certain date he would try no case except where the plaintiff held a certificate from a minister of the gospel stating that he belonged to a church which believes in and teaches the Christian religion would excuse the plaintiff from offering whatever evidence he might have tending to prove his case, even though he held no such certificate. Both such rules of the board and of the court would be illegal and void, and would constitute no legal bar to the applicant's right to stand the examination for his license, nor to the plaintiff's right to have his case tried according to law. Nor could the adoption of such a rule of the board or by court be construed to mean that the board in the one case, or the court in the other, had thereby refused and determined to examine a particular person for a license to practice medicine, or to try a particular case filed in said court. Such a board or such a court might change its mind before the date fixed arrived, and before either was called upon to act in a concrete case. As long as a man or a body of men fill any official position, the law presumes he or they will perform their duties whenever any matter is legally presented to them for action, notwithstanding general declarations previously made to the contrary. This is true for the obvious reason that no officer can legally act or illegally decline to act until a matter is legally presented to him, calling for his official action in the premises.

It is only where some rule, ordinance, statute, or other rule of conduct is relied upon in a particular case conferring or withholding some legal right can the courts or litigants question their validity. They may be unconstitutional, null, and void, or invalid for any other reason, still that fact would be no excuse for a person's refusal or declaration to perform some duty imposed upon it or him by some valid law. This was expressly held in the case of *State ex rel. v.*

**Taylor et al.** (decided by this court in banc, at its last sitting, not yet officially reported) 123 S. W. 892. There the constitutionality of an act was questioned because one section thereof provided that, before the remonstrators against the organization of drainage districts would be permitted to contest its validity, they must first give bond for costs, etc. The court there held that the unconstitutionality of said statute was no excuse for said defendant's declination to appear and defend against said proceedings. The same is true in the case at bar, for the reason that, if the rules of the board establishing the standards for medical colleges are absolutely void, still that fact would be no excuse for a graduate therefrom applying for examination for a license to practice medicine to refuse to furnish satisfactory proof of the fact that his alma mater was a reputable school, as he is required to do by said act of 1907. So it must follow that it is wholly immaterial as to what was the general intention of the board in that regard so long as these particular relators omitted to furnish or offer to furnish any such evidence, and so long as the board had not refused to act in their particular case. Until that was done, there was no just cause for saying the board had declined to perform its official duties, as was shown by the rulings made by the Wisconsin and Ohio courts. In no such case had the board been legally or properly called upon to examine applicant, touching his qualifications to practice medicine and surgery; and, until such demand is made and such proofs are furnished, the board is under no legal obligation to examine him or any of them. So, under either view of the case, whether we consider the rules of the board valid or invalid, relators are not entitled to have the alternative writ of mandamus made peremptory, for the reason that the board has not been legally called upon to give them the examination which they ask this court to compel it to give them. It is elementary that a writ of mandamus will not issue commanding an inferior court, tribunal, or ministerial body to act until it is first established by the evidence that said court, tribunal, or ministerial body has been legally requested to act, and that it has illegally declined to do so. This court in the case of *State ex rel. v. Associated Press*, 159 Mo., loc. cit. 421, 60 S. W. 93, 51 L. R. A. 151, 81 Am. St. Rep. 368, in passing on this question, said: "It is fundamental in the law of mandamus that it is indispensable to granting the writ that a prior express and specific demand be made of respondent of that which relator seeks and that a refusal of such demand occurred before relator has any standing in court, or his application for the writ contains any grounds for relief." We are therefore clear-

ly of the opinion that the judgment of the court making the alternative writ of mandamus peremptory was erroneous.

3. The relators are not without remedy, if they possess the necessary qualifications to practice medicine and surgery in this state. If they possess the necessary scholastic attainments and diplomas from some reputable college, and if they can produce before the Board of Health satisfactory evidence of the reputableness of said college, then doubtless the board will, upon proper request, give them an examination, as provided for by the act of 1907, and, if found qualified, the board will presumably issue to them licenses to practice medicine and surgery in this state; but, if after such showing the board should unjustly and arbitrarily refuse or decline to examine relators, it would then be time enough to institute mandamus proceedings against the board, requiring it to act in the premises. *State ex rel. v. Adcock*, 206 Mo. 550, 105 S. W. 270, 121 Am. St. Rep. 687.

The judgment is reversed, and the cause remanded, with directions to the circuit court to quash the alternative writ of mandamus heretofore issued by it, and to dismiss relators' petition. All concur, except *LaAMM, J.*, who dissents.

#### HECTOR et al. v. MANN.

(Supreme Court of Missouri. Feb. 2, 1910.)

#### 1. APPEAL AND ERROR (§ 173\*)—RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—DEFENSES.

In a suit to recover land sold under a partition decree, where plaintiffs, one of whom was a minor and another a married woman at the time of the partition sale, did not urge these disabilities as relieving them from being bound by the sale, but the case was tried on the theory that they stood on the same ground as the other plaintiffs, who were under no disability, the decree cannot be disturbed on the ground of minority or coverture.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1079, 1094; Dec. Dig. § 173.\*]

#### 2. PROCESS (§ 96\*)—SERVICE—PUBLICATION—AFFIDAVIT.

The publication of process against nonresident individual defendants is not invalid because the affidavit of nonresidence on which the order of publication is based does not also allege that the defendants cannot be served with the ordinary process of law.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 118; Dec. Dig. § 96.\*]

#### 3. APPEAL AND ERROR (§ 681\*)—RECORD—REVIEW—AMENDMENTS.

In a suit to recover land under a partition decree, it cannot be urged on appeal that there was an amended petition filed in the partition suit which described different land and stated an essentially different cause of action where no description of the land as set out in either petition appears in the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2883, 2884; Dec. Dig. § 681.\*]

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

#### 4. APPEAL AND ERROR (§ 195\*)—OBJECTIONS BELOW—AMENDMENT OF PLEADINGS.

The objection that an amended petition stated a cause of action different from that set up in the original petition cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1247, 1489; Dec. Dig. § 195;\* Pleading, Cent. Dig. §§ 1408-1413.]

#### 5. APPEAL AND ERROR (§ 185\*)—RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—OBJECTIONS.

In a suit to recover land sold under a partition decree, it cannot be urged for the first time on appeal that the partition decree was void because the judge who presided in the suit was a brother of one of the parties and the other parties did not consent to his acting.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 185;\* Judges, Cent. Dig. §§ 224-231.]

#### 6. APPEAL AND ERROR (§ 911\*)—REVIEW—PRE-SUMPTIONS—DISQUALIFICATION OF JUDGE.

On appeal in a suit to recover land sold under a partition decree, a remark of a witness not in response to any question, but merely describing the partition suit that "William Riley, a brother of Judge Riley, was plaintiff," was insufficient to show that the judge who tried the partition suit and one of the parties were brothers, as the court will not presume that the Judge Riley referred to was the Judge Henry Riley who was a judge at that time in the circuit court in which the suit was tried.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3682; Dec. Dig. § 911.\*]

#### 7. EVIDENCE (§ 67\*)—PRESUMPTIONS—CONTINUANCE OF CONDITION.

Where it appears that a certain judge presided at some of the judicial steps in a partition proceeding, it will be presumed, in the absence of a showing to the contrary, that he presided throughout.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 87; Dec. Dig. § 67.\*]

#### 8. PARTITION (§ 106\*)—SALE—CONFIRMATION—RECORD.

A memorandum in a minute book in the office of the clerk of court indicating that a report of a partition sale was approved, but which has never been made into a record entry, is not a judgment of the court approving the sale.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 860; Dec. Dig. § 106.\*]

#### 9. PARTITION (§ 106\*)—CONFIRMATION OF SALE—EVIDENCE.

In a suit to recover land sold under a partition decree, a memorandum in a minute book in the office of the clerk of court indicating that a report of the partition sale was approved was not objectionable as evidence because it failed to describe the land in question, and because it showed the approval was made prior to the sale.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 360; Dec. Dig. § 106.\*]

#### 10. ESTOPPEL (§ 92\*)—SALE—CONFIRMATION—RIGHT TO ATTACK VALIDITY.

When the title of a purchaser at a judicial sale is assailed, it is sufficient if he is able to show by way of defense that the assailant elected to affirm the transaction by accepting the fruits of the sale, and where land belonging to the estate of a decedent was sold under a partition decree, and the nonresident heirs, who were made parties to the partition suit by service by publication, accepted their shares of the proceeds of the sale from the officers signing receipts, which clearly stated that the funds were the result of a partition sale of the property of the estate, they elected to treat the report of

sale as approved, and were estopped to question the sale.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 260; Dec. Dig. § 92.\*]

Valliant, C. J., dissenting.

In Banc. Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Suit by Cynthia G. Hector and others against David Mann. From a decree for defendant, plaintiffs appeal. Affirmed.

C. G. Shepard and Sam J. Corbett, for appellants. Ward & Collins, for respondent.

LAMM, J. This is a suit under section 650, Rev. St. 1890 (Ann. St. 1900, p. 667), to try and determine title to certain real estate in Pemiscot county. The petition also states matters of equitable cognizance, and, in its omnibus form, may be considered a bill in equity to cancel and annul a certain deed in partition, remove a cloud upon plaintiffs' title, submitting conditions to be enforced in a certain contingency as the price of the decree. It is conceded that one Gowah W. Stewart was the common source of title. Dying he left a widow, Cynthia G. (who intermarried with one Hector, now dead), and three children, B. W., Watson L., and Carrie G.; the latter intermarried with one Frazier. Said widow and children are parties plaintiff. The case proceeds on the theory that B. W. Stewart has no interest; that his title as an heir of Gowah W. passed to one Riley under unchallenged execution sales antedating the partition. Why he is a party is entirely dark.

Plaintiffs allege in their petition that they own in fee the real estate described; that it is not in possession of anyone; that defendant claims some unknown interest, title, and estate in the premises which cannot be stated unless under a certain deed executed by the sheriff of Pemiscot county in pursuance of a decree in partition, which decree ordered the sale of the described land belonging to plaintiffs; that if defendant claims through said proceedings and deed they should be held void because these plaintiffs (defendants in said partition suit) were nonresidents of the state of Missouri and were not summoned to appear or in any way notified as the law commands; that they had no knowledge of said proceedings, actual or constructive; that the circuit court of Pemiscot county had no jurisdiction over them, and to so deprive them of their property would not be due process of law; that plaintiff Watson L. Stewart at the time was a minor and the plaintiff Carrie G. Frazier a married woman. Alleging they did not knowingly receive any proceeds of the sheriff's sale in partition, but got a small sum of money, the amount of which they do not remember, from the sheriff, they allege they were not informed of the source from which said money was derived and had no knowl-

edge of any of their lands being sold in partition. They aver themselves willing to submit to equitable terms if the proceeds paid them were derived from a partition sale and ask the court to ascertain the fact, adjudge the amount of money so received, and allow them to refund to the party or parties jointly entitled to it with interest; praying, furthermore, that the court determine their interest with those of the defendant, respectively, in the real estate, and define and adjudge the estate and interest of the parties, cancel the sheriff's deed (if it is the deed under which defendant claims), and vest out of defendant and into plaintiffs all apparent title under said deed and grant them general equitable relief. The answer denies plaintiffs' title and asserts defendant's. Alleging, furthermore, that plaintiffs were tenants in common with one William Riley (execution purchaser of B. W. Stewart's interest); that Riley sued in partition; that such steps were taken in that case that a valid judgment was rendered and the land was sold by the sheriff at a valid and regular sale; that at such sale it was knocked down to defendant on his bid of \$500 and he received a sheriff's deed conveying all the right, title, and interest of plaintiffs in said land; that the bid was all the land was worth at the time of the sale, and that plaintiffs, with full knowledge of the suit and sale, received from the sheriff the amount bid, knowing it was the consideration paid by defendant; that since the date of that deed defendant has been in actual possession of the land with the knowledge, consent, and acquiescence of plaintiffs; paid the taxes and expended large sums of money since then in good faith under a claim of ownership, and made lasting and valuable improvements; that plaintiffs, knowing these things, remained silent, and retained their share of the partition money until defendant reclaimed the land from marsh and swamp and made it valuable, wherefore defendant invokes estoppel.

For another defense it is alleged that B. W. Stewart (prior to the partition) executed to defendant his promissory note for the sum of \$275 drawing 8 per cent. interest, due January 1, 1897; that in consideration for such loan and to secure the same plaintiffs executed to one Shead, as trustee, a deed of trust conveying to him the land described in the petition to secure the note; that, the note coming due, said Shead, as trustee, filed an intervening petition in said partition asking to be subrogated to the rights of plaintiffs in the funds derived from the sale of the lands conveyed by the deed of trust; that such steps were taken in that case that he was subrogated to those rights as to Cynthia G. Hector, Carrie G. Frazier, and Watson L. Stewart; that the land was purchased by defendant at the partition sale on the judgment rendered in the partition suit; that he paid to the sheriff the amount of his bid, the sheriff by virtue of the terms of the order of the

sale accepting in part payment the amount due on said note. On these several pleas, defendant prayed the court to adjudge the title to be in him; that plaintiffs have no title whatever; that if the court found the partition sale void, etc., then, in that event, a decree go making said deed of trust in full force and effect a lien on the land; that it be sold under such decree foreclosing the deed of trust; that the proceeds be applied to the payment of debt evidenced by the note, and for such other and further relief as seems meet and proper. The reply denied the new matter in the answer. On issues thus outlined the chancellor found them for defendant, decreeing him to be the owner of the land, and that plaintiffs have no title. From that decree all the plaintiffs prosecute their appeal.

As said, Gowah W. Stewart was admitted to be the common source of title. The relationship of the plaintiffs severally to him as hereinbefore set forth was shown and that he died in 1879, leaving plaintiffs his only heirs. Cynthia G. Hector testified by deposition that she was never summoned or in any other way notified in the partition suit; that she had no knowledge of such proceedings until two years after the sale and then employed attorneys in Arkansas to look after her land, she living there, and for the first time ascertained through them that parties were claiming through partition proceedings the land descended to plaintiffs from Gowah W. Stewart. Those attorneys were instructed to bring a suit to recover the land. Witness stated she "never knowingly received one cent from the sale of any of the land." She admitted plaintiffs received "a small amount of money from the sheriff of Pemiscot county, Missouri, at one time"—the exact amount not remembered. It was very small, and witness supposed it to be "the balance due from the estate of Gowah W. Stewart, there being something said about this being the amount due me after paying Mann Bros." (Note: It seems the note hereinbefore referred to was payable to Mann Bros.) In relation to the deed of trust mentioned in defendant's answer, she said it was executed to secure B. W. Stewart's note; that, when the sheriff transmitted the money to them, that note was long past due, and that plaintiffs understood it to be the balance due them out of the sale under that deed of trust, and "had no idea that the money received" was from the sale of the lands in partition. The deposition of Watson L. Stewart was read by plaintiffs. At the time of testifying he was 27 years old. His testimony was to the same effect as that of his mother, Mrs. Hector. To the same effect was another deposition read by plaintiff, to wit, that of Carrie G. Frazier. Speaking of the money received of the sheriff, she said she "understood it to be money received in some way from the estate of my father, probably from some land sold on account of a

mortgage given to David Mann or Mann Bros." Such was the testimony of plaintiffs in chief.

To sustain his title, defendant offered his original deed in partition from McFarland, sheriff, dated February 21, 1898, conveying the land to David and Fred Mann. This offer was objected to "for the reason that judgment in partition proceedings on which said deed is based is void for the reason that the court rendering such judgment had no jurisdiction of the parties defendant in such suit; and for the further reason that said deed purports to convey only the interest of Cynthia G. Hector and not the interest of any of the other parties in this cause." The objection was overruled, the deed admitted and plaintiffs saved the point. As the deed sustained the averments of the answer in that regard (including the payment of \$500 bid at the sheriff's sale), it will not be necessary to cumber the opinion by setting it forth.

Defendant next offered an amended deed bearing date during trial of the pending suit and executed by McFarland, ex-sheriff. In the narrations of the original deed the parties to the partition proceedings were set forth as "William Riley, Petitioner, against Cynthia G. Hector et al., Defendants"—the names of the defendants not otherwise appearing. The amended deed corrected that irregularity. To the offer of this deed plaintiffs' counsel interposed the same objection they offered to the original, with this in addition, "and for the further reason that the sheriff at this late date has no right to make the amended deed now offered; the judgment in the partition proceedings being barred by the statute of limitations, it being more than three years since the rendition of the judgment." The objection was overruled, the deed admitted, and plaintiffs saved the point.

To further sustain issues on his behalf, defendant put on the stand Mr. McFarland, the sheriff at the time of the partition sale and who executed the foregoing deeds, who testified that he remembered the sale of the land. He described the partition suit as one "wherein William Riley, a brother of Judge Riley, was plaintiff, and Cynthia G. Hector, Carrie G. Frazier and husband, and Watson L. Stewart were defendants." He identified the land as that described in the deed and partition. He paid to Mrs. Hector, Mrs. Frazier, Watson L. Stewart, and William Riley the funds received from the sale and had the receipts now in hand. He paid Mr. Mann some of the money, sent the checks and receipts to the several defendants, and the receipts came back several months afterwards, the checks being paid in about two weeks, inclosing the checks and receipts by letter. Did not say now what he said in the letters. Did not go into a detailed report of the matter because he "guessed if they wanted to know they would ask some questions." The receipts follow:

"Office of the sheriff of Pemiscot county,

Missouri, August 18, 1898. Received of J. H. McFarland, ex officio sheriff of Pemiscot county, Mo., the sum of thirty-one dollars and 85/100 dollars, being amount in full due me from the distribution of funds derived from the sale of certain real estate sold for partition on the 9th day of February, 1897, under an order issued by the circuit court of Pemiscot county, Missouri, in the case of William Riley v. Cynthia G. Hector et al." Signed, "Cynthia G. Hector;" and marked in the left-hand corner, "Original."

"Office of the sheriff of Pemiscot county, Mo., Aug. 19, 1898. Received of J. H. McFarland, ex officio sheriff of Pemiscot county, Mo., the sum of \$172.13, being amount in full due me from the sale of certain real estate sold for partition on the 9th day of February, 1897, under an order issued by the circuit court of Pemiscot county, Mo., in the case of William Riley v. Cynthia G. Hector." Signed, "W. L. Stewart;" "Original" in left-hand corner.

"Office of the sheriff of Pemiscot county, Mo., Aug. 19, 1898. Received of J. H. McFarland, ex officio sheriff of Pemiscot county, Mo., the sum of fifty-five and 73/100 dollars, being the amount in full due me from the distribution of funds derived from the sale of real estate sold for partition on the 9th day of February, 1897, under an order issued from the circuit court of Pemiscot county, Mo., in the case of William Riley v. Cynthia G. Hector et al." Signed, "Carrie Frazier;" "Original" in left-hand corner.

Suspending the testimony of the sheriff McFarland for the moment in order to explain more fully the receipts and the letters accompanying them, it appears that subsequently plaintiffs produced in court at the trial a letter as and for a copy (mutatis, mutandis) of those received by them severally from the sheriff at the time of the transmission of the money, and introduced that letter in evidence, reading:

"Gayoso, Mo., Aug. 19, 189—. Mrs. Carrie Frazier, Pine Bluff, Ark. Dear Madam: Herewith I enclose you check for your interest in the Goah Stewart estate less your interest in the 'Long field,' which was decreed to go to Mann Bros. The synopsis of the matter is as follows, to-wit:

Gross proceeds.....	\$768 93
Total expense.....	154 13
Net proceeds.....	\$614 80
Mrs. Hector's dowry deducted.....	98 40
Amount to be divided among three heirs .....	\$516 40
One-third of your share of the whole	172 13
Your interest in Long field which Mann Bros. got.....	116 40

Your interest in balance of the estate \$ 55 73

"I suppose that you understand that this is the proceeds of the balance of the Stewart land which was sold in February term of our circuit in '97, and that Mann Bros. were subrogated to your interest in the Long field

on the account of a trust deed signed by you to them. I send you duplicate receipts to sign, as I need one receipt to keep and one to file in court. Please sign and return them as soon as suits your convenience, and oblige,

"Yours respectfully, J. H. McFarland.

"I just collected this a few days since is the reason it has not been sent ere now."

Before introducing that letter it was shown to the sheriff on the stand and he testified in regard to it. Resuming his testimony he said the money mentioned in the receipts was the proceeds of the partition sale after deducting the amount paid Mann on his mortgage. It seems that at the date of the mortgage Watson L. Stewart was a minor, then shortly to become of age, and that the sheriff on that account was instructed to make no deduction from his share because of the Mann mortgage, and made none; that there were two sales, and he also sent plaintiffs their pro rata of the first sale and supposed he received receipts, but could not now find them. No complaints were made by the parties at the time. Referring to the letter heretofore set forth, he was not prepared to say it was an exact copy, but it was about such a letter as he would have written; that he wrote plaintiffs when he sent the first checks for the first sale, but this letter was written in regard to the proceeds of the last sale. On cross-examination he said he made two sales of the Stewart land, two reports, and two remittances; that he had the checks he sent for the proceeds of the first sale. They did not relate to the land in question. His recollection was that he sent to each one of the parties a letter with a check and a brief statement showing the amount going to them. His best impression was that the copy of the letter examined by him was a copy of that written to each. It was just such a letter as he would have written, and he had no recollection of writing explaining the matter more fully. His recollection was that he furnished each one of them a statement similar to that in the letter put in evidence. Plaintiffs objected to the introduction of the aforesaid receipts for the reason there was nothing to show that the money was received with knowledge that it was for this land or lands in which any of the plaintiffs, except Cynthia G. Hector, had an interest. The objection was overruled and the point saved.

Defendant next introduced an intervening petition filed in the partition suit by Shead, trustee, under the Mann deed of trust, having for its purpose to subrogate Shead to the rights of defendants in the proceeds, and followed that up by putting in the deed of trust securing the Mann note signed and executed by Mrs. Hector, Mrs. Frazier, and Watson L. Stewart. Defendant next put in the decree in partition. This decree was objected to for the reason that "no summons had ever been issued directed to the defendants in said suit nor any order of publication made such as the law requires and the defendants in

said suit were not in court, and the court had no jurisdiction to render the judgment in question." The objection was not allowed and plaintiffs saved the point. Defendant next introduced the order subrogating Shead to the rights of defendants in the partition suit to the proceeds derived from the sale of the land conveyed by the deed of trust, to the amount of the secured note, and followed that with various interlocutory orders and judgments in the partition proceeding. At this point defendant rested.

Plaintiffs offered in rebuttal the original petition in the partition suit and the affidavit attached upon which an order of publication was based. Among other things in that affidavit was the statement that "the defendants Cynthia G. Hector, Watson L. Stewart, Carrie G. Frazier, James Frazier, are nonresidents of the state of Missouri. Plaintiffs next put in an amended petition filed in the same cause. The original petition was filed July 19, 1895—the amended one on the 4th day of December, 1895. Neither of these petitions is copied in full in the abstract. The object of introducing them is not apparent, further than, as will presently appear, plaintiffs contend the affidavit was not sufficient to support an order of publication. Whether the order of publication was made on the last petition or on the first does not appear. If the object of introducing the amended petition was to show that, after constructive service on defendants, an amended petition was filed materially affecting the issues, then such amendments or alterations are not pointed out. Plaintiffs next, for the purpose of showing that the report of sale was never approved, put in an order found of record in the circuit court record No. 3, page 229, known as the subrogation order, which narrates, under the caption of the case, that "on this day the sheriff files his report of sale herein." It then goes on to make a renewing order of sale as to a tract of land not in dispute, provides for subrogation as already stated, and says nothing about an approval of the report of sale.

At this point defendant resumed putting in his proof, as follows: A sheriff's deed conveying the interest of the plaintiff B. W. Stewart to William Riley. No date is given nor is the deed set out. The abstract says: "Said deed is not set out herein as there is no contention but that William Riley is the owner of B. W. Stewart's interest." Defendant next offered the minute book of the circuit court of Pemiscot county, reading: "No. 553. The regular judge vacates the bench and Special Judge T. R. R. Ely takes the bench. Report of sale filed and approved. Order of sale renewed as to 184.64 southeast quarter 18-20-12 and 80, east half southwest quarter 27-20-12; A. T. Shead subrogated to rights." To the offer of that minute plaintiffs' counsel objected. The record shows the following objection which was overruled and

an exception saved: "To which offering plaintiffs object for the reason that said order does not describe the land in question, and for the further reason that said minute shows that the approval of sale was made prior to the sale of the land in question and is an approval of sale of land made under a prior suit in partition, and for the further reason that this order shows it was made on the 13th day of February, 1896, and the deed offered in evidence shows that this land was not sold until February, 1897." Defendant next offered the record entries of the order of publication and proof of publication, alleged to be fair and regular and hence not abstracted. Declarations of law were asked by plaintiff which, the cause being in equity, are immaterial. Such is the record.

It will be seen there is no charge or proof of fraud in the concoction of the judgment in partition and none to the effect that the plaintiffs were injured by, or imposed upon, misled or in anywise hoodwinked into, receiving the proceeds of the partition sale. More significant still, there is no charge or proof that the partition sale was for an inadequate consideration—gross or otherwise. For aught appearing here, the land sold for all it was worth and plaintiffs received all justly their due in a fair partition. The then minor, Watson L. Stewart, long since of age and doing for himself, admits in his petition that he got his pro rata share of the money, whatever amount it was. The case does not proceed on the theory that it turns on the fact of his minority at the time. It is true he testified he got none of the money, but he does not deny his receipt nor does he disaffirm his act as a minor or put himself in a situation to be entitled to disaffirm it on that score. He puts himself in the same boat with his mother and sister. His theory seems to be that if they have a case, he has; otherwise, not. In this condition of things the decree cannot be disturbed on the ground of his minority, nor do plaintiffs' learned counsel make any point on the fact of minority nor on the other fact of Mrs. Frazier being a married woman at the time. It seems Mrs. Hector was discovert, her husband having died.

There is no brief for respondent, and its absence has thrown unnecessary labor upon this court. While respondent may submit his case in that form, if he choose, resting on the presumption that his judgment was right and the fact that an appellant carries the burden of upsetting it, yet the wisdom of such course is not apparent to us. In the administration of justice by an appellate tribunal an apt brief is a material aid, and its absence leaves the case unreasoned and dark on one side. With which general observations we come to a closer view of the assignments of error.

(a) The main proposition relied on for reversal is that the affidavit in the partition

suit was not sufficient to support the order of publication. It is argued that jurisdiction was never obtained over defendants and there was no due process of law. The vice of the affidavit is said to be that it does not say that defendants "cannot be served with the ordinary process of law." It will serve no useful purpose to restate the learning on the question. The point has been resolved against appellants in *Keaton v. Jorndt*, 220 Mo. 117, 119 S. W. 629; and in *Huiskamp v. Miller*, 220 Mo. 135, 119 S. W. 633. These cases received diligent attention by our learned Brethren in Division 2. They are well reasoned and meet our unqualified approval. The circuit court of Pemiscot acquired jurisdiction of the persons of the defendants in the suit, and the point is disallowed to appellants.

(b) Something is said in appellants' brief about filing an amended petition in the partition suit. It is argued that it was a departure from the original petition, described different land and states an essentially different cause of action. But appellants are precluded from making the point that different land was described because they bring here no description of the land set out in either petition. We can see no essential difference in the cause of action stated in the one petition from that in the other, nor does it appear that the point was made or relied on in the court below. When appellants offered the amended petition respondent objected to its introduction for the reason that there was no occasion to show in that petition the prayer for an order of publication. That ground of the objection implies that appellants offered the petition to show the absence of a prayer for an order of publication in the amended petition. No other purpose is indicated by the record, and appellants do not now press upon us that point. The points now made appear to be afterthoughts operating by way of a new revelation, a change in the theory of the case above from that entertained below, and we therefore treat the matter as *afield*.

(c) When Sheriff McFarland was on the stand he threw a side remark into his testimony earmarking the partition suit, not brought out by any question, but by way of descriptio personæ, viz.: "William Riley, a brother of Judge Riley, was plaintiff." Based on this pin prick of testimony it is argued that William Riley, plaintiff in the partition suit, was a brother of Hon. Henry O. Riley, who was judge of the Pemiscot county circuit court at the time that suit was pending and that he sat in that case; hence the decree in the partition suit was null and void. We shall not elaborate the point. No such ground was urged below to invalidate the partition proceedings. To the contrary, in the pleadings and in many objections below the point does not appear. Not only is it too late to spring such theory on appeal, but

there is no testimony directed to the point. We shall not take judicial cognizance that "Judge Riley" is one and the same with Judge Henry C. Riley, judge of the Pemiscot circuit court. The exuberance of American life, though developing under a democratic form of government, permits (in the familiarity of homespun talk), titles such as "Judge" this and "Colonel" that to be given willy nilly. Some colonels and judges (in chimney corner philosophy) are said to be born so, others to achieve rank, and others to have it thrust upon them. There may well be in the region in hand other men bearing the honest name of Riley, who are spoken of as "Judge," besides the elected officer who has long and well administered justice in the circuit court of Pemiscot. Moreover, it appears affirmatively that Judge Ely presided at some of the judicial steps in that partition proceeding. In the absence of showing to the contrary, the presumption is he presided throughout in every vital judicial act. This, since a circuit court in Missouri is presumed to proceed by right and not by wrong. Appellants make the stout statement that Judge Henry C. Riley determined a cause in which his brother was a litigant, without the consent of the parties to the suit and in contravention of the statute. Rev. St. § 1602 (Ann. St. 1906, p. 1195). This charge is equivalent to a lapse in a refined sense of judicial propriety. It has no basis in this record, and is made inadvertently by learned counsel. The point is ruled against appellants.

(d) It is next argued there was no approval of the report of sale, hence the deed, made without warrant of law, does not operate to vest title. Whatever may be the rule in execution sales generally, relating to their approval by the court out of which process issued, our statute on partition contemplates that a deed shall remain in abeyance until the court has approved the report of sale. Rev. St. 1899, §§ 4410 and 4414 (Ann. St. 1906, pp. 2423, 2425). Indeed, until an amended statute permitted appeals from an interlocutory judgment in partition (Rev. St. 1899, § 806 [page 769]), the approval of the report of sale was the final and only judgment from which an appeal would lie (*Buller v. Linzee*, 100 Mo. 95, 13 S. W. 344), and the statute still permits appeals from a final judgment in partition (section 806, *supra*; section 4424, Rev. St. 1899). The statutory theory being that the deed shall not pass until the sale has been judicially affirmed, accordingly it has been pointedly ruled that a deed made before the confirmation of the sale is inoperative. *Burden v. Taylor*, 124 Mo. 12, 27 S. W. 349; *Clark v. Sires*, 193 Mo. 502, 92 S. W. 224; *Thomas v. Elliott*, 215 Mo. 598, 114 S. W. 987.

In this case there is no record entry showing the approval of the report. Defendant introduced a memorandum found in a minute book in the office of the clerk of the Pemiscot circuit court indicating that a report of

sale was approved. But this minute was never amplified and dignified into a record entry. Such a minute is in no sense a judgment of the court approving the sale. It may be evidence upon which a nunc pro tunc entry could be based. See *Reed v. Colp*, 213 Mo., loc. cit. 586, 112 S. W. 255 et seq., and cases cited. The objections made below to the introduction of this minute were properly overruled because they did not make the point we are now considering and which appellants press here. But the probative force of the evidence has to be dealt with in an equity case, and we cannot very well write the law to the effect that the loose memoranda of a clerk (a mere egg out of which a record entry is to be hatched, and frequently dealing with abbreviations and other matter intended to refresh the memory) shall stand in the place and stead of a solemn record entry in the proceedings of a court of justice. If there were nothing more in the case we would reverse the judgment and remand the cause for a new trial in order to permit defendant (if he so elects) to apply for a nunc pro tunc entry and procure the same if the proper data exist to warrant it. But there is something else in the case, viz.:

(e) Conceding that the deed was prematurely made under the present record, yet it does not follow that plaintiffs were entitled to a decree determining and vesting title in them or any of them. They are confronted with the fact that they received the fruits of a judicial sale and now seek to repudiate the sale. They say they did not knowingly accept the proceeds of a sale in partition. But the record is against them. The sheriff's letters sent respectively to them refer to their interest in the "Gowah Stewart estate," to Mrs. Hector's "dowry" and a commutation of the same, to the respective interests of the heirs in land sold at a term of the circuit court, to the fact that subrogation was "decreed," and that a receipt was demanded to "file in court." If we recur to the receipts they sufficiently indicate that the money distributed arose from a "partition" sale. They say so in so many words. If defendants did not know the meaning of all the terms used, they were sufficient to put them upon inquiry and they made none. The record does not show they were illiterate people, unfamiliar with the use of fair English words indicating a proceeding in court, a judgment, sale and distribution of proceeds to heirs, and it would be dangerous to justice to permit a mere statement from a witness that he did not understand or did not know what was plainly told him to overcome the force and effect of such documentary evidence.

But it is argued that in order to operate as an estoppel the purchaser should have known and relied upon the receipt of the purchase money and changed his situation to his disadvantage because of such reliance. I cannot agree such argument is sound. There

are estoppels and estoppels, and some forms of them are so defined by lawwriters and jurists as to make one element in the estoppel the knowledge and reliance of one party upon the acts and conduct of the other; for instance, estoppel in pais, arising from misrepresentation by word, act, conduct, or silence. But there are other forms of estoppel in which knowledge of the fact upon the part of the person invoking the estoppel, and reliance upon the fact and a change of situation based upon that reliance, is not an element. It may be that "estoppel," speaking with precision, is the wrong designation, and that in attempting to classify and give names the doctrine we are about to invoke is improperly classified as "estoppel," and that it does not come under that head, but springs from election, ratification, affirmance, acquiescence, acceptance of benefits, or what not. It is classed, however, by lawwriters under the head of "quasi estoppel." Bigelow on Estoppel (5th Ed.) p. 697; 16 Cyc. 787, 784, et seq.

Says Bigelow: "Many of the cases upon this subject, it will be noticed, are simply cases of ratification or acquiescence; and it is a questionable use of terms, as we have seen, to apply the word 'estoppel' to them. A few more cases will serve to enforce this observation. Thus, if heirs of age join in a deed of quitclaim with a trustee of the ancestor's real estate, to complete title made by a previous deed executed by the trustee, it is said that they will thereafter be 'estopped' from contesting the validity of that earlier deed. So if a man assent with knowledge of the facts to the appropriation by an officer of the law of moneys arising from a judicial sale, he will be estopped thereafter from objecting." The same careful writer says (page 684), under the head of "Quasi Estoppel: Election," and a subhead, "Inconsistent Positions": "Thus, the party actively affirming a transaction such as a contract or a purchase, by reserving and retaining money upon it, is estopped thereafter to deny the force of any of its express or implied terms or conditions." He suggests there is no great objection to the use of the term "estoppel" in such cases if used as a synonym with "bar" or "preclusion." Page 694.

Under the subheads of "Acceptance of Benefits" and "Quasi Estoppel" (16 Cyc., supra) it is said: "Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he becomes bound by the transaction and cannot avoid its obligation or effect by taking a position inconsistent therewith." But the custom is to include the doctrine just announced under the head of "Estoppel" and so the case learning terms it. If it were to be held that one invoking the doctrine should know the fact of acceptance of the proceeds of a judicial sale, and in reliance upon that acceptance change his condition, the doctrine would have little

application in the practical administration of justice. It is not the rule for purchasers at judicial sales to interest themselves in the distribution of the amount bid, in the first instance nose out the disposition of such funds and act on the strength of knowledge so obtained. It is sufficient that when their title is assailed they are able to show by way of defense that the assailant elected to affirm the transaction by accepting the fruits of the sale. A long line of cases in Missouri sustains that doctrine on grounds of elevated morals. In no case we can find, breaking on the exact point, was any stress laid upon the fact that the party invoking this particular form of estoppel need know at the outset of the act of affirmance or change his position on the strength of it in order to make it effective as a defense. In some of those cases other forms of estoppel were present, and the discussion is broad enough to cover them, but on the precise form up for consideration the rule is as stated above.

In *McClanahan v. West*, 100 Mo., loc. cit. 323, 13 S. W. 676, it was said: "And then there are the receipts given by the minors, and by plaintiff herself, after she attained her majority, when acting in the presence, and under the advice, of her counsel, for her share of the proceeds of the sale in partition. If she knew from what source these proceeds came, and still receipted for them, and there is good reason to believe she did know, she certainly would not be allowed to repudiate the transaction now, even if the partition proceedings were in fact void. She certainly could not have both the money and the land. *Austin v. Loring*, 63 Mo. 19, and cases cited."

In *Austin v. Loring*, 63 Mo., loc. cit. 22, it was ruled as follows: "But no person will be allowed to adopt that part of a transaction which is favorable to him, and reject the rest to the injury of those from whom he derived the benefit. When those who are entitled to avoid a sale adopt and ratify it, equity will estop them from afterwards setting it aside. When a sale of land is made no person can be permitted to receive both the money and the land, \* \* \* it makes no difference whether the proceedings under which the sale occurs are voidable or wholly void in consequence of the want of jurisdiction." In that case this court adopted the language of the Supreme Court of Illinois in an early case (*Smith v. Warden*, 19 Pa. 424), viz.: "Where a party has taken the fruits of a judicial proceeding, he should not afterwards be heard to question it. Though an estoppel may debar the truth in a particular case, yet, as was said by the Supreme Court of the United States in *Van Rensselaer v. Kearney*, 11 How. 326 [13 L. Ed. 703], it imposes silence on a party only when in conscience and honesty he should not be allowed to speak."

In *Nanson v. Jacob*, 93 Mo., loc. cit. 344, 6 S. W. 246, 3 Am. St. Rep. 531 et seq., the

question was discussed and many cases cited. The substance of them all is that where an election exists between inconsistent remedies the party is confined to the remedy which he first prefers and adopts. The Nanson Case related to hops, and it was held that: "For the most obvious reasons, then, the plaintiff could not with one hand gather in the proceeds of the hops, in the assignee's court, and with the other hand take the hops and their proceeds in the circuit court." To the same effect is *Boogher v. Frazier*, 99 Mo. 325, 12 S. W. 885, also *Clyburn v. McLaughlin*, 106 Mo. 521, 17 S. W. 692, 27 Am. St. Rep. 869. In the last case it was held, in effect, that an owner of land, sold for delinquent taxes, who, with knowledge of the facts, accepts a part of the proceeds, thereby recognizes and ratifies its validity, and will not afterwards be heard to question it. In *Pockman v. Meatt*, 49 Mo. 345, the same proposition is resolved. In *Fischer v. Slekmann*, 125 Mo. 165, 28 S. W. 435, the doctrine was applied to the receipt by an heir of his share in a partition sale. In that case the guardian received the share and afterwards the heir gave an acquittance on final settlement. In *Meddis v. Kenney*, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496, the doctrine was applied to an heir who received his share of the surplus proceeds of land sold by an administrator for the payment of debts. To the same effect is *Cadematori v. Gauger*, 160 Mo. 352, 61 S. W. 195.

In a very late case, *Proctor v. Nance*, 220 Mo. 104, 119 S. W. 410, a defendant in a tax judgment and sale (one Hall) subsequently quitclaimed his interest to plaintiff who sued the purchaser. After paying the taxes and costs, defendant's bid created a surplus of \$4.75. Some time afterwards, this surplus was deposited in the county treasury. Thereafter Hall gave an order for it, which order was honored. The defendant pleaded this fact as an affirmance of the sale and an estoppel. It nowhere appears that defendant, prior to preparing his defense, knew anything about the appropriation of this small surplus or in aught changed his position because of such acceptance. In considering those facts, *Gantt, J.*, among other things, said: "To obviate the effect of Hall demanding and receiving the surplus of the purchase money paid by the defendant Nance at the sheriff's sale, plaintiff pleads that Hall at the time he gave the order for said surplus had no knowledge that the sale was void, and that Hall was an uneducated person, and did not intend to ratify said sale by receiving said surplus; but the very character of the transaction of taking the surplus of the sale necessarily advised Hall that his land had been sold, and that this was a part of the purchase money paid by the defendant at the execution sale. It carried notice upon its face, or at least was of that unequivocal nature that it put Hall upon inquiry as to the source of that surplus, and

why it was there in the treasury for him, and it must be held that he had notice that his land had been sold for the taxes under the tax judgment. He had the option to refuse to take down this surplus, and bring his action to remove the cloud from his title, or he could ratify the sale, even though it was not a void judgment, and thereby estop himself from disputing the validity of the proceedings under which the land had been sold. \* \* \* In this case the defendant Nance had the means of knowing whether the proceedings in the tax case were valid or void and so far bid at his peril, but he paid his money in good faith, and Hall, with knowledge that the defendant had bought and paid for the land and this purchase money had gone to the satisfaction of the taxes on the land, demanded and received the surplus from the treasury, and thus must be held to have ratified the sale. The doctrine announced in *Austin v. Loring*, 63 Mo. 19, has recently been reaffirmed and approved by this court in banc at this term of this court in the case of *Cape Girardeau & Thebes Bridge Terminal Railroad Co. v. Southern Illinois & Missouri Bridge Co.* [215 Mo. 286], 114 S. W. 1084. The attempt of the plaintiff herein to avoid the effect of taking down this surplus and ratifying the sale by tendering back the amount of the surplus into court to be repaid to the county treasury was futile, as the rights of the parties were fixed when the sale, was ratified by the demanding and receiving said surplus by Hall, the grantor for the plaintiff herein. Nor do we think the plea that Hall was an uneducated person and did not intend by receiving the surplus to ratify the sale can avail the plaintiff in this case. There is not the slightest pretense that the defendant Nance, or, for that matter, any other person, made any false representation to Hall to induce him to accept said surplus, and, in the absence of some overreaching of him in the matter, his ignorance of the law cannot be allowed to nullify his act in taking a part of the purchase money. In our opinion the defendant Nance is entitled to the benefit of this principle of estoppel in this case."

The *Cape Girardeau & Thebes Bridge Terminal Railroad Company Case*, cited in the *Proctor Case*, *supra*, now found reported in 215 Mo. 286, 114 S. W. 1084, is an illuminating discussion of the proposition in hand. In that case, defendant did nothing on the strength of plaintiff's taking down the condemnation money deposited in court in a case bottomed on the exercise of the right of eminent domain. All the defendant knew and did was known and done prior to that time. When the money was taken down the case was in this court on appeal and yet, on suggestion made here, we rule unanimously that after receiving that money in another suit plaintiff could no longer question the condemnation proceedings. The case at bar

is a typical case to apply the doctrine we have been discussing. There are features strikingly in common with the Proctor Case, and which excuse our liberal quotation from so late an opinion.

Apposite is the following significant admission in appellants' brief: "They (defendants in the partition, plaintiffs here) received the money in good faith, believing it was the surplus over and above the amount of the debt for which the land was sold under the deed of trust, and supposed their interest in that had been sold and made no further claim to that land." Yet in the suit at bar they are claiming the identical land, covered by the Mann deed of trust, discharged of the lien; that is to say, if they had lost it by foreclosure of the mortgage, they would rest content with the surplus of that sale in pocket. But as they lost it by partition sale, the receipt of the proceeds does not satisfy or bind them. There is no great amount of equity in that proposition.

But we have pursued the matter far. To sum up, we rule that by receiving the proceeds with knowledge of the source from which they came they elected to treat the report of sale as approved. They substituted their own approval for that of the court, and are bound by it.

This cause was assigned to Division 1 and the foregoing opinion by LAMM, J., was there handed down. The cause subsequently coming into banc on a dissent was reheard there. Something was said in oral argument in relation to subrogating the Mann Bros. to the extent of their mortgage debt in the proceeds of the sale of the mortgaged premises, and it was argued the court had no power to make such substitution on an intervening petition in a case where defendants were brought in by constructive service. But no such error was assigned in appellants' brief. We therefore say nothing on the question. The divisional opinion is adopted in banc as that of the court.

The premises considered, the judgment is affirmed. All concur except VALLIANT, C. J., who dissents in an opinion filed.

VALLIANT, C. J. I concur in all of the opinion of my learned Brother LAMM in this case except in the result, and except, also, what is therein said in paragraph (e) on the subject of estoppel. Before we render judgment taking a man's land from him and giving it to another on the ground of estoppel we should have some equities in the case strong enough to ride over and bear down the law. Estoppel is a doctrine of equity, and should be applied only when equity demands it. The party to be estopped must, knowingly, have acted in such a manner as to mislead his adversary, and his adversary must have placed reliance on the action and have acted as he would not otherwise have done. Ratification arises when a party knowing that he is not bound by the con-

tract that has been made in his name and is free to repudiate it if he will, but on being informed that such contract has been made in his name, and informed of the essential features of it, chooses to adopt it as his own. As I have endeavored to point out in my dissenting opinion in *Hector v. Warren* (No. 13,872, heard at this term, not yet officially reported) 124 S. W. 1119, the evidence does not make out a case for the application of either the doctrine of estoppel or that of ratification.

But this case differs from that of *Hector v. Warren* in this, to wit: Here the land in question is the land that was conveyed to the trustee to secure the debt of W. B. Stewart to Mann Bros. The plaintiffs had joined in that conveyance. They knew that Mann Brothers held that deed of trust, and they say in their brief: "They received the money in good faith, believing it was the surplus over and above the amount of debt for which the land sold under the deed, and supposed their interest in that had been sold and made no further claim to that land." It seems that the land was never sold under the deed of trust but under the partition decrees, together with a considerable quantity of other land. The record shows that the court let the mortgagee come in as a party to the partition suit and subrogated him to the rights of the plaintiffs in the proceeds of the sale of the land covered by the deed of trust, and awarded to him the proceeds of the sale of that land. There was nothing in the original petition on which the order of publication was founded that gave notice that any such proceeding was contemplated. So far, therefore, as the land in this case is concerned, there is no pretense that these plaintiffs got the proceeds. The parties managing the proceeding seemed to have gone on the theory that the plaintiffs having mortgaged the land had no further interest in it, and they treated the mortgagee as the owner of the equity, without taking the trouble to foreclose the mortgage. As the decree was rendered on default of appearance of the parties brought in by the publication, it is probable that the attention of the trial court was not especially drawn to this peculiar phase of the case, but, however that may be, it was an illegal proceeding, and one of which these plaintiffs had not even constructive notice. The only interest of these plaintiffs that could have been sold at the partition sale was their equity of redemption, but the court put the mortgagee in their shoes and awarded to him the proceeds of the sale of that equity of redemption. A mortgagor's interest in the mortgaged land may be sold under a decree in partition, but the purchaser at such sale would take the land subject to the mortgage. I do not now say that if a scheme to substitute the mortgagee for the mortgagor had all been set out in the original petition of which these plaintiffs, by the

order of publication, are presumed to have had constructive notice, and they suffered it to go without complaint at the time, could afterwards have complained of it, although I find no sanction for such a proceeding in the statutory proceeding for partition, but I do say it could not be injected into that suit without any notice, actual or constructive, to the parties whose interests were involved. If we give to this constructive notice full effect, it was notice only that a suit in partition was filed wherein it was proposed to sell their equity of redemption in the mortgaged land, that a sale thereunder would carry to the purchaser their interest subject to the mortgage, and that the proceeds of the sale of their equity would go to them. But after the suit was filed and while it was pending, without any notice to them, an entirely new feature was injected into it. Whatever may be the fact with reference to the other land, certain it is these plaintiffs never received the proceeds of the sale of the land in suit in this case. In my opinion so much of the proceedings in the partition suit as admit the trustee in the Mann Bros. deed of trust to take the place of these plaintiffs and receive the proceeds of the sale of their equity of redemption is void. The judgment in this case ought to be reversed.

#### HECTOR et al. v. WARREN et al.

(Supreme Court of Missouri. Feb. 2, 1910.)

#### ESTOPPEL (§ 92\*)—EQUITABLE ESTOPPEL—ACQUIESCENCE.

Where plaintiffs accepted the proceeds of a partition sale and retained them under such circumstances that they must be held to know that they arose from the partition sale, they thereby elected to affirm the sale, and were estopped to question it.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 260; Dec. Dig. § 92.\*]

Valliant, C. J., dissenting.

In Banc. Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Suit by Cynthia G. Hector and others against J. T. Warren and another. From a decree for defendants, plaintiffs appeal. Affirmed.

C. G. Shepard and Sam J. Corbett, for appellants. Ward & Collins, for respondents.

LAMM, J. This case is twin to Hector et al. v. Mann (handed down at this delivery) 124 S. W. 1109. Plaintiffs here were plaintiffs there. There the Mann brothers bought 185 acres of land at a partition sale in case pending in the Pemiscot circuit court entitled *Riley v. Hector et al.* Here the Warrens at the same sale bought 164.85 acres, viz., lots 1, 4, 6, 7, and 8 in section 19, township 20, range 12, in Pemiscot county, Mo., on a bid of \$110, and received a sheriff's deed; paying all the land was worth. This land was not affected

by the deed of trust given the Manns, mentioned in the Mann Case. Such question is, therefore, out of this case. Presently, after their purchase, the Warrens went into possession, reclaimed some of the land from swamp and marsh, fenced it, and it is now worth many times more than when knocked down by the sheriff at public vendue. Barring said mortgage, the pleadings and facts in this case differ in no essential particular from those in the Mann Case. The court below found for defendants. Plaintiffs appeal. The errors assigned here are the same errors assigned in the Mann Case. In fact, the two cases were heard together nial, and the evidence in the Mann Case was read into the record in this. Hence, that case should be read with this.

On the Mann record we held that plaintiffs, by accepting the proceeds of the sale in partition and retaining the same under such circumstances, must be held to know that those proceeds arose from a partition sale; that they thereby elected to affirm the sale, and were estopped to question it. Moreover, it was ruled that no reversible error was committed. Such rulings dispose of this case and there is no use to reformulate questions there under exposition or restate conclusions so freshly and fully resolved and ruled.

Accordingly, the judgment is affirmed. All concur, except VALLIANT, C. J., who dissents in an opinion filed.

VALLIANT, C. J. I am unable to concur in the conclusion that the plaintiffs are estopped to assert their title to the land, or that they ratified the sale in the partition suit, or that they have been guilty of such laches as to close the doors of an equity court against them. Estoppel is a doctrine that had its origin in equity jurisprudence, and when it is applied to forbid one asserting title to his own land the circumstances ought to show very clearly that he has been guilty of such conduct as would render it unjust to the person who has relied on and been misled to his disadvantage by such conduct. I am unable to see anything in the evidence in this that would justify the application of estoppel to these plaintiffs. I see nothing in the conduct of the defendants that particularly appeals to a court of conscience for their protection against the cold law of the case. They bought the land for a small sum at a sheriff's sale, and if that sale was valid it is their land by law, if it was not valid the title is still in the plaintiffs. Defendants have already reaped off it more than they have expended, and if they lose now they will lose not what has been added to the value of the land by their own skill or industry, but simply the increased value of the land owing to the general development of the country, what is sometimes called the un-

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

earned increment. The small amount of money which the plaintiffs received and which they testify they received, supposing it was the surplus coming to them on the foreclosure of a mortgage, after paying the mortgage debt, they offer to return, and even if they did not so offer the court in its decree would require them to return.

To prove the alleged estoppel the defendants introduced evidence as follows: One of the defendants testified that when he and his brother bought the land at sheriff's sale it was all wild land, since then they have cleared and put in condition fit for cultivation about 20 acres. It is worth \$12 to \$15 an acre to clear it and put it in cultivation. They put about \$150 or \$200 worth of fencing on the land, but have not put any house on it. The land is worth now 20 times as much as it was when they bought it. The price they paid for it at the sheriff's sale was its reasonable value at that time. They had sold timber off the land to the amount of about \$500. The use they have had of the land would a little more than pay for placing it in cultivation, and the timber would more than pay for the taxes and cost of fencing. So far they have not lost anything in the transaction. They are not acquainted with the plaintiffs. "I have never seen them (the plaintiffs) since I have owned the land. They have never been in my part of the country that I know of. I don't know what opportunity they had to lay claim to the land. I do not know where they live now. I don't know anything about them except from the records and the evidence produced. None of these people were present at the time this land was sold, so far as I know. I never notified them. I bought this land because I thought it was the officer's duty that sold it. I do not know whether they knew this land was sold."

The ex-sheriff testified to the effect as follows: He was sheriff from 1893 to 1897. During his term of office he sold some land under a judgment in a partition suit between Wm. Riley, plaintiff, and Cynthia G. Hector, Carrie G. Frazier, James Frazier, her husband, and Watson L. Stewart were defendants, and he distributed the money he received from the sale to the defendants in that suit. He sent the checks for the several shares in a letter to each of them inclosing a receipt for each to sign which they did, and he had the receipts present in court to produce. He was not sure whether he wrote a letter to each one or inclosed all the checks and receipts in one letter to Mrs. Hector, but thinks he wrote a letter to each. There were two partition suits between the same parties, and he made two sales and sent the money to the parties entitled. He has no receipts for the money he sent them for the first sale, but these receipts are for the last sale. He has no copy of the letter or letters he wrote, and does not know what he said in the letters, but thinks he told them what the

checks were for. Did not go into any detail report because he guessed if they wanted to know they would ask some questions. A typewritten and type-signed letter was shown him, and he was asked if it was a copy of the letters he sent to the parties, but he was not prepared to say that it was a copy, although it was about such a letter as he would have written. He made two sales and two reports of sales, and two remittances. He has here checks which he sent for the proceeds of the first sale dated December 28, 1895. They are not for any money received for the sale of the land in question. If the typewritten letter mentioned is not a copy of the letter he wrote to Mrs. Hector, it is just such a letter as he would have written. He has no recollection of having written her a letter explaining any more fully how the money was derived than is shown in that letter. It is something like the one he wrote her. None of the letters he wrote gave any description of the land. Receipts were then introduced dated from the office of the sheriff, August 18, 1896, one for \$31.85 signed by Mrs. Hector, one for \$172.13 by W. L. Stewart, one for \$55.73 by Mrs. Frazier, all reciting: "Being amount in full due me from distribution of funds derived from the sale of certain real estate sold for partition on the 9th day of February, 1897, under an order issued by the circuit court of Pemiscot county, Missouri, in the case of William Riley vs. Cynthia G. Hector et al." Plaintiffs introduced the typewritten letter in evidence as follows:

"Gayoso, Mo., Aug. 19, 189.. Mrs. Carrie Frazier, Pine Bluff, Ark. Dear Madam: Herewith I inclose you check for your interest in the Goah Stewart estate less your interest in the "Long field," which was decreed to go to Mann Bros. The synopsis of the matter is as follows, to wit:

Gross proceeds.....	\$768 93
Total expense.....	154 13
Net proceeds.....	\$614 80
Mrs. Hector's dowry deducted.....	98 40
Am't to be divided among three heirs..	\$516 40
1/3 of your share of the whole.....	172 13
Your interest in Long Field which Mann Bros. got.....	116 40
Your interest in balance of the estate \$	55 73

"I suppose that you understand that this is the proceeds of the balance of the Stewart land, which was sold in February term of our circuit court in '97, and that Mann Bros. were subrogated to your interest in the Long field on account of a trust deed signed by you to them. I send you duplicate receipts to sign as I need one receipt to keep and one to file in court. Please sign and return them as soon as suits your convenience, and oblige,

"Yours respectfully, J. H. McFarland.

"I just collected this a few days since is the reason it has not been sent ere now."

The ex-sheriff was recalled and testified as follows: "Q. I will ask you, Mr. McFarland, if these receipts which have been identified by you and read to the court were for the proceeds derived from the sale of the land in the case of William Riley v. Cynthia G. Hector, Carrie G. Frazier, James Frazier, her husband, and Watson L. Stewart, a minor? A. I am of the opinion as to Mrs. Hector and Mrs. Frazier that would have been their land in question went to Mr. Mann by reason of him having a mortgage for their interests. I say that is my recollection now. I don't believe they got possibly an interest in that. That is what I paid Mr. Mann for, what was their interest. Court: Where did this money come from you paid Mrs. Frazier? A. At the same time this land was sold other lands were sold, and that is the proceeds in the other land. Q. Then your answer would be as to Mrs. Frazier and Mrs. Hector that the money they received was derived from the sale of the land in the partition suit of William Riley v. Cynthia G. Hector, James Frazier, and Carrie Frazier, his wife, and Watson L. Stewart, with the exception of what is known as 'Long field proceeds'? A. Yes, sir; that is the way I understand it. As to Mr. Stewart I suppose he got his interest in the Long field."

Re-Cross Examination: "As I suggested a while ago I am of the opinion that Mrs. Frazier and Mrs. Hector had given to Mr. Mann a mortgage, and for that reason did not get any of this proceeds. I believe I tried to explain that fact in their letter. I got the idea from somebody or somewhere that Watson L. Stewart signed the same mortgage; but as he was a minor his interest didn't pass, and I was directed to send him his proceeds and I did so."

The plaintiffs testified that they never had any notice or information that a partition suit had been instituted or was pending until about two years after the land had been sold, and then they immediately requested their attorneys to bring suit to the land. Mrs. Hector and Mrs. Frazier testified that they received each a small amount of money from the sheriff, but they supposed it resulted from the sale of some land they had mortgaged to Mann Bros. W. L. Stewart testified that he never received "any money arising from the sale of these lands in partition."

There was a judgment for defendants from which judgment the plaintiffs have appealed.

1. The record shows that Goah W. Stewart, now deceased, was the common source of title; that the plaintiffs are his widow and heirs at law, and are the owners of the land in question if the title has not passed out of them into the defendants by reason of the facts stated in defendants' answer. Defendants plead title under the decree in the partition and the sheriff's deed executed as

in conformity thereto, and also by virtue of certain acts of plaintiffs which defendants say estop them from asserting title. Let us first consider the plea of estoppel.

This court has in many cases defined estoppel in pais and has specified the elements that must appear in the acts to constitute it. In *Burke v. Adams*, 80 Mo. 504, loc. cit. 514, 50 Am. Rep. 510, it was said: "It is also necessary to an estoppel in pais that the party should at the time be apprised of his rights. \* \* \* The act must have been done with the intention that the other should act upon it and the other party must have been induced thereby to act, to change his relation to the subject-matter and to his injury, were the party allowed to assert the contrary." The evidence introduced by defendants to show that these plaintiffs knew what their rights were when they accepted the small sums of money that the sheriff sent them was very meager. And the testimony of one of the defendants, who spoke for both, showed that they knew nothing about the plaintiffs or their acts, and that they were not influenced in their conduct in relation to the property by any act of the plaintiffs, and his evidence further shows that he and his brother have already reaped from the land more than they have expended in purchase and improvements. Defendants have not trusted and have not been misled to their injury by any act of the plaintiffs, and according to their own testimony if they should now lose the land they would still be the gainer in their venture. There was no evidence that they had ever heard that the sheriff had sent the money to plaintiffs or that plaintiffs had received it; they were not misled by that fact. Defendants have made out no case of estoppel against the plaintiffs. But defendants now say in their brief, what they did not plead in their answer; that is, that by receiving the money these plaintiffs ratified the sheriff's sale. Estoppel and ratification stand on different grounds, although they have some essentials in common, among which is the requirement that the party sought to be charged with ratification acted with full knowledge. "If with full knowledge of all the facts a person ratify an agreement which another person has improperly made concerning the property of the person ratifying it, he thereby makes himself a party to it. He is in precisely the same position in this respect as if the original agreement had been made with him." 9 Cyc. 387. He must be as well informed as to what the contract was as was the person who made it. In this instance these people must have known as much about it is the sheriff. But just at this point we must be careful to distinguish between an estoppel and a ratification; if the party is in a position where he could have known and where he knew that his act might mislead some one to his disadvantage, then it was his duty to inquire before acting, and

if he acted without making the inquiry and thereby misled his adversary he might be estopped, but that would not be a ratification. Estoppel proceeds on the idea that the party's conduct has been such as to induce his adversary to take certain action on the faith of it, and it would work injury to his adversary if the party were now allowed to show that the facts on which his adversary was thus induced to rely were not true, although they were in fact not true. But that element of fraud does not enter into ratification. Ratification means that a man with his eyes open adopts and gives sanction to an act done in his name which, without his sanction, would not be binding on him, and, as a contract itself may be implied from circumstances, so ratification may be implied, as, for example, when a party with full knowledge of a sale and knowledge that it was not binding on him unless he chose to adopt the unauthorized act, accepts the proceeds. One cannot be said to have voluntarily ratified an act unless he knew that he was as free to repudiate it as he was to approve it; if he labored under the belief that it was binding on him against his will, his act cannot be called ratification. If, therefore, these parties knew or were informed when they received the money sent them by the sheriff that it was the proceeds of this land sold under a decree of court for partition, and knew that there was such a defect in the record that the sale without their ratification was not binding on them, and so knowing or being informed accepted the money, they ratified the sale, and it was binding on them, the same as if they had themselves sold the land to these defendants for that much money. As was said by this court in *Pockman v. Meatt*, 49 Mo. 345, loc. cit. 349: "In proceedings in partition the sale is by the act of the parties themselves as well as by a judgment. \* \* \* Hence an acquiescence in the judgment, either by petitioners or respondents, by voluntarily receiving the proceeds is such an affirmation as waives a right to ask reversal. It is, indeed, a voluntary satisfaction, and places it beyond the further control of the court." In that case there was no question but that the parties had appeared or had been duly summoned; there was no question of their having had full notice of the proceeding.

In *Fischer v. Siekmann*, 125 Mo. 165, 29 S. W. 435, to which we are referred, the plaintiff who sought to reclaim his interest in land sold in a partition suit in which he was a party defendant was a minor and had not been properly served with process, although the court had proceeded to appoint a guardian ad litem, and had rendered judgment as if he had been properly brought in. But on the trial of the case the record of the probate court showed that after he came of age he received from his guardian his full share of the proceeds of the sale in partition, and acknowledged the same in open court;

on the trial he denied that he had received the money, but this court said that his single oath after the death of his guardian could not outweigh the solemn court record. In that case there was no question but that he knew what it was for. There is no use reviewing other cases cited by the learned counsel because no one disputes the proposition that even though the sale by the sheriff should be found to be invalid, still, if these plaintiffs, knowing that the money they received from the sheriff was the proceeds of the sale of the land in question sold under a decree in partition in which they were parties, accepted the money they are to be adjudged as having ratified the sale and are not entitled to the land.

Did they have that knowledge? We start with the fact that the record in the partition suit does not show any personal service; it shows only constructive notice. Notice by publication to a nonresident is a process to which the law is driven by necessity. If the party is a nonresident, and the order of publication is properly made and properly published and due proof thereof made, the law conclusively presumes notice to the nonresident, and will not listen to evidence to the contrary. But that presumption only goes so far as to sustain the jurisdiction of the court in its proceedings in that case. It does not follow the nonresident in his after-conduct in reference to the subject of the suit, and attach to him a fictitious notice of the court's proceedings. Before the doctrine of estoppel or ratification in reference to the court proceedings can be applied to his subsequent conduct based on the theory of his knowledge of those proceedings, it must be shown that he had actual knowledge. Now what knowledge did these plaintiffs have of the facts on which the charge of ratification is based? They testify that they had no such knowledge. They knew that they had given a mortgage on some of their land to Mann Bros., and they supposed the money came from a sale under that mortgage. Bear in mind that they were women, at least two of them were. What lawyer of experience will say that a woman, however intelligent she may be, is as familiar with law terms as a man who has been accustomed to observing court proceedings? They testify positively that they never heard of the partition suit until two years after the land had been sold; and their testimony is not disputed by a court record as was the oral testimony criticised in the case of *Fischer v. Siekmann* above mentioned. The only evidence to gainsay what they said is the testimony of the ex-sheriff and the receipts which he produced. All the information that they derived as to the source of the money was from the ex-sheriff, and he said himself that he did not inform them what land had been sold or under what proceeding. He said he gave them no details, presuming that if they wanted information they would ask questions.

The typewritten letter said nothing about a partition suit, nor did it mention any particular land, except the "Long field," the proceeds of which it said Mann Bros. got. Mann Bros. was the firm to whom the mortgage was given, and there was sufficient mention of Mann Bros.' participation in the matter in the sheriff's letter to justify an inexperienced woman in inferring, as these women say they did infer, that the money they received was from a sale under that mortgage. We are not now talking about what they ought to have known, but what they did know; not what they ought to have inferred, but what they did infer. It does not clearly appear that the ex-sheriff himself knew that the land in this suit was the land which brought the money he sent to the plaintiffs. The sale was made, according to the recital in the deed, February 9, 1897, but it was not until a year and a half thereafter that he sent the money. He said: "I made two sales of this Stewart land. I think I made two reports of sale, one for the first and one for the last. I also made two remittances. I have the checks here I sent for the proceeds of the first sale, and these checks are dated December 28, 1895, and seem to have been here by the bank January 9, 1896. The checks I now have in my hand are not for any money received for the sale of the land in question.

\* \* \* I paid Dave Mann out of this partition sale \$182.95." The witness also said: "There had been a previous sale of some more lands in partition in which these parties were interested. There were two suits, both of them being William Riley, Plaintiff, v. Cynthia G. Hector et al., Defendants." Respondents in their brief controvert the statement that there were two suits, and imply that the ex-sheriff was mistaken. There is no doubtful meaning to what he said on that subject, and he was their own witness, and the only witness by whom they seek to prove knowledge to bind the defendants. If he was liable to have been mistaken about as important a fact as that, can we say that he was not mistaken in other particulars? But the receipts in evidence do say "being the amount in full due me from the sale of certain real estate sold for partition on the 19th day of February, 1897, under an order issued by the circuit court of Pemiscot county, Missouri, in the case of William Riley v. Cynthia G. Hector et al." From that recital it is contended that they had full knowledge of the whole transaction; knowledge of such a character that would make the receipt of the money such an approval that would put them precisely in the same position as if they had made the sale themselves. Granting, for sake of the argument, that the recital is evidence of that fact, still a receipt is only prima facie evidence, while all the other evidence in this case shows that they did not know. Those receipts were written by the sheriff and sent to them to sign. There is no evidence that these defendants ever

saw or heard of those receipts or based any action on them; their own evidence is to the contrary. The evidence for the defendants shows that there were two partition suits, between the same parties, two reports of sale, and two remittances. Their witness testified that the remittances for which the receipts were shown were for the land now in suit; but he does not say that he so informed the plaintiffs, and there is nothing either in the letters or the receipts to indicate what land the remittance was for. The letter says it was for land sold during the February term, 1897, of the circuit court, and the receipt recites that it was for land sold February 18, 1897; that information might have put the parties on the inquiry which would have led to knowledge of the fact, but the question now is not what they might have known if they had pursued the inquiry, but what did they know. In my judgment the evidence does not show that the plaintiffs when they received the money had such knowledge of the transaction as to amount to a voluntary ratification of the sale. Of course they cannot keep the money if they recover the land, but the court can take care of that point in its decree even if the plaintiffs had not offered, as they have in their petition, to refund the money.

Defendants also insist that the plaintiffs have been guilty of such laches as will bar their suit. The law of laches is an equitable doctrine, and is applied when there are equities that would suffer by the delay if the rule was not applied. But there is nothing in the facts of this case that would bar the plaintiffs on that ground. Their testimony is that they did not learn of the partition suit until two years after their land had been sold, and then they immediately sought the advice of counsel and instructed them to bring suit. It seems that suit was not brought until 1905, but defendants have suffered nothing by the delay; no equities have intervened. In their brief they say that plaintiffs have waited until respondents have reclaimed the land from a marsh and swamp and made a valuable farm of it. If it was a swamp and has been reclaimed, there is nothing in the evidence to show that the respondents caused the drainage. We know that our law provides for a system of public drainage, and we also know that that system is in operation in many parts of this state. The only improvements they have made, according to the evidence, is building a fence and clearing 20 acres, of which we have already spoken; the increment otherwise must have come from waiting.

There are no particular equities in the case to bend the law to the one side or the other. The defendants bought about 160 acres of land for \$110. They have spent \$150 to \$200 in fencing, and have cleared 20 acres. They have sold off the place \$500 worth of timber, and received in rents and profits more than enough to pay for the improve-

ments and taxes. If the title they got at the sheriff's sale is valid, it is their land by the cold measure of the law; if not valid, it is the plaintiffs' land by the same measure.

STATE ex rel. GAVIN v. MUENCH et al.  
(Supreme Court of Missouri. Feb. 2, 1910.)

1. COURTS (§ 172\*)—LIMITED JURISDICTION—TITLE TO REAL PROPERTY.

In a suit in the circuit court of the city of St. Louis to enjoin the obstruction of half of a street, the answer alleged that the street had not been opened by any order of the county court, nor had a plat thereof been made and filed, and had not been used as a public highway by the public for 10 consecutive years prior to the filing of the petition. The answer also alleged that the street had never been accepted by the county court as a public highway or used by the public as such since its dedication, wherefore defendant claimed title to the middle of the street adjacent to lots owned by him, with the right to erect the fence, etc. *Held* that, since a decree for plaintiff would charge the land claimed by defendant with an easement and invest title in the street in that extent in the county, title to realty was involved within Rev. St. 1899, § 564 (Ann. St. 1906, p. 593), providing that suits whereby the title to realty may be affected shall be brought within the county within which the realty is situate, so that the court had no jurisdiction where the realty was situate in the county of St. Louis, outside the limits of the city.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 112-117; Dec. Dig. § 172.\*]

2. PROHIBITION (§ 28\*)—QUESTIONS CONSIDERED.

In prohibition to prevent respondent from taking further proceedings in a suit on the ground of want of jurisdiction of the subject-matter, questions which go to the merits of the case cannot be considered.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 77; Dec. Dig. § 28.\*]

In Banc. Petition for prohibition by the State, on the relation of Stephen J. Gavin, against Hugo Muench and others. Writ awarded.

At the suggestion of relator, made in his petition filed herein, on July 23, 1909, one of the judges of this court issued a preliminary rule to respondents, requiring them to show cause why a writ of prohibition should not issue herein made returnable October 12, 1909.

The facts, as appear from the petition and the return made thereto, are substantially as follows: Hugo Muench, one of the respondents, at all the times herein mentioned was one of the judges of the circuit court of the city of St. Louis, and the other respondents, as well as the relator, were residents of said city. On December 6, 1907, respondent Robert R. Hutchinson filed in the circuit court of said city his petition for an injunction against relator as defendant, claiming relief in the matters hereinafter stated; and on the same day said Hutchinson, as curator of respondent, Mary H. Anderson, filed her petition also against relator as defendant in said

court, praying for same relief. The relator filed a demurrer in each of said causes, raising the question of the jurisdiction of said court over the subject-matter of each of said suits. On February 18, 1908, by agreement of parties, said causes were, by order of court, consolidated; Mary H. Anderson in the meantime having reached the age of her majority. The petitions in said causes were identical in substance, and they will, for that reason, hereinafter be referred to as one case.

The petition of plaintiffs, respondents here, in said cause stated that Robert R. Hutchinson and Mary H. Anderson were the owners of lots Nos. 8, 9, 10, and 11, in Hutchinson's subdivision, lying entirely within the county of St. Louis, in the state of Missouri; that on June 21, 1870, one E. C. Hutchinson, from whom respondents claim title to their property, had duly executed and acknowledged a plat of said Hutchinson's subdivision, which said plat was recorded with the recorder of deeds of said county of St. Louis; that the relator, Stephen J. Gavin, was the owner by purchase on June 19, 1905, of lots 5 and 6 of said Hutchinson's subdivision, lying in the county of St. Louis; that upon said plat, as filed by said E. C. Hutchinson, a street 60 feet broad and designated as Barnes avenue, lying between the property owned by the respondents and the property of the relator, was dedicated as a public road forever; and that a street 50 feet wide, running from said platted Barnes avenue in a northerly direction to the northernmost limits of said subdivision, along the east line of relator's lot No. 5, was dedicated as a public road forever.

Respondents' petitions further state: "That said Barnes avenue and said street 50 feet wide, extending north and south between said lots 4 and 5, have not heretofore been opened by any order of the county court of said St. Louis county, nor a plat made thereof and filed with the clerk of said county court, nor have said roads or either of them been used as public highways by the traveling public for a period of 10 consecutive years next prior to the filing of this petition, nor has there been any public money or labor expended upon said roads or either of them for said period of 10 consecutive years." And respondents' said petitions further state: "That the said Gavin (meaning the relator herein) has denied that said Barnes avenue has ever been accepted by the said county court as a public road, and that said Barnes avenue has never been used by the public as a public road at any time since its dedication as aforesaid, and that said county court has declined to assume jurisdiction of said Barnes avenue as a public road. Relator further states to the court that said petition of respondents thereupon proceeded to set up that the relator had erected upon that portion of

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Barnes avenue lying next his lots Nos. 5 and 6 and within the middle line of said Barnes avenue a certain railroad embankment and switch track and a certain fence, and that said relator had suffered to remain upon the middle line of said street 50 feet wide a certain fence; that, by reason of said fences and embankment, respondents were deprived of their easement of ingress and egress upon and over said Barnes avenue, and said street 50 feet wide lying next to the lots of the relator within the middle line of said streets: Wherefore the respondents asked for damages and that said embankment and fences shall be removed," and that he be permanently enjoined from replacing or maintaining them in said streets, etc.

"Relator states that under the Constitution and laws of the state of Missouri, and more particularly by section 564 of the Revised Statutes of Missouri of 1899, it is provided that suits for the possession of real estate, or whereby the title thereto may be affected, shall be brought within the county within which such real estate, or some part thereof, is situated; that by the allegations of respondents' petitions filed herein all of the real estate mentioned in said petitions as belonging to respondents and relator was situated in the county of St. Louis, state of Missouri, and without the limits of the city of St. Louis, but that said suits, and both of them, were brought in the circuit court of the city of St. Louis as aforesaid and were then pending before Judge Hugo Muench, respondent herein, as aforesaid; that from the allegations of said petitions, and both of them, it appears that said streets had been abandoned by reason of their nonuser by the public for the period of 10 consecutive years preceding the filing of said petitions, as will more particularly appear from sections 9472 and 9694 of the Revised Statutes of Missouri of 1899, and that therefore the title to said streets, and each of them, had vested up to the middle line of said streets in the owners of the abutting property; that your relator was therefore the owner in fee up to the middle line of said streets where the same adjoined his said lots 5 and 6, and that, therefore, the obstructions complained of in respondents' petitions were erected upon real estate the title of which was vested in the relator, and that the respondents, and each of them, were seeking to charge said property with an easement in favor of said respondents, and that therefore the title to said property was necessarily affected by said actions, and both of them. Your relator further states that by the laws of the state of Missouri, as aforesaid, the said circuit court of the city of St. Louis and Judge Muench, the respondent herein, as one of the judges of said court, was without jurisdiction of the subject-matter to try said causes; that your relator, as will appear from the files in said causes submitted herewith, filed in both actions demurrers to said petitions, and for

grounds for said demurrers stated that said court was without jurisdiction of the subject-matter of said actions, in that the same was for the possession of and affected title to real estate situate in St. Louis county, but that respondent Judge Muench overruled said demurrers, and thereafter overruled the general demurrers filed by relator; that thereafter relator filed answers in said causes, in which answers relator set up the plea to the jurisdiction of said circuit court of the city of St. Louis and claimed title in the half of said streets lying next to his said lots 5 and 6 by reason of the abandonment of said streets, and for these reasons, together with other defenses, stated that the respondents Robert R. Hutchinson and Mary H. Anderson were not entitled to charge his said property with an easement of ingress and egress, and were not entitled to any rights over his said property. Relator further shows that said respondent Judge Muench overruled said pleas to the jurisdiction and proceeded to try and determine said causes, and thereafter, to wit, on the 15th day of July, 1909, as will appear by the files in said causes herewith submitted, said respondent Judge Muench found in favor of said respondents Robert R. Hutchinson and Mary H. Anderson, and against said relator, and found that said streets were duly dedicated and existing streets, and that said respondents had a right to ingress and egress over said streets and over that half lying next to the lots of the relator, and did order and decree that said relator remove said embankment and fences from said streets, and be hereafter enjoined from obstructing said streets or either of them. Relator further states that by said decree his title to real estate in the half of said streets adjoining said lots 5 and 6 is directly affected. And relator further states that, under the Constitution and laws of the state of Missouri, it is made the duty of the Supreme Court to see that the circuit court of the city of St. Louis and all divisions thereof and the judges thereof, as well as other inferior courts, keep within the bounds and limits of their respective jurisdictions prescribed for them by the statutes and Constitution of the state of Missouri. Relator states that said proceedings in the circuit court of the city of St. Louis before Hugo Muench as judge of Division No. 1 thereof are in violation of the Constitution and laws of the state of Missouri and to the manifest damage, prejudice, and grievance of the relator and of the public, and are wholly illegal and void; that said circuit court of the city of St. Louis, and said Hugo Muench, as judge thereof, has no jurisdiction, power, or authority to try said causes or to compel the relator to submit to the decree of said court therein. And relator further states that said proceedings filed as aforesaid are direct encroachments upon the authority and jurisdiction of the circuit court of St. Louis county. And your relator herewith exhibits to this

court the records and proceedings had in the said court in said cause in establishment of the matter stated in his petition. Wherefore, your relator, imploring the aid of this honorable court, prays to be relieved and that he may have the state's writ of prohibition directed to the said Hugo Muench, judge of the said court, and to the said Robert R. Hutchinson and Mary H. Anderson, respondents herein, to prohibit them and him from pursuing and holding the pleas aforesaid, and from taking any further cognizance or making any further order in the said causes before him touching or concerning the premises."

The return is quite lengthy. It set out in full the petition, demurrer filed thereto, the answer, the findings of facts made by the court, and the decree of court entered in said cause. Much of this, however, is foreign to the legal propositions involved in this case, and may for that reason be omitted from this statement.

The principal facts of that case are sufficiently indicated by the findings of facts made and filed by the court therein, which are as follows: "These two cases having been, by consent, tried together upon the same evidence, and the defendant (who is the same in each case) having requested that a finding of facts be made therein, the following are therefore by the court found to be the facts, applicable alike to each case: It is found that the common source of title to all the property or real estate involved in these causes was one E. C. Hutchinson, who acquired the same from John Lay and wife by deed dated December 20, 1854, and recorded in the county of St. Louis, Mo., on January 2, 1855, in Book 159, page 510 thereof. That on June 25, 1870, said E. C. Hutchinson regularly filed in the office of the recorder of deeds of said county an acknowledged plat of a subdivision of the property so acquired from Lay and wife, dividing the same into certain number of lots, of different dimensions and area, and thereby dedicating to public use forever Barnes avenue, running through said subdivision from east to west, 60 feet wide, from 'Fruit Hill Subdivision' on the east, to lot No. 12 of said subdivision, and 30 feet wide, adjoining said lot No. 12, and also another street, 50 feet wide, between said Barnes avenue and St. Charles Rock Road, running north and south, between lots 5 and 4 of said subdivision. That defendant Gavin now owns, and at the several times complained of did own, lots 5 and 6 of said Hutchinson's subdivision, having acquired the same by mesne conveyances from the common source of title; that the first of said conveyances of lots 5 and 6 was executed by said E. C. Hutchinson to one John Q. Burd, which deed is on its face dated June 18, 1870, but in fact was not acknowledged or delivered until the 6th day of July, 1870, to wit, after the acknowledg-

ment and recording of the plat of Hutchinson's subdivision, and the dedication of the streets aforesaid, and that both in and by said deed of Hutchinson to Burd, as also in and by the deed from Henrietta Robeling et al. to defendant Gavin (dated June 21, 1905, and recorded in book 167, at page 75, Records of the County of St. Louis), said lots 5 and 6 are described as being bounded on the south by Barnes avenue, and on the east by a street 50 feet wide. That on March 27, 1905, defendant Gavin filed with the county court of the county of St. Louis a written application or petition in and by which as owner of said lots 5 and 6 he asked for an order of said county court permitting him to build and operate a switch along, over, and upon said Barnes avenue, which in said petition the defendant described as a street 60 feet wide, forming the southern boundary line of his said property, and which petition was accompanied by a plat of the premises in question, showing said Barnes avenue as a street 60 feet wide, south and in front of said lots 5 and 6. That said petition was by said county court on April 3, 1905, dismissed for alleged want of jurisdiction. And the court further finds that said Barnes avenue from about the time of said dedication and the filing of the plat of Hutchinson's subdivision was used as a road or passageway by the persons immediately adjoining the same, and a few other persons in that neighborhood, both for vehicles and foot passage, but that the same was never opened towards the west, or beyond the property in Hutchinson's subdivision, and was therefore not in general use as a public thoroughfare, and that for much of the time since said dedication, and up to this time, there was a gate, or a set of railings at a point east of Hutchinson's subdivision, across said Barnes avenue, projected eastwardly, which gate was designed to, and did, keep cattle from the fields and premises of tenants in said Hutchinson's subdivision, but which gate could readily be opened, and was opened by all persons intending to use Barnes avenue west of said gate for purposes of driving or walking. That heretofore, and for more than 10 years prior to the institution of this action, there was a substantial fence in front of lots 5 and 6, and practically upon and along the northern line of Barnes avenue according to said dedication; and there was also a fence during the same time running along the center line of said 50-foot street to the east of lot 5 of said subdivision, and that said 50-foot street has never at any time been used as a public or traveled street, but said western half thereof has for about 15 years been used and occupied in conjunction with said lot 5 by the owners or temporary occupants of said lot. And I do further find from the evidence that the defendant, Stephen J. Gavin, after the purchase by him of said lots 5 and 6, and after the dismissal of his said petition by

the county court of St. Louis county, did proceed to erect a fence along the center line of said Barnes avenue in front of said lots 5 and 6, extending east to the point where the same struck the projected center line of said 50-foot street, and did further build a fence from that point northwardly along said projected center line until the same struck and connected with said old fence along the center line of said 50-foot street, and that at or about the same time said defendant caused to be erected upon and along the northern half of said Barnes avenue from a point about midway the southern boundary of said lot 6, thence west, in front of lots 10 and 11 of said subdivision, and along said Barnes avenue, to a point at or near the main line of a railroad, a high embankment varying between 2 and 7 feet in height, which embankment is used and occupied by said defendant to carry switch tracks for his private use, and which obstructions in Barnes avenue were so erected and imposed without the consent of plaintiff Hutchinson, who is the owner of lot 11, and plaintiff Mary H. Anderson, who is the owner of lots 8, 9, and 10 of said subdivision, and that the property of said plaintiffs is damaged to some extent not sufficiently established as to amount by the evidence, and is seriously inconvenienced in use and accessibility by reason of the fences, embankments, and other obstructions placed in said Barnes avenue by the defendant, and the attempted abolition of said street by defendant."

The court then gave certain declarations of law, and found for the plaintiffs, the respondents here, and against the defendant, the relator here, and perpetually enjoined him from maintaining in said streets the railroad embankment and fence mentioned in the pleadings, and from otherwise obstructing the same.

The return also shows that the demurrer filed by relator in that case questioning the jurisdiction of the circuit court of the city of St. Louis to try the cause was by that court overruled; also that relator raised the same question by his answer filed therein, which was by the court ignored, and not passed upon.

Fordyce, Holliday & White, for relator.  
C. K. Skinker, for respondents.

WOODSON, J. (after stating the facts as above). 1. The question here presented is not, did the circuit court of the city of St. Louis correctly decide the case of Robert R. Hutchinson et al. v. Stephen J. Gavin; but the question here is: Did that court have jurisdiction over the subject-matter of that suit, and did it have the authority to try and adjudicate the matters and things therein involved? Counsel for relator deny it had such jurisdiction and authority; while counsel for respondents maintain the affirm-

ative of that proposition. This briefly and sharply presents the legal proposition involved in this proceeding. Relator was the owner of lots 5 and 6 of Hutchinson's subdivision, mentioned in the pleadings, and they fronted on the streets therein named. The petition in said cause alleged, among other things, that said streets had not theretofore been opened by any order of the county court of said St. Louis county, nor a plat made thereof and filed with the clerk of said court, nor had said roads or either of them been used as public highways by the traveling public for a period of 10 consecutive years next prior to the filing of said petition, nor had there been any public money or labor expended upon said streets or either of them for said period of 10 years. The petition also stated that said Gavin (meaning the relator herein) denied that said streets had ever been accepted by the said county court as a public road, and that they had never been used by the public as such at any time since their dedication, and that said county court had declined to assume jurisdiction over the same. The answer of relator filed therein pleaded substantially the same facts respecting said streets that are charged in the petition in that regard. The answer also contained a plea challenging the jurisdiction of the circuit court of the city of St. Louis over the subject-matter of that suit, for the reason that it involved or affected title to real estate located in a different county from that in which said court was situated. There is no question but what the relator, the defendant in that case, claimed title to the land mentioned to the center of said streets. The basis of his claim was that the subdivision mentioned had not been properly platted and filed with the clerk of the county court; that said court had never accepted said streets or done any work upon them; and that they had been abandoned as such by the public by nonuser for a period of 10 years. In fact, the petition in that case not only conceded relator claimed title to said land to the center of said streets, but it, in express terms, charged that to be the fact; but respondents now try to escape the effects of that concession by insisting that said suit was an equitable proceeding which acts in personam, and for that reason could be brought and maintained in the county wherein relator resided. Ordinarily that is true, which is shown by the following well-considered cases: *State ex rel. v. Dearing*, 180 Mo. 63, 79 S. W. 454; *State ex rel. v. Zachritz*, 166 Mo. 313, 65 S. W. 999, 89 Am. St. Rep. 711; *Olney v. Eaton*, 66 Mo. 563; *Castleman v. Castleman*, 184 Mo. 438, 83 S. W. 757; *Hewitt v. Price*, 204 Mo. 31, 102 S. W. 647, 120 Am. St. Rep. 681.

But an exception is made to that rule by statute. Section 564, Rev. St. 1899 (Ann. St. 1906, p. 593), provides that in "suits for the

possession of real estate, or whereby the title thereto may be affected, shall be brought in the county within which such real estate, or some part thereof, is situate." As before stated, both the petition and the answer filed in said cause show that the relator, defendant there, set up and claimed title to the land to the center line of said streets lying adjacent to his said lots. The issues thus joined clearly put in issue the title to said real estate; and said suit necessarily involved or affected the title thereto within the meaning of said section of the statute. In discussing this same question, this court in the case of *Castleman v. Castleman*, 184 Mo., loc. cit. 438, 83 S. W. 758, said: "At the threshold of the case is raised a question of jurisdiction. Plaintiff resides in Cooper county, the land affected by the deeds in question is in that county, the suit was instituted there, the summons issued to the city of St. Louis, where defendant resides, and was served on him there. Defendant moved the court to dismiss the suit on the ground that the circuit court of Cooper county had no jurisdiction. The motion was overruled and exceptions taken. The position of appellant on this point is that this is a personal suit and could be brought only in the county of his residence or 'where the plaintiff resides and the defendant may be found.' Appellant is correct in his general proposition that a court of equity acts in personam. And, since the suit is personal in its character, it must seek the person to be affected in the county of his residence regardless of where the thing in controversy may be. *State ex rel. v. Zachritz*, 166 Mo. 313 [65 S. W. 999, 89 Am. St. Rep. 711]. But our statute (section 564, Rev. St. 1899) has ingrafted one exception to that rule. It is said: 'Suits for the possession of real estate, or whereby the title thereto may be affected, shall be brought in the county within which such real estate, or some part thereof, is situate.' Title to real estate is directly affected in this suit. By the decree appealed from the appellant is divested of title and the plaintiff invested with the same. *Keyte v. Plemmons*, 28 Mo. 104; *Ensforth v. Holly*, 33 Mo. 370; *Railroad v. Mahoney*, 42 Mo. 467." And in the case of *State ex rel. v. Dearing*, this court said: "As to respondent's first contention, it is only necessary to say that, while the subject-matter of the controversy in that suit grew out of the alleged transactions between the parties in the sale and transfer of the land in Carter, Wayne, and Butler counties, the title to these lands was in no way involved in the controversy. It was purely and simply a suit in equity operating in personam upon the defendants. That the court had jurisdiction of the persons of the defendants and of the subject-matter of the controversy between them is manifest upon the face of the statement. The only thing that is urged giving any countenance to the contention that

title to real estate is involved in that controversy is the prayer for relief in which the cancellation of the notes given for part of the purchase money for these lands, and an injunction restraining the foreclosure of the deed of trust given to secure them is asked. But such prayer could not have the effect of converting plaintiff's equitable action in personam into an action 'affecting title to real estate' within the meaning of the section relied upon. 'In granting injunctions the court operates in personam and may exercise its jurisdiction quite independently of the locality of the act to be done. Being an order directed to a person, it does not run with the land.' *Kerr on Injunctions* (3d Ed.) pp. 6, 7. This section of the statute, like the constitutional provision vesting appellate jurisdiction in this court in cases involving title to real estate, applies only to cases in which title to land is the subject of the controversy and in which the judgment will operate directly upon the title, and not to those cases where the title to land may be merely a subject of collateral inquiry or in which the judgment will only affect the title incidentally or collaterally. *Ulrich v. Papin*, 11 Mo. 43; *Railroad v. Mahoney*, 42 Mo. 467; *State ex rel. v. Court of Appeals*, 67 Mo. 199; *Bailey v. Winn*, 101 Mo. 649 [12 S. W. 1045]; *McGregor v. Pollard*, 130 Mo. 332 [32 S. W. 640]; *May v. Mortgage Trust Co.*, 138 Mo. 447 [40 S. W. 122]; *Heman v. Wade*, 141 Mo. 598 [43 S. W. 102]; *Price v. Blankenship*, 144 Mo. 203 [43 S. W. 1123]; *Gay v. Savings & Bldg. Ass'n*, 149 Mo. 606 [51 S. W. 403]; *Bonner v. Lisenby*, 157 Mo. 165 [37 S. W. 735]; *Ozark Land & Lumber Co. v. Robertson*, 158 Mo. 322 [59 S. W. 69]; *Vandergrif v. Brock*, 158 Mo. 681 [59 S. W. 979]; *Davis v. Watson*, 158 Mo. 192 [59 S. W. 65]; *Bruner Granitold Co. v. Klein*, 170 Mo. 225 [70 S. W. 687]; *Klingelhoef v. Smith*, 171 Mo. 455 [71 S. W. 1008]; *Balz v. Nelson*, 171 Mo. 682 [72 S. W. 527]; *Porter v. Railroad*, 175 Mo. 96 [74 S. W. 992]. Moreover, the jurisdiction of the court is not determined by the prayer for relief, but by the facts stated, which constitute the cause of action, and should those facts not warrant the relief asked and it should nevertheless be granted, this would be error, which could be corrected on appeal, but the jurisdiction of the court would not be affected thereby. The subject of respondent's first contention has been so thoroughly considered and threshed over in the case cited and in others therein referred to, that further comment thereon is unnecessary. Not so with the second." To the same effect are *Baker v. Squire*, 143 Mo. 92, 44 S. W. 792; *Peters v. Worth*, 164 Mo. 431, 64 S. W. 490. It is also disclosed by this record that the streets mentioned in the petition filed in said suit had been abandoned for a period of more than 10 years next before its filing, and that the county court had expended no money or labor upon them dur-

ing said period. Under that state of facts it might well be argued that sections 9472, 9694, Rev. St. 1899 (Ann. St. 1903, pp. 4347, 4421), vested the title to one-half of said streets adjoining said lots in relator. *Sikes v. Railroad*, 127 Mo. App. 326, loc. cit. 335, 336, 105 S. W. 700; *State v. Macy*, 72 Mo. App. 427. If it is true, as contended for by relator, that he owns the land to the center of said streets by virtue of the fact, if it be a fact, that the streets were never properly dedicated, or because it reverted to him, by virtue of abandonment and nonuser, then clearly the decree rendered by the circuit court of the city of St. Louis would directly affect and charge his said real estate with an easement, and thereby establish a public highway over his land in favor of the county of St. Louis. *Baker v. Squire*, 143 Mo. 92, loc. cit. 99, 100, 44 S. W. 792; *Monroe v. Crawford*, 163 Mo. 178, 63 S. W. 378. And to that extent said decree would divest that much of the title and interest in and to said land out of relator, and invest the same in said St. Louis county. *Castleman v. Castleman*, supra; *Keyte v. Plemmons*, 28 Mo. 104; *Ensworth v. Holly*, 33 Mo. 370; *Railroad v. Mahoney*, 42 Mo. 467.

We are, therefore, clearly of the opinion that the circuit court of the city of St. Louis had no jurisdiction over the subject-matter of said suit filed therein by respondents against relator, nor had it any authority to try and adjudicate the matters and things involved therein.

2. There are several other questions presented and argued by counsel for respondents, but, as they go to the merits of the case, they cannot now be considered, for the reason that the circuit court of the city of St. Louis had no jurisdiction to try the cause.

For the reasons before stated, the preliminary rule heretofore issued is made permanent, and a writ of prohibition is ordered to be issued as prayed. All concur.

### FELLER v. LEE.

(Supreme Court of Missouri. Feb. 2, 1910.)

#### 1. ADVERSE POSSESSION (§ 68\*) — CLAIM OF OWNERSHIP—RIGHTS OF SQUATTER.

A trespasser or mere squatter in possession of land under no claim of ownership or title, and admitting himself a wrongful holder, cannot acquire title by limitation.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 387-393; Dec. Dig. § 68.\*]

#### 2. ADVERSE POSSESSION (§ 85\*) — PRESUMPTION.

Where defendant took possession of land under a deed, it will be presumed that he continued to hold possession thereunder, the burden of rebutting which was on him, under the rule

that he who takes possession of land does so under some form of title.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 661, 668; Dec. Dig. § 85.\*]

#### 3. EJECTMENT (§ 15\*)—COMMON SOURCE OF TITLE—INFIRMITIES.

Where, in ejectment, there was a common source of title, the infirmities, if any therein, were common to both parties, and did not affect the controversy.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 59-62; Dec. Dig. § 15.\*]

#### 4. EJECTMENT (§ 15\*)—COMMON SOURCE OF TITLE—PLAINTIFF'S TITLE—STRENGTH.

Where, in ejectment, there is a common source of title, the rule that plaintiff must recover on the strength of his own and not on the weakness of defendant's title does not apply as to infirmities existing in the title of the common source.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 59-62; Dec. Dig. § 15.\*]

#### 5. MORTGAGES (§ 594\*) — DEED OF TRUST — EQUITY OF REDEMPTION.

In case of defective foreclosure of a deed of trust, the consequent right of redemption rests in the grantor and cannot be exercised by a stranger to the grantor's title.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1709-1731; Dec. Dig. § 594.\*]

#### 6. EJECTMENT (§ 81\*) — DEFENSES — IRREGULAR FORECLOSURE — EQUITABLE DEFENSE — PLEADING.

Where, in ejectment, defendant's answer admitting possession was a general denial, with no equitable defense pleaded, he could not defeat a recovery because of an equitable defense consisting of a right to redeem from a defective foreclosure of a deed of trust outstanding in a third person.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 220, 221; Dec. Dig. § 81.\*]

#### 7. MORTGAGES (§ 341\*) — DEED OF TRUST — FORECLOSURE—SALE — PERSON ENTITLED TO MAKE—"THEN."

A deed of trust conveyed the property to the "sheriff of W. county," in trust, etc., to hold the same to such grantee and to his successor or successors in trust, and to his or their assigns forever. It further provided that if the grantor made default in certain conditions, at the option of the holder, the "then" acting sheriff of W. county, might sell the property, etc. *Held*, that time of foreclosure was the potential consideration in the interest of the grantor to which time the word "then" referred, so that the acting sheriff at the time the creditor elected to institute foreclosure proceedings was the sheriff authorized to make the sale.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1039; Dec. Dig. § 341.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6941-6946, 7815.]

In Banc. Appeal from Circuit Court, Webster County; *Argus Cox*, Judge.

Ejectment by Samuel Feller against J. Luther Lee. Judgment for defendant, and plaintiff appeals. Reversed and remanded on opinion in department.

J. P. Smith, C. A. Newton, and Karnes, New & Krauthoff, for appellant.

LAMM, J. The suit is ejectment. On a trial without the aid of a jury, judgment

\*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

went for defendant and the cause is here on plaintiff's appeal. Ouster is laid as of March 2, 1905. Other averments of the petition are conventional. The land in dispute is the E.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 4, township 28, range 17, Webster county. The answer admits possession and denies other averments.

Plaintiff's case on the proofs and admissions is this: (1) An admission in open court that defendant was in possession. (2) A quitclaim deed from John Rylett to I. S. Wilson, dated March 24, 1891, recorded April 23, 1892. (3) A warranty deed from I. S. Wilson to George B. Hayes, dated September 1, 1894, recorded September 5, 1894. (4) A warranty deed from George B. Hayes to E. Lamphere, dated September 4, 1894, and recorded two days later. (5) A deed of trust from E. Lamphere, party of the first part, to the "sheriff of Webster county, Missouri," party of the second part—George B. Hayes, party of the third part, beneficiary, securing a principal note for \$600, due in five years from September 5, 1894, and five annual interest notes for \$48 each. (Plaintiff's title hinging on a foreclosure of this deed of trust, its narrations will receive attention hereafter. For convenience, it will be called "A.") Dated the 5th of September, 1894, and recorded one day later. (6) A trustee's deed foreclosing "A" from H. S. King, sheriff of Webster county, Mo., to E. R. Durham, dated May 9, 1903, recorded September 29, 1904. (Some of the narrations of this deed are pertinent to points considered and will receive attention later. For convenience, this deed will be called "B.") (7) A quitclaim deed from E. R. Durham to "Dan F. Blake," dated February 10, 1904, and recorded March 23, 1904. (8) A trustee's deed in bankruptcy from Daniel F. Blake as trustee to Samuel Feller, plaintiff, dated January 23, 1905, recorded two days later. This deed recited, inter alia, that said Blake was elected trustee in bankruptcy of the estate of Robinson Implement Company; that as such trustee he was ordered by the referee in bankruptcy to sell the assets of the bankrupt estate, including the land in question; that in pursuance of said order he sold the land to Feller, and, by virtue of the power of authority in the order of the sale, conveyed it to him. (9) A quitclaim deed from "Dan F. Blake" to plaintiff, dated February 18, 1905, recorded September 26, 1905. (10) It was admitted that the note secured by "A" (Hayes, payee, and Lamphere, payor) at the time of the foreclosure belonged to the bankrupt estate of Robinson Implement Company; that E. R. Durham (purchaser under "B") was at the time acting as temporary receiver of the said implement company, and that he purchased at the foreclosure sale for the benefit of said bankrupt estate; it was shown by plaintiff's testimony, and not contradicted, that the deed

from Durham to "Dan F. Blake" (No. 7) was made to said Blake in his capacity as trustee of said bankrupt estate; that plaintiff purchased at the sale of the assets of the bankrupt estate and received a trustee's deed (No. 8), and that Dan F. Blake subsequently quitclaimed to plaintiff in order to convey the record title put in him by No. 7. (11) It was admitted that the rents and profits were of the value of \$2 per month. (12) In making plaintiff's case, other admissions were made in open court, viz., that James Goss was the sheriff of Webster county, from January 1, 1893, to the 31st day of December, 1894; that he moved out of the county on March 1, 1900; that he moved back to the county on the 10th day of September, 1900; that he lived with his family in the county until the 16th day of March, 1903, and moved out of the county with his family on that date, and has ever since resided out of it; that J. R. Ray succeeded him, his term running from January 1, 1895, to December 31, 1896; that he was succeeded by James Hailey, whose official term ran from January 1, 1897, to the end of December, 1900; that Hailey was succeeded by Julian, whose official term ran from January 1, 1901, to the end of December, 1902; and that H. S. King (trustee executing "B") was the duly qualified and acting sheriff from January 1, 1903, up to and inclusive of December 31, 1904, and that he was such sheriff on the date he foreclosed "A." (13) Plaintiff also offered in evidence a tax judgment against the land, dated March 28, 1896, against John Rylett, owner, and followed that by putting in evidence a sheriff's tax deed pursuant to such judgment, conveying the land to defendant, said deed dated September 21, 1896, and recorded November 14th, same year.

Defendant's case was this: (1) He put in evidence the plat book of land entries of Webster county, showing the land entered from the government by Thomas M. Kean, under date of September 5, 1857. (2) Next, a tax judgment dated September 30, 1878, in a suit wherein "Thomas McKean" was defendant. (3) Next, a sheriff's deed under such judgment to I. S. Wilson (grantee of John Rylett, under No. 2, in plaintiff's chain of title), which said deed bore date of March 26, 1890, and was recorded the next day. (4) Oral evidence was elicited from defendant in person to the effect that he had been in possession for nine years and six months, had fenced the land, cleared off the timber from about 35 acres, put that much of it in cultivation, and "that he took possession of said land under the tax deed" (see No. 13 in plaintiff's case-made), "but that he was claiming said land by right of possession and not by right of title." His other testimony tended to show that neither plaintiff, nor those under whom he claims, had ever been in possession. (5) Through the cross-

examination of defendant, a correspondence got into the case, the letters passing between J. P. Smith, representing the title under the foreclosure of "A" and defendant. The purpose of it was to unite the two titles by buying or selling. In his letters defendant asserted that he had a tax title and wanted an offer on his own or a price on Mr. Durham's title. In one he wanted to know if an abstract and warranty deed would be made if he made an offer. In another, he contrasted his own title with that held by the other side and said his was as good as theirs. In another, he said he thought he had a good title, referring to his tax title. (6) A petition in a suit to quiet title. It was entitled Dan F. Blake, plaintiff, against the present plaintiff and defendant as codefendants. The date of filing, whether summons was sued out on it, and the purpose of introducing it, are dark.

The court gave an instruction for plaintiff that the tax deed under which defendant claims was invalid, and then refused to instruct that "A" was properly foreclosed, and that "B" conveyed title to Durham. Judgment for defendant on the merits following that refusal. Defendant filed two motions here—one to transfer to the St. Louis Court of Appeals, the other, to affirm because of no proper affidavit for appeal. Both motions were overruled. After those motions, defendant became voiceless, filing no brief. Having the burden of showing error to reverse the judgment, plaintiff's counsel undertake to state the position of defendant as well as their own below and here. As defendant stands mute, we may indulge the presumption that he is satisfied with plaintiff's statement of the contentions, viz.: On plaintiff's behalf that there was a common source of title—John Rylett; hence, in order to prevail, plaintiff did not have to go beyond such common source in proof of title. On defendant's behalf that there was no common source of title; that plaintiff must make out his case on the strength of his own and not on the weakness of defendant's title, hence should have traced title from the government. Again, on plaintiff's behalf, that King was the proper sheriff to foreclose "A"; on defendant's behalf that he was not, and therefore no title passed by "B" to Durham.

On the record outlined can the judgment stand? We think not. This, because:

1. Plaintiff did not trace title to the government. The land was entered by Thomas M. Kean. Wilson purchased at a tax sale, based on a judgment against "Thomas McKean." Counsel do not contend that sale and deed following conveyed the title of the entryman, Thomas M. Kean. However, John Rylett conveyed to Wilson. The source or character of Rylett's title is not disclosed. The date of his deed to Wilson was March 24, 1891, recorded April 23, 1892. Defendant's

paper title originated in a tax sale on a judgment against Rylett as owner, bearing date March 28, 1896, and a tax deed following on September 21, 1896. Now, if John Rylett be the common source of title, then plaintiff's title is superior to defendant's, because the record title had passed out of Rylett to Wilson long prior to the tax suit, sale, and deed through which defendant claims. Rylett owned nothing at that time, hence the sheriff's deed to defendant conveyed nothing. To get around a common source of title, defendant, while admitting he went into possession under his tax deed, and while his correspondence shows he rested on his tax deed title and proposed to dicker, sell and convey on the basis of it, yet on the witness stand he seemingly saw a great light, to wit, that he did not hold under his tax title, but by virtue of a foothold under the doctrine of "squatter sovereignty"—*pedis possessio*, pure and simple. His testimony was that he "was claiming said land by right of possession and not by right of title." By the phrase "right of possession," he could not have meant title by limitation, for limitation had not run. He must have meant a squatter's right and nothing else. But did he really mean what he said? Let us see. On such theory, however aged his possession, he could get no title by it. This, because a trespasser—a mere squatter—in possession of land, under no claim of ownership or title of any degree or character, admitting himself holding by wrong and not by right, cannot acquire title by limitation at all. A possession finally ripening into a good title under the statute of limitations must have the grace of being under a claim of right or ownership. It is the bud of such "claim" that flowers finally into title by ten years' adverse possession. *Hunter v. Wethington*, 205 Mo. 284, 103 S. W. 543; *Hunnewell v. Adams*, 153 Mo. 440, 55 S. W. 95; *Stevenson v. Black*, 168 Mo., loc. cit. 560 et seq., 68 S. W. 909; *Sanford v. Kern*, 122 S. W. 1051. So that it is quite apparent that defendant, in trying to avoid the peril of a common source of title and which peril led him to repudiate holding under his tax deed, would have us believe he was holding possession as a squatter—a possession never to be blessed by any flux of time. Let us suppose the ejectment suit had not been instituted until the ten-year limitation had run. Is it thinkable that defendant at the trial would not have claimed his tax deed filled an office in establishing title, that he had ownership by continuous adverse possession, under claim of right and under color of title? Moreover, the law presumes every possession is consistent with some title. So a presumption arises that he who goes into possession of land under a deed, as defendant admits he did under the Rylett deed, continues to hold possession under such deed. The burden was on defendant to rebut the presumption. That burden he did not well carry. No such rebuttal will arise by a

mere shift in mental attitude—a shift of position newly sprung to meet the exigencies of a law suit, ephemeral in character. There must be something palpable, some unequivocal act; for, as faith is shown by works, so defendant, if he repent of holding under his deed, must bring forth fruit meet for repentance.

We conclude there was a common source of title, to wit, John Rylett. That being so, the infirmities in John Rylett's title, if any, were common infirmities affecting the common stem of the title and in no wise affecting the controversy between plaintiff and defendant. Nor does defendant bring himself within any exception to the doctrine of a common source of title. So that, whether that doctrine proceeds in the nature of estoppel or as a rule of mere convenience in trying title, it is applicable here. *Harrison Machine Works v. Bowers*, 200 Mo., loc. cit. 234, 98 S. W. 770 et seq., and cases cited. Where there is a common source of title, agreed to, assumed, or shown to exist, the rule that plaintiff in ejectment must recover on the strength of his own and not on the weakness of defendant's title, as to infirmities existing in title anterior to its common source, is departed from.

The point is ruled against defendant.

2. This brings us to other questions: The trustee named in "A" was the "sheriff of Webster county, Missouri, party of the second part." The granting clause of "A" ran: "Unto the said party of the second part." The habendum clause ran: "To have and to hold the same with the appurtenances to the party of the second part, and to his successor or successors in trust, and to his or their grantees and assigns forever. In trust, however, for the following purposes:" (Here follows the declaration of trust.) After describing the principal note secured and five annual interest notes, the deed provides that if the principal and interest notes be paid when due, and if the grantor, Lamphere, pay taxes to accrue and keep the premises clear of statutory liens until the secured indebtedness shall be paid, then the deed shall be void, etc. But if Lamphere refuse or fail to pay the debt or interest or any part thereof when due or payable, or discharge such statutory liens, the holder of the indebtedness may pay the same, and such sums, with 8 per cent. interest, shall be a charge upon the premises and secured by "A." It provides, further, that on the happening of any of the failures or refusals narrated the deed shall remain in force, and, "at the option of the holder" of said indebtedness, the whole of the indebtedness shall become due and payable forthwith. Then follows this clause: "And the said party of the second part, or in case of his absence, death, refusal to act, or disability in any wise, the (then) acting sheriff of Webster county, Missouri, at the request of the legal holder of said note or any of them, may proceed to sell the property hereinbefore described or any part thereof at public vendue to the

highest bidder," etc. Conveyance "B" narrates, inter alia: "And, whereas, default was made in the payment of the said note, secured in said deed, by reason whereof, I, H. S. King, sheriff of Webster county, Mo., and trustee, at the request of the legal holder of said note, did proceed to execute the powers to me given by said deed, and having previously given twenty days' notice of the sale hereafter mentioned," etc. Further along it narrates: "That I, the undersigned trustee, and sheriff of Webster county, Missouri, in consideration of the premises and of the sum of four hundred dollars to me paid and credited on said note as above stated, and paying the expenses of said sale by the said E. R. Durham of the county of Jackson and state of Missouri, do hereby bargain, sell and convey unto the said E. R. Durham," etc.

The principal note secured by "A" fell due September 5, 1899. The foreclosure was on the 9th of May, 1903, and "B" was executed on that day. At the date of the execution of "A," James Goss was sheriff of Webster county. At the foreclosure, he was out of office and had not lived in the county since March 16th, 1903. The foreclosure was made because of default in the payment of the principal note. James Halley was sheriff when the principal note became due, and King was sheriff at the date of the foreclosure. Between Goss' term and Halley's term Ray held the office for a term, and between Halley's term and King's term Julian held the office for a term. On a record thus outlined more than one question is put to us. One is: Which of those sheriffs was clothed with power to make a sale under "A"? It seems defendant claimed below that (not King, but) Goss was the right party to act as trustee. Contra, plaintiff claimed below and claims here that King was the proper party. Another question is: Assuming the legal title passed by the sale and that the outstanding title, if any, is a mere equity of redemption, then is such equitable right of redemption, if existent, a defense in straight ejectment dealing only with the legal title? We will consider the last question first.

(a) If there was a defective foreclosure and a consequent right of redemption left, who had that right? Plainly Lamphere and not defendant, a stranger to Lamphere's title. But waiving that view, and conceding that a defendant in possession can show an outstanding title in another to defeat ejectment, he must at least show an outstanding legal title. Especially so in this case, because his answer (barring an admission of possession) was a general denial with no equitable defense pleaded. That in straight ejectment, with no equitable defense interposed, a defendant in possession cannot defeat recovery because of a right to redeem from a defective and irregular foreclosure of a deed of trust, is steadily held by this court. *Biffle v. Pullam*, 125 Mo. 108, 28 S.

W. 823, and cases cited; *Kennedy v. Slemers*, 120 Mo. 73, 25 S. W. 512; *Springfield Engine & Thresher Co. v. Donovan*, 120 Mo. 423, 25 S. W. 536; *Lanier v. McIntosh*, 117 Mo. 508, 23 S. W. 787, 38 Am. St. Rep. 676; *Schanewerk v. Hoberecht*, 117 Mo. 22, 22 S. W. 949, 38 Am. St. Rep. 631; *Cobe v. Lovan*, 193 Mo. 235, 92 S. W. 93, 4 L. R. A. (N. S.) 439, 112 Am. St. Rep. 480; *Adams v. Carpenter*, 187 Mo., loc. cit. 634, 635, 86 S. W. 445. In the *Lanier Case*, it was said: "A mere right of redemption in a third person, after foreclosure, is not such an outstanding title as will defeat a recovery in ejectment. The title must be such a one as the owner of the title himself could recover on, if he were asserting it in an action. It must be a present, subsisting, and operating title." The cases last cited proceed on the theory that the legal title is in the trustee of a deed of trust, and is conveyed by an irregular and defective foreclosure, subject to the right of redemption. The *Schanewerk Case*, we think, must be read in connection with *Benton Land Co. v. Zeitler*, 182 Mo. 251, 81 S. W. 193, 70 L. R. A. 94, which somewhat limits its application, but in no particular pertinent here. Deed of trust "A" conveyed the property to "the sheriff of Webster county." The name of no individual is mentioned. Now, "the sheriff of Webster county," in the person of King, executed the trust and conveyed at least the legal title by "B" to Durham. The narrations of the trustee's deed were true *prima facie*. Any defect or irregularity in the foreclosure arises dehors these two deeds and the record of them, and rests in matter in pais. The defects and irregularities considered in the *Schanewerk Case* and those following it, and which did not prevent the vesting of the legal title in purchasers at foreclosures, were as vital and far-reaching as those (if any) in the sale in hand. It would seem, therefore, that the doctrine of those cases controls this one, viz.: That whatever the outstanding title, it is not a legal one, but an equitable right of redemption, hence is no bar to recovery in ejectment where no equitable defense is interposed. We might stop at this point and treat the case as determined, but there is another question urgently crying for settlement.

(b) That question is: Were there any irregularities in the sale in respect to the execution of the power vested in the sheriff by "A"? We think not. The question hinges on getting at the meaning of the language used and thereby uncovering the intention of the parties to the contract, the deed of trust. *Linville v. Greer*, 185 Mo. 380, 65 S. W. 579; *Wolfe v. Dyer*, 95 Mo. 545, 8 S. W. 551; *Utter v. Sidman*, 170 Mo. 294, 70 S. W. 702; *Hanna v. Land Co.*, 126 Mo. 1, 28 S. W. 652; *Knapp v. Publishers*, 127 Mo. 53, 29 S. W. 885; *Buxton v. Kroeger*, 219 Mo. 224, 117 S. W. 1147. To ascertain the intention of the parties to a deed or other contract the in-

strument must be viewed as a whole from end to end and corner to corner, and interpreted in the light of the circumstances surrounding the parties, the objects to be subserved, and with common sense. Attending to that instrument we see that *Lamphere* was giving security for a note due *Hayes*. For the purpose of that security, a trust was created, and the legal title was vested in the trustee, not out and out, for all purposes, but merely for the purpose of executing the trust. *Benton Land Co. v. Zeitler*, *supra*. The trust created and power donated are limited by the fact that the trustee may never be called upon to act. His bare legal title is so modified by the purposes of the trust that the trust may terminate or fall in if the debt is paid. The dominant idea that the whole instrument is but a security for a debt must be kept steadily in view, and not only does the trust end and the legal title revert on the payment of the debt, but the trustee in the deed of trust cannot convey his bare legal title by deed disconnected from executing the power donated. Not only so, but a succession of trustees is carefully provided. In certain named contingencies the original trustee becomes *functus officio*, and his named successor is to execute the power. Now, in this trust deed there is no hint that *Lamphere* and *Hayes* were contracting that *Goss*, then sheriff, alone held a donation of power to execute the trust. To the contrary, the parties industriously and of set purpose provided for a line of succession to make the security effectual and easily accomplished by avoiding complications or accidents in the way of foreclosure. The foregoing being of the very life of the contract, in very reason the language used must be construed with reference to that capital event. Under the contract terms, the time of foreclosure was held potentially in the grasp of the owner of the indebtedness. The trustee could not legally move without his request. When the owner was ready to make the request and to set on foot a foreclosure, what was he to do? Obviously, he would look about him to find the proper person to request. The whole instrument led up to the one crucial time and event. In casting about to discover the trustee, the owner found *Goss* absent from the county and *King* to be the sheriff of Webster county. He was the "then" sheriff. The deed means that the "then" sheriff had power to act, and "then" refers to the time a foreclosure was demanded by the holder of the indebtedness. We cannot well construe the instrument to mean that *Goss*, sheriff at the date of its execution, but absent from the county and residing elsewhere at the date of the foreclosure, was the only person to act in foreclosing. And there is nothing in the instrument, as we see it, indicating that we must look around for the date of default in the payment of the secured note, and search out who was sheriff

at that particular time. Why do that? The time of default might hinge on the nonpayment of an interest note or the happening of some other contingency mentioned in the deed. By an extension agreement, the date of default might be altered. So default might spring from the nonpayment of taxes, etc. So there might be more defaults than one, happening at different times, and some of them might be waived. Again, the paper may have changed hands, and information as to these defaults may not be in possession of the present holder. Keeping in mind these usual incidents in the life of a deed of trust securing one or more notes, what sensible present purpose within the intent of the parties to the contract could be subserved by construing the phrase "the then acting sheriff of Webster county, Missouri," to mean the sheriff in office when the deed was executed or the sheriff in office on the springing of one or another default? Why say the mere time of default was of significance when the time of foreclosure obtrudes itself as the chief thing? Such construction of the contract would inevitably lead parties and courts afield to flounder in bogs of practical difficulties and uncertainties in construction, with no visible corresponding benefit attained, and no sensible purpose of the law subserved.

Furthermore, it is believed that the custom has long been to select as the sheriff, clothed with authority under deeds of trust, couched in the terms of this, the one in office at the date of the foreclosure in the contingency of absence, death, refusal to act, etc. That is the simple plan, free from trouble and doubt, easy of determination, and evidently the plan within the contemplation of the contracting parties as set forth in their language.

An analysis of the terms of the trust deed held in judgment in *McNutt v. Life Ins. Co.*, 181 Mo. 94, 79 S. W. 703, shows that the contract language construed differs in (possibly) material features from that under consideration here. But the *McNutt* Case apparently runs somewhat counter to the views entertained by us and herein expressed. That case was in division 2. For the purpose, then, of preventing confusion in rules of law affecting real estate and tending to unsettle land titles in Missouri, and to procure a single, certain, clear, and authoritative utterance of the whole court on the question, this case should be transferred to banc to be ruled by all the Brethren. We accordingly reverse the judgment and remand the case, with directions to enter judgment for plaintiff for possession and rents at \$2 per month from date of ouster.

Going into banc and being reheard there, the foregoing divisional opinion of LAMM, J., is adopted as the unanimous opinion of the court in banc. The judgment is accordingly reversed and remanded, with directions given in that opinion.

## MEMORANDUM DECISIONS.

**STATE v. RUSH.** (Kansas City Court of Appeals. Missouri. Jan. 10, 1910.) Appeal from Circuit Court, Harrison County; Geo. W. Wanamaker, Judge. Spencer Rush was convicted of selling intoxicating liquors without a license, and he appeals. Affirmed. J. M. Sallee and J. C. Wilson, for appellant. W. H. Leazenby, for the State.

ELLISON, J. The defendant was prosecuted and convicted on information for selling intoxicating liquors without license or other authority so to do. The offense is charged to have been committed in 1904, and on account of various continuances and delays the cause was not tried until 1906, and after being appealed was not submitted to this court until October, 1909. Neither party has filed any briefs or abstracts. We have examined the record, and do not discover any error which would justify a reversal of the judgment, and it is accordingly affirmed. All concur.

**CENTRAL KENTUCKY TRACTION CO. v. EDDINS.** (Court of Appeals of Kentucky. Jan. 25, 1910.) Appeal from Circuit Court, Franklin County. "Not to be officially reported." Action by William Eddins against the Central Kentucky Traction Company. From a judgment for plaintiff, defendant appealed. Affirmed. Hazelrigg & Hazelrigg, for appellant. Leslie W. Morris, for appellee.

BARKER, J. This action was instituted by appellee, William Eddins, to recover damages of the Central Kentucky Traction Company for wrongfully diverting surface water from its natural flow and precipitating the same against his house and into his cellar, whereby the foundations were rotted and undermined and the house made less comfortable by reason of the dampness. The defendant (appellant) placed in issue the allegations of the petition, and a trial before a jury resulted in a verdict in favor of appellee for \$350. From the judgment based thereon this appeal is prosecuted. East Main street comes into Frankfort on an exceedingly steep grade. The Central Kentucky Traction Company, by consent of the municipality, uses the surface of this street in coming from Lexington to Frankfort. Appellee's house is to the north of the street and down the hill from it. He claims that prior to the time appellant laid its track upon the street its surface sloped from north to south, and in that way the surface water ran down the street, past his house, without flowing in it; but when appellant laid its track upon the street it changed the grade, so as to prevent the water inclining from north to south, and then constructed a ditch by which it was gathered up in large quantities and precipitated by means of a culvert, contrary to its natural flow, down the hill at a point opposite appellee's property, thus flooding his house and cellar. The question involved is one purely of fact. There is no complaint of the instructions of the court; indeed, the court seems to have given the identical instructions asked by appellant. We find it unnecessary to state the evidence here in detail. A careful reading of the testimony convinces us that there was abundant evidence to support the claim of appellee that the construction of appellant's line of railway and the ditch served to divert the surface water from its natural flow and precipitate the same in large quantities through the culvert onto appellee's property. It is true, the testimony introduced by appellant tended to contradict the evidence for appellee; but, as

said before, the question is one of fact, and we are not able to say that the verdict is not sustained by the testimony. Judgment affirmed.

**COMMONWEALTH v. LOUISVILLE PROPERTY CO.** (Court of Appeals of Kentucky. Jan. 7, 1910.) Appeal from Circuit Court, Whitley County. "Not to be officially reported." Action by the Commonwealth of Kentucky against the Louisville Property Company. Judgment for defendant, and the Commonwealth appeals. Reversed. See, also, 121 S. W. 399. A. G. Patterson and George L. Pickett, for the Commonwealth. Henry L. Stone, Benjamin D. Warfield, and Wm. Ayers, for appellee.

**CARROLL, J.** The identical question presented by this appeal was before us in *Commonwealth v. Louisville Property Company*, reported in 128 Ky. 790, but cited by counsel as being in 109 S. W. 1183. We there held that the lower court erred in dismissing the petition upon the same ground that the court dismissed the petition in this case. We are not disposed to overrule or modify the opinion in that case. It follows, therefore, that the judgment must be reversed, with directions to proceed in conformity with the opinion *supra*.

**Ex parte BATES et al.** (Court of Criminal Appeals of Texas. Jan. 19, 1910.) Appeal from District Court, Leon County; S. W. Dean, Judge. Habeas corpus proceedings by Frank Bates, Sr., and others, to secure bail. From a judgment denying bail, relators appeal. Affirmed. John A. Mobley, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** Relators, Frank Bates, Sr., Frank Bates, Jr., and Dolly Bates, were tried under a writ of habeas corpus for bail. Upon the hearing the district judge remanded them to custody without bail. Following the practice of this court in matters of this sort, we refrain from discussing the evidence, for reasons stated in many opinions heretofore de-

livered. After a careful review of the entire record and testimony, we are of opinion that there was no error on the part of the trial judge in refusing bail. Therefore the judgment is affirmed.

**Ex parte EDWARDS.** (Court of Criminal Appeals of Texas. Jan. 19, 1910.) Appeal from District Court, Callahan County; Thomas L. Blanton, Judge. Habeas corpus proceeding by Bill Edwards to secure bail. From a judgment denying bail, relator appeals. Reversed. John A. Mobley, Asst. Atty. Gen., for the State.

**McCORD, J.** This is an appeal from the judgment of the district court of Callahan county denying bail on a habeas corpus proceeding in the court below; the appellant having been indicted by the grand jury of Callahan county for the murder of one G. A. Rogers. Appellant sued out a writ of habeas corpus for bail, and the district court, after hearing all the evidence, held that the case was not bailable, and from this judgment the relator has appealed to this court, asking that the judgment of the court below be reversed. After a careful inspection of the testimony adduced upon the trial of the writ in the court below, we are of opinion that the relator is entitled to bail, and that the court below erred in refusing him bail. It would be improper for this court, in deciding this question, to make any comment or express any opinion as to what offense the proof would show or might show appellant guilty of. It is sufficient to state that, measured by the constitutional provisions in regard to granting bail, appellant is entitled to bail in this case. The record does not disclose the financial ability of the relator. In the absence of any proof in the record as to his financial condition to give bond, this court will fix the bail of relator at \$10,000, and direct that upon the giving of bond in the terms and conditions required by law, that the sheriff release the appellant from custody. For the error indicated above, the judgment is reversed, and bail fixed at \$10,000.

END OF CASES IN VOL. 124.

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Mortgagor and mortgagee, see Chattel Mortgages, § 288; Mortgages, § 463.  
Pledgor and pledgee, see Pledges, § 33.  
Principal and broker, see Brokers, §§ 84-89.  
*Actions by or against particular classes of persons.*  
See Adjoining Landowners, § 7; Brokers, § 106; Carriers, §§ 94, 104, 135, 185, 228, 230, 274½-277, 314-321, 347, 381; Corporations, §§ 513, 518, 677; Executors and Administrators, § 470; Husband and Wife, § 270; Infants, §§ 82-110; Insane Persons, §§ 94, 101; Master and Servant, §§ 258-296; Municipal Corporations, §§ 404, 819-822; Partnership, §§ 189-218; Principal and Agent, § 190; Railroads, §§ 22, 282, 347, 350, 398, 430-446, 478-484; Warehousemen, § 34.  
Assignees, see Assignments, §§ 121, 126.  
Foreign corporations, see Corporations, § 672.  
Insurance companies, see Insurance, § 815.

Mortgagors or mortgagees, see Chattel Mortgages, §§ 173, 288; Mortgages, § 463.  
Seller of goods on condition, see Sales, § 490.  
Sureties, see Principal and Surety, § 200.  
Sureties on bonds of public officers, see Sheriffs and Constables, § 170; Taxation, § 570.  
Sureties on bonds or undertakings on appeal or writ of error, see Appeal and Error, §§ 1234, 1244.  
Tax collectors, see Taxation, § 570.  
Telegraph or telephone companies, see Telegraphs and Telephones, §§ 20, 65-74.  
Trustees, see Trusts, § 61.

*Actions relating to particular species of property or estates.*

See Trusts, § 61; Waters and Water Courses, §§ 176-179.  
Community or separate property of husband or wife, see Husband and Wife, § 270.  
Decedents' estate, see Executors and Administrators, § 470.  
Mortgaged property, see Chattel Mortgages, §§ 173, 288; Mortgages, § 463.

*Particular causes or grounds of action.*

See Bills and Notes, §§ 462-538; Conspiracy, § 20; Death, §§ 31-104; Forcible Entry and Detainer, §§ 4-29; Fraud, §§ 34, 49; Fraudulent Conveyances, §§ 222-308; Insurance, §§ 623-669, 815; Malicious Prosecution, §§ 56-69; Nuisance, §§ 43, 54; Trespass, § 50; Use and Occupation.  
Bonds and undertakings on appeal or writ of error, see Appeal and Error, §§ 1234, 1244.  
Bond of clerk of court, see Clerks of Courts, § 75.  
Bonds of public officers, see Sheriffs and Constables, § 170; Taxation, § 570.  
Breach of contract, see Contracts, § 346.  
Breach of contract for carriage of passenger, see Carriers, §§ 274½-277.  
Breach of contract of sale, see Sales, §§ 383, 384, 415, 418; Vendor and Purchaser, § 330.  
Breach of warranty of goods sold, see Sales, §§ 437, 441.  
Cloud on title, see Quieting Title.  
Compensation of brokers, see Brokers, §§ 84-89.  
Conditional contract of sale, see Sales, § 490.  
Deceit, see Fraud, §§ 34, 49.  
Delay in transportation or delivery of goods, see Carriers, §§ 104, 185.  
Delay in transportation or delivery of live stock, see Carriers, §§ 228, 230.  
Ejection of passenger or intruder from train, see Carriers, § 381.  
Failure to deliver or misdelivery of goods, see Carriers, § 94.  
Failure to deliver possession of demised premises, see Landlord and Tenant, § 129.  
Failure to furnish cars, see Carriers, § 45.  
Injuries at railroad crossings, see Railroads, §§ 347, 350.  
Injuries from defects or obstructions in streets, see Municipal Corporations, §§ 819-822.  
Injuries from fall of buildings on adjoining lands, see Adjoining Landowners, § 7.  
Injuries from fires caused by operation of railroad, see Railroads, §§ 478-484.  
Injuries from fowage, see Waters and Water Courses, §§ 176-179.  
Injuries from public improvements, see Municipal Corporations, § 404.  
Injuries to animals on or near railroad tracks, see Railroads, §§ 439-446.  
Injuries to licensees of trespassers on railroad property in general, see Railroads, § 282.  
Injuries to passengers, see Carriers, §§ 314-321, 347.  
Injuries to persons on or near railroad tracks, see Railroads, § 398.  
Injuries to servants, see Master and Servant, §§ 258-296.  
Judgments, see Judgment, §§ 903-942.  
Loss of or injury to goods in course of transportation, see Carriers, §§ 135, 185.

Loss of or injury to live stock in course of transportation, see Carriers, §§ 228, 230.  
 Negligence in general, see Negligence, §§ 111-141.  
 Negligence in operation of railroad, see Railroads, §§ 232, 347, 350, 398, 439-446, 478-484.  
 Negligence of master, see Master and Servant, §§ 258-296.  
 Negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 65-74.  
 Purchase money on sale of goods, see Sales, §§ 340, 359.  
 Recovery of possession of mortgaged property, see Chattel Mortgages, § 173.  
 Recovery of possession or proceeds of pledged property, see Pledges, § 33.  
 Recovery of price paid for land, see Vendor and Purchaser, § 334.  
 Right of action pledged, see Pledges, § 58.  
 Services, and materials furnished incident thereto, see Work and Labor.  
 Violation of liquor laws, see Intoxicating Liquors, §§ 178, 179.  
 Wrongful conversion of personal property, see Trover and Conversion, § 29.  
 Wrongful discharge of servant, see Master and Servant, §§ 36, 40.

*Particular forms of action.*

See Ejectment; Forcible Entry and Detainer, §§ 4-29; Quieting Title; Replevin; Trespass, § 50; Trespass to Try Title; Trover and Conversion.

*Particular forms of special relief.*

See Divorce; Injunction; Mandamus; Partition, §§ 13-109; Prohibition; Specific Performance.  
 Accounting by executor or administrator, see Executors and Administrators, § 470.  
 Alimony, see Divorce, § 218.  
 Application for liquor license, see Intoxicating Liquors, § 74.  
 Appointment of administrator, see Executors and Administrators, § 20.  
 Appointment of receiver, see Receivers, § 38.  
 Cancellation of instrument, see Cancellation of Instruments.  
 Confirmation or trial of tax title, see Taxation, § 805.  
 Construction of will, see Wills, § 707.  
 Determination of validity of municipal ordinances, see Municipal Corporations, § 121.  
 Enforcement of contribution among sureties, see Principal and Surety, § 200.  
 Enforcement of forfeiture for breach of condition in deed, see Deeds, § 168.  
 Enforcement of lien for price of land sold, see Vendor and Purchaser, § 295.  
 Enforcement of penalty for violation of liquor laws, see Intoxicating Liquors, §§ 178, 179.  
 Enforcement of pledge, see Pledges, § 58.  
 Enforcement of right of action pledged, see Pledges, § 58.  
 Enforcement of taxes, see Taxation, §§ 549-608, 634, 641.  
 Establishment and determination of claims to attached property, see Attachment, §§ 302, 308.  
 Establishment and enforcement of trust, see Trusts, §§ 359, 366.  
 Establishment and protection of easement, see Easements, § 61.  
 Establishment of boundaries, see Boundaries, §§ 37-54.  
 Establishment of drains, see Drains, §§ 25-35.  
 Foreclosure of mortgage, see Chattel Mortgages, § 288; Mortgages, § 463.  
 Judgment against real property for taxes, see Taxation, § 641.  
 Quieting title, see Quieting Title.  
 Reformation of instrument, see Reformation of Instruments.  
 Removal of cloud, see Quieting Title.

Restraining enforcement of taxes, see Schools and School Districts, § 107.  
 Restraining execution, see Execution, § 172.  
 Sale of property of decedent, see Executors and Administrators, § 356.  
 Separate maintenance, see Husband and Wife, § 297.  
 Setting aside sale of property of decedent, see Executors and Administrators, § 380.  
 Setting aside transfers in fraud of creditors or subsequent purchasers in general, see Fraudulent Conveyances, §§ 222-308.  
 Supplementary proceedings, see Execution, § 371.  
 Termination of trusts, see Trusts, § 61.  
 Trial of right of property, see Attachment, §§ 287-306.

*Particular proceedings in actions.*

See Appearance; Continuance; Costs; Depositions; Evidence; Execution; Judgment; Jury; Limitation of Actions; Motions; Parties; Pleading; Process; Stipulations; Trial; Venue.  
 Assessment of damages, see Damages, §§ 215-217.  
 Revival of action, see Abatement and Revival, §§ 73, 77.  
 Sales under judgment, order, or decree of court, see Execution, § 306.  
 Transfer of causes from one state court to another, see Courts, § 485.  
 Verdict, see Trial, §§ 351, 365.

*Particular remedies in or incident to actions.*

See Attachment; Garnishment; Injunction; Receivers; Set-Off and Counterclaim; Tender.  
 Supplementary proceedings, see Execution, § 371.

*Proceedings in exercise of special or limited jurisdictions.*

Courts of limited jurisdiction in general, see Courts, §§ 169, 172.  
 Criminal prosecutions, see Criminal Law.  
 Suits in equity, see Equity.  
 Suits in justices' courts, see Justices of the Peace, §§ 73-128.

*Review of proceedings.*

See Appeal and Error; Exceptions, Bill of; Judgment, §§ 336-377; New Trial.

**I. GROUNDS AND CONDITIONS PRECEDENT.**

Grounds for and right to damages, see Damages, § 4.  
 § 6. In an action for defamation, the court, after plaintiff taking a nonsuit, and after sustaining an exception to the answer, held without jurisdiction.—*Bush v. Young* (Tex. Civ. App.) 110.

**II. NATURE AND FORM.**

*Particular actions or proceedings.*

For breach of warranty on exchange of property, see Exchange of Property, § 13.  
 Petition for new trial, see New Trial, § 166.  
 To establish and enforce trust, see Trusts, § 359.  
 § 24. The failure of the lessor to receive notice of renewal sent by mail held not such a mistake as gives the court of equity jurisdiction of an action by the lessor for possession.—*Bluthenthal v. Atkinson* (Ark.) 510.

**III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.**

Election between causes of action, see Pleading, § 369.  
 Joinder of counts in indictment or information, see Indictment and Information, § 132.

§ 45. A count in assumpsit for goods sold may be joined with a count on a promissory note given for the goods claimed to have been invalidated because altered.—*McCormick Harvesting Mach. Co. v. Blair* (Mo. App.) 49.

§ 45. A city held entitled to litigate in one suit a purchaser's liability on a judgment in its favor for taxes, and also for subsequently accruing taxes on a lot, and to include therein a prayer for foreclosure of the lien common to all the taxes.—*Toepperwein v. City of San Antonio* (Tex. Civ. App.) 699.

§ 57. Two causes wherein two employes sued for injuries caused at the same time by the fall of the cage in the shaft of a coal mine, held properly consolidated.—*Southern Anthracite Coal Co. v. Bowen* (Ark.) 1048.

#### IV. COMMENCEMENT, PROSECUTION, AND TERMINATION.

Commencement within period of limitation, see Limitation of Actions, § 130.

Stay on appeal or writ of error, see Appeal and Error, §§ 483, 490.

#### ACTS.

See Statutes.

#### ADJOINING LANDOWNERS.

See Boundaries; Fences.

Easements, see Easements.

§ 7. In case of injury to adjoining property by the falling of a wall, the burden is on the owner to exculpate himself.—*Teepen v. Taylor* (Mo. App.) 1062.

§ 7. The owner of a wall of a burnt building must use every means to ascertain its safety that an ordinarily prudent man would use.—*Teepen v. Taylor* (Mo. App.) 1062.

§ 7. An act of God will protect one from liability for injury to adjoining property by the falling of a wall of a burnt building.—*Teepen v. Taylor* (Mo. App.) 1062.

#### ADJOURNMENT.

Of civil causes in general, see Continuance.

Of criminal causes in general, see Criminal Law, §§ 586-608.

#### ADJUDICATION.

Decisions of courts in general, see Courts, § 91; Judgment.

Operation and effect of former adjudication, see Judgment, §§ 603, 617, 707-732.

#### ADJUSTMENT.

Of controversy by arbitrators, see Arbitration and Award.

Of controversy by parties, see Compromise and Settlement.

#### ADMEASUREMENT OF DOWER.

See Dower, §§ 113, 114.

#### ADMINISTRATION.

Of estate of decedent, see Executors and Administrators.

Of property by receiver, see Receivers, § 82.

Of property of community on death of husband or wife, see Husband and Wife, § 276.

Of public finances, see Counties, § 192.

Of trust property, see Trusts, § 187.

#### ADMISSION.

To practice medicine or surgery, see Physicians and Surgeons, §§ 5, 6.

#### ADMISSIONS.

See Stipulations.

As evidence, see Criminal Law, § 406; Evidence, §§ 213-265.

In pleadings, see Pleading, §§ 129, 214.

To prevent continuance, see Criminal Law, § 600.

#### ADULTERY.

Corroboration of accomplices, see Criminal Law, § 511.

Evidence in civil actions, see Divorce, §§ 115, 129.

Ground for divorce, see Divorce, § 26.

§ 14. Evidence held insufficient to sustain a conviction for adultery.—*Smith v. State* (Tex. Cr. App.) 919.

#### ADVANCEMENTS.

See Descent and Distribution, §-109; Wills, § 761.

#### ADVERSE CLAIM.

Determination of claims to real property, see Quieting Title.

To property levied on or garnished, see Attachment, §§ 287-306.

#### ADVERSE POSSESSION.

See Limitation of Actions.

By co-tenant, see Tenancy in Common, § 15.

Grants of lands held adversely, see Champerty and Maintenance, § 7.

#### I. NATURE AND REQUISITES.

##### (A) Acquisition of Rights by Prescription in General.

§ 13. Occupation of land by tenants for a few years, the occasional cutting of small timber for mine props, and the taking of tan bark therefrom, together with the payment of the taxes, held insufficient to establish title by adverse possession.—*Mahoning Coal Co. v. Dowling* (Ky.) 370.

##### (B) Actual Possession.

§ 19. Possession by a purchaser at an execution sale held to establish title by adverse possession.—*Miller v. Goodin* (Ky.) 818.

§ 19. Title under statute of limitations of five years held not affected by *Sayles' Ann. Civ. St. 1897, art. 3346*.—*Hardy Oil Co. v. Burnham* (Tex. Civ. App.) 221.

§ 22. Pasturing the owner's cattle on land inclosed for that purpose and under his exclusive control is such use and enjoyment as is sufficient under the five years' statute.—*Hardy Oil Co. v. Burnham* (Tex. Civ. App.) 221.

§ 24. The occasional cutting of timber or occasional occupancy of land is not adverse possession.—*Ward v. Middleton* (Ky.) 823.

##### (C) Visible and Notorious Possession.

§ 28. A purchaser at a tax sale held not in the adverse possession of the premises under a tax deed.—*Penix v. Rice* (Ark.) 747.

§ 31. Possession of land held such as to constitute an ouster and notice thereof to others, notwithstanding their nonresidence and actual ignorance.—*Hardy Oil Co. v. Burnham* (Tex. Civ. App.) 221.

**(E) Duration and Continuity of Possession.**

§ 57. In view of an allegation of the petition not denied by the answer, and the date of a deed, *held* adverse possession for 15 years was not proved, notwithstanding certain testimony.—*Gordon v. Simmons* (Ky.) 306.

**(F) Hostile Character of Possession.**

§ 68. A mere squatter or trespasser holding possession without claim of title cannot acquire title by adverse possession.—*Feller v. Lee* (Mo.) 1129.

§ 71. Limitation of three years *held* no defense as against the heirs of a wife claiming against an unauthorized conveyance by the surviving husband.—*Hardy Oil Co. v. Burnham* (Tex. Civ. App.) 221.

§ 85. Where defendant took possession of certain land under a deed, the burden was on him to rebut the presumption that his continued possession was under the deed.—*Feller v. Lee* (Mo.) 1129.

**II. OPERATION AND EFFECT.****(A) Extent of Possession.**

§ 100. Actual possession by grantee of part of land covered by deed *held* not to extend by construction to the rest of it, so as to give title by adverse possession.—*Lowry v. McDaniel* (Tex. Civ. App.) 710.

§ 101. Where a person claiming title to land under a patent issued in 1849 lived on an adjoining tract, he was in possession to the extent of his boundary, which was not broken by a settlement of others upon land outside his boundaries under a patent issued in 1853.—*Crown Lumber Co. v. McCoy* (Ky.) 834.

**III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.**

§ 116. Where plaintiff claimed under the five-year statute of limitations, an instruction as to payment of taxes *held* erroneous.—*Dean v. Furrh* (Tex. Civ. App.) 431.

**ADVERTISEMENT.**

Of street railway franchise, see *Street Railroads*, § 24.  
Publication of process, see *Process*, § 96.

**AFFIDAVITS.**

See *Depositions*.

**Particular proceedings or purposes.**

Allowance of appeal or writ of error, see *Appeal and Error*, § 361; *Courts*, § 202.  
Continuance, see *Continuance*, § 46; *Criminal Law*, § 608.  
For appointment of administrator, see *Executors and Administrators*, § 20.  
New trial, see *Criminal Law*, §§ 956, 957; *New Trial*, § 150.  
Preliminary affidavit in criminal prosecution, see *Criminal Law*, § 211.  
Publication of process, see *Process*, § 96.  
Verification of claim against estate of decedent see *Executors and Administrators*, § 227.  
Verification of petition of claimant in attachment, see *Attachment*, § 306.

**AFFINITY.**

Element of incest, see *Incest*, § 5.

**AFFIRMANCE.**

Of judgment or order in criminal prosecutions, see *Criminal Law*, § 1182.

**AFTER-ACQUIRED TITLE.**

Estoppel to assert, see *Estoppel*, § 45.

**AGE.**

Of consent to sexual intercourse, see *Rape*, § 13.

**AGENCY.**

In general, see *Principal and Agent*.

**AGGRAVATION.**

Of injury, see *Damages*, §§ 33, 34.

**AGREEMENT.**

See *Contracts*.

**AGRICULTURE.**

Drainage of lands, see *Drains*.

**AIDER BY VERDICT.**

In civil actions, see *Pleading*, § 433.

In criminal prosecutions, see *Indictment and Information*, § 203.

**ALCOHOLIC LIQUORS.**

Regulation of manufacture, use and sale, see *Intoxicating Liquors*.

**ALIBI.**

Instructions as to defense, see *Criminal Law*, § 775.

**ALIENATION.**

Of married woman's separate property, see *Husband and Wife*, § 179.  
Suspension of absolute power of alienation, see *Perpetuities*, § 6.

**ALIMONY.**

See *Divorce*, § 218.

Separate maintenance, see *Husband and Wife*, §§ 283, 297.

**ALLOWANCE.**

Of alimony or counsel fees and expenses in divorce proceedings, see *Divorce*, § 218.  
Of appeal or writ of error, see *Appeal and Error*, § 361.  
Of bill of exceptions, see *Criminal Law*, § 1092; *Exceptions*, *Bill of*, § 43.  
Of separate maintenance to wife, see *Husband and Wife*, §§ 283, 297.

**ALTERATION.**

Of flow or discharge of water as ground for compensation, see *Eminent Domain*, § 98.

**ALTERATION OF INSTRUMENTS.**

See *Reformation of Instruments*.

§ 2. Even an immaterial alteration of a note without authority of the holder avoids it.—*McCormick Harvesting Mach. Co. v. Blair* (Mo. App.) 49.

§ 5. An alteration of a promissory note *held* material, so as to prevent its enforcement.—*McCormick Harvesting Mach. Co. v. Blair* (Mo. App.) 49.

§ 7. The alteration of a note *held* not material.—*Baldwin v. Haskell Nat. Bank* (Tex. Civ. App.) 443.

§ 23. Unless an alteration of a note given for goods sold was fraudulently made, the seller could sue in assumpsit for the value of the goods, though the alteration invalidated the notes so as to prevent an action thereon.—*McCormick Harvesting Mach. Co. v. Blair* (Mo. App.) 49.

§ 29. Every material alteration of a promissory note is *prima facie* fraudulent.—*McCormick Harvesting Mach. Co. v. Blair* (Mo. App.) 49.

## AMBIGUITIES.

Parol or extrinsic evidence to construe ambiguous instruments, see Evidence, §§ 448-460.

## AMENDMENT.

Of particular acts, instruments, or proceedings. See Indictment and Information, § 161; Pleading, § 225.

Constitution, see Constitutional Law, § 9. Irregularities and errors at trial, see Trial, § 412.

Judgment, see Judgment, §§ 294-314.

Pleading, see Pleading, §§ 236-250.

Record on appeal or writ of error, see Criminal Law, § 1110.

## AMOUNT IN CONTROVERSY.

Jurisdictional amount, see Appeal and Error, § 45; Courts, §§ 121, 169, 172.

## ANIMALS.

Carriage of live stock, see Carriers, §§ 217-230.

Fence laws, see Fences.

Injuries to animals from operation of railroads, see Railroads, §§ 407-446.

§ 57. In a prosecution for violating the local stock law, it was essential to allege and prove the precedent steps, required by law, by which the stock law was adopted.—*Hill v. State* (Tex. Cr. App.) 940.

§ 57. In a prosecution for violating the local stock law, information held defective for not alleging that the commissioners' court made an order directing an election to be held to determine whether horses, cattle, etc., should be permitted to run at large.—*Hill v. State* (Tex. Cr. App.) 940.

§ 79. Statement of statutory liability of owner or keeper of dog for killing or maiming other domestic animals.—*Adams v. Brown* (Mo. App.) 1065.

§ 83. Statement of when one is liable as keeper of a dog for its injury to other domestic animals.—*Adams v. Brown* (Mo. App.) 1065.

## ANNULMENT.

Actions to annul written instruments, see Cancellation of Instruments.

## ANSWER.

In general, see Pleading, §§ 84-149.

Operation and effect as appearance, see Appearance, § 8.

To interrogatories to jury, see Trial, §§ 351, 365.

## APPEAL AND ERROR.

See Exceptions, Bill of; New Trial.

Appellate jurisdiction of particular state courts, see Courts, §§ 207-247.

Judicial notice of matters appearing in reports of cases on appeal, see Evidence, § 43.

Remedy by appeal or writ of error as affecting right to vacate judgment, see Judgment, § 338.

### Review in special proceedings.

Probate proceedings, see Wills, § 384.

### Review of criminal prosecutions.

See Criminal Law, §§ 1024-1189; Homicide, §§ 338-340.

By habeas corpus, see Habeas Corpus.

## I. NATURE AND FORM OF REMEDY.

§ 10. The remedy by petition for review given by Rev. St. 1895, art. 1375, held concurrent and additional to the remedy by writ of error.—*Kruegel v. Cobb* (Tex. Civ. App.) 723.

## II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

§ 20. Where the district court was without jurisdiction, the court, on appeal from the judgment rendered, acquired none.—*Bush v. Young* (Tex. Civ. App.) 110.

## III. DECISIONS REVIEWABLE.

### (C) Amount or Value in Controversy.

§ 45. Under Ky. St. § 950 (*Russell's St. § 2784*), held, that no appeal lies from a dismissal on plaintiff's failure to plead further after demurrer sustained to his petition in an action to recover \$55.30.—*Spalding v. Wathen, Mueller & Co.* (Ky.) 791.

### (D) Finality of Determination.

§ 79. A judgment which in no way disposes of a party made a defendant is not a "final judgment" and is not appealable.—*Griffin v. Terry* (Tex. Civ. App.) 115.

§ 79. A judgment held to dispose of all the parties to the case rendering it appealable.—*Griffin v. Terry* (Tex. Civ. App.) 115.

§ 79. A judgment held not final because not disposing of the controversy between all the parties.—*Florence v. Choice* (Tex. Civ. App.) 436.

§ 79. A judgment in trespass to try title held not final, and writ of error does not lie to review it.—*McKnight v. McKnight* (Tex. Civ. App.) 734.

### (E) Nature, Scope, and Effect of Decision.

§ 108. Refusal of the trial judge to file, as required by Laws 1907, p. 446, c. 7, conclusions of fact and law when a demand is made therefor, is reversible error.—*Wandry v. Williams* (Tex.) 85.

## IV. RIGHT OF REVIEW.

Criminal prosecutions, see Criminal Law, § 1024.

### (A) Persons Entitled.

§ 150. Where a judgment debtor answered in garnishment proceedings and denied that the garnishee was indebted in accordance with the garnishee's admission, the debtor could not appeal from a judgment against the garnishee.—*Baughn v. J. B. McKee Co.* (Tex. Civ. App.) 732.

### (B) Estoppel, Waiver, or Agreements Affecting Right.

§ 154. Where plaintiff takes a nonsuit because of a ruling which prevents recovery, he may have such ruling reviewed by an appeal from the judgment refusing to set aside the nonsuit.—*Ford v. Houston & T. C. R. Co.* (Tex. Civ. App.) 715.

## V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

Criminal prosecutions, see Criminal Law, §§ 1032-1063.

**(A) Issues and Questions in Lower Court.**

§ 172. The court on appeal *held* not entitled to take a matter into consideration because not raised in the court below.—*Erie City Iron Works v. Noble* (Tex. Civ. App.) 172.

§ 173. In a suit to recover land sold under a partition decree, *held*, that the court on appeal cannot disturb the decree on the ground of minority or coverture where these questions were not raised in the trial court.—*Hector v. Mann* (Mo.) 1109; *Same v. Warren* (Mo.) 1119.

§ 173. A party on appeal *held* not entitled to urge objections not raised in the trial court.—*Curtis v. Laughlin* (Mo. App.) 56.

§ 173. Where a defense was not pleaded in the answer or otherwise, it cannot be noticed upon appeal.—*Pryor v. Crum* (Mo. App.) 597.

§ 179. On appeal, *held* that the action of the trial court in fixing an attorney's fee for a trustee would not be disturbed.—*Curtis v. Laughlin* (Mo. App.) 56.

§ 179. Defendant cannot urge on appeal that a certain measure of damages should have been adopted when it did not request any instruction submitting that measure of damages, or otherwise raise the question below.—*Drake v. City of Bosworth* (Mo. App.) 570.

**(B) Objections and Motions, and Rulings Thereon.**

Criminal prosecution, see Criminal Law, §§ 1032-1063.

§ 185. In a suit to recover land sold under a partition decree, it cannot be urged for the first time on appeal that the partition decree was void because the judge who presided in the suit was a brother of one of the parties and the other parties did not consent to his acting.—*Hector v. Mann* (Mo.) 1109; *Same v. Warren* (Mo.) 1119.

§ 187. An objection for defective parties plaintiff cannot be raised for the first time on appeal.—*Snear Mining Co. v. T. J. Shinn & Co.* (Ark.) 1045.

§ 195. In a suit to recover land under a partition decree, it cannot be urged on appeal that there was an amended petition filed in the partition suit which described different land and stated an essentially different cause of action, where it does not appear that the point that the amended petition stated a different cause of action was made or relied on in the trial court.—*Hector v. Mann* (Mo.) 1109; *Same v. Warren* (Mo.) 1119.

§ 213. Where there was in the evidence an issue of fact, proper for submission, but a party did not ask to have it submitted, he cannot urge the failure to submit as ground for reversal.—*Brady v. Maddox* (Tex. Civ. App.) 739.

§ 215. Instructions which, though somewhat ambiguous and misleading, could have been cured by a specific objection thereto, which was not made, would not be ground for reversal.—*St. Louis, I. M. & S. Ry. Co. v. Dallas* (Ark.) 247.

§ 216. A party cannot complain that a charge is not sufficiently definite, where he did not request one more specific.—*International & G. N. Ry. Co. v. Rogers* (Tex. Civ. App.) 446.

§ 216. Failure to submit issues *held* not ground for reversal of judgment where the court was not requested to submit such issues.—*Trabue v. Cook* (Tex. Civ. App.) 455.

§ 232. The appellate court can consider only the objection made to evidence on its introduction. District and County Rules 58 (67 S. W. xxiv).—*Chicago, R. I. & G. Ry. Co. v. Thompson* (Tex. Civ. App.) 144.

**(C) Exceptions.**

Criminal prosecutions, see Criminal Law, § 1056.

§ 250. The Supreme Court can rule upon the competency of plaintiffs as witnesses on an appeal in an equity case, though no exception was saved to the chancellor's failure to rule upon their competency.—*McKee v. Downing* (Mo.) 7.

**(D) Motions for New Trial.**

§ 281. In absence of a motion for new trial, only errors apparent on the record proper will be considered on appeal.—*Haglin v. Atkinson-Williamson Hardware Co.* (Ark.) 518.

§ 289. Error in excluding evidence is waived by failure to make the exclusion a ground of motion for new trial.—*King v. Black* (Ark.) 237.

§ 294. The sufficiency of the evidence will not be considered in absence of a motion for a new trial.—*International & G. N. R. Co. v. Miller* (Tex. Civ. App.) 109.

§ 294. That the evidence does not support the verdict cannot be assigned as error when such point has not been raised in motion for new trial.—*International & G. N. R. Co. v. Owens* (Tex. Civ. App.) 210.

§ 295. As the error in making a judgment include the penalty and attorney's fee appeared in the judgment itself, motion for new trial was unnecessary to bring it to the attention of the appellate court.—*Industrial Mut. Indemnity Co. v. Armstrong* (Ark.) 236.

**VI. PARTIES.**

§ 327. Plaintiff bringing a writ of error against defendant in an action for the title and possession of personalty *held* required to make the sureties in defendant's reply bond parties thereto.—*Clark v. Lowe* (Tex. Civ. App.) 733.

§ 327. Plaintiff appealing from a judgment in trespass to try title *held* required to make a party affected by the judgment a party to the appeal.—*McKnight v. McKnight* (Tex. Civ. App.) 734.

**VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.****(A) Time of Taking Proceedings.**

§ 345. That appellant is given time within which to prepare and tender his bill of evidence and exceptions *held* not to prevent the running of Civ. Code Prac. § 738, fixing the time for filing the appeal.—*Willis v. Witt* (Ky.) 362.

**(B) Petition or Prayer, Allowance, and Certificate or Affidavit.**

Review of proceedings of probate courts, see Courts, § 202.

§ 361. Misstatements of the date of a judgment in the petition for a writ of error from the district court to the Court of Civil Appeals *held* waived by a failure to move to dismiss the writ in that court.—*Murphy v. Williams* (Tex.) 900.

§ 361. Misstatements of the date of a judgment in the petition for a writ of error from the district court to the Court of Civil Appeals *held* immaterial.—*Murphy v. Williams* (Tex.) 900.

**(C) Payment of Fees or Costs, and Bonds or Other Securities.**

§ 384. Misstatements of the date of a judgment in the bond for a writ of error from the district court to the Court of Civil Appeals *held* immaterial.—*Murphy v. Williams* (Tex.) 900.

§ 392. Misstatements of the date of a judgment in the bond for a writ of error from the district court to the Court of Civil Appeals *held* waived by a failure to move to dismiss the writ in that court.—*Murphy v. Williams* (Tex.) 900.

§ 395. Under Civ. Code Prac. § 724, where an appeal bond was not executed before the clerk of circuit court within 60 days after the judgment, the appeal from county court *held* properly dismissed.—*Caplinger v. Pritchard* (Ky.) 352.

### VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

#### (A) Powers and Proceedings of Lower Court.

§ 439. The allowance of an appeal does not prevent the trial court from thereafter, during the same term, setting aside its judgment and entering a proper one.—*Casey v. St. Louis & S. F. R. Co.* (Mo. App.) 562.

### IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

Assignment of claim under supersedeas bond, see Assignments, § 73.

§ 485. A supersedeas bond prevents the further taking of any step under the judgment, and leaves the matters in the condition in which they were when the supersedeas took effect.—*Love v. Cahn* (Ark.) 259.

§ 490. Where a judgment holding an injunction improperly granted was superseded, the supersedeas suspends the judgment, and no action can then be brought on the injunction bond.—*United States Fidelity & Guaranty Co. v. Herzig* (Ky.) 279.

### X. RECORD AND PROCEEDINGS NOT IN RECORD.

Review of criminal prosecutions, see Criminal Law, §§ 1090-1124.

#### (A) Matters to be Shown by Record.

§ 511. Recitals in the abstract of record *held* to show timely filing of the bill of exceptions.—*Ives v. Crawford County Farmers' Bank* (Mo. App.) 23.

§ 512. Appeal from district court in probate matters will be dismissed for want of jurisdiction; the record not affirmatively showing jurisdiction of the district court by proper appeal from probate court.—*Goodwin v. Walker* (Tex. Civ. App.) 462.

#### (B) Scope and Contents of Record.

§ 537. Matters of exception *held* not reviewable, where the bill of exceptions was not filed in time.—*Tillman v. City of Glasgow* (Mo. App.) 576.

#### (C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

Making and filing of bill of exceptions, see Exceptions, Bill of.

Review of criminal prosecutions, see Criminal Law, §§ 1090-1124.

§ 547. Error in overruling a motion for a continuance will not be considered on appeal where the error is not presented by a bill of exceptions in accordance with rule 55 for district and county courts (67 S. W. xiv).—*Trabue v. Cook* (Tex. Civ. App.) 455.

§ 548. In absence of a statement of facts on appeal from a judgment awarding a materialman part of the amount claimed, *held*, that it could not be said that the judgment for plaintiff for only a part of his claim was contrary to the

findings.—*Elliott v. Waites & Wilkie* (Tex. Civ. App.) 992.

§ 548. In absence of a statement of facts, the Court of Civil Appeals can only consider the pleadings, findings, and judgment, and cannot consider any error depending upon the sufficiency of the evidence.—*Elliott v. Waites & Wilkie* (Tex. Civ. App.) 992.

§ 553. The Supreme Court cannot consider error in refusing to permit an amended answer to be filed, where it was not made a part of the record by order of court or bill of exceptions, though it was copied into the record.—*Herndon v. Louisville Nat. Banking Co.* (Ky.) 835.

#### (D) Contents, Making, and Settlement of Case or Statement of Facts.

§ 569. A purported statement of facts not signed by any one, or approved by the trial court, cannot be considered on appeal.—*Elliott v. Waites & Wilkie* (Tex. Civ. App.) 992.

#### (E) Abstracts of Record.

Review of criminal prosecutions, see Criminal Law, § 1103.

§ 580. The statutory requirement that appellant shall file an abstract of the entire record cannot be disregarded.—*Webster v. Berry* (Mo. App.) 1078.

§ 586. Where the record contained conclusions of appellant as to the effect of testimony, but no abstract of the same, it was fatally defective as not complying with rule 9 of the Supreme Court.—*Bloomer v. Cone & Co.* (Ark.) 254.

§ 592. Where, upon appeal, the evidence upon which the court rendered the decree dismissing appellant's complaint is not abstracted, the decree will be affirmed.—*Poe v. Poe* (Ark.) 1029.

#### (F) Making, Form, and Requisites of Transcript or Return.

Review of criminal prosecutions, see Criminal Law, § 1104.

#### (H) Transmission, Filing, Printing, and Service of Copies.

§ 619. Failure of the clerk to send up a statement of facts is no excuse for a defect in the record.—*Shaw v. Schuch* (Tex. Civ. App.) 688.

#### (I) Defects, Objections, Amendment, and Correction.

Review of criminal prosecutions, see Criminal Law, § 1110.

§ 634. Where the record renders it impracticable to examine into the merits of the appeal, it will be dismissed.—*Compton v. Rasmussen* (Mo. App.) 575.

§ 635. Under Supreme Court rule 9, an abstract which did not show that the appellant filed a motion for new trial, and that it was denied, was fatally defective, so that the judgment will be affirmed; no errors appearing in the record proper.—*Haglin v. Atkinson-Williamson Hardware Co.* (Ark.) 518.

§ 635. Where appellant's abstract did not set forth so much of the record as was necessary to understand the questions presented as required by Court of Appeals Rule 15, and the judgment was valid on its face, it will be affirmed.—*Stroup v. Thomas* (Mo. App.) 1069.

§ 644. Where no objection is made to the abstract of the evidence, the court on appeal will assume that the abstract is correct.—*Poe v. Poe* (Ark.) 1029.

§ 659. Failure of the clerk to send up a statement of facts, which has not been discovered by counsel until after decision, is no reason for certiorari to perfect the record.—*Shaw v. Schuch* (Tex. Civ. App.) 688.

**(J) Conclusiveness and Effect, Impeaching and Contradicting.**

Review of criminal prosecutions, see Criminal Law, §§ 1111, 1112.

§ 662. The court on appeal is bound by a charge as stated in the record and must assume that it is there correctly stated, where it differs from the statement thereof in the appellant's brief.—*Western Union Telegraph Co. v. Bennett* (Tex. Civ. App.) 151.

§ 665. The Supreme Court will take appellant's abstract as the record of the proceedings below, unless its correctness is questioned by appellee; and a statement therein that a motion for new trial was filed and overruled sufficiently shows the lower court's refusal to correct the alleged errors.—*Haglin v. Atkinson-Williamson Hardware Co.* (Ark.) 518.

**(K) Questions Presented for Review.**

Review of criminal prosecutions, see Criminal Law, §§ 1114-1124.

§ 671. An abstract of record held insufficient to allow consideration of the bill of exceptions.—*Webster v. Berry* (Mo. App.) 1078.

§ 671. Where the record contains neither statement of facts, conclusions by the court, nor bill of exceptions, there is nothing for the court to review.—*Shaw v. Schuch* (Tex. Civ. App.) 688.

§ 673. A judgment cannot be reversed because suit was not brought within one year's limitation, where there is nothing in the record by which it could be determined when the action was brought.—*McKee v. Downing* (Mo.) 7.

§ 679. Where it does not appear from the record that the general demurrer to the petition was acted on below, the question of the sufficiency of the petition is not presented.—*Poitevent v. Scarborough* (Tex.) 87.

§ 681. In a suit to recover land under a partition decree, it cannot be urged on appeal that there was an amended petition filed in the partition suit which described different land and stated an essentially different cause of action, where no description of the land as set out in either petition appears in the record.—*Hector v. Mann* (Mo.) 1109; *Same v. Warren* (Mo.) 1119.

§ 686. A bill of exceptions held not to show error in overruling a challenge for cause to a juror.—*International & G. N. R. Co. v. Owens* (Tex. Civ. App.) 210.

§ 699. Error in giving an instruction will not be considered where the transcript does not show that it was given.—*King v. Black* (Ark.) 237.

**XI. ASSIGNMENT OF ERRORS.**

Review of criminal prosecutions, see Criminal Law, § 1129.

§ 719. In the absence of an assignment of error or propositions, the objection in argument to certain evidence will not be considered.—*Finberg v. Gilbert* (Tex. Civ. App.) 979.

§ 730. An assignment of error complaining of the court's failure to submit an issue in a certain manner, although charges were requested, held insufficient.—*Galveston, H. & S. A. Ry. Co. v. Word* (Tex. Civ. App.) 478.

§ 731. An assignment of error that "the verdict of the jury is greatly excessive" is obnoxious to the rules of the Courts of Civil Appeals, and will not be considered.—*International & G. N. R. Co. v. Miller* (Tex. Civ. App.) 109.

§ 736. Assignments presenting different questions, unaccompanied by any proposition, will not be reviewed.—*Kruegel v. Cobb* (Tex. Civ. App.) 723.

§ 742. An assignment of error held such that it would not be considered.—*Weil v. Martinez* (Tex. Civ. App.) 116.

§ 742. An assignment of error on appeal on the ground that a conclusion of fact was not supported by evidence held without merit.—*Weil v. Martinez* (Tex. Civ. App.) 116.

§ 742. An assignment of error held such that it would be overruled.—*Weil v. Martinez* (Tex. Civ. App.) 116.

§ 742. In considering assignments complaining of the refusal of instructions, the court is confined to the proposition stated under the assignment.—*Houston & T. C. R. Co. v. Hanks* (Tex. Civ. App.) 136.

§ 742. The statement under an assignment of error held required to show wherein assumption of a fact in an instruction was prejudicial.—*Chicago, R. I. & G. Ry. Co. v. Thompson* (Tex. Civ. App.) 144.

§ 742. The statement under an assignment of error held required to point out facts making rejection of a requested charge prejudicial.—*Chicago, R. I. & G. Ry. Co. v. Thompson* (Tex. Civ. App.) 144.

§ 742. A proposition under an assignment of error held not sustained by the statement thereunder.—*Galveston, H. & S. A. Ry. Co. v. Grant* (Tex. Civ. App.) 145.

§ 742. Where an assignment of error is not followed by a statement as required by the rules, it will be overruled.—*Covington v. Sloan* (Tex. Civ. App.) 690.

§ 742. Assignments of error as to which there is no statement from the record following the propositions thereunder, as required by rule 31 (87 S. W. xv) of the Court of Civil Appeals, need not be considered.—*Sievert v. Underwood* (Tex. Civ. App.) 721.

§ 742. Assignments presenting different questions, unaccompanied by any proposition, will not be reviewed.—*Kruegel v. Cobb* (Tex. Civ. App.) 723.

§ 750. An assignment of error that the court erred in not sustaining a plea in abatement held not reviewable in the absence of an assignment attacking a finding of fact.—*City Loan & Trust Co. v. Sterner* (Tex. Civ. App.) 207.

**XII. BRIEFS.**

Review of criminal prosecutions, see Criminal Law, § 1130.

§ 768. The Supreme Court accepts appellant's assignments of error urged in his brief as being properly raised in the motion for new trial, unless appellee claims the contrary.—*Haglin v. Atkinson-Williamson Hardware Co.* (Ark.) 518.

**XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.**

Review of criminal prosecutions, see Criminal Law, § 1131.

**XV. HEARING AND REHEARING.**

§ 832. Failure of the clerk to send up a statement of facts which has not been discovered by counsel until after decision is no reason for rehearing.—*Shaw v. Schuch* (Tex. Civ. App.) 688.

§ 835. Questions to which the court's attention was not called in the original brief and abstract cannot be reviewed on rehearing.—*Blank v. Huddleston* (Ark.) 786.

**XVI. REVIEW.**

Criminal prosecutions, see Criminal Law, §§ 1134-1173.

Probate proceedings, see Wills, § 384.

**(A) Scope and Extent in General.**

Criminal prosecutions, see Criminal Law, § 1134.

§ 837. In determining whether a letter written by plaintiff addressed to defendant was properly excluded when offered by plaintiff on the ground that the evidence did not show a delivery, the evidence as to delivery of the letter should be viewed from the standpoint of plaintiff's evidence.—Sills v. Burge (Mo. App.) 605.

§ 837. The Supreme Court in testing the validity of the judgment in trespass to try title, alleged to be incorrect in its description of the land, may look to the evidence to aid in its interpretation.—Poitevent v. Scarborough (Tex.) 87.

§ 854. A ruling dismissing a petition will not be reversed because the reason given therefor is unsustainable, where the ruling is proper on other grounds.—Kruegel v. Cobb (Tex. Civ. App.) 723.

**(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.**

§ 874. The sufficiency of a petition against one at whose instance interpleas were filed *held* not material.—Ives v. Crawford County Farmers' Bank (Mo. App.) 23.

§ 875. On an appeal by a surety from the judgment against him upon the cross-petition of his co-surety for contribution after judgment was rendered against the latter for the creditor and satisfied, a ruling made upon questions arising in the original action by the creditor cannot be considered.—Fritts v. Kirchdorfer (Ky.) 882.

**(C) Parties Entitled to Allege Error.**

Criminal prosecutions, see Criminal Law, § 1137.

§ 882. Defendant cannot complain of the failure of an instruction to cover a certain point, where the court sustained his objection to an instruction covering this point offered by plaintiff.—Elk Coal Co. v. Bingham (Ky.) 314.

§ 882. A party *held* not to invite submission to the jury of an issue.—Mudd v. Missouri, K. & T. Ry. Co. (Mo. App.) 59.

§ 882. In an action for injuries to a passenger on a street car, defendant *held* not entitled to complain of an instruction for plaintiff, where it used the same language in some of its instructions which were also given.—Lehnick v. Metropolitan St. Ry. Co. (Mo. App.) 542.

**(E) Presumptions.**

Review of criminal prosecutions, see Criminal Law, §§ 1141, 1144.

§ 901. The burden is upon appellant to show error in rejecting a charge.—Beavers v. Baker (Tex. Civ. App.) 450.

§ 907. Where a decree recites that the issues were determined on oral and written evidence, which is not brought into the record, it will be presumed that the decree was warranted by the evidence.—Bloomer v. Cone & Co. (Ark.) 254.

§ 907. In the absence of testimony, all presumptions will be indulged in favor of the court's finding on appeal.—Stroup v. Thomas (Mo. App.) 1069.

§ 909. In replevin for a building, it would be presumed, in support of a judgment for plaintiff, in the absence of proof, that it was personal property.—Marshall v. Moore (Mo. App.) 585.

§ 911. In a suit to recover land sold under a partition decree, evidence *held* not to show that the judge who tried the case and one of the parties were brothers.—Hector v. Mann (Mo.) 1109; Same v. Warren (Mo.) 1119.

§ 927. Where the evidence is substantial, the court on appeal, in considering a demurrer to the evidence, will accept it as true.—Walker v. Lewis (Mo. App.) 567.

§ 928. Where there is nothing in the record to show which party offered an instruction that was given, it will be presumed that it was given by the court without the request of either party.—Chesapeake & O. Ry. Co. v. Marcum (Ky.) 293.

§ 931. Under the facts, *held* it must be assumed that if there was any evidence inadmissible on stated ground, it was not considered by the trial court.—Rowan v. Stockwell (Tex. Civ. App.) 148.

§ 931. In the absence of a bill of exceptions to the refusal of a trial judge to grant a motion for findings of fact and conclusions of law, it will be presumed that the judge knew nothing about the motion.—Covington v. Sloan (Tex. Civ. App.) 690.

§ 932. It will not be presumed that the jury took into consideration in assessing the damages an item of which there was no evidence.—Vanderburgh v. St. Louis & S. F. R. Co. (Mo. App.) 563.

§ 934. All presumptions, consistent with the record, must be indulged to support the judgment below.—Kreugel v. Rawlins (Tex.) 419.

§ 938. The court on appeal *held* not entitled to presume that writings read in evidence and omitted from the bill of exceptions were sufficient to sustain the judgment not sustainable by the evidence in the bill of exceptions.—St. Louis, I. M. & S. Ry. Co. v. Townes (Ark.) 1036.

**(F) Discretion of Lower Court.**

§ 959. The right to file amended pleadings after the trial has begun is within the discretion of the trial judge, and, unless abused, his action will not be disturbed.—Illinois Cent. R. Co. v. Frost (Ky.) 821.

§ 966. A motion for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed unless manifestly abused.—St. Louis Southwestern Ry. Co. v. Jackson (Ark.) 241.

§ 966. Exercise of the trial court's discretion in denying an application for a continuance, will not be reviewed unless manifestly abused.—Spear Mining Co. v. T. J. Shinn & Co. (Ark.) 1045.

§ 978. When objection to a juror is made after a verdict for the first time, it becomes to some extent a matter of discretion whether or not the verdict should be set aside; and, when no fraud or collusion of the successful party is shown, an order refusing a new trial will not be disturbed.—Gershner v. Scott-Mayer Commission Co. (Ark.) 772.

§ 984. A disallowance of witnesses' mileage fees *held* to be based upon an erroneous view of the law, so that the judgment disallowing such fees was reviewable.—McKewen v. St. Louis, I. M. & S. Ry. Co. (Ark.) 506.

**(G) Questions of Fact, Verdicts, and Findings.**

Review of criminal prosecutions, see Criminal Law, §§ 1159, 1160.

§ 993. A finding for defendant on an issue will not be set aside because the greater number of witnesses testified thereon in plaintiff's favor.—West Louisville Brewing Co. v. Schaefer (Ky.) 395.

§ 994. A verdict is conclusive on the appellate court as to the credibility of the witnesses.—*Brady v. Maddox* (Tex. Civ. App.) 739.

§ 997. On appeal from a judgment on a verdict directed for plaintiff, the court must view the testimony in its light most favorable to defendants.—*Montgomery & Co. v. Arkansas Cold Storage & Ice Co.* (Ark.) 768.

§ 997. In an action against a city for personal injuries from falling over a wire stretched across the sidewalk, the question whether a verdict should be directed for defendant held for the trial court.—*Asbill v. City of Joplin* (Mo. App.) 22.

§ 997. Where the only error assigned on appeal is that the court erred in refusing to sustain a demurrer to the testimony, if the evidence will sustain the verdict upon any theory of the law applicable thereto, judgment must be affirmed.—*Clover v. Joplin & P. Ry. Co.* (Mo. App.) 43.

§ 999. The findings of a jury on the evidence held conclusive.—*Kirn v. E. E. Souther Iron Co.* (Mo. App.) 45.

§ 1001. Where the evidence is sufficient to warrant the submission of an issue to the jury, and it is submitted with appropriate instructions, the finding of the jury is conclusive.—*Cochran v. City of Springfield* (Mo. App.) 53.

§ 1001. A verdict supported by substantial evidence will not be disturbed on appeal, though on the same evidence the reviewing court would have found a different verdict.—*Lehnick v. Metropolitan St. Ry. Co.* (Mo. App.) 542.

§ 1001. A verdict supported by sufficient evidence is conclusive on appeal.—*Steger v. Barrett* (Tex. Civ. App.) 174.

§ 1001. Negligence is primarily for the jury; and, where there is any evidence reasonably tending to show its existence, and that it was the proximate cause of an injury complained of, the verdict is conclusive.—*Buchanan & Gilder v. Murayda* (Tex. Civ. App.) 973.

§ 1002. The finding of the jury on conflicting evidence is conclusive on appeal.—*King v. Black* (Ark.) 237; *Gershner v. Scott-Mayer Commission Co.* (Ark.) 772; *St. Louis, I. M. & S. R. Co. v. Weatherly* (Ark.) 1031; *Hilburn v. Phoenix Ins. Co.* (Mo. App.) 63; *Tuck v. Springfield Traction Co.* (Mo. App.) 1079; *Brady v. Maddox* (Tex. Civ. App.) 739.

§ 1002. In an action for injuries by the premature explosion of a blast which plaintiff was setting off, evidence held to sustain a verdict for plaintiff.—*Nortonville Coal Co. v. Whited* (Ky.) 397.

§ 1003. A verdict sustained by evidence will not be disturbed because it is contrary to the weight of the evidence.—*Dow Wire & Iron Works v. Smith* (Ky.) 819.

§ 1004. A finding on conflicting evidence as to the amount of damages in a personal injury case will not be disturbed on appeal, where it cannot be said on the whole case that the verdict is palpably against the evidence.—*Pittsburg, C., C. & St. L. Ry. Co. v. Schaub* (Ky.) 885.

§ 1004. Where the amount of recovery in an action for personal injuries to an employe has been sustained by the trial court in full, or a remittitur ordered, the verdict will not be disturbed by the appellate court, except in a clear case of abuse of discretion.—*Kirn v. E. E. Souther Iron Co.* (Mo. App.) 45.

§ 1004. Passion, prejudice, or misconduct must appear to have influenced the amount of the verdict before the appellate court will reverse on that ground.—*Roberts v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 230.

§ 1005. Where the instructions as a whole properly presented the issues to the jury, and there was evidence sustaining the theories of the respective parties, the weight of the testimony and the right to draw proper conclusions therefrom were solely for the jury, and their finding, confirmed by the trial court, is conclusive on appeal.—*Pryor v. Crum* (Mo. App.) 597.

§ 1006. Where there is evidence to sustain the third verdict of a jury, it will not be disturbed as against the weight of evidence.—*Chesapeake & O. Ry. Co. v. Brashear's Adm'x* (Ky.) 277.

§ 1006. In an action for injuries to a passenger, the fact that the jury on the first trial award plaintiff only \$1,000 does not show that a verdict of \$2,500 on a second trial, with a different jury and somewhat different evidence, was the result of passion or prejudice.—*Lehnick v. Metropolitan St. Ry. Co.* (Mo. App.) 542.

§ 1009. The Supreme Court will not reverse the chancellor's finding, based in part upon facts not in the record on appeal.—*Williams v. Bolling* (Ky.) 401.

§ 1009. The Supreme Court will not disturb the chancellor's finding upon conflicting evidence.—*Williams v. Bolling* (Ky.) 401; *Wiggins v. Brown* (Ky.) 843; *St. Louis & S. F. R. Co. v. Yankee* (Mo. App.) 18.

§ 1010. A finding supported by evidence will not be disturbed on appeal.—*Phelps v. Jones* (Mo. App.) 1067; *Matson v. Stewart* (Tex. Civ. App.) 736; *Finberg v. Gilbert* (Tex. Civ. App.) 979.

§ 1011. A finding on conflicting testimony of witnesses who appeared before the trial judge will not be disturbed on appeal.—*Pitman v. Ball* (Mo. App.) 1082.

§ 1011. A finding of fact of the trial court on conflicting evidence will not be disturbed on writ of error.—*De Zavala v. Daughters of the Republic of Texas* (Tex. Civ. App.) 160.

#### (H) Harmless Error.

Criminal prosecutions, see Criminal Law, §§ 1165-1173.

§ 1028. The judgment for the right party, rendered in proceedings recognized by law, will not be disturbed for mistakes and errors not material to the issue.—*Meeks v. Clear Jack Mining Co.* (Mo. App.) 1084.

§ 1028. Where the evidence in an action for the loss of property by fire showed negligence in setting the fire and authorized a judgment on that ground, the error, if any, on the issue of promise to indemnify against loss, was not reversible.—*Steger v. Barrett* (Tex. Civ. App.) 174.

§ 1031. Where the evidence on a material question of fact was so conflicting as to leave it doubtful on which side it preponderated, substantial errors in rulings on evidence will be considered prejudicial and reversible.—*Sills v. Burge* (Mo. App.) 605.

§ 1031. An erroneous charge is presumed to be injurious.—*St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Tex. Civ. App.) 1002.

§ 1033. Appellant cannot complain of an instruction in his own favor.—*Texas & Pacific Coal Co. v. McWain* (Tex. Civ. App.) 202.

§ 1036. A defect of parties in an action on a fire policy held not ground for reversal under Civ. Code Prac. § 134.—*Phoenix Ins. Co. of Hartford v. Flowers* (Ky.) 403.

§ 1036. Failure to grant request of a grantor's trustee in bankruptcy to be substituted as plaintiff in a suit to set aside a conveyance as fraudulent held harmless error.—*Atkins v. Globe Bank & Trust Co.* (Ky.) 879.

§ 1039. A judgment for plaintiff in a personal injury case *held* not reversible for error in allowing recovery for loss of time not pleaded.—Main Jellico Mountain Coal Co. v. Parker (Ky.) 871.

§ 1039. In view of Civ. Code Prac. §§ 444, 449, a proceeding by cross-petition against a co-surety for contribution after judgment went against cross-petitioner for the creditor, if improper, was at most a mere irregularity.—Fritts v. Kirchdorfer (Ky.) 882.

§ 1040. In a suit for failure to promptly transmit and deliver an unrepeatable message, a defendant *held* not injured by the sustaining of an exception to a part of its answer setting up a contract exemption from liability.—Western Union Telegraph Co. v. Bennett (Tex. Civ. App.) 151.

§ 1040. Overruling an exception made to an answer in an action by a national bank on a note *held* harmless.—Trabue v. Cook (Tex. Civ. App.) 455.

§ 1040. The error, if any, in overruling an exception to allegations of a petition was harmless, where the facts alleged could be proved without any allegation in the petition.—Western Union Telegraph Co. v. Douglass (Tex. Civ. App.) 488.

§ 1042. Any error in refusing to strike averments of the petition in an action on a fire policy that plaintiff submitted to an examination under oath by the company and had offered to arbitrate the amount of the loss would not be material after verdict for plaintiff.—Hilburn v. Phoenix Ins. Co. (Mo. App.) 63.

§ 1046. Where parties filed new pleadings at the submission term, their rights were not prejudiced by the submission where the new issues raised were found in their favor.—Atkins v. Globe Bank & Trust Co. (Ky.) 879.

§ 1050. In a passenger's action for damages for his ejection from the smoker after the conductor had directed him to leave it so as to make room for colored passengers, admission of evidence as to the conductor's power and duties *held* not reversible error.—Bradford v. St. Louis, I. M. & S. Ry. Co. (Ark.) 516.

§ 1050. In an action for injuries to a street car passenger, the error in admitting hearsay evidence *held* harmless.—Brady v. Springfield Traction Co. (Mo. App.) 1070.

§ 1050. In an action on a fire policy covering store goods, error in admitting evidence as to the value of plaintiff's goods two weeks before the fire *held* not harmful to defendant.—Hartford Fire Ins. Co. v. Becton (Tex. Civ. App.) 474.

§ 1051. In an action by a bank on notes executed by defendant's son in defendant's name to cover overdrafts of the son's account, defendant *held* not prejudiced by allowing the bank's president to state that the overdrafts were good only in case the defendant was bound.—Mathis v. Bank of Taylorsville (Ky.) 876.

§ 1051. In an action against a city for injuries on a defective street, the admission of a plat of dedication of the municipality *held* not prejudicial.—Scheffler v. City of Hardin (Mo. App.) 569.

§ 1051. The error, if any, in admitting incompetent evidence to prove a fact established by competent evidence sufficient to support the verdict, is not reversible.—Ft. Worth & D. C. Ry. Co. v. Arthur (Tex. Civ. App.) 213.

§ 1051. In proceedings to restrain defendant from re-engaging in the photograph business, *held* not reversible error to allow plaintiff to testify as to a statement made by defendant to plaintiff's partner.—Parrish v. Adwell (Tex. Civ. App.) 441.

§ 1051. Error in admitting testimony in an action on a fire insurance policy that the company's adjuster did not give insured's attorney notice on investigating the loss after the fire *held* not reversible.—Hartford Fire Ins. Co. v. Becton (Tex. Civ. App.) 474.

§ 1051. In an action on a fire policy, testimony by insured's wife that defendant's agent did not offer to return the unearned premium to herself or her husband *held* not reversible.—Hartford Fire Ins. Co. v. Becton (Tex. Civ. App.) 474.

§ 1051. Where a fact sought to be established by depositions was shown by all the evidence so that there was no issue on the subject, any error in admitting them was harmless.—Hartford Fire Ins. Co. v. Becton (Tex. Civ. App.) 474.

§ 1051. Appellant cannot object to the admission of testimony where on cross-examination he elicits the same testimony.—Covington v. Sloan (Tex. Civ. App.) 690.

§ 1051. The admission of evidence which is merely cumulative of proper evidence, even if erroneous, is harmless.—Finberg v. Gilbert (Tex. Civ. App.) 979.

§ 1051. The erroneous admission in evidence of a judgment in another action, fixing a line or corner by which the land in suit could be identified *held* harmless.—Finberg v. Gilbert (Tex. Civ. App.) 979.

§ 1052. In an action for damages for land taken for a railroad right of way, defendant *held* not prejudiced by the admission of certain evidence.—Missouri & N. A. Ry. Co. v. Bratton (Ark.) 231.

§ 1053. Prejudicial effect of improper cross-examination *held* not cured by statement of counsel and direction of the court to the jury.—Chenoweth v. Sutherland (Mo. App.) 1055.

§ 1056. In replevin for a steam shovel which plaintiff leased to defendant's sub-contractor, the exclusion of evidence of defendant's contract with the subcontractor for the use of the shovel could not prejudice defendant, where the subcontractor had forfeited his right to use the shovel under the contract with plaintiff when defendant contracted with him for its use.—Cullin-McCurdy Const. Co. v. Vulcan Iron Works (Ark.) 1023.

§ 1056. Exclusion of evidence bearing only on mitigation of damages *held* harmless.—Kirby v. Lower (Mo. App.) 34.

§ 1057. In an action between adjoining lot owners to recover a strip claimed by plaintiff as a part of his lot, an objection to the exclusion of evidence *held* obviated by a stipulation made at trial.—Beavers v. Baker (Tex. Civ. App.) 450.

§ 1060. The misconduct of counsel for the successful party in his argument to the jury *held* not prejudicial.—Brady v. Springfield Traction Co. (Mo. App.) 1070.

§ 1060. A judgment for the right party will not be reversed because of reprehensible argument by the party's attorney to the jury.—Tuck v. Springfield Traction Co. (Mo. App.) 1079.

§ 1060. In an action on a fire policy, remarks of plaintiff's counsel in argument *held* not prejudicial to defendant in view of the issues and evidence.—Hartford Fire Ins. Co. v. Becton (Tex. Civ. App.) 474.

§ 1062. In an action against a telegraph company for delay in delivering messages, the refusal to withdraw all issues involving one of the messages *held* not prejudicial.—Western Union Telegraph Co. v. Douglass (Tex. Civ. App.) 488.

§ 1064. In an action against a railroad company for personal injuries from stepping on a

spike in a plank left exposed by defendant's servants in repairing a station platform, an inaccuracy in an instruction to the jury *held* harmless error.—*Hanna v. St. Louis & S. F. R. Co. (Ark.)* 514.

§ 1064. The giving of an instruction *held* harmless error, though it was erroneous.—*J. S. Minor & Sons v. Paragon Plaster Co. (Ky.)* 268.

§ 1064. Where a verdict appears to the appellate court to be excessive, an erroneous charge as to an element of damages *held* not to be harmless.—*Scanlan & Bartell v. Davis (Tex. Civ. App.)* 126.

§ 1064. In an action for breach of contract by which plaintiff agreed to work and ship lumber to defendant "with as little delay as possible," and defendant agreed to furnish orders therefor, "with as little delay as possible," any error in a certain instruction *held* not to have prejudiced defendant.—*Wm. Cameron & Co. v. Matthews (Tex. Civ. App.)* 192.

§ 1066. Prejudicial error cannot be predicated on instructions announcing correct principles of law, where they were based on evidence in the case to which they were applicable.—*Southern Anthracite Coal Co. v. Bowen (Ark.)* 1048.

§ 1066. An instruction as to the right of a telegraph company to make rules governing the handling of messages *held* not prejudicial, in view of the evidence.—*Western Union Telegraph Co. v. Brasher (Ky.)* 788.

§ 1066. In an action by a bank on notes executed by defendant's son, in defendant's name, to satisfy overdrafts of the son's account, the submission of an issue to the jury not made by the pleadings *held* harmless.—*Mathis v. Bank of Taylorsville (Ky.)* 876.

§ 1066. In an action on a fire policy, an instruction *held* not prejudicial to insurer.—*Culver v. Williamsburg City Fire Ins. Co. (Mo. App.)* 540.

§ 1066. In an action for carrying a passenger past his destination, an erroneous instruction relating to a plea of privilege *held* harmless where there was no issue as to plaintiff's residence.—*Gulf, C. & S. F. Ry. Co. v. Ward (Tex. Civ. App.)* 130.

§ 1066. It is reversible error to submit an issue not made by the evidence, unless the jury were not misled.—*Houston & T. C. R. Co. v. Barron (Tex. Civ. App.)* 996.

§ 1067. No error can be predicated on the refusal of an instruction which is practically the same as an instruction given.—*Main Jellico Mountain Coal Co. v. Parker (Ky.)* 871.

§ 1067. In an action for injuries from a defective sidewalk, refusal to charge that notice of the defect to the city clerk was not notice to the city *held* harmless error, in view of the evidence as to other notice.—*Cochran v. City of Springfield (Mo. App.)* 53.

§ 1068. Reversal will not be granted for error in an instruction as to punitive damages where the court is reasonably convinced that the jury awarded no punitive damages.—*Chesapeake & O. Ry. Co. v. Conley (Ky.)* 861.

§ 1068. Where the jury returned the only verdict that could have been rendered legally, the error in a charge submitting an issue was not reversible.—*Steger v. Barrett (Tex. Civ. App.)* 174.

§ 1068. Where, in an action for injuries from delay in shipment of live stock, the jury found against the initial carrier alone, it was a finding that the delay occurred upon that road; and refusal to charge that it was a presumption of law that the injury was inflicted by the last carrier was harmless.—*International & G. N. Ry. Co. v. Rogers (Tex. Civ. App.)* 446.

§ 1070. Where the findings of the jury on all the issues and all the items of damages were separate and distinct, the action of the court in denying recovery on a specified item cured errors as to that item committed during the trial.—*Steger v. Barrett (Tex. Civ. App.)* 174.

§ 1073. In an action against two railroad companies, where the court instructed a finding in favor of one of them, and submitted the case to the jury as to the other, and the jury returned a verdict for plaintiff, the error, if any, of the court in entering judgment dismissing the petition as to the first company, and against the second company for the amount of the verdict, *held* harmless.—*Chesapeake & O. Ry. Co. v. Hawkins (Ky.)* 836.

#### (J) Decisions of Intermediate Courts.

§ 1091. That there was a proper appeal from probate court, giving the district court jurisdiction, cannot be assumed on appeal from the district court in probate matters.—*Goodwin v. Walker (Tex. Civ. App.)* 462.

#### (K) Subsequent Appeals.

§ 1097. The opinion of the Court of Civil Appeals, approved by the Supreme Court, *held* to be the law of the case on a subsequent appeal.—*Walker v. Thornton (Tex. Civ. App.)* 166.

### XVII. DETERMINATION AND DISPOSITION OF CAUSE.

Review of criminal prosecutions, see Criminal Law, §§ 1182-1189.

#### (B) Affirmance.

Review of criminal prosecutions, see Criminal Law, § 1182.

#### (C) Modification.

§ 1152. Certain error in the appointment of a receiver *held* not such as to require on appeal more than a modification of the order and taxation of costs against plaintiffs.—*Hardy Oil Co. v. Burnham (Tex. Civ. App.)* 221.

#### (D) Reversal.

Review of criminal prosecutions, see Criminal Law, §§ 1186, 1189.

§ 1169. Refusal of the judge to file on request conclusions of law and fact, under Laws 1907, p. 446, c. 7, is reversible error.—*Wandry v. Williams (Tex.)* 85.

§ 1170. Under Civ. Code Prac. §§ 134, 338, 756, providing against reversal for technical errors, where, upon a survey of the whole record, the appellate court cannot perceive that anything, though erroneous, has influenced the result, it is their duty to affirm.—*Chesapeake & O. Ry. Co. v. Conley (Ky.)* 861.

§ 1171. The right to nominal damages for breach of official duty *held* a substantial right for the invasion of which the judgment will be reversed.—*State ex rel. Armour Packing Co. v. Dickmann (Mo. App.)* 29.

#### (F) Mandate and Proceedings in Lower Court.

§ 1207. A judgment entered after the remand of a case *held* to conform to the decision of the court on appeal.—*United States Fidelity & Guaranty Co. v. Miller (Ky.)* 341.

### XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 1234. Liability under a supersedeas bond *held* to include liability for rent of land for a specified year and to continue until the cause was disposed of by the appellate court.—*Love v. Cahn (Ark.)* 259.

§ 1234. The liability incurred by the execution of a supersedeas bond *held* fixed by its

terms, construed according to the ordinary meaning of the language used.—*Love v. Cahn* (Ark.) 259.

§ 1244. In an action on a supersedeas bond brought by the assignee thereof, the obligors *held* not entitled to complain on the ground that the bond was not assignable and that the obligee was therefore a necessary party.—*Love v. Cahn* (Ark.) 259.

## APPEARANCE.

By garnishee, see Garnishment, § 104.

Waiver of defects in garnishment return, see Garnishment, § 104.

§ 8. The appearance by a surety on the bond of plaintiff in replevin as attorney for plaintiff *held* not such as to authorize judgment without process against the sureties as well as plaintiff on the bond, it being a common-law bond.—*Huttig-McDermid Pearl Button Co. v. Springfield Shirt Co.* (Mo. App.) 1094.

§ 8. In an action for carrying a passenger beyond his destination, an agreement to a continuance of the case by defendant's attorney amounted to an appearance rendering a citation unnecessary.—*Gulf, C. & S. F. Ry. Co. v. Ward* (Tex. Civ. App.) 130.

## APPLIANCES.

Defective and dangerous appliances, liability of master for injuries to servant, see Master and Servant, §§ 101-124, 208-211, 233-236.

## APPLICATION.

For liquor license, see Intoxicating Liquors, § 74.

Of assets of partnership to liabilities, see Partnership, § 181.

Of instructions to case, see Criminal Law, § 814; Trial, §§ 248-253.

Of payments, see Payment, §§ 36, 44.

*For particular remedies or forms of relief.*

See Motions.

Allowance of appeal or writ of error, see Appeal and Error, § 361.

Appointment of receiver, see Receivers, § 38.

Change of venue, see Venue, § 58.

Continuance, see Continuance, § 46; Criminal Law, §§ 603, 608.

Election between causes of action, counts, or defenses, see Pleading, § 369.

Judgment on pleadings, see Pleading, §§ 345-369.

New trial, see Criminal Law, §§ 956-959; New Trial, §§ 150, 166.

Publication of process, see Process, § 96.

Sale of property of decedent, see Executors and Administrators, § 356.

## APPOINTMENT.

Of corporate officers, see Corporations, § 284.

Of executors or administrators, see Executors and Administrators, §§ 17, 20.

Of receivers, see Receivers, § 38.

## APPROPRIATION.

Of payments, see Payment, §§ 36, 44.

Of property to public use, see Eminent Domain.

## APPROVAL.

Of case or statement of facts by trial judge, see Appeal and Error, § 569.

Of verdict by trial court as affecting power of appellate court to review questions of fact, see Criminal Law, § 1160.

## APPURTENANCES.

Easements in general, see Easements.

## ARBITRATION AND AWARD.

### II. ARBITRATORS AND PROCEEDINGS.

§ 34. Certain procedure adopted by arbitrators *held* no ground for a vacation of their award.—*Sanders v. Newton* (Tex. Civ. App.) 482.

### III. AWARD.

§ 78. Charges of fraud on the part of arbitrators are not sustained by evidence relating to the merits of the controversy decided.—*Sanders v. Newton* (Tex. Civ. App.) 482.

§ 82. The general rule as to the conclusiveness of an award of arbitrators stated.—*Sanders v. Newton* (Tex. Civ. App.) 482.

§ 82. Facts *held* insufficient to authorize disturbance of award of arbitrators.—*Sanders v. Newton* (Tex. Civ. App.) 482.

## ARGUMENTATIVENESS.

In instructions, see Trial, § 240.

## ARGUMENT OF COUNSEL.

In civil actions, see Trial, §§ 126-133.

In criminal prosecutions, see Criminal Law, §§ 719-730.

## ARMS.

See Weapons.

## ARREST.

### II. ON CRIMINAL CHARGES.

§ 62. The violation of Pen. Code, art. 1010h, *held* not to justify the offender's arrest without warrant.—*Freeman v. Costley* (Tex. Civ. App.) 458.

## ARSON.

Construction of charge as a whole, see Criminal Law, § 822.

§ 41. In a prosecution for arson, an instruction as to the sufficiency of the burning *held* properly refused, as not called for by the evidence.—*Wigfall v. State* (Tex. Cr. App.) 649.

## ASSAULT AND BATTERY.

### I. CIVIL LIABILITY.

Ejection of passenger or intruder from train, see Carriers, §§ 356-381.

### II. CRIMINAL RESPONSIBILITY.

Assault with intent to kill, see Homicide, § 257. Former jeopardy, see Criminal Law, §§ 170, 186.

#### (B) Prosecution and Punishment.

Complaint on information and belief, see Criminal Law, § 211.

Harmless error, see Criminal Law, § 1173.

Newly discovered evidence, ground for new trial, see Criminal Law, § 940.

Variance of information from affidavit, see Indictment and Information, § 122.

§ 83. Testimony that almost immediately after the quarrel began, but after the alleged assault, defendant's brother shot the father of the prosecuting witness, *held* inadmissible.—*Majors v. State* (Tex. Cr. App.) 663.

§ 86. In a prosecution for aggravated assault, evidence that witness prior to the difficulty attempted to settle the differences existing between complainant and accused *held* admissible in rebuttal.—*Decker v. State* (Tex. Cr. App.) 912.

§ 88. In a prosecution for aggravated assault, evidence that two months before defendant had threatened to kill complainant *held* admissible.—*Decker v. State* (Tex. Cr. App.) 912.

§ 92. Evidence *held* to justify a finding that accused, when he assaulted complainant, used a dangerous weapon.—*Decker v. State* (Tex. Cr. App.) 912.

§ 96. On trial for aggravated assault, accused *held* entitled to an affirmative charge submitting his claim that he was not within the reach of prosecutrix.—*Piper v. State* (Tex. Cr. App.) 861.

§ 96. In a prosecution for aggravated assault, an instruction *held* misleading for failure to require a premeditated design to exist in defendant's mind at the time of the assault.—*Decker v. State* (Tex. Cr. App.) 912.

§ 96. On a trial for aggravated assault, the refusal to give a charge on self-defense *held* reversible error.—*Culp v. State* (Tex. Cr. App.) 946.

§ 96. Where, on a trial for aggravated assault, the issue of provoking a difficulty was not raised by the evidence, a charge limiting accused's right of self-defense, by charging on provoking a difficulty, was erroneous.—*Culp v. State* (Tex. Cr. App.) 946.

## ASSENT.

Of husband as defense to prosecution for detention of wife, see Abduction, § 2.

Of lessor to assignment or subletting by lessee, see Landlord and Tenant, § 75.

Of parties to contracts in general, see Contracts, § 98.

To acts of others as ground of estoppel in pais, see Estoppel, § 92.

## ASSESSMENT.

Of damages in general, see Damages, §§ 215-217.

Of expenses of public improvements, see Municipal Corporations, § 449.

Of taxes, see Schools and School Districts, § 108.

## ASSETS.

Of estate of decedent, see Executors and Administrators, § 55.

Of partnership, see Partnership, § 181.

## ASSIGNMENT OF DOWER.

See Dower, §§ 113, 114.

## ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 719-750; Criminal Law, § 1129.

## ASSIGNMENTS.

Application of statute of frauds to assignment of existing estates or interests in real property, see Frauds, Statute of, §§ 69, 70.

In bankruptcy, see Bankruptcy, § 156.

Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

*Transfers of particular species of property, rights, or instruments.*

See Mechanics' Liens, § 204.

Leases, see Landlord and Tenant, § 75.

Liens for price of land sold, see Vendor and Purchaser, § 261.

## I. REQUISITES AND VALIDITY.

### (A) Property, Estates, and Rights Assignable.

§ 24. An action for fraud practiced on a buyer by the seller and inducing the purchase is not assignable.—*Mullinax v. Lowry* (Mo. App.) 572.

### (B) Mode and Sufficiency of Assignment.

§ 54. The assignee of a cause of action may maintain an action thereon, though he paid no consideration therefor.—*Pearce v. Wallis, Landes & Co.* (Tex. Civ. App.) 496.

## II. OPERATION AND EFFECT.

§ 73. An assignment of a claim under a supersedeas bond vests in the assignee an equitable right to the claim.—*Love v. Cahn* (Ark.) 259.

§ 80. An assignee of a contract of sale may not avail himself of the fraud of the seller practiced on the assignor, unless the cause of action in favor of the assignor on the ground of fraud has been assigned.—*Mullinax v. Lowry* (Mo. App.) 572.

## IV. ACTIONS.

Issues on application for change of venue, see Venue, § 58.

§ 121. Under Kirby's Dig. § 5999, an assignee of a claim under a supersedeas bond *held* the real party in interest, entitling him to sue in his own name thereon.—*Love v. Cahn* (Ark.) 259.

§ 126. The answer, in an action by the assignee, *held* to present no defense on the merits.—*Pearce v. Wallis, Landes & Co.* (Tex. Civ. App.) 496.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy, § 156.

## ASSOCIATIONS.

Judicial notice of associations and members thereof, see Evidence, § 22.

Mutual benefit insurance associations, see Insurance, §§ 782-815.

## ASSUMPSIT, ACTION OF.

Joinder of causes of action, see Action, § 45.

Particular implied contracts as grounds of action, see Work and Labor.

## ASSUMPTION.

As to facts by trial court in instructing jury, see Criminal Law, § 761; Trial, §§ 191, 194.

Of risk by employé, see Master and Servant, §§ 203-222, 280, 288, 295.

Of risk by passenger on freight train, see Carriers, § 280.

Of risk from failure to provide fire escapes for lodging houses, see Innkeepers, § 10.

## ATTACHMENT.

See Execution; Garnishment.

Exemptions, see Exemptions; Homestead.

Right of seller to recover property as against attaching creditors of infant, see Infants, § 31.

Specific attachment to recover goods purchased, see Sales, § 399.

## II. PROPERTY SUBJECT TO ATTACHMENT.

Exemptions, see Exemptions; Homestead.

## VIII. CLAIMS BY THIRD PERSONS.

In justice court, see Justices of the Peace, § 86.

§ 287. One intervening in attachment *held* not precluded from recovering the property on the ground that he had been induced to sell it by fraudulent representations because he held an unrecorded mortgage.—*Wray v. Hale* (Mo. App.) 38.

§ 302. Where in attachment a third person claims title, *held*, that under Civ. Code Prac. § 29, allowing him to become a party, the case should be tried with reference to his rights.—*Cofield v. Kline* (Ky.) 407.

§ 306. Though Civ. Code Prac. § 29, requires that an intervening claimant's petition shall be verified, his claim should not be dismissed because of failure to do so.—*Cofield v. Kline* (Ky.) 407.

## ATTENDANCE.

Of witnesses, see Witnesses, § 29.

## ATTESTATION.

Acknowledgments in general, see Acknowledgment.

## ATTORNEY AND CLIENT.

Absence of counsel as ground for continuance, see Criminal Law, § 593.

Argument and conduct of counsel at trial, see Criminal Law, §§ 719-730; Trial, §§ 126-133.

Attorneys as public officers, see District and Prosecuting Attorneys.

Attorneys in fact, see Principal and Agent.

Disqualification of counsel to act as judge, see Judges, § 47.

## II. RETAINER AND AUTHORITY.

Authority of county superintendent to employ attorney, see Schools and School Districts, § 48.

§ 101. Plaintiff's attorney has no authority to compromise with defendant's attorney or release defendant from liability, or to shift his liability by contracting with another to assume it.—*Cullin-McCurdy Const. Co. v. Vulcan Iron Works* (Ark.) 1023.

§ 101. A release of a claim for personal injuries executed by plaintiff's attorneys *held* binding, though executed by the attorneys with the intent to defraud plaintiff.—*Miller v. Dallas Consol. Electric St. Ry. Co.* (Tex. Civ. App.) 453.

## III. DUTIES AND LIABILITIES OF ATTORNEY TO CLIENT.

§ 123. Deed of client to attorneys set aside.—*Cline v. Charles* (Ky.) 347.

§ 123. Contract between attorney and client *held* not to be enforced where relation of confidence continues, and parties do not deal at arm's length.—*Cline v. Charles* (Ky.) 347.

## IV. COMPENSATION AND LIEN OF ATTORNEY.

### (A) Fees and Other Remuneration.

Recovery in action on insurance policy, see Insurance, § 666.

Recovery in proceeding to construe will, see Wills, § 707.

§ 150. The client as long as he acts in good faith, without intent to defraud, *held* to have the right to compromise and settle his cause of action with or without the consent of his lawyers.—*Hurr v. Metropolitan St. Ry. Co.* (Mo. App.) 1057.

§ 150. An attorney *held* entitled to certain fees from defendant who had settled with the

client.—*Hurr v. Metropolitan St. Ry. Co.* (Mo. App.) 1057.

## ATTORNEYS IN FACT.

See Principal and Agent.

## ATTRACTIVE NUISANCES.

Machinery and other things attractive to children, see Negligence, § 23.

## AUDITA QUERELA.

Relief against execution in general, see Execution, § 172.

Relief against judgment by equitable proceedings, see Judgment, §§ 407-463.

Relief against judgment by motion or other proceedings in same action, see Judgment, §§ 336-377.

## AUTHENTICATION.

Of documents offered in evidence, see Evidence, § 372.

## AUTHORITY.

Of agents, see Principal and Agent, §§ 73, 99, 101.

Of attorneys, see Attorney and Client, § 101.

Of brokers, see Brokers, § 8.

Of executors or administrators, see Executors and Administrators, §§ 105-158.

Of guardians, see Guardian and Ward, §§ 33, 43.

Of judges, see Judges, § 36.

Of officers and agents of corporations in general, see Corporations, §§ 399-433.

Of partner to represent firm, see Partnership, § 158.

Of receivers, see Receivers, § 82.

Of trustees, see Trusts, § 187.

To amend or correct judgment, see Judgment, § 299.

To make admission binding another, see Evidence, § 241.

To make arrest without warrant, see Arrest, § 62.

## AUTREFOIS ACQUIT AND CONVICT.

See Criminal Law, §§ 170, 186.

## AVOIDANCE.

Of contract or conveyance of infant, see Infants, § 31.

Of insurance policy, see Insurance, §§ 248, 290.

## AWARD.

Of arbitrators, see Arbitration and Award, §§ 78, 82.

## BAGGAGE.

Of passenger, see Carriers, §§ 399, 400.

## BAIL.

### II. IN CRIMINAL PROSECUTIONS.

Admissibility of evidence of forfeiture of bail, see Criminal Law, § 351.

## BAILMENT.

Particular species of bailments, and bailments incident to particular occupations.

See Pledges; Warehousemen.

Carriage of goods, see Carriers, §§ 39-185.

**BANKRUPTCY.**

Secondary evidence of petition in bankruptcy, see Evidence, § 158.

**III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.**

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

Trustee in bankruptcy as party to suit for conversion of timber, see Logs and Logging, § 35.

§ 156. In view of the bankruptcy act (Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), *held*, that a bankrupt's trustee has a right, when authorized by the bankrupt court, to be substituted as plaintiff in a suit by creditors in a state court to recover property fraudulently conveyed.—*Atkins v. Globe Bank & Trust Co. (Ky.)* 879.

(E) Actions by or Against Trustee.

Trustee as party to action for conversion of timber, see Logs and Logging, § 35.

**BANKS AND BANKING.****III. FUNCTIONS AND DEALINGS.**

(C) Deposits.

Forgery of checks, see Forgery.

Liability of executor for loss of deposits by bank failure, see Executors and Administrators, § 105.

§ 138. A bank having paid the check of a company signed only by its president, when by agreement of the bank and company its checks were also to be countersigned by another officer, *held* the bank was liable for the amount to the company's receiver.—*Ellis v. Western Nat. Bank (Ky.)* 334.

(H) Actions.

Grounds for change of venue, see Venue, § 45.

**IV. NATIONAL BANKS.**

§ 270. In an action by a national bank to collect a note, evidence *held* sufficient to authorize the presumption of payment of usurious interest.—*Trabue v. Cook (Tex. Civ. App.)* 455.

§ 270. Persons entitled to recover penalty for usury paid national bank limited to those who pay or their representatives.—*Trabue v. Cook (Tex. Civ. App.)* 455.

§ 270. Remedy available on payment of usury to national bank stated.—*Trabue v. Cook (Tex. Civ. App.)* 455.

§ 270. An accommodation maker of a note given to a national bank can set up the defense of usury to defeat the recovery of interest.—*Trabue v. Cook (Tex. Civ. App.)* 455.

**BAR.**

Of action by former adjudication, see Judgment, §§ 603, 617.

Of action by laches or staleness of demand, see Equity, § 73.

Of prosecution by limitation, see Criminal Law, § 159.

**BARROOMS.**

See Intoxicating Liquors.

**BARTER.**

See Exchange of Property.

**BASE FEE.**

Construction of wills, see Wills, § 602.

**BASTARDS.**

See Incest, § 5.

**BATTERY.**

See Assault and Battery.

**BELIEF.**

Complaint on information and belief, see Criminal Law, § 211.

Verification of information on information and belief, see Indictment and Information, § 52.

**BENEFICIAL ASSOCIATIONS.**

Benefit and relief funds for servants, acceptance as affecting master's liability for injuries to servant, see Master and Servant, § 100.

Mutual benefit insurance association, see Insurance, §§ 782-815.

**BENEFICIARIES.**

Of insurance, see Insurance, §§ 782-785.

Of trust, see Trusts.

**BENEFITS.**

Acceptance, ground of estoppel in pais, see Estoppel, § 92.

Benefit and relief funds for servants, acceptance as affecting master's liability for injuries to servant, see Master and Servant, § 100.

Mutual benefit insurance, see Insurance, §§ 782-785.

**BENEFIT SOCIETIES.**

See Insurance, §§ 782-815.

**BEQUESTS.**

See Wills.

**BEST AND SECONDARY EVIDENCE.**

See Criminal Law, §§ 398-404; Evidence, §§ 158-175.

**BETTERMENTS.**

In general, see Improvements.

Liens for improvements on real estate, see Mechanics' Liens.

Public improvements, see Drains; Highways; Municipal Corporations, §§ 280-449.

**BETTING.**

See Gaming.

**BIDS.**

For contracts with municipal corporations, see Municipal Corporations, § 335.

**BILL OF EXCEPTIONS.**

See Criminal Law, §§ 1090-1124; Exceptions, Bill of.

**BILL OF EXCHANGE.**

See Bills and Notes.

**BILL OF RIGHTS.**

See Constitutional Law.

## BILL OF SALE.

See Sales, § 146.

## BILLS AND NOTES.

Alteration, see Alteration of Instruments.

Alteration of note for price of goods as affecting right of action for value, see Alteration of Instruments, § 23.

Forgery, see Forgery.

Gifts of, see Gifts, § 32.

Payment of debts in general by bill, note or check, see Payment, §§ 16, 17, 67.

### I. REQUISITES AND VALIDITY.

#### (B) Form and Contents of Promissory Notes and Duebills.

Right of accommodation maker of note to national bank to set up defense of usury, see Banks and Banking, § 270.

§ 44. A note executed by a husband payable at his death, or the death of his wife, if she survived him, if there was enough of his estate left for that purpose, *held* a valid claim against the estate of the wife.—Central University of Kentucky v. Cox's Ex'r (Ky.) 299.

#### (E) Consideration.

§ 90. A note *held*, under the circumstances disclosed, to have been obtained without consideration.—Jobes v. Wilson (Mo. App.) 548.

§ 92. A check *held* supported by a valid consideration and enforceable notwithstanding the agreement that it shall not be payable until after his death.—Foxworthy v. Adams (Ky.) 381.

§ 94. An antecedent debt due the payee was a good consideration for the execution of a promissory note for the amount of the debt.—Lovelace v. Lovelace (Ky.) 400.

### II. CONSTRUCTION AND OPERATION.

§ 122. An accommodation maker of a note *held* liable as principal, and not as surety.—Trabue v. Cook (Tex. Civ. App.) 455.

### III. MODIFICATION, RENEWAL, AND RESCISSION.

§ 137. The time for the payment of a note *held* not extended by any valid agreement.—City Loan & Trust Co. v. Sterner (Tex. Civ. App.) 207.

### IV. NEGOTIABILITY AND TRANSFER.

#### (A) Instruments Negotiable.

§ 146. The negotiable instrument law of 1905 has no application to a note executed prior to the taking effect of the statute.—Merchants' Nat. Bank v. Brisch (Mo. App.) 76.

### V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

#### (A) Indorsement Before Delivery to or Transfer by Payee.

§ 254. Insolvency of the maker of a note, so as to excuse the holder from suing thereon at the request of the indorser, *held* the absence of property of the debtor out of which a debt might be made by execution.—First Nat. Bank v. Robinson (Tex. Civ. App.) 177.

### VII. PAYMENT AND DISCHARGE.

Payment of checks by bank, see Banks and Banking, § 138.

Payment of debts in general by bill, note or check, see Payment, §§ 16, 17.

## VIII. ACTIONS.

Right of accommodation maker of note to national bank to set up defense of usury, see Banks and Banking, § 270.  
Separate answers by codefendants, see Pleading, § 84.

§ 462. In an action by the holder of a note against an indorser without suing the maker, the petition *held* to sufficiently allege the insolvency of the maker.—First Nat. Bank v. Robinson (Tex. Civ. App.) 177.

§ 493. The burden of proof as to want of consideration in an action on a note under the law as it stood prior to negotiable instrument law of 1905 stated.—Merchants' Nat. Bank v. Brisch (Mo. App.) 76.

§ 497. The burden of proof as to knowledge of fraud, in an action on a note, under the law as it stood, prior to negotiable instrument law of 1905, stated.—Merchants' Nat. Bank v. Brisch (Mo. App.) 76.

§ 497. Under Negotiable Instrument Law 1905 (Laws 1905, p. 250; Ann. St. 1906, §§ 463—55 to 463—59) §§ 55, 59, where a note given for the price of a horse was delivered to the agent of the payee after the greater part thereof was paid, on the agent's representations that he had no authority to indorse such payment, but would have the payee do so, which was not done, the assignee of the note has the burden of showing that he is a bona fide holder.—Jobes v. Wilson (Mo. App.) 548.

§ 509. Facts to be considered by the jury in determining the bona fides of the assignee of a note determined.—Jobes v. Wilson (Mo. App.) 548.

§ 516. In an action by the holder against the indorser of a note in which the indorser claimed a release because of the failure to sue the maker, evidence *held* to show that the maker was insolvent, excusing suit by the holder.—First Nat. Bank v. Robinson (Tex. Civ. App.) 177.

§ 519. In an action on two notes given for machinery, in which defendant claimed a credit for an attachment to the machinery not furnished as agreed, evidence *held* to show that the attachment was not to be included as a part of the machinery sold.—Aultman & Taylor Machinery Co. v. Walker (Ky.) 329.

§ 519. In an action on two notes given with two others for a threshing machine which was resold and returned to plaintiff, upon defendant's inability to meet the notes, under an agreement by which plaintiff gave defendant \$1,000 worth of the purchase-money notes, evidence *held* to establish plaintiff's claim as to the extent of defendant's liability on the notes after the agreement was executed.—Aultman & Taylor Machinery Co. v. Walker (Ky.) 329.

§ 527. In an action on two notes given with two others for a threshing machine which was sold and returned to the seller upon the buyer's inability to meet the notes, in which defendants claim that certain credits should be allowed for payments made, evidence *held* to show that only \$175 was paid upon the notes after their execution.—Aultman & Taylor Machinery Co. v. Walker (Ky.) 329.

§ 537. In an action on a note by the assignee thereof, where it is shown that there was fraud by the payee in obtaining the note, whether plaintiff is a bona fide holder is a question for the jury.—Jobes v. Wilson (Mo. App.) 548.

§ 537. In an action on a note, refusal to direct the jury to find for plaintiff as to the interest stipulated for in the note *held* proper.—Trabue v. Cook (Tex. Civ. App.) 455.

§ 538. In an action on a note, an instruction *held* not warranted by the evidence.—Merchants' Nat. Bank v. Brisch (Mo. App.) 76.

## BIRTH.

Of issue, effect on will, see Descent and Distribution, § 47.

## BLACKMAIL.

See Threats.

## BLASPHEMY.

Profane swearing as disorderly conduct, see Disorderly Conduct.

## BOARDING HOUSES.

See Innkeepers.

## BOARDS.

School boards, see Schools and School Districts, §§ 48, 53.

## BONA FIDE PURCHASERS.

Of personal property in general, see Sales, § 473.  
Of property subject to taxation, see Taxation, § 511.  
Of public lands, see Public Lands, § 178.  
Of real property in general, see Vendor and Purchaser, §§ 224-244.

## BONDS.

Of indemnity, see Indemnity.  
School district bonds, see Schools and School Districts, § 97.  
Sureties on bonds, see Principal and Surety.  
*Bonds for performance of duties of trust or office.*  
See Sheriffs and Constables, § 170.  
Municipal officers, see Municipal Corporations, § 145.  
Tax collectors, see Taxation, § 570.  
*Bonds in judicial proceedings.*  
See Injunction, § 241; Replevin, § 126.  
Appeal or writ of error in general, see Appeal and Error, §§ 384-395, 1234, 1244.  
Security for costs, see Costs, § 110.

## BOROUGHES.

See Municipal Corporations.

## BOUNDARIES.

See Fences.  
Mutual rights and liabilities of adjoining proprietors, see Adjoining Landowners.  
Of school district, see Schools and School Districts, § 41.  
Right of subsequent purchaser of public land to attack boundaries fixed by prior patent, see Public Lands, § 176.

### I. DESCRIPTION.

§ 3. Where footsteps of the surveyor are found and identified, they must control, and all classes of calls must yield to them.—Taft v. Ward (Tex. Civ. App.) 437.  
§ 3. Calls for the corners of adjoining surveys must be rejected when they conflict with the actual work of the surveyor.—Taft v. Ward (Tex. Civ. App.) 437.  
§ 3. It is only in the absence of other means of identification that known calls in other surveys can be appealed to, to locate a tract of land.—Taft v. Ward (Tex. Civ. App.) 437.  
§ 8. Where no mark could be found designating and fixing the lines of the outside subdivisions, they could be fixed by marked cor-

ners and footsteps around inside surveys to which they were tied by the field notes.—Taft v. Ward (Tex. Civ. App.) 437.

## II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

Declaration, see Evidence, § 274.

§ 37. In an action to recover land claimed as included in a deed which described it as extending to a cliff on the top of a ridge, where there were two cliffs on the ridge, evidence held to sustain a finding that the further cliff was meant.—Justice v. Justice (Ky.) 331.

§ 37. Evidence held to show that a course in the description of a boundary should read "S. 10° W. 20 poles," instead of "S. 10° W. 200 poles."—Bates v. Bates (Ky.) 858.

§ 47. The owner of land held estopped from setting up a claim to certain land by reason of certain statements made by him.—Ward v. Middleton (Ky.) 823.

§ 54. Corrected field notes pursuant to 9 Gammel's Gen. Laws, p. 107, held to constitute a prima facie case in plaintiff's favor.—Finberg v. Gilbert (Tex. Civ. App.) 979.

## BOUNTIES.

Rewards offered for performance of single and special services, see Rewards.

## BREACH.

Of conditions of insurance policies, see Insurance, § 290.  
Of contract in general, see Contracts, §§ 312-323.  
Of contract for transportation of passenger, see Carriers, §§ 267-277.  
Of contract of sale, see Sales, §§ 140-177.  
Vendor and Purchaser, §§ 130, 137.  
Of contract of sale as ground for rescission, see Vendor and Purchaser, § 93.  
Of contract, restraining, see Injunction, §§ 59, 61.  
Of covenant, see Covenants, § 102.

## BREACH OF THE PEACE.

See Assault and Battery, §§ 83-96; Disorderly Conduct.  
Requests for instructions, see Criminal Law, § 825.  
Shooting firearms, see Weapons, § 15.

§ 1. What constitutes "public place," within Pen. Code 1895, arts. 333, 335, making it an offense to fight in a public place, stated.—Austin v. State (Tex. Cr. App.) 639.

## BRIEFS.

On appeal or writ of error, see Appeal and Error, § 768; Criminal Law, § 1130.

## BROKERS.

Judicial notice of custom as to obligation to furnish abstract of title, see Evidence, § 20.  
Judicial notice of custom that authority to sell includes obligation to furnish abstract, see Evidence, § 20.

## II. EMPLOYMENT AND AUTHORITY.

§ 8. In an action by a broker for commissions, evidence held to support a finding that a contract of employment between the broker and the owner was in force when the owner sold the land.—Brady v. Maddox (Tex. Civ. App.) 739.

**IV. COMPENSATION AND LIEN.**

§ 54. Brokers *held* not to have furnished a purchaser, able, ready, and willing to buy on the owner's terms so as to be entitled to commissions.—*Simmons v. Oneth* (Mo. App.) 534.

§ 54. Right of broker to commissions on producing and introducing to principal a person able and willing to buy stated.—*Simmons v. Oneth* (Mo. App.) 534.

§ 54. To entitle a broker to recover commissions it is not necessary that there be a written contract between the vendor and the vendee, it sufficing if the broker secure a purchaser willing and financially able to buy on the proposed terms.—*Watkins v. Thomas* (Mo. App.) 1063.

§ 56. Right of broker to commissions where he is procuring cause of negotiations resulting in a sale stated.—*Simmons v. Oneth* (Mo. App.) 534.

§ 57. A vendor *held* to have waived his right to receive notes payable at certain times in lieu of notes payable on or before maturity.—*Watkins v. Thomas* (Mo. App.) 1063.

§ 61. A broker under certain circumstances *held* not entitled to a commission for finding a purchaser for a wife's separate property.—*Brady v. Maddox* (Tex. Civ. App.) 739.

§ 63. Where the owner of land on the production of a purchaser by a broker fixes or varies the terms, he is liable for a commission if he fails to carry out his contract and convey according to the modified terms agreed upon by the buyer.—*Simmons v. Oneth* (Mo. App.) 534.

§ 67. A broker is not permitted to act for both the purchaser and seller without the knowledge and consent of both.—*Dennison v. Gault* (Mo. App.) 43.

**V. ACTIONS FOR COMPENSATION.**

Evidence of agency in general, see Principal and Agent, § 23.

§ 94. In order to recover commissions for procuring a purchaser for property, the burden is upon plaintiff to show that the owners employed him to procure a purchaser, and that his services were the procuring cause of the sale.—*Sills v. Burge* (Mo. App.) 605.

§ 85. In a broker's action for commissions for procuring the sale of property, a letter written by plaintiff to defendants *held* admissible as being the initiatory act which resulted in the broker's employment.—*Sills v. Burge* (Mo. App.) 605.

§ 86. In a broker's action for commissions for procuring the sale of property, evidence *held* to show that defendants received plaintiff's letter stating that he desired to have defendant call with a view to selling the property.—*Sills v. Burge* (Mo. App.) 605.

§ 86. Evidence *held* not to show a contract to pay a broker commissions for securing a purchaser for lands.—*Knott v. Godair* (Tex. Civ. App.) 189.

§ 86. In an action by a broker for commissions, evidence *held* to support a finding that it was through the broker's efforts that a prospective purchaser was procured.—*Brady v. Maddox* (Tex. Civ. App.) 739.

§ 88. In an action for broker's commissions, a charge *held* proper.—*Wetman v. Spencer* (Tex. Civ. App.) 209.

§ 88. In an action by a broker for commissions, a certain charge *held* not necessarily to require a verdict for defendant.—*Brady v. Maddox* (Tex. Civ. App.) 739.

**VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.**

§ 106. In an action by a purchaser of land to recover earnest money of an agent who paid the money over to his principal, evidence *held* to show that the purchaser intended to breach his contract without regard to any alleged breaches of the seller as to abstract of title, payment of tax, etc., and hence the agent was not in fault in paying over the earnest money to the principal.—*Conness v. Baird* (Tex. Civ. App.) 113.

**BUCKET SHOPS.**

See Gaming, § 17.

**BUILDING CONTRACTS.**

Liens for labor and materials, see Mechanics' Liens.

**BUILDINGS.**

Lien for construction or repair, see Mechanics' Liens.

Negligence as to condition of buildings on adjoining lands, see Adjoining Landowners, § 7.

**BURDEN OF PROOF.**

In civil actions, see Evidence, §§ 91, 96.  
Showing error on appeal or writ of error, see Appeal and Error, § 901.

**BURGLARY.****I. OFFENSES AND RESPONSIBILITY THEREFOR.**

§ 2. One breaking and entering a railroad car and taking property therefrom is guilty of burglary, without regard to the value of the property; Pen. Code 1895, art. 841, not being applicable.—*Boyd v. State* (Tex. Cr. App.) 651.

**II. PROSECUTION AND PUNISHMENT.**

Acts and declarations of conspirators, and co-defendants, see Criminal Law, § 427.

§ 24. An indictment *held* not to allege burglary of a private residence at night.—*Ellis v. State* (Tex. Cr. App.) 667.

§ 41. Evidence that defendants were seen near the burglarized house a short time before, without positive identification of the goods alleged to have been taken, is insufficient to support a conviction.—*Love v. State* (Tex. Cr. App.) 932.

§ 41. Evidence *held* sufficient to sustain a conviction for burglary.—*Jones v. State* (Tex. Cr. App.) 939.

§ 46. In a burglary prosecution, accused's rights *held* sufficiently protected by the charges given, and a peremptory instruction to acquit was properly refused.—*Ellis v. State* (Tex. Cr. App.) 667.

**BURNING.**

Criminal responsibility, see Arson.

**BURNT-RECORD ACT.**

See Records, § 17.

**BUSINESS.**

Good will, see Good Will.  
License taxes for occupations, see Licenses, § 7.  
Regulation of conduct of business as regulation of commerce, see Commerce, § 58.

**CALENDARS.**

Of causes for trial, see Trial, § 11.

**CALLS.**

In deeds, see Boundaries, §§ 3, 8.

**CANALS.**

See Drains.

**CANCELLATION OF INSTRUMENTS.**

See Quieting Title; Reformation of Instruments.

Setting aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 222-308.

*Grounds for cancellation and cancellation or rescission of particular instruments by act of parties.*

Contracts of sale, see Sales, §§ 89, 90; Vendor and Purchaser, §§ 82, 93.

Conveyances or contracts of infants, see Infants, § 31.

Insurance policies, see Insurance, § 248.

**I. RIGHT OF ACTION AND DEFENSES.**

§ 25. Defendant in possession of land, claiming title through deed from plaintiff's grantee, could defeat plaintiff's claim to cancellation of the deed by showing title either in himself or in some third person where the deed did not authorize such cancellation.—*Oklolona Mercantile Co. v. Greeson* (Ark.) 257.

**II. PROCEEDINGS AND RELIEF.**

§ 45. In an action to cancel a deed and obtain possession of the land and to enjoin defendant from cutting timber thereon, the burden of proof *held* to be on plaintiff.—*Oklolona Mercantile Co. v. Greeson* (Ark.) 257.

§ 47. The dismissal of an action for cancellation of a deed *held* not error, in view of the many different statements made by plaintiff as to why he conveyed the land, and as to the consideration, and the length of time which had elapsed from the making of the deed.—*Newman v. Newman* (Ky.) 828.

**CARELESSNESS.**

See Negligence.

**CARNAL KNOWLEDGE.**

See Adultery; Incest; Rape; Seduction.

**CARRIERS.**

As employers, see Master and Servant.

Construction, regulation, and operation of railroad in general, see Railroads.

Construction, regulation, and operation of street railroads in general, see Street Railroads.

Construction, regulation, and operation of telegraph and telephone lines, see Telegraphs and Telephones.

**I. CONTROL AND REGULATION OF COMMON CARRIERS.**

Statutory and municipal regulation of railroads in general, see Railroads, § 244.

**II. CARRIAGE OF GOODS.****(A) Delivery to Carrier.**

§ 39. In the absence of evidence to the contrary, the carriage of money is strictly speaking not in the line of the duty of a carrier holding himself out only as a carrier of goods,

wares, and merchandise.—*Chesapeake & O. Ry. Co. v. Hall* (Ky.) 372.

§ 45. A charge authorizing recovery against a carrier for its failure to furnish cars in a reasonable time generally *held* erroneous, as submitting an issue not pleaded.—*Galveston, H. & S. A. Ry. Co. v. Word* (Tex. Civ. App.) 478.

**(D) Transportation and Delivery by Carrier.**

§ 85. Where a carrier is required to give notice of the arrival of the goods, there is a corresponding duty devolving on the consignee to put himself in a position to receive the notice.—*St. Louis, I. M. & S. Ry. Co. v. Townes* (Ark.) 1086.

§ 94. In an action against a railroad company for the wrongful delivery to another of two of three cars consigned to plaintiff, brought after plaintiff had recovered from the bankrupt estate of the one receiving the cars a pro rata allowance for the value of all three cars, the railroad company *held* only entitled to set off against plaintiff's claim the amount recovered for the value of the two cars wrongfully delivered, and not the amount received for the third car, which was allowed plaintiff by mistake.—*Louisville & A. R. Co. v. Hiram Blow & Co.* (Ky.) 391.

**(E) Delay in Transportation or Delivery.**

§ 99. A shipment having been accepted without notice to the shipper that there was a shortage of cars and an unprecedented amount of business, the carrier should be held liable for unreasonable delay.—*Missouri, K. & T. Ry. Co. of Texas v. Early-Clement Grain Co.* (Tex. Civ. App.) 1015.

§ 104. A shipper suing the carrier for damages to goods during the carrier's delay to notify him of the refusal of a third person, to whom the goods had been sold, to accept them, *held* not entitled to recover because of the insufficiency of the evidence.—*St. Louis, I. M. & S. Ry. Co. v. Townes* (Ark.) 1036.

**(F) Loss of or Injury to Goods.**

§ 108. A carrier of freight is an insurer against any loss or damage to the goods except that caused by act of God or the public enemy, and it is liable for a larceny by its agent in charge of the freight.—*Chesapeake & O. Ry. Co. v. Hall* (Ky.) 372.

§ 110. Notwithstanding the Constitution, a carrier need not receive money for transportation unless it is first notified of the value of the money, so that it may charge a rate sufficient to justify it in taking the degree of care observed in the transportation of money.—*Chesapeake & O. Ry. Co. v. Hall* (Ky.) 372.

§ 110. A shipper giving false information to the carrier as to the contents or value of a package delivered for transportation *held* not entitled to recover the value of the goods.—*Chesapeake & O. Ry. Co. v. Hall* (Ky.) 372.

§ 110. The ignorance of an agent as to the contents of a package delivered for shipment *held* not to affect liability of carrier where the principal intended to deceive the carrier as to its value.—*Chesapeake & O. Ry. Co. v. Hall* (Ky.) 372.

§ 117. Liability of carrier using cars of a refrigerator company defined.—*Gibson & Draughn v. Little Rock & H. S. W. Ry. Co.* (Ark.) 1033.

§ 117. Common carriers must furnish suitable vehicles for transporting freight, and are liable for losses caused by their failure to do so, though they are entitled to determine, in the first instance, the sufficiency of the vehicles furnished.—*Nicholson v. St. Louis & S. F. R. Co.* (Mo. App.) 573.

§ 135. In allowing damages to a consignee the carrier should be credited with the amount realized from a sale thereof for the benefit of consignee's creditors.—*Chesapeake & O. Ry. Co. v. Lavin* (Ky.) 274.

#### (H) Limitation of Liability.

§ 156. A carrier *held* not liable for damage to bulk corn by reason of it being loaded in a stock car, in view of the provision of the bill of lading, and the owner's conduct.—*Nicholson v. St. Louis & S. F. R. Co.* (Mo. App.) 573.

#### (I) Connecting Carriers.

§ 174. If it is the custom to forward goods by boat from the carrier's line to the consignee, and he knew this when he ordered the goods shipped, and the owner of a boat has previously received goods for him, the carrier may deliver the goods to such owner for transportation.—*Chesapeake & O. Ry. Co. v. Lavin* (Ky.) 274.

§ 177. The Hepburn amendment makes the initial carrier liable for an injury to an interstate shipment, but the connecting carrier is also liable if the injury is the result of its negligence.—*Gibson & Draughn v. Little Rock & H. S. W. Ry. Co.* (Ark.) 1033.

§ 185. In the absence of proof, it will be presumed that an injury to goods transported by connecting carriers was caused by the last carrier.—*Gibson & Draughn v. Little Rock & H. S. W. Ry. Co.* (Ark.) 1033.

### III. CARRIAGE OF LIVE STOCK.

Opinion evidence, see Evidence, § 472.

§ 217. A live stock shipper *held* not guilty of contributory negligence defeating recovery for delay in furnishing cars.—*Galveston, H. & S. A. Ry. Co. v. Word* (Tex. Civ. App.) 478.

§ 219. In an action against a railroad for damages to stock in transportation, an instruction on the measure of damages *held* erroneous.—*Texas & P. Ry. Co. v. Jones* (Tex. Civ. App.) 194.

§ 228. Evidence of the state of the live stock market on a given date *held* irrelevant in a suit against a carrier for delay.—*Galveston, H. & S. A. Ry. Co. v. Word* (Tex. Civ. App.) 478.

§ 230. In an action for damages to stock in transportation, an instruction *held* erroneous as requiring a verdict for plaintiff irrespective of defendant's negligence.—*Texas & P. Ry. Co. v. Jones* (Tex. Civ. App.) 194.

§ 230. A special charge in the language of Gen. Laws 1907, p. 343, c. 184, as to the duty of a carrier to have sufficient cars to meet all demands, *held* erroneous as calculated to cause the jury to consider important a duty not in issue.—*Galveston, H. & S. A. Ry. Co. v. Word* (Tex. Civ. App.) 478.

§ 230. Evidence *held* to entitle a carrier to a charge as to a shipper's right to recover for a fall in the market.—*Galveston, H. & S. A. Ry. Co. v. Word* (Tex. Civ. App.) 478.

§ 230. A charge as to a live stock shipper's right to recover for a fall in the market *held* not to have been vitiated by a reference to the cause of the decline.—*Galveston, H. & S. A. Ry. Co. v. Word* (Tex. Civ. App.) 478.

§ 230. A charge as to a carrier's liability to a live stock shipper for a decline in market *held* properly refused.—*Galveston, H. & S. A. Ry. Co. v. Word* (Tex. Civ. App.) 478.

§ 230. A charge requested by a carrier, sued for delay in transportation of cattle, *held* improperly refused.—*Houston & T. C. R. Co. v. Barron* (Tex. Civ. App.) 996.

### IV. CARRIAGE OF PASSENGERS.

#### (A) Relation Between Carrier and Passenger.

§ 234. A statute of New Mexico requiring a party claiming damages for injury to file notice thereof within 90 days does not affect the right of recovery for injuries received in New Mexico where asserted under a contract made in Texas; the passenger being a nonresident of New Mexico.—*El Paso & N. E. Ry. Co. v. Landon* (Tex. Civ. App.) 744.

#### (B) Fares, Tickets, and Special Contracts.

§ 253. Where a party purchased a ticket for passage over defendants' roads, they assumed the relation of common carrier toward her, and it is immaterial so far as their liability for her injury is concerned whether these duties arose out of an implied or an express contract.—*El Paso & N. E. Ry. Co. v. Landon* (Tex. Civ. App.) 744.

#### (C) Performance of Contract of Transportation.

Error in instructions cured by giving other instructions, see Trial, § 296.

§ 267. Railroad companies may, independent of statute, make reasonable rules for the separation of passengers belonging to different races if equal accommodations are provided, though reasonable rules prescribed by statute must be followed.—*Bradford v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 516.

§ 274½. Under the venue statute (Gen. Laws 1901, p. 31, c. 27, § 1), suits for carrying a passenger past his destination may be brought either in the county where the injury occurred or where plaintiff resided.—*Gulf, C. & S. F. Ry. Co. v. Ward* (Tex. Civ. App.) 130.

§ 276. In an action for carrying a passenger past his destination, evidence *held* to show that he was a resident of another county from that in which the suit was brought.—*Gulf, C. & S. F. Ry. Co. v. Ward* (Tex. Civ. App.) 130.

§ 276. In an action for breach of a contract for carriage of a passenger resulting from a derailment, the carrier's liability is subject to the same rules and may be established by like testimony and presumptions as in cases of torts.—*El Paso & N. E. Ry. Co. v. Landon* (Tex. Civ. App.) 744.

§ 277. Damages recoverable for the breach of a contract for carriage of a passenger resulting from a derailment are the same as in an action of tort on the same facts.—*El Paso & N. E. Ry. Co. v. Landon* (Tex. Civ. App.) 744.

#### (D) Personal Injuries.

Argumentative instructions, see Trial, § 240. Best and secondary evidence, see Evidence, § 171.

§ 280. A carrier *held* required to exercise the highest degree of care for the protection of its passengers on its freight trains consistent with the practicable operation of such trains.—*St. Louis Southwestern Ry. Co. v. Jackson* (Ark.) 241.

§ 280. A carrier must exercise the utmost care for the safety of its passengers that would be used by very cautious persons under the same circumstances.—*Brady v. Springfield Traction Co.* (Mo. App.) 1070.

§ 280. What is required of a carrier in the performance of its duties to use proper care for the safety of its passengers depends in a given case on the facts thereof, and not on the common practice of the carrier.—*Brady v. Springfield Traction Co.* (Mo. App.) 1070.

§ 280. There is no relaxation of the rule requiring the high degree of care as to a passen-

ger on a freight train which is due to those who travel on regular passenger trains.—*Lewis v. Texas & N. O. Ry. Co.* (Tex. Civ. App.) 1006.

§ 281. A street car conductor *held* negligent in giving a signal to start a car before an old lady in enfeebled condition had had a reasonable opportunity to take a seat.—*Brady v. Springfield Traction Co.* (Mo. App.) 1070.

§ 286. The duty of railroad companies to keep in a reasonably safe condition the platforms of and approaches to their stations stated.—*St. Louis & S. F. R. Co. v. Caldwell* (Ark.) 1034.

§ 286. A railroad company *held* negligent as to a passenger in not guarding a hole near an approach to its station.—*St. Louis & S. F. R. Co. v. Caldwell* (Ark.) 1034.

§ 287. A street car *held* required to stop a sufficient length of time to give passengers an opportunity to board it, and reach a place of safety.—*Brady v. Springfield Traction Co.* (Mo. App.) 1070.

§ 303. Where it was customary for passengers to board and alight from a street car at a certain point, it was the duty of the street car employes to use ordinary care to protect passengers getting off there.—*Central Kentucky Traction Co. v. Chapman* (Ky.) 830.

§ 303. A street car conductor's duty *held* to require him to observe both sides of the car to protect passengers in alighting.—*Central Kentucky Traction Co. v. Chapman* (Ky.) 830.

§ 303. Under an ordinance, a street railroad *held* required to stop the car to permit a passenger to alight, where he, at the time of paying the fare, specified the street at which he wanted to alight.—*Texas Traction Co. v. Hanson* (Tex. Civ. App.) 494.

§ 306. Both under the policy of the statutes and independent thereof, the operating lessee of a railroad must exercise care to protect passengers and others having a right upon its depot premises by keeping such premises and the approaches thereto in a reasonably safe condition.—*St. Louis & S. F. R. Co. v. Caldwell* (Ark.) 1034.

§ 308. Where a passenger purchased a ticket over several roads from one of them authorized to act in this regard for the others, all the roads are liable for injuries to her from the negligence of any one of them.—*El Paso & N. E. Ry. Co. v. Landon* (Tex. Civ. App.) 744.

§ 314. A petition in an action for injuries to a street car passenger *held* to state a cause of action.—*Brady v. Springfield Traction Co.* (Mo. App.) 1070.

§ 314. A petition in an action for injuries to a street car passenger *held* to state a cause of action without alleging that the sudden jerk of the car complained of was an extraordinary or unusual one.—*Brady v. Springfield Traction Co.* (Mo. App.) 1070.

§ 316. Certain proof *held* to make a prima facie case of negligence of the operators of a street car resulting in injury to a passenger.—*Brady v. Springfield Traction Co.* (Mo. App.) 1070.

§ 316. The presumption of negligence of the carrier arising from proof by a passenger of the derailment of the train and consequent injury to him *held* one of fact, which may be overcome.—*Texas & P. Ry. Co. v. Mosley* (Tex. Civ. App.) 485.

§ 317. In an action for injuries to a street car passenger while attempting to alight at a point just before the street car crossed a railroad, evidence *held* admissible that it was customary for passengers to board, and alight from, the car at a point just across the railroad as

well as where plaintiff attempted to alight.—*Central Kentucky Traction Co. v. Chapman* (Ky.) 830.

§ 318. In an action for injuries to plaintiff while traveling on a freight train, evidence *held* to support a verdict for plaintiff.—*Lewis v. Texas & N. O. Ry. Co.* (Tex. Civ. App.) 1006.

§ 320. Whether a carrier failed to exercise proper care for the protection of a passenger riding on a freight train *held* for the jury.—*St. Louis Southwestern Ry. Co. v. Jackson* (Ark.) 241.

§ 320. In an action against a carrier for injuries to a passenger, evidence *held* to require the submission to the jury of the question of negligence.—*Lewis v. Texas & N. O. Ry. Co.* (Tex. Civ. App.) 1006.

§ 321. In an action for injury to a passenger on a freight train, an instruction *held* properly refused because abstract.—*St. Louis Southwestern Ry. Co. v. Jackson* (Ark.) 241.

§ 321. In an action against a street car company for injuries by failing to give a passenger sufficient time to alight, an instruction *held* properly given; there being some evidence authorizing it.—*Central Kentucky Traction Co. v. Chapman* (Ky.) 830.

§ 321. An instruction, in an action for injuries by the derailment of the train, *held* properly refused because misleading.—*Texas & P. Ry. Co. v. Mosley* (Tex. Civ. App.) 485.

#### (E) Contributory Negligence of Person Injured.

§ 347. In an action against a railroad company for injuries caused by falling into a hole adjacent to a depot approach, whether plaintiff was guilty of contributory negligence *held* for the jury.—*St. Louis & S. F. R. Co. v. Caldwell* (Ark.) 1034.

#### (F) Ejection of Passengers and Intruders.

§ 356. If a ticket *held* by a passenger was worthless, he could be ejected, though he believed in good faith that he was entitled to ride.—*Freeman v. Costley* (Tex. Civ. App.) 458.

§ 358. One who refuses to pay his fare may be ejected, though he afterwards offers to pay his fare when the train is stopped to eject him.—*Freeman v. Costley* (Tex. Civ. App.) 458.

§ 359. In view of Kirby's Dig. §§ 6622-6632, a conductor *held* authorized to order white passengers to leave the smoker and take seats in another car; and, if a white passenger refused to change his seat, the conductor could use such force as was necessary to eject him.—*Bradford v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 516.

§ 366. The ejection of an intoxicated passenger, under the circumstances stated, *held* negligence so as to make the company liable for resulting injuries.—*St. Louis, I. M. & S. Ry. Co. v. Dallas* (Ark.) 247.

§ 370. If a passenger was not so intoxicated that he was unable to understand the dangers to which he was exposed at the place he was ejected, he could not recover for injuries occurring after he was put off, caused by his failure to exercise due care for his safety.—*St. Louis, I. M. & S. Ry. Co. v. Dallas* (Ark.) 247.

§ 381. In an action for injuries to a passenger by being run over by another train after he was ejected from defendant's train, evidence *held* sufficient to support a verdict for plaintiff.—*St. Louis, I. M. & S. Ry. Co. v. Dallas* (Ark.) 247.

#### (G) Passengers' Effects.

§ 390. A carrier of passengers permitting them to carry personal baggage is not liable for the loss of an unusual amount of money carried as baggage, or for more than might be needed to

defray the usual personal and traveling expenses of the passengers.—*Chesapeake & O. Ry. Co. v. Hall* (Ky.) 372.

§ 400. A carrier receiving a trunk for carriage by freight without notice that it contains money *held* liable for the larceny of the money by an agent of the carrier in whose immediate care the trunk is placed.—*Chesapeake & O. Ry. Co. v. Hall* (Ky.) 372.

## CARRYING WEAPONS.

See Weapons, §§ 6-13.

## CARS.

In general, see Carriers; Railroads.

## CASE ON APPEAL.

In criminal prosecutions, see Criminal Law, § 1099.

Part of record, see Appeal and Error, § 537.

## CATALOGS.

Admissibility in evidence to show sale, see Sales, § 87.

## CATTLE.

See Animals.

Fence laws in general, see Fences.

Injuries to, by operation of railroad, see Railroads, §§ 407-446.

## CAUSE.

Probable cause for prosecution, see Malicious Prosecution, §§ 20-24.

## CAUSE OF ACTION.

See Action; Malicious Prosecution, §§ 20-24.

Joinder, see Action, § 45.

Successive causes of action, judgment as bar to another action, see Judgment, § 603.

## CAVEAT EMPTOR.

Application of doctrine to sales, see Sales, § 41.

## CEMETERIES.

Exemption from taxation, see Taxation, § 245.

## CERTAINTY.

As to amount or extent of damage, see Damages, § 79.

## CERTIFICATE.

Of dissent, see Courts, § 247.

Of occupancy of public lands, see Public Lands, § 173.

Teachers' certificates, see Schools and School Districts, §§ 130, 131.

To depositions, see Depositions, §§ 75, 78.

To practice medicine, see Physicians and Surgeons, § 5.

## CERTIORARI.

Bringing up record on appeal or writ of error, see Appeal and Error, § 659.

## CESTUI QUE TRUST.

See Trusts.

## CHAMPERTY AND MAINTENANCE.

§ 7. Where land was adversely *held* conveyed, and also when understanding was made

therefor, the conveyance was champertous.—*Day v. Hicks* (Ky.) 805.

## CHANCERY.

See Equity.

## CHANGE OF VENUE.

See Venue, §§ 45, 58.

## CHARACTER.

Of witness, see Witnesses, §§ 344-355.

## CHARGE.

Criminal accusation, see Indictment and Information.

Instructions to jury, see Criminal Law, §§ 761-764, 770-823, 825, 829; Trial, §§ 191-296.

Of indebtedness on married women's separate property, see Husband and Wife, § 149.

## CHARTER.

Corporate charters in general, see Corporations, §§ 14, 18.

## CHATTEL LOANS.

Validity of ordinance imposing license fee on persons making loans, see Licenses, § 7.

## CHATTEL MORTGAGES.

See Pledges.

Transfers operating to hinder, delay, or defraud creditors in general, see Fraudulent Conveyances.

### I. REQUISITES AND VALIDITY.

(B) Form and Contents of Instruments.

§ 45. An error in the name of the mortgagor appearing in the body of a chattel mortgage *held* not to invalidate it.—*Payne v. King* (Mo. App.) 1066.

### III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

§ 150. Under Rev. St. 1899, § 3404 (Ann. St. 1903, p. 1936), a variance between the name of the mortgagor in the original instrument and in the copy filed *held* not to invalidate the filing so as to render it inoperative to impart constructive notice.—*Payne v. King* (Mo. App.) 1066.

### IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 173. In replevin by a chattel mortgagee against a purchaser from the mortgagor, a verdict *held* erroneously directed for plaintiff.—*Payne v. King* (Mo. App.) 1066.

§ 173. In replevin between a chattel mortgagee and a purchaser of the property, where there was no evidence showing the value of the property at the time of the trial, the assessment of the value as the amount of the purchase price secured by the mortgage and remaining unpaid *held* error.—*Payne v. King* (Mo. App.) 1066.

### IX. FORECLOSURE.

§ 249. Where a chattel mortgage was not given to secure separate indebtedness, a foreclosure by one of several mortgagees was invalid.—*Hutchins-Hanks Coal Co. v. Walnut Land & Coal Co.* (Mo. App.) 1098.

§ 258. Power of sale contained in a chattel mortgage, in order to pass title to the purchaser, must be strictly followed.—*Hutchins-Hanks Coal Co. v. Walnut Land & Coal Co.* (Mo. App.) 1098.

§ 267. Chattel mortgagees, having no real interest in the debt or mortgage, held not entitled to complain of foreclosure proceedings.—*Hutchins-Hanks Coal Co. v. Walnut Land & Coal Co.* (Mo. App.) 1098.

§ 288. The right of a chattel mortgagee to the funds in the hands of an auctioneer selling the property held superior to the rights of another creditor.—*American Nat. Bank v. Matthews* (Ky.) 811.

## X. REDEMPTION.

§ 295. A chattel mortgagor, having joined with one of the mortgagees in purchasing the property at a foreclosure sale, held to have lost his equity of redemption.—*Hutchins-Hanks Coal Co. v. Walnut Land & Coal Co.* (Mo. App.) 1098.

## CHATELS.

In general, see Property.  
Gift, see Gifts.  
Pledge, see Pledges.  
Sale, see Sales.

## CHEAT.

See False Personation; False Pretenses.

## CHECKS.

In general, see Bills and Notes.  
Forgery, see Forgery.  
Payment of, by bank, see Banks and Banking, § 138.  
Payment of debts in general by checks, see Payment, § 67.

## CHILDREN.

See Guardian and Ward; Infants; Parent and Child.  
Care required of master as to infant servant, see Master and Servant, § 153.  
Dangerous machinery as attractions to children, see Negligence, § 23.  
Rights of surviving children as to homestead, see Homestead, § 140.

## CHOSE IN ACTION.

Assignment of, see Assignments, § 24.

## CIRCUMSTANTIAL EVIDENCE.

Instructions, see Criminal Law, § 784.

## CITATION.

See Process.

## CITIES.

See Municipal Corporations.

## CIVIL ACTION.

See Action.

## CIVIL RIGHTS.

Constitutional guaranty of trial by jury, see Jury, § 25.  
Protection of vested rights, see Constitutional Law, § 93.

## CLAIM AND DELIVERY.

See Replevin.

## CLAIMS.

Against estate of decedent, see Executors and Administrators, §§ 219-227.  
Against exempt property, see Homestead, §§ 97, 105.  
Of mechanic's lien, see Mechanics' Liens, § 118.  
To property levied on, see Attachment, §§ 287-306.

## CLERKS OF COURTS.

Judicial notice of signature, see Criminal Law, § 304.

§ 75. Under Ky. St. §§ 4242, 4263 (Russell's St. §§ 6171, 6226), held, that a judgment against a county court clerk and his bondsman, in a suit by a revenue officer for a violation of the statute, properly included the penalty due the state, under section 4242, and that for the benefit of the revenue officer, under section 4263.—*Smedley v. Commonwealth* (Ky.) 408.

## CLIENTS.

See Attorney and Client.

## CLOUD ON TITLE.

See Quieting Title.

## CO-ADMINISTRATORS.

See Executors and Administrators, § 124.

## COERCION.

See Threats.

## CO-EXECUTORS.

See Executors and Administrators, § 124.

## COLLATERAL ATTACK.

On judgment, see Judgment, § 497.  
On probate of will, see Wills, § 421.

## COLLATERAL SECURITY.

See Pledges.

## COLLATERAL UNDERTAKING.

See Principal and Surety.  
Application of statute of frauds, see Frauds, Statute of, § 26.

## COLLECTION.

Of taxes, see Taxation, §§ 549-608.

## COLLECTORS.

Of taxes, see Taxation, §§ 549-570.

## COLLEGES AND UNIVERSITIES.

Schools in general, see Schools and School Districts.

§ 6. The power given to the trustees of the county seminary incorporated by act of February 13, 1864 (Acts 1863-64, p. 373, c. 306), authorized them to convey the seminary property for the use of a religious society.—*Estill County v. Board of Trustees of Estill Collegiate Institute of Irvine* (Ky.) 412.

§ 6. In a suit to enforce a mechanic's lien on seminary property conveyed for the use of a religious society, held, that a petition might be filed by the county so that the question whether the fund coming to the trustees of the seminary vested in the graded school district, as provided by Ky. St. § 4484 (Russell's St. § 5762), or in

the county court for the benefit of the common schools of the county, as provided by section 323, Ky. St. (Russell's St. § 2306), might be settled. —*Estill County v. Board of Trustees of Estill Collegiate Institute of Irvine (Ky.)* 412.

### **COLLISION.**

Of street car with animals or vehicles, see Street Railroads, § 90.

### **COLORED PERSONS.**

Authority of carriers to separate white and colored persons, see Carriers, § 267.  
Ejection of white passengers from coach set apart for negroes, see Carriers, § 359.

### **COLOR OF TITLE.**

See Adverse Possession.

Affecting right to compensation for improvements, see Improvements, § 4.

### **COMBINATIONS.**

See Conspiracy.

### **COMITY.**

Between courts, see Courts, §§ 472-485.

### **COMMERCE.**

Carriage of goods and passengers, see Carriers.

### **I. POWER TO REGULATE IN GENERAL.**

§ 8. The power of Congress to regulate interstate commerce is plenary and includes the power to prescribe qualifications, duties, and liabilities of railroad employes.—*State v. Texas & N. O. R. Co. (Tex. Civ. App.)* 984.

### **III. MEANS AND METHODS OF REGULATION.**

§ 58. Acts 30th Leg. c. 122, lessening the hours of labor prescribed by Act Cong. March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, p. 1170) for railroad telegraph operators engaged in interstate commerce, cannot be operative during the time intervening between the passage and the taking effect of the act of Congress.—*State v. Texas & N. O. R. Co. (Tex. Civ. App.)* 984.

§ 58. Acts 30th Leg. c. 122, prescribing the hours of labor of railroad telegraph operators is void as being in conflict with Act Cong. March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, p. 1170) on the same subject.—*State v. Texas & N. O. R. Co. (Tex. Civ. App.)* 984.

### **COMMERCIAL PAPER.**

See Bills and Notes.

### **COMMISSIONS.**

Of broker, see Brokers, §§ 54-67, 84-88.

### **COMMIXTURE.**

See Confusion of Goods.

### **COMMON CARRIERS.**

See Carriers.

### **COMMON KNOWLEDGE.**

Judicial notice of matters of common knowledge, see Evidence, §§ 12-43.

### **COMMON LANDS.**

Joint estates in lands, see Tenancy in Common.

### **COMMON NUISANCE.**

See Nuisance, § 75.

### **COMMON SCHOOLS.**

See Schools and School Districts, §§ 10-131.

### **COMMUNITY PROPERTY.**

See Husband and Wife, §§ 258-276.

### **COMPANIES.**

See Corporations; Partnership.

### **COMPENSATION.**

Compensatory damages, see Damages, §§ 30-69.  
For improvements, see Improvements, § 4.  
For performance of contract, see Contracts, § 231.

For property taken for public use, see Eminent Domain, §§ 69-119.

*Of particular classes of officers or other persons.*

See District and Prosecuting Attorneys, § 5; Witnesses, § 29.

Attorneys, see Attorney and Client, § 150.

Brokers, see Brokers, §§ 54-67, 84-88.

Employés, see Master and Servant, § 73.

Tax collectors, see Taxation, § 549.

### **COMPENSATORY DAMAGES.**

See Damages.

### **COMPETENCY.**

Of evidence, see Criminal Law, §§ 384-396.

Of expert witnesses, see Evidence, § 537.

Of impeaching witness, see Witnesses, § 355.

Of juror, see Jury, § 87.

Of witnesses, see Witnesses, §§ 40-160.

### **COMPLAINT.**

In civil actions, see Pleading.

In criminal prosecution, preliminary complaint, see Criminal Law, § 211.

In criminal prosecutions, see Indictment and Information.

Of pain as part of *res gestæ*, see Evidence, §§ 127, 128.

### **COMPOSITIONS WITH CREDITORS.**

See Compromise and Settlement.

### **COMPROMISE AND SETTLEMENT.**

See Payment; Release.

Admissibility of evidence of offer to compromise as an admission, see Evidence, § 213.

Authority of attorney, see Attorney and Client, § 101.

Effect on attorney's right to fee, see Attorney and Client, § 150.

Parol evidence to vary written contract of settlement, see Evidence, § 419.

§ 2. Where defendant sold plaintiff 20 tons of hay, and after plaintiff found that some of it was of poor quality and that the quantity was short gave him some more to make up the shortage, and promised that, if he found any more that was faulty, he would make it right, *held* not to constitute a settlement barring plaintiff's right to recover for the value of the hay that

was worthless.—*Broderick v. Hartman* (Mo. App.) 1060.

§ 2. Where plaintiff purchased defendant's right to possession of a certain farm, together with the crop thereon, and, after finding that some of the crop had been removed, defendant agreed to allow him a certain discount for the deficiency, this settlement barred the plaintiff's right to recover for the crop taken away.—*Broderick v. Hartman* (Mo. App.) 1060.

§ 17. Where, when the parties executed a contract by which the machine sold was returned to the seller upon return to the buyer of a part of the purchase-money notes, the buyer did not then claim for credits for an attachment of the machine not received or claim credit for a certain amount as paid thereon, the settlement contract would exclude a claim for such credits in an action by the seller on the notes not discharged by the settlement.—*Aultman & Taylor Machinery Co. v. Walker* (Ky.) 320.

§ 19. A settlement based on a mutual mistake of the parties, whether of law or fact, may be opened for correction.—*Alexander v. Owen County* (Ky.) 386.

§ 23. Evidence held insufficient to show a contract was procured by fraud.—*Gordon v. Simmons* (Ky.) 306.

## COMPUTATION.

Of period of limitation of civil actions, see Limitation of Actions, §§ 43-130.

## CONCLUSION.

Formal conclusion of information, see Indictment and Information, § 50.  
Of law on trial by court, see Trial, § 390.  
Of witness, see Criminal Law, § 448; Evidence, §§ 471-501.

## CONCLUSIVENESS.

Of admissions, see Evidence, § 265.  
Of award of arbitrators, see Arbitration and Award, § 82.  
Of certificate of occupancy of public lands, see Public Lands, § 173.  
Of judgment, see Judgment, §§ 707-732.  
Of record on appeal or other proceeding for review, see Appeal and Error, § 662.  
Of return in garnishment proceedings, see Garnishment, § 96.  
Of stipulations, see Stipulations, § 18.  
Of verdicts and findings, see Appeal and Error, §§ 993-1011.

## CONCURRENT JURISDICTION.

Of courts in general, see Courts, §§ 472-485.

## CONCURRENT NEGLIGENCE.

Of master and fellow servant, see Master and Servant, § 201.  
Of master and servant of independent contractor, see Master and Servant, § 96.

## CONDEMNATION.

Taking property for public use, see Eminent Domain.

## CONDITIONAL ESTATES.

See Estates, § 1.

## CONDITIONAL SALES.

See Sales, §§ 454-480.

## CONDITIONS.

Estates on conditions, see Estates, § 1.  
Parol or extrinsic evidence to show existence of condition or contingency, see Evidence, § 420.

### *In contracts and conveyances.*

See Deeds, § 168.  
Insurance policies, see Insurance, § 290.  
Sale, see Sales, §§ 454-480.  
Statement in memorandum required by statute of frauds, see Frauds, Statute of.

### *Precedent to actions or other proceedings.*

For fraud, see Fraud, § 34.  
To enforce specific performance, see Specific Performance, § 101.  
To set aside sale of property of decedent, see Executors and Administrators, § 380.

## CONDUCT.

See Disorderly Conduct.  
Of counsel at trial, see Criminal Law, §§ 719-730.  
Of jury, see Criminal Law, §§ 834, 857.  
Of witness as ground of impeachment, see Witnesses, §§ 344-355.

## CONFEDERACY.

See Conspiracy.

## CONFESSION.

Admissibility in evidence, see Criminal Law, §§ 519, 534.

## CONFIDENTIAL RELATIONS.

See Brokers; Guardian and Ward; Partnership; Principal and Agent; Trusts,  
Element of fraud as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 104.

## CONFIRMATION.

Of partition, see Partition, § 106.  
Of tax title, see Taxation, § 805.

## CONFLICTING CLAIMS.

Determination of conflicting claims to real property, see Quieting Title.

## CONFLICT OF LAWS.

As to contracts for transmission and delivery of telegrams, see Telegraphs and Telephones, § 27.  
As to liability for negligence or default in transmission or delivery of telegrams, see Telegraphs and Telephones, § 27.  
As to relation of carrier and passenger, see Carriers, § 234.  
Conflicting jurisdiction of courts, see Courts, §§ 472-485.

## CONFUSION OF GOODS.

### I. NATURE AND EFFECT.

§ 5½. That a vendor and purchaser had wrongfully confused logs cut, the title to some of which was not in the vendor, would not preclude his right to bring trover for those to which he had title.—*Swann-Day Lumber Co. v. Hall* (Ky.) 826.

### II. RIGHTS AND REMEDIES OF PERSONS INTERESTED.

§ 12. A plaintiff in replevin may show by facts that defendant has taken his property

and has commingled it with property of his own of the same nature and character, and by facts trace the possession thereof to defendant, and recover from the mass a quantity equal to the amount he owned.—*Nashville Lumber Co. v. Barefield* (Ark.) 758.

§ 12. Where the identity of a specific article is lost by the wrongful act of another taking possession thereof and commingling the same with his own of the same nature and character, the owner may recover in replevin from the mass a quantity equal to the amount he owned.—*Nashville Lumber Co. v. Barefield* (Ark.) 758.

§ 12. Where some ore belonging to one was mingled with ore mined by him with knowledge that it belonged to another, so that the same could not be separated, the latter could maintain replevin for all of it.—*Meeks v. Clear Jack Mining Co.* (Mo. App.) 1084.

## CONGRESS.

Power to regulate commerce, see Commerce, § 8.

## CONJUGAL RIGHTS.

See Husband and Wife.

## CONNECTING CARRIERS.

See Carriers, §§ 174-185, 219.

## CONSANGUINITY.

Element of incest, see Incest, § 5.

## CONSENT.

Of husband as defense to prosecution for detention of wife, see Abduction, § 2.

Of lessor to assignment or subletting by lessee, see Landlord and Tenant, § 75.

Of parties to contracts in general, see Contracts, § 98.

Want of consent to sexual intercourse as element of rape, see Rape, § 13.

## CONSEQUENT DAMAGES.

See Damages, §§ 30-37.

## CONSERVATORS.

See Guardian and Ward.

## CONSIDERATION.

Of contracts in general, see Contracts, §§ 58, 89.

Parol or extrinsic evidence to show nature of consideration of contracts, see Evidence, § 419.

*Of particular classes of contracts.*

See Assignments, § 54; Bills and Notes, §§ 90-94.

Conveyance or other transfer, sufficiency as to creditors of grantor or subsequent purchasers, see Fraudulent Conveyances § 74.

Modification of contract, see Contracts, § 237.

Modification of contract of sales, see Sales, § 89; Vendor and Purchaser, § 82.

Sale of goods, see Sales, §§ 19-21.

Sale of good will, see Good Will, § 5.

Sale of land, as affecting good faith of purchaser, see Vendor and Purchaser, § 235.

## CONSOLIDATION.

Of actions, see Action, § 57.

Of street railroads, see Street Railroads, § 51.

## CONSPIRACY.

Acts and declarations of conspirators as evidence against co-conspirators in general, see Criminal Law, §§ 423-427.

### I. CIVIL LIABILITY.

#### (B) Actions.

§ 20. Where complainant failed to establish his title in trespass to try title, he could not recover exemplary damages against defendants in that action for an alleged conspiracy to prevent his recovery therein.—*Kruegel v. Cobb* (Tex. Civ. App.) 723.

## CONSTABLES.

See Sheriffs and Constables.

## CONSTITUTIONAL LAW.

*Provisions relating to particular subjects.*

See Highways, § 122; Vagrancy, § 1.

Jurisdiction, see Courts, § 472.

Licenses for occupations and privileges, see Licenses, § 7.

Regulation of commerce, see Commerce, § 8.

Subjects and titles of statutes, see Statutes, § 122.

Taxation for highways, see Highways, § 122.

### I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

§ 14. The sovereign authority which makes a Constitution may abrogate and repeal its provisions.—*Davidson v. Schmidt* (Mo. App.) 552.

§ 9. Under Const. art. 17, § 1, providing for an amendment of the Constitution by a majority of votes cast, a majority of the votes cast on the proposition for amendment is sufficient.—*Itasca Independent School Dist. v. McElroy* (Tex. Civ. App.) 1011.

### II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 15. The Constitution must be considered as a whole, and sections relating to the same subject must be read in connection with each other.—*State v. Clay County* (Ark.) 757.

§ 26. The Constitution is the paramount law to which all other laws must yield, and is the measure of the rights and powers of the legislative department.—*Merwin v. Fussell* (Ark.) 1021.

§ 35. Few of the provisions of a state Constitution should be construed as directory, as they are the expressions of the highest will of the people, and should be followed.—*Merwin v. Fussell* (Ark.) 1021.

§ 42. It is only where a statute relied on in a particular case as conferring or withholding some legal right that the court or litigants can question its validity, and the invalidity of a statute is no excuse for one's refusal to perform a duty imposed by a valid law.—*State ex rel. Abbott v. Adcock* (Mo.) 1100.

§ 46. If a defense is based upon a statute it is not necessary that its invalidity be specifically raised by pleading, if the court's attention is directed to the fact that its validity is questioned, and the determination of the question is necessary to the decision of the case.—*McCabe's Adm'x v. Maysville & B. S. R. Co.* (Ky.) 892.

### VI. VESTED RIGHTS.

§ 93. The right of a purchaser of timber to purchase the land itself within Acts 1895, p. 63, c. 47, § 16, held a vested right which could not be affected by Acts 1901, p. 296, c. 125, § 8, re-

quiring purchasers of land to be actual settlers thereon.—*Hooks v. Kirby* (Tex. Civ. App.) 158.

## CONSTRUCTION.

Of statutes, see Statutes, § 228.

Parol or extrinsic evidence to aid construction of written instruments, see Evidence, §§ 448-460.

*Of contracts, instruments, or judicial acts or proceedings.*

See Bills and Notes, § 122; Sales, §§ 69-87, 468; Wills, §§ 439-707.

Assignments, see Assignments, §§ 73, 80.

Constitutional provisions, see Constitutional Law, §§ 15-46.

Contracts, see Contracts, §§ 176-231.

Deeds, see Boundaries, §§ 3, 8; Deeds, §§ 124, 168.

Instructions, see Criminal Law, §§ 822, 823; Trial, §§ 286-298.

Judgment or order, see Judgment, § 525.

Leases, see Mines and Minerals, §§ 62-71.

Sales of realty, see Vendor and Purchaser, §§ 58-80.

Suretyship agreement, see Principal and Surety, § 86.

Testamentary trusts, see Wills, § 682.

Verdict or findings, see Trial, § 365.

*Of buildings or other works.*

See Street Railroads, §§ 24, 51; Telegraphs and Telephones, § 20.

## CONSTRUCTIVE NOTICE.

Of mortgage, see Chattel Mortgages, § 150.

To principal, from knowledge of or notice to agent, see Principal and Agent, § 177.

To purchaser of land of claims or liens against property, see Vendor and Purchaser, §§ 229-231.

## CONSTRUCTIVE POSSESSION.

Under color of title, see Adverse Possession, §§ 100, 101.

## CONSTRUCTIVE SERVICE.

Of process, see Process, § 96.

## CONSTRUCTIVE TRUSTS.

See Trusts, § 95.

## CONTAGIOUS DISEASES.

Liability of railroad company for negligence of servants causing spread of, see Negligence, § 1.

## CONTEMPORANEOUS AGREEMENTS.

Evidence of parol agreements affecting written instruments, see Evidence, § 441.

## CONTEST.

Of will, see Wills, § 384.

## CONTIGUOUS LANDOWNERS.

See Adjoining Landowners.

## CONTINGENT FEES.

Of attorney, see Attorney and Client, § 150.

## CONTINGENT REMAINDERS.

Construction of wills, see Wills, § 634.

## CONTINUANCE.

Consent to continuance as appearance, see Appearance, § 8.

Of criminal prosecutions, see Criminal Law, §§ 586-608.

Review of decisions, see Appeal and Error, § 966.

Review of proceedings, see Appeal and Error, § 547.

§ 26. An application for a continuance to take testimony *held* properly denied for defendants' lack of diligence.—*Spear Mining Co. v. T. J. Shinn & Co.* (Ark.) 1045.

§ 29. The refusal to grant a continuance on the ground of surprise *held* proper on the showing made.—*St. Louis Southwestern Ry. Co. v. Jackson* (Ark.) 241.

§ 30. The court on allowing amendments to pleadings *held* not authorized to continue the case unless the amendment so changed the cause of action as to justify the belief that the opposing counsel could not then meet the changed conditions.—*Illinois Cent. R. Co. v. Frost* (Ky.) 821.

§ 30. Where an amendment to the petition to conform to the proof did not change the issue which defendant understood it was called on to meet, a motion for a continuance because of the allowance of the amendment was properly denied.—*Illinois Cent. R. Co. v. Frost* (Ky.) 821.

§ 46. An application for a continuance on the ground of the absence of the president and manager of the defendant corporation *held* properly denied on the showing made.—*City Loan & Trust Co. v. Sterner* (Tex. Civ. App.) 207.

## CONTINUING NUISANCE.

Accrual of cause of action, see Limitation of Actions, § 55.

## CONTRACTORS.

Independent contractors, see Master and Servant, § 318.

Right to mechanic's lien, see Mechanics' Liens, § 93.

## CONTRACTS.

Agreements within statute of frauds, see Frauds, Statute of.

Alteration, see Alteration of Instruments.

Assignment, see Assignments.

As subject of set-off or counterclaim, see Set-Off and Counterclaim, § 31.

Cancellation of written contracts, see Cancellation of Instruments.

Estoppel by contract, see Estoppel, § 78.

Liquidated damages or penalties, see Damages, §§ 74-81.

Operation and effect of champerty, see Champerty and Maintenance.

Operation and effect of gaming laws, see Gaming, § 17.

Parol or extrinsic evidence to construe and apply language of written contract, see Evidence, §§ 448-460.

Parol or extrinsic evidence to contradict or vary written contract, see Evidence, §§ 400-420.

Reformation, see Reformation of Instruments.

Restraining breach, see Injunction, §§ 59, 61.

Separate or subsequent oral agreement affecting written contract, see Evidence, § 441.

Specific performance, see Specific Performance.

Will distinguished from contract, see Wills, § 88.

*Contracts of particular classes of persons.*

See Attorney and Client, §§ 123, 150; Brokers, § 106; Carriers, § 253; District and Prosecuting Attorneys, § 5; Husband and Wife, §§ 41-49, 179, 278; Master and Servant, § 100; Municipal Corporations, §§ 335-359; Principal and Agent, § 101; Warehousemen. Attorney, with client, see Attorney and Client, § 101. Insurance companies, see Insurance. Officers and agents of corporations in general, see Corporations, §§ 399-433.

*Contracts relating to particular subjects.*

See Good Will, § 5; Insurance. Compensation of broker, see Brokers, §§ 54-67. Compensation of county attorney, see District and Prosecuting Attorneys, § 5. Extension of time for payment of bill or note, see Bills and Notes, § 137. Married women's separate property, see Husband and Wife, § 179. Public improvements, see Municipal Corporations, §§ 335-359. Separation of husband and wife, see Husband and Wife, § 278. Storage, see Warehousemen. Transportation of passengers, see Carriers, § 253.

*Particular classes of express contracts.*

See Bills and Notes; Covenants; Deeds; Exchange of Property; Indemnity; Partnership; Rewards; Sales. Agency, see Principal and Agent. Extension of time of payment of bill or note, see Bills and Notes, § 137. Indorsement of bill or note, see Bills and Notes, § 254. Insurance policies, see Insurance. Leases, see Landlord and Tenant. Limiting liability of master for injury to servant, see Master and Servant, § 100. Sales of realty, see Vendor and Purchaser. Separation agreements, see Husband and Wife, § 278. Stipulations in actions, see Stipulations. Suretyship, see Principal and Surety.

*Particular classes of implied contracts.*

See Use and Occupation; Work and Labor.

*Particular modes of discharging contracts.*

See Compromise and Settlement; Payment; Release; Tender.

**I. REQUISITES AND VALIDITY.****(A) Nature and Essentials in General.**

Implied tenancy, see Landlord and Tenant, § 10.

§ 10. An agreement to sell a one-half interest in a stallion *held* not lacking in mutuality.—*Strother v. Miller* (Ky.) 358.

**(B) Parties, Proposals, and Acceptance.**

Gambling contracts, see Gaming, § 17.

§ 27. A party leasing premises for saloon purposes cannot recover damages from the owner because he is unable to continue his business through the refusal of the owner to sign his petition for a license.—*Lansdowne v. Reihmann* (Ky.) 353.

**(C) Formal Requisites.**

Of deed, see Deeds, §§ 26, 42, 54-61. Of mortgage, see Chattel Mortgages, § 45.

**(D) Consideration.**

Parol or extrinsic evidence to show nature of consideration, see Evidence, § 419. Sufficiency as to creditors and subsequent purchasers, see Fraudulent Conveyances, § 74.

*Particular classes of contracts.*

See Bills and Notes, §§ 90-94; Sales, §§ 19-21. Assignment, see Assignments, § 54. Modification of contract of sale, see Sales, § 89; Vendor and Purchaser, § 82. Sale of good will, see Good Will, § 5.

§ 58. A contract between a railroad company and a street car company for the division of expenses at a crossing of the street car tracks over the tracks of the railroad company *held* based on a sufficient consideration.—*Beaumont Traction Co. v. Texarkana & Ft. S. Ry. Co.* (Tex. Civ. App.) 987.

§ 88. A consideration for a written contract being presumed, *held* plaintiff need show none, but defendant must plead and prove the absence thereof.—*Williams Commission Co.'s Assignee v. W. A. Shirley & Bro.* (Ky.) 327.

**(E) Validity of Assent.**

To contract of sale, see Sales, §§ 38, 41.

§ 98. The invalidity of a portion of a contract providing for crossing of street car tracks over a railroad's right of way *held* not to invalidate a provision for division of the cost of maintaining lights and safety appliances at the crossing.—*Beaumont Traction Co. v. Texarkana & Ft. S. Ry. Co.* (Tex. Civ. App.) 987.

**(F) Legality of Object and of Consideration.**

Champertous contracts, see Champerty and Maintenance. Restraining breach of contract in restraint of trade, see Injunction, § 61.

**II. CONSTRUCTION AND OPERATION.**

Effect of express contract on implied obligation to pay for services rendered and materials furnished incident thereto, see Work and Labor, § 14.

*Particular classes of contracts.*

See Bills and Notes, § 122; Chattel Mortgages, § 150; Compromise and Settlement, § 17; Sales, §§ 68-87, 463.

Assignments, see Assignments, §§ 73, 80. Deeds, see Boundaries, §§ 3, 8; Deeds, § 124, 168.

Leases, see Mines and Minerals, §§ 62-71.

Sales of realty, see Vendor and Purchaser, §§ 58-80.

Suretyship, see Principal and Surety, § 86.

**(A) General Rules of Construction.**

Parol or extrinsic evidence to construe and apply language of written contract, see Evidence, §§ 448-460.

Parol or extrinsic evidence to contradict or vary written contract, see Evidence, §§ 400-420. Separate or subsequent oral agreement affecting written contract, see Evidence, § 441.

§ 176. Construction of written instruments is for the court, except where there is ambiguity to be solved by extrinsic facts unconceded, or the writing is merely adduced as evidence of facts from which different inferences may be drawn; but, where ambiguity cannot be solved by referring to other parts, and when surrounding circumstances are controverted, it is for the jury.—*Thetford v. General Accident Assur. Corp., Limited* (Mo. App.) 39.

**(B) Parties.**

§ 187. Creditors of a corporation which has transferred its assets to another corporation *held* entitled to sue the latter on its promise to pay a portion of the transferring company's debts.—*Spear Mining Co. v. T. J. Shinn & Co.* (Ark.) 1045.

**(C) Subject-Matter.**

Liquidated damages and penalties, see Damages, §§ 76-81.

Parol or extrinsic evidence to identify subject-matter, see Evidence, § 460.

**(E) Conditions.**

In insurance policies, see Insurance, § 290.

**(F) Compensation.**

§ 231. In a suit on a railroad construction subcontract, plaintiff *held* not limited to measurements in the borrow pits, but was entitled to prove the amount of earth removed by measurements on the fill.—Eddington-Griffiths Const. Co. v. Turner (Ky.) 800.

**III. MODIFICATION AND MERGER.**

Consideration for modification of contract of sale of land, see Vendor and Purchaser, § 82.

§ 237. A contract, to operate a discharge of an earlier contract, must be supported by a valuable consideration.—Whitsett v. Carney (Tex. Civ. App.) 443.

**IV. RESCISSION AND ABANDONMENT.**

Cancellation of written contracts in equity, see Cancellation of Instruments.

Recovery on quantum meruit for part performance of services where contract is rescinded or abandoned, see Work and Labor, § 14.

Rescission of contract of sale, see Vendor and Purchaser, §§ 82, 93.

Rescission of contract or conveyance of infant, see Infants, § 31.

Rescission of insurance policy, see Insurance, § 248.

**V. PERFORMANCE OR BREACH.**

Affecting right of contractor to mechanic's lien, see Mechanics' Liens, § 93.

Enforcement of specific performance, see Specific Performance.

Liquidated damages and penalties for breach, see Damages, §§ 74-81.

Measure of damages for breach, see Damages, § 122.

Pleading damages, see Damages, § 157.

Recovery on quantum meruit on part performance where contract for services is rescinded or abandoned or full performance is prevented, see Work and Labor, § 14.

Restraining breach, see Injunction, §§ 59, 61.

Time of performance as affecting application of statute of frauds, see Frauds, Statute of, §§ 44, 50.

**Particular classes of contracts.**

See Covenants, § 102.

Employment, see Master and Servant, § 65.

Employment of broker, see Brokers, §§ 54-57.

Sales, see Sales, §§ 146-177; Vendor and Purchaser, §§ 130, 137.

Transportation of passengers, see Carriers, §§ 267-277.

With municipal corporation, see Municipal Corporations, § 359.

§ 312. A party to a contract is not justified in treating it as broken by the adverse party, unless there has been a distinct and unequivocal intention manifested either by words or conduct of the adverse party not to perform the contract.—Majestic Milling Co. v. Copeland (Ark.) 521.

§ 319. Defendant *held* not entitled to retain a percentage of the contract price of the construction of a railroad grade, where plaintiff's failure to perform resulted from defendant's failure to furnish proper borrow pits as required.—Eddington-Griffiths Const. Co. v. Turner (Ky.) 800.

§ 319. A contractor having without sufficient excuse failed to substantially perform his contract *held* not entitled to recover thereon.—Murphy v. Williams (Tex.) 900.

§ 319. Where a building contract contained no stipulation for completion by the owner on the contractor's default, and the owner did so, he was not liable to the contractor for the balance of the price after deducting cost of completion and damages.—Murphy v. Williams (Tex.) 900.

§ 319. Where a contract has been performed in part by a party thereto, and full performance is prevented by the adverse party, the party may sue on the contract.—Matson v. Stewart (Tex. Civ. App.) 736.

§ 323. In an action on a railroad grade construction subcontract, the quantity of earth removed by plaintiff under his subcontract, *held* for the jury.—Eddington-Griffiths Const. Co. v. Turner (Ky.) 800.

**VI. ACTIONS FOR BREACH.**

Damages, liquidated damages and penalties, see Damages, §§ 74-81.

Damages, measure, see Damages, § 122.

Damages, nominal or substantial, see Damages, § 11.

Effect of express contract on right to recover on quantum meruit, see Work and Labor, § 14.

Parol or extrinsic evidence to construe and apply language of written contract, see Evidence, §§ 443-460.

Parol or extrinsic evidence to contradict or vary written contract, see Evidence, §§ 400-420.

Restraining breach, see Injunction, §§ 59, 61.

Separate or subsequent oral agreement affecting written contract, see Evidence, § 441.

Statutory limitations, see Limitation of Actions, §§ 47, 49.

§ 346. In an action for breach of contract to mine coal, *held*, that there was no variance between the pleading and proof.—Elk Coal Co. v. Bingham (Ky.) 314.

**CONTRADICTION.**

Of record, see Criminal Law, § 1112.

Of witness, see Witnesses, § 405.

**CONTRIBUTION.**

Among sureties, see Principal and Surety, § 200.

Matters precluded by former adjudication in action by co-surety in action for contribution, see Judgment, § 617.

Scope of review on appeal from judgment for contribution among co-sureties, see Appeal and Error, § 875.

**CONTRIBUTORY NEGLIGENCE.**

See Negligence, §§ 82, 83, 141.

**CONTROVERSY.**

Amount in controversy as affecting jurisdiction of courts, see Appeal and Error, § 45; Courts, §§ 121, 169, 172.

Submission to arbitrators, see Arbitration and Award.

**CONVERSION.**

Wrongful conversion of personal property, see Trover and Conversion.

**CONVEYANCES.**

Application of statute of frauds, see Frauds, Statute of, §§ 69, 70.

Contracts to convey, see Vendor and Purchaser.

Declarations by grantor as evidence against grantee or subsequent purchasers, see Evidence, § 230.

Description of boundaries, see Boundaries.

Estoppel by deed, see Estoppel, §§ 28-45.

Fraudulent as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Parol or extrinsic evidence to construe and apply language of instrument, see Evidence, § 452.

Reformation, see Reformation of Instruments. Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

*Conveyances by or to particular classes of persons.*

See Corporations, § 445; Guardian and Ward, § 43; Infants, § 31.

Married women, see Husband and Wife, § 179. Purchasers at execution sales, see Execution, § 306.

Purchasers at tax sales, see Taxation, §§ 764, 789.

Sheriff's, see Execution, § 306.

Survivor of community, see Husband and Wife, § 273.

*Conveyances of particular species of, or estates or interests in, property.*

See Mines and Minerals, §§ 54, 55.

Community property, see Husband and Wife, § 273.

Lands held adversely, see Champerty and Maintenance, § 7.

Married women's separate property, see Husband and Wife, § 179.

Personal property, in general, see Chattel Mortgages; Sales.

Public lands, see Public Lands, §§ 173-178.

Real property in general, see Deeds; Mortgages; Vendor and Purchaser.

*Particular classes of conveyances.*

See Assignments; Chattel Mortgages; Deeds; Mortgages.

Bills of sale, see Sales, § 146.

In trust, see Trusts, §§ 44-61.

Tax deeds, see Taxation, §§ 764, 789.

## CONVICTS.

Nature and extent of punishment, see Criminal Law, § 1223.

Reward for return of escaped convict, see Rewards, §§ 8, 14.

## CORPORATIONS.

Injunctions involving corporate franchises, management and dealings, see Injunction, § 70.

Judicial notice of corporations and members thereof, see Evidence, § 22.

Taxation of corporations and corporate property, see Taxation, §§ 113, 145.

*Particular classes of corporations.*

See Carriers; Colleges and Universities; Municipal Corporations; Railroads.

Banks, see Banks and Banking.

Insurance companies, see Insurance.

Mutual benefit insurance associations, see Insurance, §§ 782-815.

School districts, see Schools and School Districts, §§ 10-131.

Street railroad companies, see Street Railroads.

Telegraph or telephone companies, see Telegraphs and Telephones.

## I. INCORPORATION AND ORGANIZATION.

§ 14. Rev. St. 1895, art. 642, subd. 14, while authorizing the formation of a corporation for a business consisting of manufacturing and mining, held not to authorize the formation of such corporation for two businesses—one of manu-

facturing and the other of mining.—*Johnston v. Townsend* (Tex.) 417.

§ 18. Under Rev. St. 1895, art. 642, subd. 14, and other statutory provisions, a proposed charter held too indefinite.—*Johnston v. Townsend* (Tex.) 417.

## IV. CAPITAL, STOCK, AND DIVIDENDS.

(D) Transfer of Shares.

Testimony as to transactions with decedent in action to set aside transfer, see Witnesses, § 159.

## V. MEMBERS AND STOCKHOLDERS.

Accrual of cause of action for unpaid subscription, see Limitation of Actions, § 58.

## VI. OFFICERS AND AGENTS.

Of railroad companies, see Railroads, § 17.

(A) Election or Appointment, Qualification, and Tenure.

§ 284. An adjournment of a meeting of the members of a corporation held legal so as to preclude the right of a dissatisfied minority to continue in session and elect officers.—*De Zavala v. Daughters of the Republic of Texas* (Tex. Civ. App.) 160.

(C) Rights, Duties, and Liabilities as to Corporation and Its Members.

§ 310. Whether the president of an insurance company willingly or unintentionally by culpable negligence, ostensibly received for its benefit forged municipal bonds in exchange for stock, he is responsible to make good the default.—*Fidelity & Deposit Co. of Maryland v. Wiseman* (Tex.) 621.

## VII. CORPORATE POWERS AND LIABILITIES.

Of banks, see Banks and Banking, § 138.

Rights of creditor of corporation on contract of other corporation purchasing assets to pay debts, see Contracts, § 187.

(A) Extent and Exercise of Powers in General.

§ 387. Under Kirby's Dig. § 851, the right of a corporation to hold real estate held a matter exclusively between the state and the corporation.—*Bowman v. J. H. Trainor Co.* (Ark.) 1018.

§ 387. A purchaser, with constructive notice by record of a prior conveyance to a corporation, held not entitled to impeach conveyances by the corporation to a trustee to pay debts and conveyances by the trustee to a new corporation.—*Bowman v. J. H. Trainor Co.* (Ark.) 1019.

(B) Representation of Corporation by Officers and Agents.

Notice to officer or agent of insurance company as notice to company, see Insurance, § 378.

§ 399. The actual authority of a corporate president may be established by resolution of the board of directors or by inference drawn from a continued exercise of similar authority.—*Tyler Estate v. Hoffman* (Mo. App.) 535.

§ 399. Facts stated which would give a corporate president actual authority to make a chattel mortgage.—*Tyler Estate v. Hoffman* (Mo. App.) 535.

§ 400. A particular course of business by a corporation through its president may create apparent authority to do acts which in point of fact the officer has been inhibited from doing by the directors.—*Tyler Estate v. Hoffman* (Mo. App.) 535.

§ 415. A corporate by-law *held* not to expressly authorize the corporate president to confer liens on its property by way of mortgage or pledge.—Tyler Estate v. Hoffman (Mo. App.) 535.

§ 425. When the estoppel mode of validating the acts of a corporate officer comes into operation stated.—Tyler Estate v. Hoffman (Mo. App.) 535.

§ 426. If the bringing of a suit in the name of a private corporation without authority of the governing body was illegal, the subsequent ratification of such action by the governing body at a regular meeting in proper form operated to legalize the action from the beginning.—De Zavala v. Daughters of the Republic of Texas (Tex. Civ. App.) 160.

§ 432. In an action against a railroad company for breach of a contract entered into with its station agent, evidence *held* sufficient to support the finding of the jury that the contract was within the apparent scope of the station agent's authority.—Cincinnati, N. O. & T. P. R. Co. v. Ashurst (Ky.) 303.

§ 432. Certain evidence *held* admissible to show that a corporate president had power to give a chattel mortgage and pledge the corporate property.—Tyler Estate v. Hoffman (Mo. App.) 535.

§ 433. In an action against a railroad company for breach of a contract entered into with a station agent, evidence *held* sufficient to go to the jury on the question whether the contract was within the apparent scope of the authority of the station agent.—Cincinnati, N. O. & T. P. R. Co. v. Ashurst (Ky.) 303.

(C) Property and Conveyances.

§ 445. One corporation, by securing the assets of another corporation in a bona fide manner, does not thereby become liable for the debts of the transferring corporation.—Spear Mining Co. v. T. J. Shinn & Co. (Ark.) 1045.

(E) Torts.

*Particular classes of corporations or associations.*

See Carriers, §§ 99, 104, 108-135, 156, 174-185, 217-230, 280-321, 358-381, 399, 400; Railroads, §§ 274-282, 327-350, 360-398, 407-446, 454-484; Street Railroads, §§ 81-103.

(F) Civil Actions.

*By or against particular classes of corporations or associations.*

See Carriers, §§ 94, 104, 135, 185, 228, 230, 274-277, 314-321, 347, 381; Railroads, §§ 22, 282, 347, 350, 398, 439-446, 478-484.

Insurance companies, see Insurance, §§ 623-669.

Telegraph or telephone companies, see Telegraphs and Telephones, § 20.

§ 513. It is not necessary, in a suit by a private corporation, to allege in the petition that the suit is authorized by the governing body thereof.—De Zavala v. Daughters of the Republic of Texas (Tex. Civ. App.) 160.

§ 518. To warrant the admission of evidence of the ratification of an action brought in the name of a corporation without the authority of the governing body, *held*, that it is not necessary to plead it.—De Zavala v. Daughters of the Republic of Texas (Tex. Civ. App.) 160.

**VIII. INSOLVENCY AND RECEIVERS.**

Of insurance companies, see Insurance, § 70.

§ 550. All the creditors of an insolvent corporation, or any number of them, could unite

in a creditors' bill to enforce an agreement by other corporations having taken over the insolvent's assets, to pay a certain portion of the insolvent's debts.—Spear Mining Co. v. T. J. Shinn & Co. (Ark.) 1045.

§ 550. Creditors of an insolvent corporation *held* entitled to recover against it and two successive transferees of its assets the amount of their claims against the debtor corporation.—Spear Mining Co. v. T. J. Shinn & Co. (Ark.) 1045.

**XII. FOREIGN CORPORATIONS.**

§ 672. That a foreign corporation has not complied with the laws of the domestic state, incapacitating it to sue, is a matter of defense, and that it has need not be alleged by plaintiff.—Cooper Wagon & Buggy Co. v. Cornell (Mo. App.) 53.

**CORRECTION.**

Of erroneous instructions by other instructions, see Trial, § 296.

Of irregularities and errors at trial, see Trial, § 412.

Of judgment, see Judgment, §§ 294-314.

Of record on appeal or writ of error, see Appeal and Error, § 644; Criminal Law, § 1110.

**CORROBORATION.**

Of confession, see Criminal Law, § 534.

Of testimony of accomplices in criminal prosecution, see Criminal Law, § 511.

Of testimony of female in prosecution for rape, see Rape, § 54.

**CORRUPTION.**

In general, see Fraud.

**CO-SERVANTS.**

See Master and Servant, §§ 177-201.

**COSTS.**

Payment or security on taking appeal or other proceeding for review, see Appeal and Error, §§ 384-395.

Review of decisions, see Appeal and Error, § 984.

**III. PERSONS, PROPERTY, AND FUNDS LIABLE.**

§ 93. Where a creditor of a company, on refusal of its receiver so to do, sued a bank owing the company, and afterwards the receiver was made plaintiff, and the creditor's name was stricken out, *held* it was error to award costs against him, judgment having been recovered against the bank.—Ellis v. Western Nat. Bank (Ky.) 334.

**IV. SECURITY FOR PAYMENT.**

Security to perfect appeal or other proceeding for review, see Appeal and Error, §§ 384-395.

§ 110. Under Civ. Code Prac. § 616, nonresident plaintiffs suing to have a will declared void so as to take testator's property by descent must give a bond for costs.—Cape v. Cape (Ky.) 869.

§ 110. Proceedings by nonresident plaintiffs to have a will which had been probated declared void so as to take the property by descent *held* an "action" within Civ. Code Prac. § 616, requiring nonresident plaintiffs before commencing an action to give security of costs.—Cape v. Cape (Ky.) 869.

## VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

Security to perfect appeal or other proceeding, see Appeal and Error, §§ 384-395.

## VIII. PAYMENT AND REMEDIES FOR COLLECTION.

Payment or security on taking appeal or other proceeding for review, see Appeal and Error, §§ 384-395.

## IX. IN CRIMINAL PROSECUTIONS.

Fees of prosecuting attorneys, see District and Prosecuting Attorneys, § 5.

## CO-SURETIES.

See Principal and Surety, § 200.

## CO-TENANCY.

See Tenancy in Common.

## COUNSEL.

See Attorney and Client; District and Prosecuting Attorneys.

## COUNTERCLAIM.

See Set-Off and Counterclaim.

## COUNTERFEITING.

See Forgery.

## COUNTIES.

See Municipal Corporations; Schools and School Districts, §§ 10-131.

County in which to sue, see Venue.

Highways, see Highways.

Judicial notice of population, see Evidence, § 12.

## II. GOVERNMENT AND OFFICERS.

### (D) Officers and Agents.

Clerks of courts, see Clerks of Courts.

Compensation of county attorneys, see District and Prosecuting Attorneys, § 5.

Prosecuting attorneys, see District and Prosecuting Attorneys.

School boards and officers, see Schools and School Districts, § 48.

Sheriffs, see Sheriffs and Constables.

Tax collectors, see Taxation, §§ 549-570.

## IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

Taxes for highway purposes, see Highways, § 122.

§ 192. The fiscal court of a county *held* to act in a legislative capacity in ordering levy of a tax, so that it may at a subsequent term repeal such order, where no rights have become vested by virtue of it.—Commonwealth v. Beauchamp (Ky.) 284.

## COUNTS.

Separate counts in pleading, necessity and sufficiency of election, see Indictment and Information, § 132; Pleading, § 369.

Separate counts in pleading, right to join, see Indictment and Information, § 132.

## COUNTY ATTORNEYS.

See District and Prosecuting Attorneys.

## COUNTY ROADS.

See Highways.

## COURSES AND DISTANCES.

See Boundaries.

## COURTS.

See Judgment.

Appellate jurisdiction, see Appeal and Error, § 20.

Effect in state courts of judgments of United States courts, see Judgment, § 829.

Examination of witnesses by court, see Witnesses, § 246.

Judges, see Judges.

Judicial notice of jurisdiction, organization, and procedure of courts, see Evidence, § 43.

Mandamus to inferior courts, see Mandamus, §§ 48, 60.

Province of court and jury, see Criminal Law, §§ 741-764; Trial, §§ 136-178, 191, 194.

Right to trial by jury, see Jury, § 25.

Trial by court without jury, see Trial, § 390.

Supplementary proceedings, see Execution, § 371.

## I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

Presumptions as to jurisdiction on appeal or writ of error, see Appeal and Error, § 911.

Review of questions of jurisdiction, see Appeal and Error, § 185.

§ 1. The repeal of a statute conferring jurisdiction will oust the jurisdiction thereby conferred.—Davidson v. Schmidt (Mo. App.) 552.

## II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

### (A) Creation and Constitution, and Court Officers.

Clerks of courts, see Clerks of Courts.  
Judges, see Judges.

### (B) Terms, Vacations, Place and Time of Holding Court, Courthouses, and Accommodations.

Authority of court to amend or correct judgment after the term, see Judgment, § 299.

### (D) Rules of Decision. Adjudications. Opinions, and Records.

Former decision of appellate court as law of the case on subsequent appeal, see Appeal and Error, § 1097.

Operation and enforcement in state courts of judgments of United States courts, see Judgment, § 829.

§ 91. Where the Court of Criminal Appeals declared the local option election in a certain district void, and the state and county accepted this decision, and licenses were issued for the sale of liquor for many years, this decision is conclusive upon the civil courts.—State v. Schwarz (Tex.) 420.

## III. COURTS OF GENERAL ORIGINAL JURISDICTION.

### (A) Grounds of Jurisdiction in General.

§ 121. A petition by an assessor for commissions in assessing the rolling stock of a railroad for municipal taxation *held* demurrable.—City of Tyler v. Coker (Tex. Civ. App.) 729.

## IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 169. County court *held* not to have jurisdiction of an action for damages because of

the amount involved.—*Pecos & N. T. Ry. Co. v. Womble* (Tex. Civ. App.) 111.

§ 172. A suit to enjoin defendant from maintaining an embankment and fence along and across a street *held* one in which title to realty was involved within Rev. St. 1899, § 564 (Ann. St. 1906, p. 593), so that the circuit court of the city of St. Louis had no jurisdiction where the land was in the county of St. Louis, outside the city limits.—*State ex rel. Gavin v. Muench* (Mo.) 1124.

## V. COURTS OF PROBATE JURISDICTION.

Sale of property of decedent, see Executors and Administrators, § 358.

§ 202. Under Kirby's Dig. § 1348, the filing of the affidavit of the party aggrieved and prayer for appeal *held* prerequisites to the granting of an appeal by the probate court.—*Tharp v. Barnett* (Ark.) 1027.

§ 202. Where the circuit court acquired no jurisdiction on appeal from the probate court, the circuit court should dismiss the appeal, but should not render judgment for costs of the proceeding.—*Tharp v. Barnett* (Ark.) 1027.

## VI. COURTS OF APPELLATE JURISDICTION.

Appellate jurisdiction in general, see Appeal and Error, § 20.

Decisions reviewable, see Appeal and Error, §§ 45-106.

### (A) Grounds of Jurisdiction in General.

§ 207. Under Const. art. 7, § 4, conferring only appellate jurisdiction, the Supreme Court *held* without original jurisdiction to issue quo warranto against the officers of a county to test their right to exercise jurisdiction over territory alleged to be outside the county.—*State v. Clay County* (Ark.) 757.

§ 207. Under Const. art. 7, § 5, giving jurisdiction to issue writs of quo warranto in specified cases, the Supreme Court *held* without jurisdiction to issue quo warranto against the officers of a county to test their right to exercise jurisdiction over territory alleged to lie without the county.—*State v. Clay County* (Ark.) 757.

§ 207. Even if the Court of Appeals has authority to issue mandamus to control the action of inferior tribunals, such as the county courts, it will not do so; petitioner having an adequate remedy by applying to the circuit court for the writ.—*Commonwealth v. Peter* (Ky.) 896.

### (B) Courts of Particular States.

§ 231. Where a constitutional question is raised, it gives the Supreme Court exclusive appellate jurisdiction, though it has been passed on by such court and is no longer a constitutional question in this state.—*State v. Cowan* (Mo. App.) 586, 587.

§ 231. An assignment of error in the motion for a new trial shown by a transcript on appeal *held* to raise a constitutional question in a case where no briefs were filed.—*State v. Cowan* (Mo. App.) 587.

§ 247. A motion to certify points of dissent in the Court of Civil Appeals to the Supreme Court, under Rev. St. 1895, arts. 1040, 1042, must be made during the term at which the case is determined.—*Western Union Telegraph Co. v. Hudson* (Tex.) 85.

§ 247. A certificate, embodying questions to be submitted to the Supreme Court from the Court of Civil Appeals, which includes the entire case, should be dismissed.—*Falfurrias Immigration Co. v. Spielhagen* (Tex.) 616.

§ 247. The Supreme Court will not answer a certified question as to whether the facts of a case bring it within a statute, where the Court of Civil Appeals made no conclusions of fact.—*Metropolitan Life Ins. Co. v. Lennox* (Tex.) 623.

§ 247. The question whether property was exempt under Const. art. 11, § 9, not being involved in a proceeding to enjoin the collection of taxes on timber standing on county school lands, *held*, that the Supreme Court has no jurisdiction of the case under Rev. St. 1893, art. 941.—*Peach River Lumber Co. v. Montgomery* (Tex.) 904.

## VII. UNITED STATES COURTS.

Effect in state courts of judgments of United States courts, see Judgment, § 829.

## VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

### (A) Courts of Same State, and Transfer of Causes.

Change of venue, see Venue, §§ 45, 58.

Transfer of causes from equity docket to law docket, and vice versa, see Trial, § 11.

§ 472. Const. 1875, art. 6, § 22 (Ann. St. 1906, p. 234), revising the subject of mechanics' liens as contained in Const. 1820, art. 5, § 6, and Const. 1865, art. 6, § 13, construed, and *held* that the circuit court did not have original jurisdiction of mechanics' liens for less than \$50 in a county having less than 50,000 population, as Acts March 30, 1872, p. 44, § 1, had provided that justices of the peace also had jurisdiction in such cases.—*Davidson v. Schmidt* (Mo. App.) 552.

§ 472. A circuit court *held* not to have jurisdiction of a mechanic's lien for less than \$50 since under Const. 1875, art. 6, § 22 (Ann. St. 1906, p. 234), when construed in connection with Const. 1820, art. 5, § 6, and Const. 1865, art. 6, § 13, and Acts March 30, 1872, p. 44, § 1, and Wag. St. 1872, c. 82, art. 1, § 3, and chapter 41, art. 3, § 2, and Rev. St. 1899, §§ 1674, 3801 (Ann. St. 1906, pp. 1217, 2151), such court was divested of such jurisdiction.—*Davidson v. Schmidt* (Mo. App.) 552.

§ 475. The question of the ownership of a money judgment, as between adverse claimants, could be determined by a court other than that which rendered the judgment, and such determination would be binding upon the parties to the action to determine ownership.—*Kruegel v. Rawlins* (Tex.) 418.

§ 480. District court *held* without jurisdiction to enjoin prosecution of a similar suit between the same parties previously begun in another district court.—*Harrison v. Littlefield* (Tex. Civ. App.) 212.

§ 485. Under Act March 10, 1909 (Acts 31st Leg. c. 42), entitled "An act to amend article 904a, chapter 12, title XXVII of the Revised Civil Statutes of the State of Texas," *held*, that cases from a county in which a Court of Civil Appeals is actually sitting, may have to be transferred to a Court of Civil Appeals sitting in another county, where the county from which they are appealed is the nearest county to the place where the court to which they are transferred is held.—*In re Transfer of Causes Between Courts of Civil Appeals* (Tex.) 622.

## COVENANT, ACTION OF.

Covenants on which the action may be maintained, see Covenants.

## COVENANTS.

Conditions and restrictions in deeds, see Deeds, § 168.  
Restraining breach, see Injunction, §§ 59, 61.

## III. PERFORMANCE OR BREACH.

§ 102. A contract between a grantee with warranty and the attorneys for plaintiff in a suit on a paramount title *held* not to be such a purchase of a paramount title by the covenantee as would authorize a suit on the warranty.—*Sievert v. Underwood* (Tex. Civ. App.) 721.

## IV. ACTIONS FOR BREACH.

Accrual of cause of action, see Limitation of Actions, § 47.

## COVERTURE.

See Husband and Wife.

As affecting limitation of actions, see Limitation of Actions, § 73.

## CREDIBILITY.

Of witness, see Witnesses, §§ 321-405.

## CREDITORS.

See Attachment; Bankruptcy; Compromise and Settlement; Execution; Exemptions; Fraudulent Conveyances; Garnishment; Homestead; Payment; Release.

Application of firm assets to liabilities, see Partnership, § 181.

Of decedent, see Executors and Administrators, §§ 219-227.

Of husband, rights as to wife's property, see Husband and Wife, § 149.

Of intestate, see Descent and Distribution, § 125.

Of married woman, rights as to separate property, see Husband and Wife, § 149.

## CREDITORS' SUIT.

Proceedings supplementary to execution, see Execution, § 371.

Remedies in cases of fraudulent transfers, see Fraudulent Conveyances, §§ 222-308.

## CRIMES.

See Criminal Law.

## CRIMINAL LAW.

Arrest of accused, see Arrest, § 62.

Competency and challenge to jurors, see Jury, § 87.

Cross-examination of accused, see Witnesses, § 277.

Habeas corpus to review proceedings, see Habeas Corpus.

Indictment, information, or complaint, see Indictment and Information.

Malicious prosecution, see Malicious Prosecution.

Prosecuting officers, see District and Prosecuting Attorneys.

Summoning, attendance, discharge, and compensation of jurors, see Jury, §§ 66-72.

### Particular offenses.

See Abduction; Adultery; Arson; Breach of the Peace; Burglary; Disorderly Conduct; False Personation; False Pretenses; Forgery; Gaming, §§ 71-97; Homicide; Incest; Libel and Slander, § 152; Rape, §§ 6, 13; Robbery; Seduction, § 40; Threats; Vagrancy. Assault and battery, see Assault and Battery, §§ 83-96.

Carrying weapons, see Weapons, §§ 6-13, 17.

Larceny, see Larceny.

Offenses relating to weapons, see Weapons.

Practicing medicine or surgery without authority, see Physicians and Surgeons, § 6.

Removal or destruction of fences, see Fences, § 28.

Shooting firearms, see Weapons, § 15.

Violations of liquor laws, see Intoxicating Liquors, §§ 146, 169, 200-239.

Violations of regulations relating to animals, see Animals, § 57.

## II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

§ 48. Pen. Code 1895, art. 41, relating to liability for criminal acts committed while under voluntary intoxication, *held* not to apply to one whose mind was unbalanced by the use of morphine.—*Moss v. State* (Tex. Cr. App.) 647.

## VI. LIMITATION OF PROSECUTIONS.

§ 159. Code Cr. Proc. 1895, art. 470, applies as a statute of limitation only where a new indictment is found and not where another indictment is substituted for one lost, so that, if prosecution was not barred when the original indictment was returned, a prosecution under a substituted indictment will not be barred though substituted when the prosecution would be barred under a new indictment.—*Brown v. State* (Tex. Cr. App.) 101.

## VII. FORMER JEOPARDY.

§ 170. A conviction for affray, prior to the filing of an affidavit or warrant of arrest, *held* no bar to a subsequent prosecution for aggravated assault, based on the same transaction.—*Decker v. State* (Tex. Cr. App.) 912.

§ 186. A former acquittal, resulting from variance in the name of the person alleged to have been assaulted, *held* not to constitute jeopardy.—*Reynolds v. State* (Tex. Cr. App.) 931.

## VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

Variance between indictment or information and preliminary warrant or complaint, see Indictment and Information, § 122.

§ 211. In view of Code Cr. Proc. 1895, art. 257, a complaint for aggravated assault *held* not insufficient because on information and belief, so as to violate Const. art. 1, § 9.—*Fricks v. State* (Tex. Cr. App.) 922.

## X. EVIDENCE.

Competency of witnesses in general, see Witnesses, §§ 40-160.

Credibility, impeachment, contradiction, and corroboration of witnesses, see Witnesses, §§ 321-405.

Cross-examination of witnesses, see Witnesses, §§ 268-277.

Examination of witnesses, see Witnesses, §§ 240-277.

### In particular criminal prosecutions.

See Adultery, § 14; Assault and Battery, §§ 83-92; Burglary, § 41; Gaming, § 97; Homicide, §§ 144-257; Incest, § 13; Larceny, §§ 45-64; Rape, §§ 43-54; Seduction, § 40.

For injuring fence, see Fences, § 28.

Violations of liquor laws, see Intoxicating Liquors, §§ 233, 236.

(A) Judicial Notice, Presumptions, and Burden of Proof.

In prosecution for homicide, see Homicide, § 144.

§ 804. The court takes judicial notice of the names and signatures of its own officers, and, where the officer and signature is followed by the word "Clerk," it will be presumed on appeal that he was clerk of the court in which the case was tried.—*Cardenas v. State* (Tex. Cr. App.) 953.

(B) **Facts in Issue and Relevant to Issues, and Res Gestæ.**

§ 338. In a prosecution for gaming, a question as to why another witness was not present as a witness *held* properly excluded; the answer only bearing on accused's application for a continuance because of his absence.—*Melton v. State* (Tex. Cr. App.) 910.

§ 351. In a prosecution for theft, accused's forfeiture of his bail bond and flight *held* admissible in evidence.—*Brown v. State* (Tex. Cr. App.) 101.

§ 351. Evidence that on the night of the difficulty accused and his companion went eight or ten miles to witness' house, where they stayed all night, *held* admissible as an incriminating circumstance.—*Decker v. State* (Tex. Cr. App.) 912.

§ 361. In a prosecution for theft, accused's forfeiture of his bail bond and flight being in evidence, his explanation of such facts *held* admissible.—*Brown v. State* (Tex. Cr. App.) 101.

§ 366. In a prosecution for assault with intent to murder, statements of the assaulted party *held* admissible as res gestæ.—*Graves v. State* (Tex. Cr. App.) 676.

(C) **Other Offenses, and Character of Accused.**

Impeachment of accused as witness by proving accusation or conviction of other crime, see Witnesses, § 345.

§ 369. In a prosecution for unlawfully carrying a pistol, evidence that accused had been previously indicted in the county for a like offense was inadmissible.—*Waterhouse v. State* (Tex. Cr. App.) 633.

§ 369. In a prosecution for homicide, evidence of other crimes just prior to the homicide *held* inadmissible.—*Pace v. State* (Tex. Cr. App.) 949.

§ 372. In a prosecution for violating the local option law, evidence of a transaction in which prosecutor and defendant purchased and divided a quart of whiskey *held* not to show an offense and inadmissible to illustrate defendant's system.—*Vannort v. State* (Tex. Cr. App.) 654.

(D) **Materiality and Competency in General.**

§ 384. Evidence *held* too remote to show one was sober.—*Gordon v. Commonwealth* (Ky.) 806.

§ 390. Defendant *held* not entitled to testify he had no idea of killing a person.—*Gordon v. Commonwealth* (Ky.) 806.

§ 392. In a robbery prosecution, the subpoenas and attachment for a witness, to procure whom accused applied for a continuance, which was denied, as well as testimony that such witness was present at a former term of court, *held* not admissible.—*Chancey v. State* (Tex. Cr. App.) 423.

§ 396. Where certain alleged threats made by accused were in part inquired about at accused's suggestion, the state was entitled to have all the testimony touching the same matter introduced in its behalf.—*Singleton v. State* (Tex. Cr. App.) 92.

§ 396. On a trial for theft, accused *held* entitled to show the balance of a conversation, a

part of which was brought out by the state.—*Maxey v. State* (Tex. Cr. App.) 927.

(E) **Best and Secondary and Demonstrative Evidence.**

§ 398. An entry in a family Bible as to the date of the prosecutrix's birth alleged to have been made by her mother, who was a witness, *held* inadmissible.—*Rowan v. State* (Tex. Cr. App.) 668.

§ 402. On a prosecution for violation of the liquor law, secondary evidence of defendant's license as a dramshop keeper *held* admissible.—*State v. Poundstone* (Mo. App.) 79.

§ 404. In a prosecution for assault with intent to murder, *held* error to allow the assaulted party to exhibit his scars to the jury.—*Graves v. State* (Tex. Cr. App.) 676.

§ 404. On a trial for theft, accused *held* entitled to have the property charged to have been stolen brought into court for comparison by the jury with that described by a witness.—*Wilson v. State* (Tex. Cr. App.) 943.

(F) **Admissions, Declarations, and Hearsay.**

Dying declarations, see Homicide, § 203.

§ 406. Statements by accused, made before the grand jury, not reduced to writing as required by the statute, are inadmissible.—*Fry v. State* (Tex. Cr. App.) 920.

§ 417. "Pedigree" defined.—*Rowan v. State* (Tex. Cr. App.) 668.

§ 417. In a prosecution for gaming, a question to accused's witness whether another did not ask certain persons in witness' presence and accused's absence where their poker players were, and the persons questioned stated that they did not know, was not admissible; the answer not binding accused.—*Melton v. State* (Tex. Cr. App.) 910.

§§ 419, 420. In a prosecution for selling liquor on Sunday, testimony by the officer who took the liquor from T., who purchased it, as to statements made by T. as to where he got it, *held* hearsay.—*Long v. State* (Tex. Cr. App.) 640.

§§ 419, 420. Testimony of an officer describing a place shown him by a witness *held* not hearsay.—*Long v. State* (Tex. Cr. App.) 640.

(G) **Acts and Declarations of Conspirators and Codefendants.**

§ 423. Acts or declarations of an alleged conspirator to be admissible must relate to what was done or said while the conspiracy continued.—*Wiley v. State* (Ark.) 249.

§ 424. On a trial for larceny, evidence that a part of the stolen property was found in the possession of a third person jointly indicted with accused *held* admissible.—*Wiley v. State* (Ark.) 249.

§ 427. On a trial for larceny, evidence that a part of the stolen property was found in the possession of accused and a third person jointly indicted with accused *held* admissible to establish a conspiracy.—*Wiley v. State* (Ark.) 249.

§ 427. Before evidence of the acts or declarations of an alleged conspirator is admissible, the conspiracy must be shown by other evidence.—*Wiley v. State* (Ark.) 249.

§ 427. In a prosecution of two for burglary, in the absence of evidence of co-operation between them, evidence that goods stolen were found in the possession of either defendant is not admissible against the other.—*Love v. State* (Tex. Cr. App.) 932.

**(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.**

Use of writings to refresh memory of witness, see Witnesses, § 255.

§ 438. In a homicide case, *held*, that the court properly permitted the jury to view and consider a photograph purporting to show the situation of the parties, and conditions of the encounter.—*Sellers v. State* (Ark.) 770.

**(I) Opinion Evidence.**

§ 448. A question in a robbery prosecution *held* properly excluded as calling for witness' opinion on a question of law.—*Chancey v. State* (Tex. Cr. App.) 426.

§ 448. In a prosecution for rape, it was error to permit prosecutrix's mother to testify that she saw nothing to arouse her suspicions of intimacy between prosecutrix and accused until after he had left the house when she found letters, not introduced, which aroused her suspicions.—*Rowan v. State* (Tex. Cr. App.) 668.

§ 448. In a prosecution for rape, evidence of defendant's statement after he had obtained a new trial from his first conviction that he was really guilty *held* admissible as an admission.—*Rowan v. State* (Tex. Cr. App.) 668.

**(J) Testimony of Accomplices and Codefendants.**

Corroboration of testimony of female in prosecution for rape, see Rape, § 54.

§ 507. A definition of an accomplice in relation to accomplice's testimony *held* correct.—*Pace v. State* (Tex. Cr. App.) 949.

§ 507. If accused's illegitimate daughter voluntarily had intercourse with him, she was an accomplice.—*Wadkins v. State* (Tex. Cr. App.) 959.

§ 511. Under Cr. Code Prac. § 241, the corroboration of an accomplice must connect accused with the commission of the offense.—*Frazier v. Commonwealth* (Ky.) 797.

§ 511. In a trial for adultery, the woman with whom the crime is charged to have been committed cannot corroborate herself.—*Smith v. State* (Tex. Cr. App.) 919.

**(K) Confessions.**

§ 519. Confessions voluntarily made while accused was in jail and while he was in the jail yard were properly admitted in evidence.—*Crosby v. State* (Ark.) 781.

§ 534. Under Code Cr. Proc. 1895, art. 790, as amended by Laws 30th Leg. c. 118, *held* that, where one accused of robbery turned the stolen property over to an officer upon her arrest, her admission made to him at the time, that she had the property, was admissible.—*Martin v. State* (Tex. Cr. App.) 681.

**(L) Evidence at Preliminary Examination or at Former Trial.**

§ 539. Testimony of a witness on a former trial is not admissible, in the absence of a showing that he is dead or beyond the jurisdiction of the court.—*Wyatt v. State* (Tex. Cr. App.) 929.

**(M) Weight and Sufficiency.**

Credibility, impeachment, corroboration, and contradiction of witnesses, see Witnesses, §§ 321-405.

**In particular criminal prosecutions.**

See Adultery, § 14; Burglary, § 41; Homicide, §§ 231-257; Larceny, §§ 55-64; Rape, §§ 52, 54.

For injuring fence, see Fences, § 28.

Violations of liquor laws, see Intoxicating Liquors, § 236.

§ 549. Courts and juries are not limited, in searching for the truth, to the mere words of a witness.—*State v. Draughn* (Mo. App.) 20.

§ 560. It is not necessary to sustain a conviction that evidence should show the guilt of defendant beyond the possibility of a doubt, but only beyond a reasonable doubt.—*State v. Draughn* (Mo. App.) 20.

**XI. TIME OF TRIAL AND CONTINUANCE.**

§ 586. The granting or refusing of a continuance is largely a matter of discretion.—*Deckard v. State* (Tex. Cr. App.) 673.

§ 593. Refusal to grant a continuance for absence of counsel for accused charged with murder *held* reversible error.—*Ray v. Commonwealth* (Ky.) 792.

§ 594. The refusal of a continuance for the absence of a nonresident witness could not be sustained because there was no certainty that his presence could be obtained at any term of court, since Cr. Code Prac. § 153, authorizes a defendant to take depositions of a nonresident witness.—*Settle v. Commonwealth* (Ky.) 393.

§ 594. An application for a continuance for absent witness *held* not to make a sufficient showing.—*Boyd v. State* (Tex. Cr. App.) 651.

§ 594. A continuance will not be granted in a criminal case to procure the testimony of a fugitive from justice, whose whereabouts is unknown.—*Deckard v. State* (Tex. Cr. App.) 673.

§ 595. In a trial for rape of a girl under 16 years of age, defendant was entitled to a continuance to procure the testimony of a physician who officiated at the birth of prosecutrix, and whose testimony would show that she was over such age.—*Settle v. Commonwealth* (Ky.) 393.

§ 595. In a trial for rape, defendant *held* entitled to a continuance for absence of a witness.—*Settle v. Commonwealth* (Ky.) 393.

§ 595. Testimony of a witness, to procure which a continuance was asked in a criminal prosecution, *held* not material, so that the continuance was properly denied.—*Chancey v. State* (Tex. Cr. App.) 426.

§ 596. Proposed testimony, which was the same as that of a witness sought to be impeached, was not impeaching testimony, so as to authorize a continuance in a criminal case to procure it for that purpose.—*Chancey v. State* (Tex. Cr. App.) 426.

§ 597. The refusal of a continuance for absence of a witness *held* proper.—*Singleton v. State* (Tex. Cr. App.) 92.

§ 597. A continuance for absence of a witness was properly refused, where the testimony of all witnesses rendered it certain such witness was not seen at the time of the homicide.—*Singleton v. State* (Tex. Cr. App.) 92.

§ 597. Application for continuance for absent witness *held* properly refused.—*Wigfall v. State* (Tex. Cr. App.) 649.

§ 598. The denial in a criminal case of a second application for a continuance to procure an absent witness *held* not an abuse of the trial court's discretion.—*Deckard v. State* (Tex. Cr. App.) 673.

§ 600. In a prosecution for rape, *held*, that the court did not abuse its discretion in refusing a continuance because of the absence of certain witnesses.—*Druin v. Commonwealth* (Ky.) 856.

§ 603. Statement of essentials of motion for continuance for absence of witnesses.—*Shinn v. State* (Ark.) 263.

§ 608. A continuance for absence of a witness was properly refused, where the affidavit

of the witness denied that she would testify to the facts stated in the application.—Singleton v. State (Tex. Cr. App.) 92.

§ 608. Nothing will be presumed to aid a second application for a continuance in a criminal case.—Deckard v. State (Tex. Cr. App.) 673.

## XII. TRIAL.

Competency of and challenge to jurors, see Jury, § 87.

Summoning, attendance, discharge, and compensation of jurors, see Jury, §§ 66-72.

### *In particular criminal prosecutions.*

See Arson, § 41; Assault and Battery, § 96; Burglary, § 46; Forgery, § 48; Homicide, §§ 266-309; Larceny, § 78; Rape, § 50; Robbery, § 26; Threats, § 8.

For carrying concealed weapons, see Weapons, § 17.

For disorderly conduct, see Disorderly Conduct, § 12.

Violations of liquor laws, see Intoxicating Liquors, § 239.

### (B) Course and Conduct of Trial in General.

§ 649. Refusing to allow defendant's counsel five minutes in which to consult with witnesses at the close of state's case *held* not ground for reversal.—Davis v. State (Tex. Cr. App.) 104.

§ 656. A remark by the court, in ruling upon an objection to a question, that he did not think it was material, but would permit it, was improper.—Melton v. State (Tex. Cr. App.) 910.

§ 656. A statement by the judge, in the hearing of the jury, that he believed defendant guilty as a matter of law, *held* erroneous.—Dean v. State (Tex. Cr. App.) 924.

### (C) Reception of Evidence.

Examination of witnesses, see Witnesses, §§ 240-277.

Eyewitnesses in prosecution for homicide, see Homicide, § 266.

On prosecution for homicide, see Homicide, § 266.

§ 665. A witness being an officer of the court, *held* it may, in its discretion, exempt him from the operation of the rule.—Perkins v. Commonwealth (Ky.) 794.

§ 665. In a prosecution for rape, *held* proper to allow the father of the girl who testified as a witness to remain in the courtroom, and assist in the prosecution.—Druin v. Commonwealth (Ky.) 856.

§ 673. The mere admission of evidence *held* equivalent to a statement by the court that it tends in some degree to sustain the issue, though its weight is for the jury.—Hogue v. State (Ark.) 783.

§ 673. Where a previously written statement, contradictory of a witness' testimony in court, is admissible for the purpose of impeachment, the court should by an instruction confine its consideration to that purpose.—Goss v. State (Tex. Cr. App.) 107.

§ 676. The trial court may use a sound discretion in the matter of limiting the number of witnesses, especially on questions of impeachment merely.—State v. Bowerman (Mo. App.) 41.

§ 676. A statute allowing costs against a county or state, providing that there shall be only three witnesses to prove any one fact, does not require the court to limit the number of witnesses to three on any question that may

be in issue in the trial of a case.—State v. Bowerman (Mo. App.) 41.

### (D) Objections to Evidence, Motions to Strike Out, and Exceptions.

§ 695. A general objection to evidence of the seizure of liquor in defendant's possession prior to the alleged sale is insufficient as an objection on the ground that such possession by defendant was not reasonably contemporaneous with the sale.—Goss v. State (Tex. Cr. App.) 107.

### (E) Arguments and Conduct of Counsel.

§ 719. In a prosecution for unlawfully carrying a pistol, certain argument of the prosecutor *held* improper.—Waterhouse v. State (Tex. Cr. App.) 633.

§ 719. Right of prosecuting attorney to make a statement from which it might be inferred that he knows a fact damaging to the accused or to a witness stated.—Pace v. State (Tex. Cr. App.) 949.

§ 721. Remarks of counsel *held* not a reference to the failure of defendants to testify.—State v. Faught (Mo. App.) 62.

§ 723. Certain argument of the commonwealth's attorney on a trial for murder *held* not prejudicial.—Frazier v. Commonwealth (Ky.) 797.

§ 730. In a prosecution for rape, erroneous statements by counsel for the prosecution in his argument *held* harmless, where the court at once instructed the jury to disregard them.—Druin v. Commonwealth (Ky.) 856.

§ 730. In a robbery case, argument of prosecuting attorney *held* not ground for reversal.—Martin v. State (Tex. Cr. App.) 681.

§ 730. Reference by counsel to a former conviction *held* reversible error, under Code Cr. Proc. 1895, art. 823, notwithstanding the court's reprimand of the attorney and instruction to the jury.—Wyatt v. State (Tex. Cr. App.) 929.

### (F) Province of Court and Jury in General.

§ 741. The case is for the jury, there being any evidence to connect defendant with commission of the crime.—Gordon v. Commonwealth (Ky.) 806.

§ 741. The weight of the evidence in a criminal case is for the jury.—Wadkins v. State (Tex. Cr. App.) 959.

§ 742. Whether a witness testifying to an agreement with accused and another person to manufacture a defense to a prosecution for homicide is an accomplice *held* to be for the jury.—Pace v. State (Tex. Cr. App.) 949.

§ 761. An instruction in a criminal case *held* not objectionable as assuming the existence of a fact.—Hogue v. State (Ark.) 783.

§ 761. In a prosecution for larceny and receiving stolen property, the court's failure to charge on circumstantial evidence with reference to the latter offense *held* erroneous.—Rupe v. State (Tex. Cr. App.) 655.

§ 761. In a prosecution for practicing medicine without a license, *held* error for the court to charge that the uncontradicted testimony in the case showed him to be a resident of B. county.—Kellogg v. State (Tex. Cr. App.) 938.

§ 763, 764. An instruction in a criminal case *held* not on the weight of the evidence.—Hogue v. State (Ark.) 783.

§ 763, 764. A charge in a larceny prosecution *held* not upon the weight of the evidence.—Brown v. State (Tex. Cr. App.) 101.

(G) *Necessity, Requisites, and Sufficiency of Instructions.**In particular criminal prosecutions.*

See Assault and Battery, § 96; Burglary, § 46; Forgery, § 48; Homicide, §§ 280-309; Larceny, § 78; Rape, § 59.

For carrying concealed weapons, see Weapons, § 17.

Violations of liquor laws, see Intoxicating Liquors, § 239.

§ 770. The court in a criminal case must correctly instruct on every point warranted by the evidence.—Gordon v. Commonwealth (Ky.) 800.

§ 775. An instruction on alibi *held* proper.—O'Hara v. State (Tex. Cr. App.) 95.

§ 775. In view of evidence, *held*, a requested instruction to acquit if defendant was not present at the time of deceased's death, and death was caused by strangulation, should have been given.—Betts v. State (Tex. Cr. App.) 424.

§ 778. An instruction on issues made by the state's evidence which, if sustained, would or might deny him the benefit of self-defense, *held* not to shift the burden of proof to him.—Bordeaux v. State (Tex. Cr. App.) 640.

§ 778. A charge in a prosecution for aggravated assault *held* erroneous, as placing the burden of proof on defendant to establish his defense.—Stuart v. State (Tex. Cr. App.) 656.

§ 780. In a burglary prosecution, a charge on the consideration of an accomplice's testimony and the sufficiency of the corroborative testimony *held* to sufficiently present the issue.—Tucker v. State (Tex. Cr. App.) 904.

§ 780. When the court leaves to the jury the question whether a witness is an accomplice, it should give the jury a guide to determine the question.—Pace v. State (Tex. Cr. App.) 949.

§ 780. An instruction as to conviction on the testimony of an accomplice *held* error.—Pace v. State (Tex. Cr. App.) 949.

§ 780. If accused's illegitimate daughter voluntarily had intercourse with him, the jury should have been instructed that she was an accomplice.—Wadkins v. State (Tex. Cr. App.) 959.

§ 780. In a prosecution for incest with accused's illegitimate child, a charge *held* erroneous as on the weight of the evidence.—Wadkins v. State (Tex. Cr. App.) 959.

§ 781. Under Cr. Code Prac. § 240, one cannot be convicted on a confession not made in open court, unless the corpus delicti is otherwise shown.—Frazier v. Commonwealth (Ky.) 797.

§ 782. A charge in a larceny prosecution *held* not misleading as tending to require a less amount of proof to convict than is required by statute.—Brown v. State (Tex. Cr. App.) 101.

§ 783. In a prosecution for rape, it was error to omit to charge that certain impeaching testimony should be limited to that purpose.—Rowan v. State (Tex. Cr. App.) 668.

§ 784. Where the only question to be determined by the jury is intent, the court is not required to charge on circumstantial evidence.—William v. State (Tex. Cr. App.) 964.

§ 784. Where the act constituting the crime is proved by direct and positive evidence, the court is not required to instruct on the law of circumstantial evidence, though the intent is proved by circumstances.—Williams v. State (Tex. Cr. App.) 954.

§ 784. The court is not required to charge on circumstantial evidence, unless the testimony is wholly circumstantial.—Williams v. State (Tex. Cr. App.) 954.

§ 787. An instruction *held* not objectionable as not in terms instructing the jury that they could not consider defendant's failure to testify.—Singleton v. State (Tex. Cr. App.) 92.

§ 787. An instruction regarding defendant's failure to testify *held* proper.—O'Hara v. State (Tex. Cr. App.) 95.

§ 790. Laws 1901, p. 140 (Ann. St. 1906, § 2627), requiring the court to instruct on all questions of law arising in the case, does not apply to misdemeanors.—State v. Poundstone (Mo. App.) 79.

§ 792. An instruction on a question of principals in the theft of property *held* proper.—McCoy v. State (Tex. Cr. App.) 921.

§ 810. An instruction on the question of manslaughter *held* proper, and not contradictory of a further instruction on the same subject.—Davis v. State (Tex. Cr. App.) 104.

§ 810. In a prosecution for homicide, conflicting instructions *held* error.—Barbee v. State (Tex. Cr. App.) 961.

§ 811. While in a theft prosecution accused's forfeiture of his bail bond and flight, as well as his explanation of such facts, were admissible, the court should not refer to either the incriminating or explanatory evidence in its charge.—Brown v. State (Tex. Cr. App.) 101.

§ 811. An instruction *held* not erroneous as ignoring issues.—Smith v. State (Tex. Cr. App.) 679.

§ 811. An instruction as to the effect of an isolated part of the evidence was properly refused.—Wadkins v. State (Tex. Cr. App.) 959.

§ 814. The refusal of an instruction not warranted by the facts proven is proper.—Middleton v. Commonwealth (Ky.) 355.

§ 814. In a criminal prosecution, under two counts in an indictment, where one count is abandoned by the county attorney, it is error to authorize a conviction under either of the counts.—Austin v. State (Tex. Cr. App.) 636.

§ 814. A witness *held* not an accomplice.—Fields v. State (Tex. Cr. App.) 652.

§ 814. A charge, in a prosecution for horse theft, that unless accused was in exclusive possession of the horse the jury should acquit, *held* properly refused as not based on the evidence.—Johnson v. State (Tex. Cr. App.) 664.

§ 814. Where, in a criminal case, there was no showing that any statements or confessions were made by accused, there was no error in refusing requested charges that statements and confessions made by him while under arrest were not competent.—Johnson v. State (Tex. Cr. App.) 664.

§ 814. In a prosecution for burglary of a saloon, certain testimony *held* not to necessarily connect a witness with the crime, so as to require a charge that she was an accomplice.—Tucker v. State (Tex. Cr. App.) 904.

§ 822. Instructions on arson *held* sufficient, when construed as a whole, notwithstanding omission from one of the word "willful".—Wigfall v. State (Tex. Cr. App.) 649.

§ 822. Instructions should be construed as a whole.—Tucker v. State (Tex. Cr. App.) 904.

§ 823. The giving of an instruction which singles out a circumstance *held* not prejudicial in view of the whole charge.—Hogue v. State (Ark.) 783.

§ 823. An instruction *held* not subject to the objection of failure to require the existence of malice to constitute murder in the second degree.—Davis v. State (Tex. Cr. App.) 104.

§ 823. In view of the subsequent charge given in a robbery prosecution, accused *held* not

prejudiced by a part of a prior charge.—*Chan-  
cey v. State* (Tex. Cr. App.) 426.

§ 823. In a prosecution for aggravated as-  
sault, accused *held* not prejudiced by an instruc-  
tion on self-defense.—*Decker v. State* (Tex. Cr.  
App.) 912.

(H) Requests for Instructions.

§ 825. Where the court charges as to all  
questions which are apparently in issue, if de-  
fendant wishes instructions on other questions  
which he thinks are involved, he should request  
them.—*State v. Ramsauer* (Mo. App.) 67.

§ 825. In a prosecution for fighting in a pub-  
lic place, a charge *held* correct, and a requested  
charge properly refused.—*Austin v. State* (Tex.  
Cr. App.) 639.

§ 829. Error cannot be predicated on the re-  
fusal of instructions on subjects fully covered  
by full and accurate instructions given.—*Sellers  
v. State* (Ark.) 770.

§ 829. A charge requested in a larceny pro-  
secution as to where the theft was committed  
*held* to be fully covered by charges given.—  
*Brown v. State* (Tex. Cr. App.) 101.

(J) Custody, Conduct, and Deliberations  
of Jury.

§ 854. The statute forbidding the separation  
of the jury applies to jurors who have been seg-  
regated and impaneled in the case, and does  
not require jurors to be locked up after they  
have been examined as a whole, and no chal-  
lenges have been made, and they have not been  
selected or sworn.—*Martin v. State* (Tex. Cr.  
App.) 681.

§ 857. Statements made by jurors while con-  
sidering their verdict *held* not objectionable as  
the receipt of additional testimony, but were  
justifiable statements of their conclusions.—*Rea-  
gan v. State* (Tex. Cr. App.) 685.

(K) Verdict.

Operation and effect as curing defects in plead-  
ing, see Indictment and Information, § 208.

§ 878. Where there is a fatally defective  
count in an information, and the case was sub-  
mitted on all counts, a general verdict of con-  
viction cannot stand.—*Smith v. State* (Tex. Cr.  
App.) 665.

XIII. MOTIONS FOR NEW TRIAL  
AND IN ARREST.

§ 938. Rule stated as to essentials of newly  
discovered evidence, as grounds for new trial.  
—*O'Hara v. State* (Tex. Cr. App.) 95.

§ 939. In a trial for robbery, a new trial  
for newly discovered evidence *held* properly re-  
fused.—*O'Hara v. State* (Tex. Cr. App.) 95.

§ 939. Accused *held* chargeable with want of  
diligence in failing to procure alleged newly  
discovered evidence.—*Reagan v. State* (Tex. Cr.  
App.) 685.

§ 939. Accused *held* not entitled to a new  
trial for newly discovered evidence.—*Williams v.  
State* (Tex. Cr. App.) 916.

§ 940. The court *held* required to grant a  
new trial, after conviction for aggravated as-  
sault, on the ground of newly discovered evi-  
dence disclosing a conspiracy between a third  
person and prosecutrix to bring about a convic-  
tion on perjured testimony.—*Piper v. State*  
(Tex. Cr. App.) 661.

§ 941. Alleged newly discovered evidence  
which is cumulative is not ground for new trial.  
—*Reagan v. State* (Tex. Cr. App.) 685.

§ 942. Alleged newly discovered evidence  
which is impeaching is not ground for new trial.  
—*Reagan v. State* (Tex. Cr. App.) 685.

§ 945. In a prosecution for homicide, alleged  
newly discovered evidence *held* probably untrue  
and probably would not have changed the result  
if admitted, and was therefore not ground for  
new trial.—*Reagan v. State* (Tex. Cr. App.) 685.

§ 956. A motion for new trial for misconduct  
of the jury was properly denied where the af-  
fidavits in support thereof were not specific, and  
the record failed to show that the misconduct  
in fact occurred.—*Reagan v. State* (Tex. Cr.  
App.) 685.

§ 957. Denial of a motion for a new trial  
for misconduct of the jury *held* not so clearly  
erroneous as to require a reversal.—*Douglas v.  
State* (Tex. Cr. App.) 933.

§ 959. Allowing and refusing cross-examina-  
tion on motion for new trial *held* proper.—*Gor-  
don v. Commonwealth* (Ky.) 806.

§ 959. Continuing to another term hearing  
of motion for new trial *held* proper.—*Gordon v.  
Commonwealth* (Ky.) 806.

XV. APPEAL AND ERROR, AND  
CERTIORARI.

See Homicide, §§ 338-340.

(A) Form of Remedy, Jurisdiction, and  
Right of Review.

§ 1024. Under the rulings of the Supreme  
Court, the state has no right to appeal from an  
order of the trial court sustaining a plea in  
abatement.—*State v. Donahue* (Mo. App.) 42.

(B) Presentation and Reservation in Low-  
er Court of Grounds of Review.

§ 1032. Objection that the record does not  
show return of indictment into court by the  
grand jury cannot be made for first time on  
appeal (Kirby's Dig. § 1233).—*Shinn v. State*  
(Ark.) 263.

§ 1035. Under Cr. Code Prac. § 281, *held*  
any error in not excluding a witness while oth-  
ers were testifying, having been brought to the  
court's attention only on motion for new trial,  
was not reviewable.—*Perkins v. Commonwealth*  
(Ky.) 794.

§ 1038. To take advantage of the omission of  
a special charge in a misdemeanor case, it should  
have been asked, and exception taken to its re-  
fusal.—*Gracy v. State* (Tex. Cr. App.) 659.

§ 1056. A conviction will not be disturbed  
for the failure to limit the scope of impeaching  
evidence, in the absence of an exception to such  
failure and a request for such limitation.—*Goss  
v. State* (Tex. Cr. App.) 107.

§ 1063. An instruction not objected to in the  
motion for new trial will not be reviewed on  
appeal.—*Rowan v. State* (Tex. Cr. App.) 668.

(D) Record and Proceedings Not in Rec-  
ord.

§ 1090. On appeal matter not evidenced  
by bill of exceptions will not be considered.—  
*O'Hara v. State* (Tex. Cr. App.) 95.

§ 1090. In absence of a bill of exceptions to  
the introduction of testimony, the Court of  
Criminal Appeals cannot consider any error  
with reference thereto.—*Chancey v. State* (Tex.  
Cr. App.) 426.

§ 1090. Refusal to grant a continuance, con-  
tested on the issue of diligence, cannot be con-  
sidered, in the absence of a bill of exceptions  
reserved to the ruling.—*Davis v. State* (Tex.  
Cr. App.) 634, 635.

§ 1090. Error in the admission of testimony  
need not be considered on appeal, where no bill  
of exception was reserved.—*Ellis v. State* (Tex.  
Cr. App.) 667.

§ 1091. In the absence of the application for  
a continuance for the absence of witnesses, the

bill of exceptions *held* too indefinite.—Clark v. State (Tex. Cr. App.) 632.

§ 1092. A bill of exceptions, which does not appear to have been filed, cannot be considered.—Oliver v. State (Tex. Cr. App.) 637.

§ 1092. Mere statement of a ground of objection in the bill of exceptions is not a certificate of the judge that the fact stated is true.—Douglas v. State (Tex. Cr. App.) 933.

§ 1099. A statement of facts, not filed within the statutory time fixed after the adjournment of the term, cannot be considered on appeal.—Oliver v. State (Tex. Cr. App.) 637.

§ 1099. Under Act 31st Leg. p. 376, c. 39, § 7, a statement of facts *held* filed in time when filed within the time as extended.—Pace v. State (Tex. Cr. App.) 949.

§ 1103. Under Rev. St. 1899, § 2716 (Ann. St. 1906, p. 1595), where neither party filed an abstract of record, and the state filed a complete record of the case, including the information, plea in abatement, demurrer, and ruling of the court below, the court, on appeal, will examine the record, including all the motions and everything that was done during the trial as shown by the record.—State v. Donahue (Mo. App.) 42.

§§ 1103, 1104. Where an appeal is without a supersedeas, it is appellant's duty to file a full transcript or an abstract of the record.—State v. Cowan (Mo. App.) 587.

§ 1110. A bill of exceptions cannot be aided either by statements in reply to a motion for a new trial, nor by the statement of facts.—Douglas v. State (Tex. Cr. App.) 933.

§ 1111. Qualification or explanation of a bill of exceptions by the court will control recitals in the bill.—Douglas v. State (Tex. Cr. App.) 933.

§ 1111. A bill of exceptions controls the statement of facts.—Douglas v. State (Tex. Cr. App.) 933.

§ 1112. Counsel for accused, having accepted a bill of exceptions with a qualification of the judge indorsed thereon, *held* estopped to claim it to be unfair and injurious.—Douglas v. State (Tex. Cr. App.) 933.

§ 1114. Where certain judgments of conviction of the local option law were not made to appear in the motion to require appellant to give a peace bond, they will not be considered on appeal, since they form no part of the record.—Sharp v. Commonwealth (Ky.) 316.

§ 1118. In view of condition of the record on a criminal appeal, and of the application for a continuance, *held* that the Court of Criminal Appeals could not hold that the application was a first application for a continuance.—Chancey v. State (Tex. Cr. App.) 426.

§ 1120. Where the bill of exceptions to the exclusion of testimony does not show what witness' answer would have been, or the ground of the objection thereto, or the purpose for which it was offered, the trial court's action in excluding it cannot be reviewed.—Chancey v. State (Tex. Cr. App.) 426.

§ 1122. A conviction will not be reversed, in the absence of a statement of facts, for an alleged erroneous charge.—Emerson v. State (Tex. Cr. App.) 684.

§ 1124. A motion for a new trial for newly discovered evidence, not accompanied by an affidavit of the proposed witness, nor containing anything to verify a statement as to what he would testify, and not sworn to by accused, *held* insufficient.—Martin v. State (Tex. Cr. App.) 681.

#### (E) Assignment of Errors and Briefs.

§ 1129. An assignment simply that the court erred in giving instructions is insufficient.—Gracy v. State (Tex. Cr. App.) 659.

§ 1130. Under Rev. St. 1899, § 2716 (Ann. St. 1906, p. 1595), where neither party filed a brief, and the state filed a complete record of the case, including the information, plea in abatement, demurrer, and ruling of the court below, the court, on appeal, will examine the record, including all the motions and everything that was done during the trial as shown by the record.—State v. Donahue (Mo. App.) 42.

#### (F) Dismissal, Hearing, and Rehearing.

§ 1131. A dismissed appeal will not be reinstated, where the term of court in which defendant was convicted was not legally held.—Thompson v. State (Tex. Cr. App.) 659.

#### (G) Review.

In prosecutions for homicide, see Homicide, §§ 338-340.

§ 1134. In passing on exceptions to evidence, the reviewing court is guided by the explanation of the trial judge in the bill of exceptions accepted by defendant.—Goss v. State (Tex. Cr. App.) 107.

§ 1137. Accused cannot complain on appeal of an instruction he himself requested.—Decker v. State (Tex. Cr. App.) 912.

§ 1141. The court on appeal *held* authorized to presume that the matters stated in an affidavit in support of a motion for new trial on the ground of newly discovered evidence are true.—Piper v. State (Tex. Cr. App.) 661.

§ 1144. Where the record showed that one B. was the county judge of a certain county, the Court of Criminal Appeals would judicially determine that he was authorized to administer oath, and it would be presumed, in the absence of anything to the contrary, that such B., as county judge, took the complaint in the case, though the name of the county was omitted.—Cardenas v. State (Tex. Cr. App.) 953.

§ 1153. There is no presumption of the capacity of a witness under 14 years of age to testify; the question of his competency being for the trial judge's discretion, the exercise of which is not reviewable in absence of clear abuse or manifest error.—Crosby v. State (Ark.) 781.

§ 1153. The discretion of the court in allowing a witness to stay in the courtroom and assist in the trial, while others are excluded, is not ground for reversal, unless discretion was abused.—Druin v. Commonwealth (Ky.) 856.

§ 1156. Under Cr. Code Prac. § 281, the court on appeal cannot reverse for errors in refusing a new trial.—Ray v. Commonwealth (Ky.) 792.

§ 1156. Denial of new trial for prejudice of jury *held* not reviewable.—Gordon v. Commonwealth (Ky.) 806.

§ 1156. Where, on a motion for new trial, it was for the first time disclosed that one of the jurors had expressed an opinion before the trial that defendant was guilty, under Cr. Code Prac. § 281, the court cannot review the question on appeal.—Druin v. Commonwealth (Ky.) 856.

§ 1156. Whether a new trial should be granted for misconduct of the jury is within the discretion of the trial court, whose ruling will not be interfered with unless clearly erroneous.—Douglas v. State (Tex. Cr. App.) 933.

§ 1159. Where there is any substantial evidence to sustain it, a verdict of guilty will not be disturbed on appeal.—Wiley v. State (Ark.) 249.

§ 1159. Where evidence was sufficient to take the question of defendant's guilt to the jury, the verdict will not be disturbed.—*Hughes v. Commonwealth (Ky.)* 788.

§ 1159. On appeal in a criminal case, the only inquiry as to sufficiency of evidence *held* to be whether there was any competent evidence conducing to show defendant's guilt.—*Perkins v. Commonwealth (Ky.)* 794.

§ 1159. A conviction will not be reversed as against the evidence, unless there is a total absence of evidence, or the necessary inference is that the jury acted from prejudice.—*State v. Faught (Mo. App.)* 62.

§ 1159. A verdict of guilty, on conflicting evidence, is conclusive on appeal, and the Court of Criminal Appeals can only determine whether accused was tried according to law.—*Chancey v. State (Tex. Cr. App.)* 426.

§ 1160. When the verdict has been approved by the trial court, the appellate court will not interfere.—*O'Hara v. State (Tex. Cr. App.)* 95.

§ 1160. The denial of a motion for a new trial for the jury's misconduct will not be disturbed, where the testimony on which the ruling is based is conflicting.—*Williams v. State (Tex. Cr. App.)* 916.

§ 1165. There having been no substantial error on the trial, *held* conviction will be affirmed.—*Gordon v. Commonwealth (Ky.)* 806.

§ 1166. Refusal of a continuance on the ground that certain witnesses were absent will not be interfered with on appeal, unless the substantial rights of the accused were prejudiced.—*Druin v. Commonwealth (Ky.)* 856.

§ 1169. In a prosecution for rape, the court's error in admitting certain hearsay testimony bearing on prosecutrix's age *held* prejudicial.—*Rowan v. State (Tex. Cr. App.)* 668.

§ 1169. In a prosecution for aggravated assault, there was no substantial error in permitting complainant to testify that he was apprehensive of blood poisoning from his wounds.—*Decker v. State (Tex. Cr. App.)* 912.

§ 1170½. Any error in excluding a question, in a robbery prosecution, on the ground that it called for witness' opinion on a question of law, *held* not of sufficient importance to authorize a reversal of a judgment of conviction.—*Chancey v. State (Tex. Cr. App.)* 426.

§ 1171. A conviction *held* not reversible for inappropriate remarks of counsel when not such as to influence the verdict.—*Sellers v. State (Ark.)* 770.

§ 1171. Remarks of counsel *held* improper, but not so prejudicial as to require a reversal.—*Davis v. State (Tex. Cr. App.)* 104.

§ 1171. In a robbery prosecution, a statement by the district attorney in argument that a certain person was the man who assisted accused in committing the robbery *held* not to have prejudiced accused.—*Chancey v. State (Tex. Cr. App.)* 426.

§ 1172. Ordinarily, the giving of an unauthorized instruction is ground for reversal.—*Middleton v. Commonwealth (Ky.)* 355.

§ 1172. Under Cr. Code Prac., § 225, the giving of additional instructions after the argument has commenced is not ground for reversal.—*Middleton v. Commonwealth (Ky.)* 355.

§ 1172. Error in an instruction in failing to define certain words *held* harmless.—*State v. Bowerman (Mo. App.)* 41.

§ 1172. In a prosecution for unlawfully carrying a pistol, where the court charged the law more favorably than defendant could have asked on the issue of the authority of the city marshal to deputize him, he cannot complain.—*Schuh v. State (Tex. Cr. App.)* 808.

§ 1172. In a prosecution for assault, accused *held* not prejudiced by error in the court's general definition of what constitutes an assault.—*Reynolds v. State (Tex. Cr. App.)* 931.

§ 1173. In a prosecution for aggravated assault, a refusal of a request to charge *held* prejudicial error, in view of the charge given.—*Stuart v. State (Tex. Cr. App.)* 656.

#### (H) Determination and Disposition of Cause.

§ 1182. Where the only record before the court on appeal is the judgment following the verdict assessing a fine, and there is no error to be found therein, it will be affirmed.—*State v. Cowan (Mo. App.)* 587.

§ 1186. Where it appears that accused had a substantially fair trial of the merits of his case, a conviction will not be disturbed.—*Middleton v. Commonwealth (Ky.)* 355.

§ 1189. Where there is a good count in the information, on reversal of a general verdict of conviction for defects in one count, the cause will be remanded for a new trial, rather than dismissed.—*Smith v. State (Tex. Cr. App.)* 665.

### XVII. PUNISHMENT AND PREVENTION OF CRIME.

Laws relating to punishment for larceny, see Larceny, § 88.

§ 1223. Under Ky. St. § 2557b, subd. 3 (*Russell's St. § 3639*), the court cannot require a peace bond where defendant was tried and convicted of two violations on the same day.—*Sharp v. Commonwealth (Ky.)* 316.

### CRIMINAL LIBEL

See Libel and Slander, § 152.

### CROPS.

Injuries to growing crops, measure of damages, see Damages, § 112.

### CROSS-DEMANDS.

See Set-Off and Counterclaim.

### CROSS-EXAMINATION.

Of witnesses in general, see Witnesses, §§ 268-277, 330.

### CROSSINGS.

Railroad crossings, see Railroads, §§ 244, 413. Railroad crossings, accidents at, see Railroads, §§ 327-350.

### CUMULATIVE EVIDENCE.

Newly discovered cumulative evidence as ground for new trial, see Criminal Law, § 941.

### CURATORS.

See Guardian and Ward.

Ad litem in action by or against infant, see Infants, §§ 82-110. Ad litem, in action by or against insane persons, see Insane Persons, § 94.

### CURSING.

See Disorderly Conduct.

### CURTESY.

See Dower.

Rights of surviving husband in respect of community property, see Husband and Wife, § 273.

## CUSTODIA LEGIS.

Replevy of goods in custody of law, see Replevin, § 4.

## CUSTODY.

Of jury, see Criminal Law, § 854.

## CUSTOMS AND USAGES.

§ 11. A custom by a telegraph company to receive messages by telephone will render the company liable for failure to deliver the message.—*Gore v. Western Union Telegraph Co.* (Tex. Civ. App.) 977.

## DAMAGES.

Compensation for property taken for public use, see Eminent Domain, §§ 69-119.  
Release of claim for damages, see Release.

### *Damages for particular injuries.*

See Death, §§ 96, 99; Malicious Prosecution, § 69.

Breach of contract for carriage of passenger, see Carriers, § 277.

Breach of contract of sale, see Sales, §§ 384, 418.

Flowage, see Waters and Water Courses, § 178.

Injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 67, 71.

Injuries from public improvements, see Municipal Corporations, §§ 396, 404.

Loss of or injury to goods in course of transportation, see Carriers, § 135.

Taking or detention of personal property, see Replevin, §§ 82, 84.

Trespass, see Trespass, § 50.

*Recovery in particular actions or proceedings.*  
See Replevin, §§ 82, 84; Trespass, § 50.

## I. NATURE AND GROUNDS IN GENERAL.

§ 4. The law presumes that nominal damages result from breach of an officer's duty to make a true return to a summons.—*State ex rel. Armour Packing Co. v. Dickmann* (Mo. App.) 29.

## II. NOMINAL DAMAGES.

In action on bond of sheriff for false return, see Sheriffs and Constables, § 170.

Refusal to award nominal damages as ground for reversal, see Appeal and Error, § 1171.

§ 11. In tort there can be no substantial recovery unless there is some damage, and there must be not only a wrong done, but a consequent injury, to permit a recovery.—*State ex rel. Armour Packing Co. v. Dickmann* (Mo. App.) 29.

§ 11. In an action on the bond of a sheriff for a false return to a summons, resulting in default judgment against plaintiff, the sheriff held entitled to show, in mitigation of a substantial recovery, that plaintiff's payment of the judgment liquidated a just debt.—*State ex rel. Armour Packing Co. v. Dickmann* (Mo. App.) 29.

## III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

§ 30. A person permanently injured held entitled to recover for the diminished earning power because of such injury, but not for permanent impairment of health in addition thereto.—*City of Georgetown v. Groff* (Ky.) 888.

§ 32. "Inconvenience" defined.—*Texas Traction Co. v. Hanson* (Tex. Civ. App.) 494.

§ 33. Proper measure of damages, in an action for injuries, where at the time of the accident plaintiff was in an enfeebled condition, stated.—*Roberts v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 230.

§ 34. Where the person injured used ordinary care in selecting the surgeon who treated him and who amputated his foot and leg, he could recover for the loss of his foot, though the physician made a mistake in amputating it.—*Houston & T. C. R. Co. v. Hanks* (Tex. Civ. App.) 136.

§ 34. Where one sustaining a personal injury used ordinary care in treating it, that he improperly treated it did not defeat a recovery of the damages suffered by him because of such improper treatment.—*Texas & P. Ry. Co. v. Mosley* (Tex. Civ. App.) 485.

§ 37. Measure of damages in an action by a parent for a personal injury to a minor child defined.—*Pacific Express Co. v. Watson* (Tex. Civ. App.) 127.

## (B) Aggravation, Mitigation, and Reduction of Loss.

Duty to prevent or reduce damages from failure of warehousemen to store property, see Warehousemen, § 34.

§ 59. In an action on the bond of a sheriff for a false return to a summons, resulting in default judgment against plaintiff, the sheriff held entitled to show, in mitigation of a substantial recovery, that plaintiff's payment of the judgment liquidated a just debt.—*State ex rel. Armour Packing Co. v. Dickmann* (Mo. App.) 29.

## (C) Interest, Costs, and Expenses of Litigation.

§ 69. One suing for the negligent destruction of property by fire may recover interest from the date of the loss.—*Steger v. Barrett* (Tex. Civ. App.) 174.

## IV. LIQUIDATED DAMAGES AND PENALTIES.

Restraining breach of contract providing for liquidated damages, see Injunction, § 59.

§ 74. Contracts for liquidated damages held not sustained except on the principle that parties may agree in advance as to what the damages will be in case of a breach thereof.—*Kellam v. Hampton* (Tex. Civ. App.) 970.

§ 76. Where there is a doubt as to the intention of the parties as to whether the sum reserved in the contract is a penalty or liquidated damages, the law declares the sum a penalty.—*Kellam v. Hampton* (Tex. Civ. App.) 970.

§ 76. In the absence of an agreement the law decrees that the sum reserved in a contract is a penalty which cannot be recovered by the person for whose benefit it is reserved without proof of the damages sustained by him.—*Kellam v. Hampton* (Tex. Civ. App.) 970.

§ 77. The criterion in the interpretation of a contract, as to whether the sum reserved therein is a penalty or liquidated damages, held the intention of the parties ascertained by the terms of the instrument itself.—*Kellam v. Hampton* (Tex. Civ. App.) 970.

§ 78. Where a contract not to engage in a rival business in a particular locality within a specified time provides for the payment of a stipulated sum on a breach, the amount is regarded as liquidated damages and not as a penalty.—*Wills v. Forester* (Mo. App.) 1090.

§ 78. A contract for the sale of real estate held not to make a note given by the purchaser for a part of the price liquidated damages.—*Kellam v. Hampton* (Tex. Civ. App.) 970.

§ 79. Where damages are not capable of being ascertained by any satisfactory rule, and the language of the contract admits it, the sum reserved therein is liquidated damages, but otherwise it is a penalty subject to the intention of the parties as evidenced by the contract.—*Kellam v. Hampton* (Tex. Civ. App.) 970.

§ 81. To give a deposit the character of liquidated damages, the contract must be proved by which the parties agreed that in case of a breach by the depositor the amount of the deposit shall go to the adverse party as damages.—*Kellam v. Hampton* (Tex. Civ. App.) 970.

### V. EXEMPLARY DAMAGES.

For injuries to licensees on railroad property, see Railroads, § 282.

### VI. MEASURE OF DAMAGES.

For trespass, see Trespass, § 50.

#### (A) Injuries to the Person.

§ 95. Measure of damages for a personal injury stated.—*City of Georgetown v. Groff* (Ky.) 888.

#### (B) Injuries to Property.

§ 108. The measure of plaintiff's damages for injuries to land by oil leaking from defendant's pipe line, *held* the difference in value before and after the injury.—*Gulf Pipe Line Co. v. Brymer* (Tex. Civ. App.) 1007.

§ 112. In an action for destruction of plaintiff's meadow from fire, where the roots of the grass were killed, the measure of damage was the rental value of the land and the cost of re-seeding.—*Crouch v. Kansas City Southern Ry. Co.* (Mo. App.) 1077.

§ 112. Statement of measure of damages for burning grass and sod.—*Texas Cent. R. Co. v. Qualls* (Tex. Civ. App.) 140.

§ 112. In an action for injuries to growing crops, the measure of damages was properly stated as the difference between the reasonable market value of the crops that would have been raised but for the injury, less the reasonable value of additional work or expense that would have been necessary in raising and marketing such additional amount of crops and the reasonable market value, at the time of their maturity, of the crops actually raised.—*Missouri, K. & T. Ry. Co. of Texas v. Gilbert* (Tex. Civ. App.) 434.

§ 112. The measure of plaintiff's damages for grass and cornstalks destroyed by oil leaking from defendant's pipe line, *held* the market value.—*Gulf Pipe Line Co. v. Brymer* (Tex. Civ. App.) 1007.

#### (C) Breach of Contract.

§ 122. The measure of damages for a materialman's failure to furnish materials within a reasonable time is the rental value of the building during the delay.—*Leifer Mfg. Co. v. Gross* (Ark.) 1039.

### VII. INADEQUATE AND EXCESSIVE DAMAGES.

Ground for reversal of judgment, see Appeal and Error, § 1171.

Inspection of injuries by jury, see Trial, § 309.

#### For particular injuries.

See Death, § 99; Malicious Prosecution, § 69.

Detention of property, see Replevin, § 82.

Injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, § 71.

§ 130. A verdict in an action for personal injuries *held* not excessive.—*St. Louis Southwestern Ry. Co. v. Jackson* (Ark.) 241.

§ 132. In an action for personal injuries to a minor, 17 years old, a verdict for \$15,000 *held* not excessive.—*International & G. N. R. Co. v. Miller* (Tex. Civ. App.) 109.

§ 132. A verdict in a personal injury action *held* not excessive.—*Houston & T. C. R. Co. v. Hanks* (Tex. Civ. App.) 136.

### VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

#### (A) Pleading.

§ 153. A petition which, while not specifying the amounts of special damage sustained, stated a cause of action and showed some loss to plaintiff, was sufficient on demurrer.—*McDaniel v. Hutcherson* (Ky.) 384.

§ 153. In an action for breach of contract, plaintiff *held* not entitled to recover certain items of special damage, where the petition did not allege the amounts of such items.—*McDaniel v. Hutcherson* (Ky.) 384.

§ 155. Matter in mitigation, to be available, must be pleaded.—*State ex rel. Armour Packing Co. v. Dickman* (Mo. App.) 29.

§ 157. Interest *held* recoverable where the pleading praying for general relief demands judgment for a sum sufficient to include interest in addition to the sum claimed to be due at the time of the accrual of the cause of action.—*Erie City Iron Works v. Noble* (Tex. Civ. App.) 172.

§ 158. In an action for injuries to plaintiff's foot, necessitating two operations, certain evidence *held* admissible as symptomatic of the diseased condition necessitating the second operation.—*Houston & T. C. R. Co. v. Hanks* (Tex. Civ. App.) 136.

§ 159. An action being for depreciation in market value of a lot, injury to trees can only be considered as it affects such value.—*Southwestern Telegraph & Telephone Co. v. Smithdeal* (Tex.) 627.

#### (B) Evidence.

§ 163. The jury must be governed by the evidence in the case in awarding damages for pain and suffering.—*St. Louis, I. M. & S. Ry. Co. v. Dallas* (Ark.) 247.

§ 173. One suing for a personal injury may testify as to the amount he had earned in the management of other laborers, on it appearing that the injury rendered him unfit to perform the duties of managing other laborers.—*St. Louis Southwestern Ry. Co. v. Jackson* (Ark.) 241.

§ 174. Testimony in an action for burning of grass and sod as to the number of cattle it would pasture and the price for pasturing *held* admissible.—*Texas Cent. R. Co. v. Qualls* (Tex. Civ. App.) 140.

§ 175. Where it is claimed that a building has been defectively constructed, evidence is admissible of the specific defects, and to show the cost of removing defective materials and replacing the same.—*Leifer Mfg. Co. v. Gross* (Ark.) 1039.

§ 189. Evidence of damage *held* too indefinite to entitle defendant to a recoupment against plaintiff's claim for the contract price of building materials.—*Leifer Mfg. Co. v. Gross* (Ark.) 1039.

#### (C) Proceedings for Assessment.

Inspection of injuries by jury, see Trial, § 309.

§ 215. An instruction as to punitive damages should tell the jury that the giving of punitive damages is a matter of discretion.—*Chesapeake & O. Ry. Co. v. Conley* (Ky.) 861.

§ 216. In an action for injuries at a railroad crossing, the refusal to amend an instruction on the measure of damages *held* proper under

the evidence.—*Chesapeake & O. Ry. Co. v. Hawkins* (Ky.) 836.

§ 216. In an action for injuries, an instruction *held* proper.—*Roberts v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 230.

§ 216. An instruction, in an action for personal injuries, *held* to authorize double damages.—*Texas Traction Co. v. Hanson* (Tex. Civ. App.) 494.

§ 216. In a passenger's action for personal injuries, evidence *held* to authorize an instruction permitting recovery for future pain and diminished future earning capacity.—*Missouri, K. & T. Ry. Co. of Texas v. Farris* (Tex. Civ. App.) 497.

§ 217. In an action for injuries to land, grass, and cornstalks by the leakage of oil from defendant's pipe line, an instruction *held* misleading as authorizing a double recovery for the grass and the cornstalks.—*Gulf Pipe Line Co. v. Brymer* (Tex. Civ. App.) 1007.

**(D) Computation and Amount, Double and Treble Damages, and Remission.**

Review of amount of recovery, see Appeal and Error, §§ 295, 1004.

§ 228. A remittitur of special damages cures errors in respect thereto occurring in the trial.—*Steger v. Barrett* (Tex. Civ. App.) 174.

## DAMS.

In nonnavigable waters, see Waters and Water Courses, §§ 176-179.

## DANGEROUS WEAPONS.

Carrying weapons, see Weapons.

## DATE.

Misstatement of date of judgment in bond for writ of error, see Appeal and Error, §§ 384, 392.

Misstatement of date of judgment in petition for writ of error, see Appeal and Error, § 361.

## DEADLY WEAPONS.

Carrying weapons, see Weapons.

## DEATH.

Cause of loss within insurance policy, see Insurance, § 446.

Dying declarations in prosecutions for homicide, see Homicide, § 203.

Of devisee or legatee before gift takes effect, see Wills, § 555.

Of party to action as ground for abatement, see Abatement and Revival, §§ 58-77.

Testimony as to transactions with persons since deceased, see Witnesses, §§ 144-160.

## I. EVIDENCE OF DEATH AND OF SURVIVORSHIP.

Declaration of absentee, see Evidence, § 269.  
Hearsay evidence as to death, see Evidence, § 322.

Pleading in action on insurance certificate, see Insurance, § 815.

§ 2. The statutory presumption of death from seven years' absence from the state (Rev. St. 1899, § 3144 [Ann. St. 1906, p. 1786]) does not arise until it is conclusively shown that decedent left the state.—*Bradley v. Modern Woodmen of America* (Mo. App.) 69.

§ 2. Evidence *held* sufficient to give rise to the presumption of death after the lapse of seven years.—*Bradley v. Modern Woodmen of America* (Mo. App.) 69.

§ 2. The presumption of death from seven years' absence of a person may be rebutted by evidence of his unhappy domestic relations.—*Bradley v. Modern Woodmen of America* (Mo. App.) 69.

§ 2. Presumptions as to date of death from seven years' absence determined.—*Bradley v. Modern Woodmen of America* (Mo. App.) 69.

§ 2. The presumption of death from seven years' absence does not depend on the absentee's exposure to some peril which would be apt to shorten his life.—*Bradley v. Modern Woodmen of America* (Mo. App.) 69.

§ 2. Where it appears in an action on a life policy that insured disappeared and has not been heard from for more than seven years, the burden is on plaintiff to show that death occurred before the lapse of the policy.—*Bradley v. Modern Woodmen of America* (Mo. App.) 69.

§ 2. Matters to be considered in determining whether death occurred before the lapse of the policy determined.—*Bradley v. Modern Woodmen of America* (Mo. App.) 69.

## II. ACTIONS FOR CAUSING DEATH.

### (A) Right of Action and Defenses.

§ 31. Under Kirby's Dig. § 6290, creating a right of action for death, a mother *held* not an heir at law within the meaning of the statute.—*Kansas City Southern Ry. Co. v. Frost* (Ark.) 748.

### (B) Jurisdiction, Venue, and Limitations.

Venue of action against tram road, see Railroads, § 22.

### (D) Pleading and Evidence.

Opinion evidence, see Evidence, § 471.

### (E) Damages, Forfeiture, or Fine.

§ 95. Under Kirby's Dig. § 6290, creating a right of action for death, the damages recoverable in the case of children *held* not limited as matter of law to the time before majority.—*Kansas City Southern Ry. Co. v. Frost* (Ark.) 748.

§ 99. In an action for the death of a switchman, a recovery of \$15,000 *held* under the evidence not excessive.—*Kansas City Southern Ry. Co. v. Frost* (Ark.) 748.

### (F) Trial, Judgment, and Review.

Requests for instructions, see Trial, § 260.

§ 104. In an action by parents for the negligent death of a minor child, an instruction on the measure of damages *held* erroneous.—*Missouri, K. & T. Ry. Co. of Texas v. Kemendo* (Tex. Civ. App.) 968.

## DE BENE ESSE.

See Depositions.

## DEBTOR AND CREDITOR.

See Attachment; Bankruptcy; Compromise and Settlement; Execution; Exemptions; Fraudulent Conveyances; Garnishment; Homestead; Payment; Release.

Application of firm assets to liabilities, see Partnership, § 181.

Debts of intestate, see Descent and Distribution, § 125.

## DECEDENTS.

Estates, see Descent and Distribution; Executors and Administrators; Wills.

Testimony as to transactions with persons since deceased, see Witnesses, §§ 144-160.

## DECEIT.

See Fraud.

## DECEPTION.

See Fraud.

## DECLARATION.

In pleading, see Pleading.

## DECLARATIONS.

As evidence, see Criminal Law, §§ 417, 423-427; Evidence, §§ 267-274.  
Dying declarations, see Homicide, § 203.

## DECREE.

Judgments in general, see Judgment.

## DEDICATION.

### I. NATURE AND REQUISITES.

§ 1. No particular words *held* necessary to dedicate a well or other easements to public use.—Thompson v. McPherson (Ky.) 272.

§ 1. Dedication of a well to public use may be by parol.—Thompson v. McPherson (Ky.) 272.

§ 19. The conveyance of land with reference to a recorded map on which a plot of ground is marked "park," does not amount to a dedication of such plot to the public or ratify a parol dedication by a former owner of which the grantor had no notice.—Adoue & Lobit v. Town of La Porte (Tex. Civ. App.) 134.

§ 35. Evidence that a city has graded a street dedicated for a street shows acceptance of the dedication and the exercise of jurisdiction over the street.—Scheffler v. City of Hardin (Mo. App.) 569.

§ 44. Evidence *held* to show dedication of a well to public use.—Thompson v. McPherson (Ky.) 272.

## DEDUCTIONS.

From wages of employé, see Master and Servant, § 73.

## DEEDS.

Acknowledgment of execution, see Acknowledgment.

Color of title, see Adverse Possession, § 71.

Covenants in deeds, see Covenants.

Declarations by grantor as evidence against grantee, or subsequent purchasers, see Evidence, § 230.

Description of boundaries, see Boundaries.

Estoppel by deed, see Estoppel, §§ 28-45.

Parol or extrinsic evidence to construe and apply language of instrument, see Evidence, § 452.

Reformation, see Reformation of Instruments.

Right of owner without deed to mortgage land, see Mortgages, § 11.

Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

*Deeds by or to particular classes of persons.*

See Corporations, § 445; Infants, § 31.

Client to attorney, see Attorney and Client, § 123.

Married women, see Husband and Wife, § 179.

Purchasers at execution sales, see Execution, § 306.

Purchasers at tax sales, see Taxation, §§ 764, 789.

Sheriffs, see Execution, § 306.

Survivor of community, see Husband and Wife, § 273.

*Deeds of particular species of, or estates or interest in, property.*

See Mines and Minerals, § 55.

Community property, see Husband and Wife, § 273.

Lands held adversely, see Champerty and Maintenance, § 7.

Married women's separate property, see Husband and Wife, § 179.

Property of infant, see Guardian and Ward, § 43.

### Particular classes of deeds.

Of trust, see Trusts, §§ 44-61.

Separation deeds, see Husband and Wife, § 273.

Tax deeds, see Taxation, §§ 764, 789.

Trust deeds, see Chattel Mortgages; Mortgages.

### I. REQUISITES AND VALIDITY.

(A) *Nature and Essentials of Conveyances in General.*

Will distinguished from deed, see Wills, § 88.

§ 9. A deed to be valid must pass some interest vesting in the grantee on the delivery of the deed.—Ison v. Halcomb (Ky.) 818.

(B) *Form and Contents of Instruments.*

Tax deeds, see Taxation, § 764.

§ 26. A deed conveyed good title as between the parties, though it did not state the name of the grantor's grantor or the page of the record upon which his deed was recorded, contrary to Ky. St. § 405 (Russell's St. § 2061).—Perkins v. J. M. Robinson, Norton & Co. (Ky.) 310.

§ 42. The variance between the date of an original grant and the statement in an act of sale by the grantee to a purchaser *held* not to render the deed of the original grantee so uncertain as to the subject-matter that it would be inadmissible in evidence.—Davidson v. Ryle (Tex.) 616.

### (C) Execution.

Acknowledgment, see Acknowledgment.

### (D) Delivery.

§ 54. The general rule is that a deed does not become operative till delivered and accepted, or the grantor does some act equivalent to acceptance.—Atkins v. Globe Bank & Trust Co. (Ky.) 879.

§ 59. The lodging of a deed for record in the proper office by the grantor is sufficient to constitute a delivery as of that date.—Atkins v. Globe Bank & Trust Co. (Ky.) 879.

§ 61. Deeds *held* ineffective to pass title on the grantor's death for want of delivery.—Ashley v. Ashley (Ark.) 778.

### (E) Validity.

Cancellation for invalidity in general, see Cancellation of Instruments, §§ 45, 47.

## III. CONSTRUCTION AND OPERATION.

Estoppel by deed, see Estoppel, §§ 28-45.

### (A) General Rules of Construction.

Parol or extrinsic evidence to construe and apply language of instrument, see Evidence, § 452.

### (B) Property Conveyed.

Description of boundaries, see Boundaries, §§ 3, 8.

### (C) Estates and Interests Created.

§ 124. A deed containing a condition as to the alienation of property *held* void as repug-

nant to the fee-simple title granted.—*Diamond v. Rotan* (Tex. Civ. App.) 198.

**(D) Exceptions and Reservations.**

Reservation of minerals and mineral rights, see *Mines and Minerals*, § 55.

**(E) Conditions and Restrictions.**

§ 168. Where the agreement of a son to care for and support his father during life in payment for land conveyed to him was made in good faith, the deed will not be set aside because the son subsequently changed his mind and failed or refused to perform such agreement.—*Selari v. Selari* (Tex. Civ. App.) 997.

**IV. PLEADING AND EVIDENCE.**

Parol or extrinsic evidence to construe and apply language of instrument, see *Evidence*, § 452.

§ 194. If the grantees in a deed are infants, and the deed is beneficial to them, their acceptance thereof will be presumed as of the time it is delivered to the clerk for record or placed in the hands of a third person to be delivered or recorded.—*Atkins v. Globe Bank & Trust Co.* (Ky.) 879.

§ 200. Evidence held admissible on the question whether delivery of a deed to a bank was delivery to the grantees.—*Phillips v. Henry* (Tex. Civ. App.) 184.

§ 200. Evidence held inadmissible on the question whether delivery of a deed to a bank was delivery to the grantees.—*Phillips v. Henry* (Tex. Civ. App.) 184.

§ 200. Evidence held not admissible on the question whether delivery of a deed to a bank operated as a delivery to the grantees.—*Phillips v. Henry* (Tex. Civ. App.) 184.

§ 207. In an action to set aside a deed, evidence held insufficient to show that plaintiff's signature and acknowledgment were forged.—*Duff v. Virginia Iron, Coal & Coke Co.* (Ky.) 309.

§ 211. Sufficiency of evidence to justify cancellation of deed for fraud, stated.—*Selari v. Selari* (Tex. Civ. App.) 997.

§ 211. Evidence held insufficient to support a finding that a deed from a father to son was procured by the fraud of the son.—*Selari v. Selari* (Tex. Civ. App.) 997.

**DEEDS OF TRUST.**

See *Trusts*, §§ 44-61.

**DEFAMATION.**

See *Libel and Slander*.

**DEFAULT.**

In performance of contracts in general, see *Contracts*, §§ 312-323.

Judgment, see *Justices of the Peace*, § 122.

**DEFEASANCE.**

Defeasible fee, see *Wills*, § 602.

**DEFECTS.**

In parties, see *Parties*, §§ 75, 96.

In record on appeal or writ of error, see *Appeal and Error*, §§ 634-659.

**DEFILEMENT.**

Of female, see *Rape; Seduction*.

**DEFINITIONS.**

In instructions to jury, see *Trial*, § 219.

**DEFRAUD.**

See *Fraud*.

**DEGREES.**

Of crime, see *Homicide*, §§ 250-254, 307-309.

**DELAY.**

Hindering and delaying creditors by fraudulent transfers, see *Fraudulent Conveyances*.

In delivery of goods sold, see *Sales*, § 176.

In performance of contracts, measure of damages, see *Damages*, § 122.

In procuring evidence as affecting right to continuance, see *Continuance*, § 28.

In transmission or delivery of telegraph or telephone messages, see *Telegraphs and Telephones*, §§ 27-74.

In transportation or delivery of goods, see *Carriers*, §§ 99, 104.

In transportation or delivery of live stock, see *Carriers*, §§ 228, 230.

Laches, see *Equity*, § 73.

**DELEGATION.**

Of duty of master to protect servant from injury, see *Master and Servant*, § 103.

**DELIBERATION.**

Element of murder, see *Homicide*, §§ 156-159, 286.

**DELIVERY.**

Of deeds, see *Deeds*, §§ 54-61, 194, 200.

Of goods by carrier, see *Carriers*, §§ 85, 94, 99, 104.

Of goods by initial to connecting carrier, see *Carriers*, § 174.

Of goods sold, see *Sales*, §§ 152-177.

Of goods to carrier, see *Carriers*, §§ 39, 45.

Of insurance policy, see *Insurance*, § 136.

Of mail, presumptions, see *Evidence*, § 71.

Of telegraph or telephone messages, see *Telegraphs and Telephones*, §§ 27-74.

**DEMAND.**

For insurance premiums or assessments as waiver of grounds for avoidance or forfeiture of policy, see *Insurance*, § 392.

For jury, see *Jury*, § 25.

**DEMISE.**

See *Landlord and Tenant*.

**DEMONSTRATIVE EVIDENCE.**

See *Criminal Law*, § 404.

**DEMURRER.**

See *Pleading*, §§ 214, 225.

Operation and effect as appearance, see *Appearance*, § 8.

Raising defense of statute of limitations, see *Limitation of Actions*, § 180.

Review of decisions, see *Appeal and Error*, § 1040.

To evidence, see *Trial*, § 156.

**DENIALS.**

In pleading, see *Pleading*, § 129.

**DEPOSITARIES.**

Deposits incident to particular occupations, see Banks and Banking; Warehousemen.

**DEPOSITIONS.**

See Witnesses.

§ 64. The answer of a witness testifying by deposition *held* responsive to the interrogatories.—*Ft. Worth & D. C. Ry. Co. v. Arthur* (Tex. Civ. App.) 213.

§ 75. Since the statute does not so require, it is not necessary for the officer taking depositions to designate in his certificate the office he holds.—*Texas & P. Ry. Co. v. Mosley* (Tex.) 90.

§ 78. Under *Sayles' Ann. Civ. St. 1897*, art. 2286, and *Rev. St. 1895*, art. 2284, as amended by Act April 12, 1907 (*Gen. Laws 1907*, p. 186, c. 91, § 1), including article 2291f of said act, the indorsement by the postmaster on depositions sent by mail that he received the same from the officer before whom they were taken *held unnecessary*.—*Texas & P. Ry. Co. v. Mosley* (Tex.) 90.

§ 83. Depositions could not be suppressed on the ground that a motion to strike out was not passed upon at the term it was filed; the statute expressly authorizing that it be passed upon at the next term.—*Hartford Fire Ins. Co. v. Becton* (Tex. Civ. App.) 474.

§ 83. A deposition cannot be quashed because the certificate was signed by the officer taking it without adding the name of his office.—*Texas & P. Ry. Co. v. Mosley* (Tex. Civ. App.) 485.

§ 83. A party, believing that the answers of a witness testifying by deposition were not full enough, *held* required to procure a postponement of the case to enable him to procure a further deposition.—*Western Union Telegraph Co. v. Douglass* (Tex. Civ. App.) 488.

§ 96. A deposition, taken at a time when a person is not a party to the action, cannot be used against him after he has been made a party.—*Meeks v. Clear Jack Mining Co.* (Mo. App.) 1084.

**DEPOSITS.**

In bank, see Banks and Banking, § 138.

Liability of executor for loss of deposit by bank failure, see Executors and Administrators, § 105.

Of earnest money by vendee, recovery on default of vendor, see Vendor and Purchaser, § 334.

**DESCENT AND DISTRIBUTION.**

See Dower; Executors and Administrators; Homestead, § 140; Wills.

Estoppel against heirs, see Estoppel, § 28.

**I. NATURE AND COURSE IN GENERAL.**

Community property, see Husband and Wife, § 273.

Evidence of death, see Death, § 2.

§ 8. While the possibility of reverter limited to take effect on the happening of the condition provided against is not an estate which may be conveyed, it is nevertheless one capable of being inherited.—*Diamond v. Rotan* (Tex. Civ. App.) 196.

**II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.****(A) Heirs and Next of Kin.**

§ 47. Under *Rev. St. 1895*, art. 5345, when considered in connection with articles 5343 and 5344, the will of a wife *held* void on the subsequent birth of a child.—*Pearce v. Carrington* (Tex. Civ. App.) 469.

**(B) Surviving Husband or Wife.**

Election between distributive share and legacy or devise, see Wills, § 785.

Rights as to homestead, see Homestead, § 140.

**III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTUTES.**

Partition among coheirs, see Partition.

Right to appointment as administrator, see Executors and Administrators, § 17.

**(A) Nature and Establishment of Rights in General.**

Community and separate property of husband and wife, see Husband and Wife, §§ 273, 274. Right to sue for causing death of intestate, see Death, § 31.

**(B) Advancements.**

As affecting rights under will, see Wills, § 761.

§ 109. Under *Rev. St. 1899*, §§ 2913, 2914 (*Ann. St. 1906*, pp. 1675, 1676), the doctrine of bringing advancements into hotchpot *held* applicable only in cases of intestacy.—*In re Lear's Estate* (Mo. App.) 592.

**(C) Debts of Intestate and Incumbrances on Property.**

§ 125. The right of the heirs of the deceased owner to land is subject to the payment of his debts.—*Ison v. Halcomb* (Ky.) 813.

**DESCRIPTION.**

Of land in tax deed, see Taxation, § 764.

Of property conveyed, see Boundaries, §§ 3, 8; Deeds, § 42.

Of property in contract of sale, see Sales, §§ 68-87.

Of property obtained by false pretenses, allegations in indictment, see False Pretenses, § 32.

**DESTRUCTION.**

Of fences, see Fences, § 28.

**DETAINER.**

See Forcible Entry and Detainer.

**DETINUE.**

Actions for damages only, for injuring, taking, converting, or detaining personalty, see Trespass; Trover and Conversion.

Actions for recovery of personalty founded on right of possession, see Replevin.

**DEVISES.**

See Wills.

**DIAMOND RINGS.**

Exemption from execution, see Exemptions, § 40.

**DIKES.**

See Drains.

**DILIGENCE.**

Affecting right to continuance, see Continuance, § 26; Criminal Law, § 598.  
 Affecting right to equitable relief in general, see Equity, § 73.  
 Affecting right to new trial, see Criminal Law, § 939; New Trial, § 102.  
 Affecting right to specific performance, see Specific Performance, § 101.  
 Of carrier in transportation and delivery of goods, see Carriers, §§ 99, 104.

**DIMINUTION OF RECORD.**

See Appeal and Error, §§ 634-639.

**DIRECTING VERDICT.**

See Trial, §§ 168, 178.

**DISABILITIES.**

See Infants; Insane Persons.  
 Affecting limitation of actions, see Limitation of Actions, § 73.

**DISBURSEMENTS.**

Costs in general, see Costs.

**DISCHARGE.**

Of servant, see Master and Servant, §§ 36, 40.  
*From indebtedness, obligation, or liability.*  
 See Bills and Notes, § 527; Compromise and Settlement; Judgment, § 891; Release.  
 Sureties in general, see Principal and Surety, § 95.

**DISCOVERED PERIL.**

Injury avoidable notwithstanding contributory negligence, see Negligence, § 83; Street Railroads, § 103.

**DISCOVERY.**

See Depositions.

**DISCRETION OF COURT.**

Amendment of pleadings, see Pleading, § 236.  
 Continuance, see Criminal Law, § 586.  
 Limiting number of witnesses, see Criminal Law, § 676.  
 Review of discretion in civil actions, see Appeal and Error, §§ 959-984.  
 Review of discretion in criminal prosecutions, see Criminal Law, §§ 1153, 1156.  
 Separation and exclusion of witnesses, see Trial, § 41.

**DISMISSAL AND NONSUIT.**

As affecting limitation of actions, see Limitation of Actions, § 130.  
 Dismissal of appeal or writ of error, see Criminal Law, § 1131.  
 Dismissal of proceedings for establishing drains, see Drains, § 35.

**DISORDERLY CONDUCT.**

Disorderly mode or course of life, see Vagrancy.  
 Offenses against the public peace in general, see Breach of the Peace.

§ 12. In a prosecution for cursing in a public place, *held* error to refuse a requested charge.—Austin v. State (Tex. Cr. App.) 636.

**DISORDERLY HOUSE.**

As nuisances, see Nuisance, § 75.

**DISPARAGEMENT.**

Of title or interest by grantors, former owners, or privies as admission, see Evidence, § 230.

**DISPATCH.**

See Telegraphs and Telephones.

**DISPOSSESSION.**

See Forcible Entry and Detainer.

**DISPUTE.**

Amount in dispute as affecting jurisdiction of courts, see Appeal and Error, § 45; Courts, §§ 121, 169, 172.  
 Submission to arbitrators, see Arbitration and Award.

**DISQUALIFICATION.**

Of judge, see Judges, § 47.

**DISSEISIN.**

See Forcible Entry and Detainer.

**DISSENT.**

Certification from Court of Civil Appeals to Supreme Court, see Courts, § 247.

**DISSOLUTION.**

Of partnership, see Partnership, § 259.

**DISTRIBUTION.**

Of estate of decedent, see Descent and Distribution.

**DISTRICT AND PROSECUTING ATTORNEYS.**

Advice of prosecuting officer as defense to action for malicious prosecution, see Malicious Prosecution, § 22.  
 Authority of county superintendent to employ counsel to assist county attorney, see Schools and School Districts, § 48.

§ 5. Under Ky. St. § 127 (Russell's St. § 4750), and Const. § 161, a county attorney *held* bound to prosecute an action for breach of a bond given by school book publishers under Ky. St. 1903, §§ 4423, 4424, at the request of the county superintendent of common schools, without additional compensation, so that a contract between such superintendent and the county attorney, allowing him part of the amount recovered for services in prosecuting such action while he was county attorney, was unenforceable.—Money v. Beard & Marshall (Ky.) 232.

§ 5. The county commissioners have no authority to contract with the county attorney for compensation for prosecutions under Sayles' Ann. Civ. St. 1897, art. 300, except as is provided in article 297.—Lattimore v. Tarrant County (Tex. Civ. App.) 205.

§ 5. Sayles' Ann. Civ. St. 1897, art. 299, which makes it unlawful for a county attorney to accept any fees for the prosecution of any case, applies only to cases which he is required by law to prosecute, and does not prevent his employment by the county for services outside of his official duties.—Lattimore v. Tarrant County (Tex. Civ. App.) 205.

§ 5. Under Sayles' Ann. Civ. St. 1897, arts. 2495c, 2495d, 2495f, before the county is entitled to any of the fees collected by the county attorney, it must appear that he has received in

fees the maximum amount of compensation allowed him by law.—*Lattimore v. Tarrant County* (Tex. Civ. App.) 205.

§ 10. Plaintiff after having been adjudged guilty of an offense, *held* not entitled to maintain a civil action against the prosecuting attorney for alleged, unnecessarily severe cross-examination resulting in such conviction.—*Ostmann v. Bruere* (Mo. App.) 1059.

## DISTRICTS.

School districts, *see* Schools and School Districts, §§ 10-131.

## DISTURBANCE OF PUBLIC ASSEMBLAGE.

Breach of the public peace, *see* Breach of the Peace.

## DITCHES.

*See* Drains.

## DIVISION FENCES.

*See* Fences.

## DIVISION LINES.

*See* Boundaries, § 8.

## DIVORCE.

Separation agreements and separate maintenance, *see* Husband and Wife, §§ 278-297.

### II. GROUNDS.

§ 26. Under Ky. St. § 2117 (Russell's St. § 67), rule stated as to proof required to show adultery by the husband, entitling the wife to a divorce.—*Baker v. Baker* (Ky.) 866.

### IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

#### (D) Evidence.

§ 115. Where a husband sues his wife for divorce on the ground of adultery, the general character of the wife for unchastity is not in issue.—*Poe v. Poe* (Ark.) 1029.

§ 129. To entitle a wife to a divorce on the ground of adultery, it is necessary only to establish his adulterous relations by the weight of the evidence.—*Baker v. Baker* (Ky.) 866.

§ 129. In a divorce action by a wife, evidence *held* sufficient to show adultery by defendant.—*Baker v. Baker* (Ky.) 866.

#### (F) Judgment or Decree.

§ 168. A divorce decree, after remarriage of the party securing the divorce, cannot be collaterally attacked, unless the record affirmatively shows lack of jurisdiction.—*Douglas v. State* (Tex. Cr. App.) 933.

§ 168. On collateral attack on a divorce decree because citation was signed before the suit was filed, it would be presumed that the waiver was filed by him after the suit was instituted.—*Douglas v. State* (Tex. Cr. App.) 933.

### V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

Actions for separate maintenance, *see* Husband and Wife, § 297.

§ 218. Under Kirby's Dig. §§ 2679, 2681, 2682, 2683, an order allowing alimony, attorney's fees, and costs, *held* a temporary order, and not an abuse of discretion for the court to

set it aside after defendant had filed his depositions to be read on the final hearing of the cause.—*Poe v. Poe* (Ark.) 1029.

§ 218. Under Kirby's Dig. §§ 2679, 2681, 2682, 2683, *held* not error to refuse plaintiff further time to take testimony on motion to vacate an order allowing alimony; the order being temporary and subject to review on the hearing in the divorce proceedings.—*Poe v. Poe* (Ark.) 1029.

## DOCKETS.

Of civil causes for trial, *see* Trial, § 11.

## DOCTORS.

*See* Physicians and Surgeons.

## DOCUMENTS.

As evidence, *see* Criminal Law, § 438; Evidence, §§ 342-372.

Best and secondary evidence, *see* Criminal Law, §§ 398-404; Evidence, §§ 158-175.

Use by witness to refresh memory, *see* Witnesses, § 255.

## DOGS.

In general, *see* Animals.

## DOMESTIC ANIMALS.

*See* Animals.

## DOMICILE.

Removal from homestead, *see* Homestead, §§ 161-163.

## DONATIONS.

*See* Gifts.

## DOWER.

Rights of widow in respect of community property, *see* Husband and Wife, § 273.

### III. RIGHTS AND REMEDIES OF WIDOW.

§ 113. A widow to whom land is assigned as dower *held* to be a life tenant thereof.—*Nashville Lumber Co. v. Barefield* (Ark.) 758.

§ 114. A widow to whom land is assigned as dower *held* without authority to sell the standing timber thereon, unless essential to the legitimate use of the property for purposes of husbandry.—*Nashville Lumber Co. v. Barefield* (Ark.) 758.

## DRAFTS.

*See* Bills and Notes.

## DRAINS.

### I. ESTABLISHMENT AND MAINTENANCE.

§ 25. Proceedings for the construction of a drainage ditch *held* in substantial compliance with the statute, and sufficient.—*Terre Noir Drainage Dist. No. 3 v. Thornton* (Ark.) 774.

§ 28. Under Kirby's Dig. §§ 1414, 1415, though the jurisdiction of the county court is special, a petition for the establishment of a drainage district which sets forth the essential facts required by the statute from which the court may find the necessity or desirability of the improvement is sufficient.—*Terre Noir Drainage Dist. No. 3 v. Thornton* (Ark.) 774.

§ 28. A petition for the construction of a drainage ditch *held* sufficient under Kirby's Dig.

§§ 1414, 1415.—Terre Noir Drainage Dist. No. 3 v. Thornton (Ark.) 774.

§ 35. Drain proceedings held erroneously dismissed.—Schonbackler v. Hayden (Ky.) 349.

## DRAMSHOPS.

See Intoxicating Liquors.

## DRUNKARDS.

Contributory negligence of passenger ejected from train, see Carriers, § 370.

Negligence in ejection of intoxicated passenger, see Carriers, § 368.

Penalties for sale of liquors to drunkards after notice, see Intoxicating Liquors, § 178.

Penalties for sale of liquor to drunkards after notice, see Intoxicating Liquors, § 179.

## DURESS.

Criminal duress, see Threats.

## DUTIES.

Customs duties, see Customs Duties.

## DYING DECLARATIONS.

See Homicide, § 203.

## EARNEST.

Liability of broker for repayment to purchaser, see Brokers, § 106.

Right of vendee to recover earnest money on default of vendor, see Vendor and Purchaser, § 334.

## EARNING CAPACITY.

Impairment of, evidence, see Damages, § 173.

## EARNINGS.

Damages for loss, see Damages, § 37.

## EASEMENTS.

See Dedication; Highways.

Mutual rights, duties, and liabilities of adjoining landowners, see Adjoining Landowners.

## I. CREATION, EXISTENCE, AND TERMINATION.

Ways of necessity incident to conveyance of mining rights, see Mines and Minerals, § 55.

## II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 61. Evidence held to sustain a finding that the use of an easement in a passway from plaintiff's farm to a public road was adverse and not permissive.—Cook v. Down (Ky.) 838.

## EDUCATION.

See Colleges and Universities; Schools and School Districts.

## EJECTION.

Of passengers or intruders from passenger trains, see Carriers, §§ 356-361.

## EJECTION.

See Forcible Entry and Detainer, §§ 4-29; Trespass to Try Title.

## I. RIGHT OF ACTION AND DEFENSES.

§ 9. One suing for the recovery of land must recover on the strength of his own title, and not on the weakness of the title of defendant, and he must recover on the cause of action alleged.—Ison v. Halcomb (Ky.) 813.

§ 15. Where in ejectment there is a common source of title, common infirmities affecting such common source are immaterial.—Feller v. Lee (Mo.) 1129.

§ 15. The rule that plaintiff in ejectment must recover on the strength of his own title is inapplicable to infirmities anterior to the title of a common source.—Feller v. Lee (Mo.) 1129.

## III. PLEADING AND EVIDENCE.

§ 69. Where plaintiffs suing to recover land based their claim on a deed to A., and there was a latent ambiguity in it, it was unnecessary for defendant to plead this ambiguity.—Justice v. Justice (Ky.) 351.

§ 81. Defendant in ejectment not having pleaded any equitable defense could not defeat a recovery by showing a prior defective foreclosure of a deed of trust, and the equitable right to redeem outstanding in a third person.—Feller v. Lee (Mo.) 1129.

§ 82. One suing for the recovery of land must recover on the strength of his own title, and not on the weakness of the title of defendant, and he must recover on the cause of action alleged.—Ison v. Halcomb (Ky.) 813.

## ELECTION.

Between causes of action, counts, or defenses, see Pleading, § 369.

Between counts in indictment or information, see Indictment and Information, § 132.

Between testamentary provisions and other rights in general, see Wills, § 785.

## ELECTIONS.

*Of particular officers.*

Corporate officers in general, see Corporations, § 284.

*To determine particular questions.*

Amendment or revision of Constitution, see Constitutional Law, § 9.

Issuance of school district bonds, see Schools and School Districts, § 97.

Levy of school taxes, see Schools and School Districts, § 103.

Public expenditures, see Municipal Corporations, § 867.

## II. ORDERING OR CALLING ELECTION, AND NOTICE.

Election to determine issuance of school district bonds, see Schools and School Districts, § 97.

Election to determine levy of school taxes, see Schools and School Districts, § 103.

§ 38. The time of holding an election is one of its essential ingredients.—Merwin v. Fussell (Ark.) 1021.

## ELECTRICITY.

Electric railroads, see Street Railroads.

Telegraph and telephone lines, see Telegraphs and Telephones.

## ELEVATORS.

Grain elevators, see Warehousemen.

## ELIGIBILITY.

Of witnesses, see Witnesses, §§ 40-160.

**EMBEZZLEMENT.**

See False Personation; False Pretenses; Larceny.  
Civil liability for conversion, see Trover and Conversion.

**EMINENT DOMAIN.**

Dedication of property to public use, see Dedication.  
Public improvements by municipalities, see Municipal Corporations, §§ 280-449.

**II. COMPENSATION.****(A) Necessity and Sufficiency in General.**

§ 69. A foreign telephone company is not exempt from payment of damages to abutting property by construction of its lines in a street under a permit from the state and a city.—*Southwestern Telegraph & Telephone Co. v. Smithdeal* (Tex.) 627.

**(B) Taking or Injuring Property as Ground for Compensation.**

§ 98. Where a railroad was completed across plaintiff's land before an action for appropriation and damages, damages for the obstruction of water courses prior to the action were recoverable therein.—*Missouri & N. A. Ry. Co. v. Bratton* (Ark.) 231.

§ 100. An abutting lot owner has a right to grow trees on the sidewalk, and if damaged by telephone wires, contributing to depreciation of market value of property, the injuries should be considered as if caused by the structure.—*Southwestern Telegraph & Telephone Co. v. Smithdeal* (Tex.) 627.

§ 100. A telephone line may have been constructed by authority of law and with due care, yet, if its presence on the street causes or contributes to depreciation of "market value" of abutting property, the company is liable.—*Southwestern Telegraph & Telephone Co. v. Smithdeal* (Tex.) 627.

§ 119. Where telephone lines are constructed in a street, the structure is an additional burden.—*Southwestern Telegraph & Telephone Co. v. Smithdeal* (Tex.) 627.

**EMPLOYÉS.**

See Master and Servant.

**EMPLOYMENT.**

Of broker, see Brokers, § 8.

**ENDOWMENT.**

See Dower.

**ENROLLMENT.**

See Records.

**ENTICEMENT.**

Of female, see Abduction.

**ENTRY.**

On land, by force, see Forcible Entry and Detainer.

**ENTRY, WRIT OF.**

Actions for damages for wrongful entry upon or injury to real property, see Trespass.  
Actions for forcible entry and detainer, see Forcible Entry and Detainer, §§ 4-29.  
Actions for recovery of possession of real property, and damages for detention thereof, see Ejectment; Trespass to Try Title.

**EQUITABLE DEFENSES.**

In actions at law, see Action, § 24.

**EQUITABLE ESTATES.**

See Mortgages; Trusts.

**EQUITABLE ESTOPPEL.**

See Estoppel, §§ 78-98; Set-Off and Counterclaim, § 8.

**EQUITY.**

Equitable action as distinguished from action at law, see Action, § 24.

Equitable defenses in action at law, see Action, § 24.

Equitable estates, see Mortgages; Trusts.

Equitable estoppel, see Estoppel, §§ 78-98.

Equitable set-off, see Set-Off and Counterclaim, § 8.

Of redemption, see Chattel Mortgages, § 205; Mortgages, § 594.

Transfer of causes from equity docket to law docket, and vice versa, see Trial, § 11.

Transfer of cause to law docket, see Trial, § 11.

*Particular subjects of equitable jurisdiction and equitable remedies.*

See Cancellation of Instruments; Fraudulent Conveyances, §§ 222-308; Injunction; Quieting Title; Receivers; Reformation of Instruments; Specific Performance; Trusts.

Contribution among co-sureties, see Principal and Surety, § 200.

Establishment and enforcement of trust, see Trusts, §§ 359, 366.

Relief from judgment, see Judgment, §§ 407-463.

**Review on appeal.**

Necessity of exceptions for purpose of review in equitable actions, see Appeal and Error, § 250.

Scope and extent of review in equitable actions, see Appeal and Error, § 1009.

**I. JURISDICTION, PRINCIPLES, AND MAXIMS.**

**(B) Remedy at Law and Multiplicity of Suits.**

To establish and enforce trust, see Trusts, § 359.

**II. LACHES AND STALE DEMANDS.**

See Quieting Title, § 29.

To confirm or try tax title, see Taxation, § 805.

§ 73. To justify a decree divesting title to land, which title has existed for many years, upon oral testimony of others than the original parties, held, that the chancellor must be satisfied by clear and positive proof.—*McKee v. Downing* (Mo.) 7.

**III. PARTIES AND PROCESS.**

To establish and enforce trust, see Trusts, § 366.

**V. EVIDENCE.****In particular proceedings.**

See Injunction, §§ 123, 130.

For divorce, see Divorce, §§ 115, 129.

For relief from judgment, see Judgment, § 461.

To cancel written instrument, see Cancellation of Instruments, §§ 45, 47.

To foreclose mortgages, see Mortgages, § 463.

To reform written instrument, see Reformation of Instruments, § 45.

To set aside transfers in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 271-299.

**VIII. HEARING, SUBMISSION OF ISSUES TO JURY, AND REHEARING.**

In suits for injunction, see Injunction, § 130.  
In suits to set aside transfers in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 308.

**X. DECREE AND ENFORCEMENT THEREOF.**

For divorce, see Divorce, § 168.

**EQUITY OF REDEMPTION.**

See Mortgages, § 594.

**ERROR, WRIT OF.**

See Appeal and Error.

**ESTABLISHMENT.**

Of boundaries, see Boundaries, §§ 37-54.  
Of schools, see Schools and School Districts, § 10.  
Of street railroads, see Street Railroads, §§ 24, 51.  
Of telegraphs or telephones, see Telegraphs and Telephones, § 20.  
Of trusts, see Trusts, §§ 359, 366.

**ESTATES.**

Bankrupts' estates, see Bankruptcy.  
Created by deed, see Deeds, § 124.  
Created by will, see Wills, §§ 600-612.  
Decedents' estates, see Descent and Distribution; Executors and Administrators; Wills.  
Restrictions on creation of perpetuities, see Perpetuities.

**Particular estates.**

See Dower; Homestead; Life Estates.  
Estates for years, see Landlord and Tenant.  
Tenancy in common, see Tenancy in Common.

§ 1. The distinction between estate on limitation and one on condition, stated.—Diamond v. Rotan (Tex. Civ. App.) 196.

§ 10. Under a deed containing a limitation over in a certain event, *held*, that the grantee after the grantor's death became seised of the fee-simple title by a merger of estates so as to avoid the effect of the limitation.—Diamond v. Rotan (Tex. Civ. App.) 196.

§ 10. Sayles' Ann. Civ. St. 1897, art. 626, providing that merger of estates should not affect the remainder, *held* not to prevent a merger of estates in the grantee in a deed so as to defeat a condition therein.—Diamond v. Rotan (Tex. Civ. App.) 196.

**ESTOPPEL.****I. BY RECORD.**

By judgment, see Judgment, §§ 603, 617, 707-732.

**II. BY DEED.****(A) Creation and Operation in General.**

§ 28. Heirs of an administratrix conveying the lands of her husband *held* estopped to claim any interest in such lands.—Broocks v. Payne (Tex. Civ. App.) 463.

§ 29. Where one party claimed under a warranty deed, and the other parties claimed under a patent issued upon a survey made under a land warrant issued to the same grantor, both parties claimed under the same grantor, and could not dispute his title.—Martin v. Bentley (Ky.) 873.

§ 32. A grantee accepting a second deed *held* estopped from claiming any land not embraced therein.—Poitevent v. Scarborough (Tex.) 87.

**(B) Estates and Rights Subsequently Acquired.**

§ 45. Persons claiming under a patent issued under a land warrant assigned to them by a grantor *held* to take title subject to the rights of the grantee.—Martin v. Bentley (Ky.) 873.

**III. EQUITABLE ESTOPPEL.**

To assert or deny particular facts, rights, claims, or liabilities.

See Partnership, §§ 37, 38.

Authority of officers and agents of corporations in general, see Corporations, § 425.

Defects in or objections to notice and proof of loss under insurance policy, see Insurance, § 559.

Grounds for avoidance or forfeiture of insurance policy, see Insurance, §§ 372-392.

Right to require notice and proof of loss under insurance policy, see Insurance, § 559.

Validity of insurance policy, see Insurance, §§ 372-392.

To maintain or oppose particular remedies or defenses.

See Specific Performance, § 101.

Appeal or other proceeding for review, see Appeal and Error, §§ 154, 882; Criminal Law, § 1137.

Objections to evidence, see Trial, § 105.

**(B) Grounds of Estoppel.**

§ 78. Where defendant had agreed in writing to sell plaintiff his farm, and subsequently told plaintiff he would secure a loan for him, *held* that he was not estopped to repudiate this promise by the fact that plaintiff relied upon it, there being no consideration for the promise.—Norris v. Letchworth (Mo. App.) 559.

§ 92. Parties receiving the proceeds of a partition sale, knowing them to be such, *held* estopped to question the validity thereof.—Hector v. Mann (Mo.) 1109; Same v. Warren (Mo.) 1119.

§ 92. Where plaintiffs accepted the proceeds of a partition sale, they thereby elected to affirm the sale and were estopped to question it.—Hector v. Warren (Mo.) 1119.

**(C) Persons Affected.**

§ 98. A subsequent purchaser of a part of a tract of land, *held* estopped from denying that a strip of land had been previously conveyed.—Brown v. Patterson (Mo.) 1.

**EVIDENCE.**

See Depositions; Witnesses.

Absence of evidence, ground for continuance, see Continuance, § 26; Criminal Law, §§ 594-598.

Admissibility under pleadings, see Pleading, § 380.

Applicability of instructions to evidence, see Criminal Law, § 814; Trial, § 252.

Comments of counsel on matters not sustained by evidence, see Criminal Law, § 719.

Comments of judge on evidence, or witnesses, see Criminal Law, § 658.

Exceptions to evidence, see Trial, § 105.

Instructions as to rules of evidence, see Criminal Law, §§ 778-787; Trial, §§ 203, 237.

Instructions ignoring, see Trial, § 253.

Instructions on evidence or witnesses as invasion of province of jury, see Trial, §§ 191, 194.

Motion to strike out evidence, see Trial, § 96.  
 Newly discovered evidence ground for new trial, see Criminal Law, §§ 938-945; New Trial, §§ 102, 150.  
 Objections to evidence, see Criminal Law, § 695.  
 Questions of fact for jury, see Criminal Law, §§ 741, 742; Trial, §§ 136-143.  
 Reception at trial, see Criminal Law, §§ 665-676; Homicide, § 206; Trial, §§ 41-105.  
 Reception by arbitrators, see Arbitration and Award, § 34.  
 Waiver and correction of errors in rulings as to admissibility of evidence, see Trial, § 412.

*As to particular facts or issues.*

See Adverse Possession, §§ 57, 85; Alteration of Instruments, § 29; Boundaries, § 37; Compromise and Settlement, § 23; Dedication, § 44.  
 Acceptance of deed, see Deeds, § 194.  
 Acknowledgment of written instruments, see Acknowledgment, § 62.  
 Adultery as ground for divorce, see Divorce, §§ 115, 129.  
 Agency, see Brokers, § 8; Principal and Agent, § 23.  
 Assumption of risk by servant injured, see Master and Servant, § 280.  
 Authority of corporate officer or agent, see Corporations, § 432.  
 Bar of statute of limitations, see Limitation of Actions, § 186.  
 Breach of warranty on exchange of property, see Exchange of Property, § 13.  
 Competency of witness, see Witnesses, § 40.  
 Consideration of bill or note, see Bills and Notes, § 493.  
 Consideration of contract, see Contracts, § 88.  
 Construction of contracts of sale, see Sales, § 87.  
 Contributory negligence of servant injured, see Master and Servant, § 281.  
 Creation, existence, and validity of trust, see Trusts, §§ 44, 89.  
 Damages, see Damages, §§ 163-189.  
 Death, see Death, § 2.  
 Delay in transportation or delivery of goods, see Carriers, §§ 104, 185.  
 Delivery of deed, see Deeds, § 200.  
 Execution of deed, see Deeds, § 207.  
 Fraud in procuring settlement, see Compromise and Settlement, § 23.  
 Fraud or undue influence in procuring execution of will, see Wills, §§ 163, 166.  
 Fraudulent conveyance, see Fraudulent Conveyances, §§ 271-299.  
 Good faith of purchaser of bill or note and payment of value, see Bills and Notes, § 509.  
 Good faith of purchaser of land, see Vendor and Purchaser, §§ 242-244.  
 Impairment of earning capacity, see Damages, § 173.  
 Incompetency of fellow servant, see Master and Servant, § 279.  
 Insanity of insured, see Insurance, § 665.  
 Insolvency of maker of note, see Bills and Notes, § 516.  
 Loss of or injury to goods in course of transportation, see Carriers, § 185.  
 Loss of or injury to property in general, see Damages, § 174.  
 Negligence of fellow servant, see Master and Servant, § 279.  
 Negligence of master causing injury to servant, see Master and Servant, § 278.  
 Payment, see Payment, §§ 65-75.  
 Payment of bill or note, see Bills and Notes, § 527.  
 Proximate cause of death of guest at lodging house, see Innkeepers, § 10.  
 Testamentary capacity, see Wills, § 52.  
 Title of mortgagor, see Mortgages, § 463.  
 Title to property sold at tax sale, see Taxation, § 789.  
 Validity of deed, see Deeds, § 211.

*In actions by or against particular classes of persons.*

See Adjoining Landowners, § 7; Brokers, §§ 84-86; Carriers, §§ 104, 185, 228, 276, 316-318, 381; Master and Servant, §§ 40, 65, 263-281; Municipal Corporations, § 819; Principal and Agent, § 190; Railroads, §§ 347, 398, 441, 443, 481, 482.  
 Telegraph or telephone companies, see Telegraphs and Telephones, § 66.

*In particular civil actions or proceedings.*

See Forcible Entry and Detainer, § 29; Trespass to Try Title, § 38.  
 For breach of contract by servant, see Master and Servant, § 65.  
 For breach of contract for carriage of passenger, see Carriers, § 276.  
 For breach of contract of sale, see Sales, §§ 383, 384, 415.  
 For breach of warranty of goods sold, see Sales, § 441.  
 For compensation of broker, see Brokers, §§ 84-86.  
 For death of guest at lodging house, see Innkeepers, § 10.  
 For delay in transportation or delivery of goods, see Carriers, §§ 104, 185.  
 For delay in transportation or delivery of live stock, see Carriers, § 228.  
 For divorce, see Divorce, §§ 115, 129.  
 For ejection of passenger or intruder from train, see Carriers, § 381.  
 For equitable relief against judgment, see Judgment, § 461.  
 For injunction, see Injunction, §§ 128, 130.  
 For injuries at railroad crossings, see Railroads, § 347.  
 For injuries from defects or obstructions in streets, see Municipal Corporations, § 819.  
 For injuries from fires caused by operation of railroads, see Railroads, §§ 481, 482.  
 For injuries from negligence, see Negligence, §§ 121, 134.  
 For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, § 66.  
 For injuries to animals on or near railroad tracks, see Railroads, §§ 441, 443.  
 For injuries to passengers, see Carriers, §§ 316-318.  
 For injuries to persons on or near railroad tracks, see Railroads, § 398.  
 For injuries to servants, see Master and Servant, §§ 265-281.  
 For loss of or injury to goods in course of transportation, see Carriers, § 185.  
 For loss of or injury to live stock in course of transportation, see Carriers, § 228.  
 For malicious prosecutions, see Malicious Prosecution, §§ 56, 64.  
 For new trial, see New Trial, § 150.  
 For price or value of goods sold, see Sales, § 359.  
 For wrongful discharge of servant, see Master and Servant, § 40.  
 On judgment, see Judgment, § 942.  
 Probate proceedings and actions relating to wills or probate, see Wills, § 302.  
 To cancel written instrument, see Cancellation of Instruments, §§ 45, 47.  
 To establish boundaries, see Boundaries, § 37.  
 To foreclose mortgage, see Mortgages, § 463.  
 To protect easement, see Easements, § 61.  
 To recover earnest money from broker, see Brokers, § 106.  
 To recover property exchanged, see Exchange of Property, § 13.  
 To reform written instrument, see Reformation of Instruments, § 45.  
 To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 271-299.

*In criminal prosecutions.*

See Adultery, § 14; Assault and Battery, §§ 83-92; Burglary, § 41; Criminal Law, §§ 304-560; Gaming, § 97; Homicide, §§ 144-257; Incest, § 13; Larceny, §§ 45-64; Rape, §§ 43-54; Seduction, § 40.  
Application for new trial, see Criminal Law, §§ 956, 957.  
Violations of liquor laws, see Intoxicating Liquors, §§ 233, 236.

*Review and procedure thereon in appellate courts.*

Matters considered in determining questions, see Appeal and Error, § 837.  
Presentation of evidence, by bill of exceptions, case, or statement, see Appeal and Error, § 548.  
Review of rulings as dependent on motion for new trial in lower court, see Appeal and Error, § 289.  
Review of rulings as dependent on prejudicial nature of error, see Appeal and Error, §§ 1050-1057.  
Review of rulings as dependent on presentation of evidence in record, see Criminal Law, §§ 1120-1124.  
Review of sufficiency of evidence, see Appeal and Error, §§ 294, 993-1011; Criminal Law, §§ 1159, 1160.

**I. JUDICIAL NOTICE.**

In criminal prosecutions, see Criminal Law, § 304.

§ 12. Courts may take judicial notice that a county has less than a certain population.—Davidson v. Schmidt (Mo. App.) 552.

§ 20. The court takes judicial notice of the custom that authority to a broker to sell land carries with it the obligation to furnish an abstract of title.—Watkins v. Thomas (Mo. App.) 1063.

§ 20. The Court of Civil Appeals will take judicial notice that the greater part of a railroad's rolling stock is required to be constantly in use on its various lines, but that only a comparatively small portion would be normally in a certain city.—City of Tyler v. Coker (Tex. Civ. App.) 729.

§ 22. The Court of Civil Appeals will take judicial notice, as a geographical fact, that a specified railroad operates a main line and branches within the state, traversing different counties, and that some of those lines do not pass through a certain city.—City of Tyler v. Coker (Tex. Civ. App.) 729.

§ 25. The court takes judicial notice of an incorporated municipality and its location.—Scheffler v. City of Hardin (Mo. App.) 569.

§ 43. The court, in an action on the bond of a sheriff for a false return, held not authorized to take judicial notice of the fact that plaintiff appeared in such action.—State ex rel. Armour Packing Co. v. Dickmann (Mo. App.) 29.

**II. PRESUMPTIONS.**

Rebuttal of presumption of death from absence, see Death, § 2.

*As to particular facts or issues.*

Acceptance of deed, see Deeds, § 194.

Authority of husband as wife's agent, see Husband and Wife, § 138.

Competency of minor as witness, see Witnesses, § 40.

Death, see Death, § 2.

Negligence of connecting carrier, see Carriers, § 185.

Payment, see Payment, § 65.

Prejudice from error in trial court, see Appeal and Error, § 1031.

Unsafe condition of buildings on adjoining lands, see Adjoining Landowners, § 7.

*In particular civil actions or proceedings.*

For injuries from negligence, see Negligence, § 121.

For injuries to animals on or near railroad tracks, see Railroads, § 441.

For injuries to passengers, see Carriers, § 316.

For injuries to servants, see Master and Servant, § 265.

For loss of or injuries to goods by connecting carriers, see Carriers, § 185.

For malicious prosecution, see Malicious Prosecution, § 56.

§ 54. Under the facts, held it could not be presumed from a sheriff seizing property in replevin that the bond was delivered to and approved by him, as required by Rev. St. 1890, c. 56, § 4465 (Ann. St. 1903, p. 2450), to be the statutory bond authorizing summary judgment.—Huttig-McDermid Pearl Button Co. v. Springfield Shirt Co. (Mo. App.) 1094.

§ 54. One presumption cannot be made the basis of another presumption.—Missouri, K. & T. Ry. Co. of Texas v. Byrd (Tex. Civ. App.) 738.

§ 67. Where it appears that a certain judge presided at some of the judicial steps in a partition proceeding, it will be presumed in the absence of a showing to the contrary that he presided throughout.—Hector v. Mann (Mo.) 1109; Same v. Warren (Mo.) 1119.

§ 71. Where a notice of renewal was sent by mail, it is presumed to have been received, but this presumption may be rebutted.—Bluthenthal v. Atkinson (Ark.) 510.

§ 71. The receipt of a letter will be presumed from proof that it was properly addressed, stamped, and mailed.—Sills v. Burge (Mo. App.) 605.

§ 71. Where there was no evidence that a letter constituting a part of a contract was mailed, that the writer testified that he dictated it to his stenographer, and, according to the usual course of business, it must have been mailed, did not raise a presumption that it was received by the addressee.—Sills v. Burge (Mo. App.) 605.

§ 83. The law held to presume that public officers will perform their duties when called on.—State ex rel. Abbott v. Adcock (Mo.) 1100.

**III. BURDEN OF PROOF.***As to particular facts or issues.*

See Damages, § 163.

Compensation of broker, see Brokers, § 84.

Condition of buildings on adjoining lands, see Adjoining Landowners, § 7.

Consideration of bill or note, see Bills and Notes, § 493.

Error in trial court, see Appeal and Error, § 901.

Fraud or undue influence in procuring execution of will, see Wills, § 163.

Fraudulent conveyance, see Fraudulent Conveyances, §§ 271, 276.

Good faith of purchaser of bill or note and payment of value, see Bills and Notes, § 497.

Good faith of purchaser of land, see Vendor and Purchaser, § 242.

In justice court, see Justices of the Peace, § 104.

Payment, see Payment, § 67.

Testamentary capacity, see Wills, § 52.

*In particular civil actions or proceedings.*

See Trespass to Try Title, § 38.

For breach of contract of sale, see Sales, § 415.

For injuries to animals on or near railroad tracks, see Railroads, § 441.

For injuries to servants, see Master and Servant, § 265.

On insurance policies, see Insurance, § 646.

To restrain execution, see Execution, § 172.

To set aside transfers in fraud of creditors or subsequent purchasers, see *Fraudulent Conveyances*, §§ 271, 276.

§ 91. Where the allegations of an answer and counterclaim were denied by the reply, and no proof was offered to establish the defenses set up therein, judgment properly went against defendant as to such defenses.—*Herndon v. Louisville Nat. Banking Co.* (Ky.) 835.

§ 96. In an action for damages to plaintiff's land, through an overflow from construction of defendant's road, an instruction as to burden of proof *held* erroneous.—*Gurley v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 502.

#### IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

##### (A) Facts in Issue and Relevant to Issues.

In criminal prosecutions, see *Criminal Law*, §§ 338-366.

§ 100. The receipt of a letter may be shown by circumstantial evidence.—*Sills v. Burge* (Mo. App.) 605.

§ 113. The actual value of a mining lease is not shown by evidence of what a subsequent lease on the same tract brought on a sale four or five years later.—*Pitman v. Ball* (Mo. App.) 1082.

§ 113. Trade publications *held* inadmissible to show market price of a delayed shipment of sheep at the place of destination on a certain date.—*Galveston, H. & S. A. Ry. Co. v. Word* (Tex. Civ. App.) 478.

##### (B) Res Gestæ.

In criminal prosecutions, see *Criminal Law*, § 366.

§ 127. Expressions of pain uttered by a person receiving a personal injury *held* admissible as illustrative of the character and extent of the injury.—*St. Louis Southwestern Ry. Co. v. Jackson* (Ark.) 241.

§ 128. A physician in describing the result of an examination of a patient sustaining a personal injury *held* authorized to give certain statements of the patient made to him in the course of the examination.—*Brady v. Springfield Traction Co.* (Mo. App.) 1070.

##### (C) Similar Facts and Transactions.

Other offenses, see *Criminal Law*, §§ 369, 372.

§ 142. In an action for breach of contract to install a pumping plant on a rice plantation resulting in the loss of rice crops, certain evidence *held* admissible on the issue of damages.—*Erie City Iron Works v. Noble* (Tex. Civ. App.) 172.

##### (D) Materiality.

In criminal prosecutions, see *Criminal Law*, § 384.

§ 147. Negative evidence is admissible to disprove the sounding of the whistle at a crossing.—*Chesapeake & O. Ry. Co. v. Brashear's Adm'r* (Ky.) 277.

##### (E) Competency.

In criminal prosecutions, see *Criminal Law*, §§ 384-396.

#### V. BEST AND SECONDARY EVIDENCE.

In criminal prosecutions, see *Criminal Law*, §§ 396-404.

Parol evidence to supply lost execution, see *Records*, § 17.

§ 158. To show that a person is insolvent, secondary evidence that he had filed a petition in bankruptcy and turned over his property to

the trustees is improper.—*First Nat. Bank v. Robinson* (Tex. Civ. App.) 177.

§ 171. In an action against a railroad company for injuries to a passenger by falling into a hole on another's land, adjacent to an approach to the depot, the admission of a certified copy of a deed *held* to relate to a collateral matter, so that it need not be shown that the original was not obtainable before introducing the certified copy.—*St. Louis & S. F. R. Co. v. Caldwell* (Ark.) 1034.

§ 174. In an action for injuries from fire set by sparks from passing locomotives, admission of copies of certain train records *held* error.—*Cathey v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 217.

§ 175. Field notes and maps prepared for and used in the general land office, *held* admissible as original evidence.—*Finberg v. Gilbert* (Tex. Civ. App.) 979.

#### VI. DEMONSTRATIVE EVIDENCE.

In criminal prosecution, see *Criminal Law*, § 404.

#### VII. ADMISSIONS.

##### (A) Nature, Form, and Incidents in General.

§ 213. Where there was no evidence of any negotiations for a compromise, plaintiff's testimony that defendant made her an offer of settlement, but they did not settle, was admissible; being merely the recital of a fact.—*Hilburn v. Phoenix Ins. Co.* (Mo. App.) 63.

§ 215. A statement signed by plaintiff in a personal injury action, giving the circumstances of his injury, *held* admissible as a declaration against interest.—*St. Louis, I. M. & S. Ry. Co. v. Dallas* (Ark.) 247.

##### (C) By Grantors, Former Owners, or Privies.

§ 230. Admissions made by one in possession of real estate as to his claims may be proved by third persons as against his subsequent purchaser.—*Brown v. Patterson* (Mo.) 1.

##### (D) By Agents or Other Representatives.

§ 241. In a broker's action for commissions for procuring the sale of land, evidence *held* admissible as against all of defendants as to statements to plaintiff by the son of one defendant, relating to the sale of the property.—*Sills v. Burge* (Mo. App.) 605.

##### (E) Proof and Effect.

§ 265. The receipt of a letter may be shown by admissions of the person to whom it was addressed.—*Sills v. Burge* (Mo. App.) 605.

#### VIII. DECLARATIONS.

##### (A) Nature, Form, and Incidents in General.

§ 267. In proceedings to restrain defendant from re-engaging in the photograph business, evidence of plaintiff as to a statement made by defendant to plaintiff's partner *held* not mere hearsay, but admissible for the jury to determine whether the statement induced plaintiff to act.—*Parish v. Adwell* (Tex. Civ. App.) 441.

§ 269. In an action on a life policy where it appears that insured disappeared and has not been heard from for more than seven years, evidence of declarations by insured when he left home, of the purpose of his trip, and when he would return, is admissible.—*Bradley v. Modern Woodmen of America* (Mo. App.) 69.

§ 274. Where a father conveyed to a son and a daughter parts of a tract of land, declarations made by him as to the boundary between them *held* competent evidence against those

claiming under the daughter.—*Justice v. Justice* (Ky.) 351.

### IX. HEARSAY.

§ 314. In an action for injuries to a passenger, evidence by a witness that the person injured had told her that she had attempted to commit abortion on herself would be hearsay.—*El Paso & N. R. Ry. Co. v. Landon* (Tex. Civ. App.) 744.

§ 317. Certain testimony of a witness, in an action against a telegraph company for delay in delivering a message, *held* inadmissible as hearsay.—*Western Union Telegraph Co. v. Douglass* (Tex. Civ. App.) 488.

§ 318. In an action for injuries from fire set by sparks from passing locomotives, allowing a witness to read from certain train records not made in his presence, *held* error.—*Cathey v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 217.

§ 318. In an action for injuries from fire set by sparks from passing locomotives, *held* proper to allow the train dispatcher to testify from information on his "train sheet" as to certain matters.—*Cathey v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 217.

§ 322. Evidence of rumors in the vicinity of the home of a person who has not been heard from for more than seven years, as to the cause of his leaving home, is hearsay, and inadmissible.—*Bradley v. Modern Woodmen of America* (Mo. App.) 69.

### X. DOCUMENTARY EVIDENCE.

Depositions, see Depositions, § 96.

In criminal prosecutions, see Criminal Law, § 438.

Use of writings to refresh memory of witness, see Witnesses, § 255.

#### (B) Exemplifications, Transcripts, and Certified Copies.

§ 342. An indorsement made on an original grant of land on file in the General Land Office *held* an archive of the office, rendering a certified copy of the indorsement admissible in evidence.—*Davidson v. Ryle* (Tex.) 616.

§ 342. A certified sketch from a map *held* admissible as evidence of whatever appears thereon.—*Finberg v. Gilbert* (Tex. Civ. App.) 979.

§ 348. A certificate to a copy of a foreign judgment *held* sufficient.—*Varn v. Arnold Hat Co.* (Tex. Civ. App.) 693.

#### (C) Private Writings and Publications.

Admissibility of catalogues as evidence of sale, see Sales, § 87.

In criminal prosecutions, see Criminal Law, § 438.

#### (D) Production, Authentication, and Effect.

§ 372. *Sayles' Ann. Civ. St.* 1897, art. 2312, as amended by Act April 23, 1907 (Gen. Laws 1907, p. 308, c. 165), *held* not to authorize the admission of a will in evidence, in the absence of a judgment probating it.—*Dean v. Furrh* (Tex. Civ. App.) 481.

### XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

#### (A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 400. In replevin for machinery sold under written contracts, or orders of purchase, parol evidence as to representations or warranties or other matters outside the sale order was inadmissible.—*Robinson & Co. v. Ligon* (Mo. App.) 590.

§ 419. Evidence of the actual consideration of a check delivered subject to a written memorandum *held* admissible.—*Foxworthy v. Adams* (Ky.) 381.

§ 419. Oral evidence *held* not admissible to vary or contradict a written compromise agreement.—*Hurr v. Metropolitan St. Ry. Co.* (Mo. App.) 1057.

§ 420. Parol evidence *held* not admissible to import a condition into an absolute deed.—*Selari v. Selari* (Tex. Civ. App.) 997.

#### (C) Separate or Subsequent Oral Agreement.

§ 441. Where no fraud was charged in connection with the obtaining or execution of written orders of purchase of machinery, all previous understandings or arrangements between the parties or their agents were merged in the contracts.—*Robinson & Co. v. Ligon* (Mo. App.) 590.

#### (D) Construction or Application of Language of Written Instrument.

§ 448. A written contract is neither varied nor contradicted by parol testimony which merely makes certain that which the face of the contract leaves uncertain as to what the intention of the parties was.—*Montgomery & Co. v. Arkansas Cold Storage & Ice Co.* (Ark.) 768.

§ 450. A receipt given to an accident insurance company *held* to be so ambiguous as to warrant admission of parol evidence to show it was only intended to partially settle for a second injury.—*Thetford v. General Accident Assur. Corp., Limited* (Mo. App.) 39.

§ 450. A clear and unambiguous written agreement to take property "subject to all taxes due thereon" is not subject to construction or explanatory testimony to show an agreement to assume the same.—*Toepperwein v. City of San Antonio* (Tex. Civ. App.) 699.

§ 452. Parol evidence is admissible to aid in construing a deed containing a latent ambiguity.—*Justice v. Justice* (Ky.) 351.

§ 460. Where a written contract for the storage of apples provided that it was subject to all rules and regulations governing the storage of apples, but was silent as to what the rules and regulations were, it was necessary to resort to evidence aliunde to ascertain what they were.—*Montgomery & Co. v. Arkansas Cold Storage & Ice Co.* (Ark.) 768.

§ 460. Admissibility of extrinsic evidence to identify the land sought to be recovered with that described in plaintiff's patent determined.—*Finberg v. Gilbert* (Tex. Civ. App.) 979.

### XII. OPINION EVIDENCE.

In criminal prosecutions, see Criminal Law, § 448.

#### (A) Conclusions and Opinions of Witnesses in General.

§ 471. The testimony of a witness *held* admissible as a statement of a fact.—*St. Louis Southwestern Ry. Co. v. Jackson* (Ark.) 241.

§ 471. In an action for the death of a car inspector evidence that it was negligent operation for the trainmen to run the engine in the yards without ringing the bell or giving warning was inadmissible as the opinion of the witness.—*Russell's Adm'r v. Louisville & N. R. Co.* (Ky.) 841.

§ 471. An answer on cross-examination *held* not subject to objection that it would be stating a conclusion.—*Chenoweth v. Sutherland* (Mo. App.) 1055.

§ 471. Inquiries *held* not open to objection of calling for conclusion.—*Chenoweth v. Sutherland* (Mo. App.) 1055.

§ 471. The testimony of a witness that a person was an honest man is inadmissible as the opinion of the witness.—*Davidson v. Ryle* (Tex.) 616.

§ 471. A statement by a witness *held* not objectionable as being his conclusion.—*Ft. Worth & D. C. Ry. Co. v. Arthur* (Tex. Civ. App.) 213.

§ 471. A blue print of survey introduced with the testimony of the surveyor is not objectionable as the conclusions of the witness.—*Finberg v. Gilbert* (Tex. Civ. App.) 979.

§ 472. It is improper to ask a witness whether certain acts constituted negligence.—*Teepen v. Taylor* (Mo. App.) 1062.

§ 472. In an action for injuries to an employé while repairing an engine on a track, the opinion of a witness *held* inadmissible because the jury could determine the facts from the evidence.—*Houston & T. O. R. Co. v. Hanks* (Tex. Civ. App.) 136.

§ 472. In an action against a railroad for injuries to stock in transportation, certain opinion evidence *held* incompetent.—*Texas & P. Ry. Co. v. Jones* (Tex. Civ. App.) 194.

§ 474. One *held* qualified to testify to the value of a stock of merchandise.—*Culver v. Williamsburg City Fire Ins. Co.* (Mo. App.) 540.

§ 474. A witness *held* competent to testify as to the value of a building destroyed by fire.—*Ft. Worth & D. C. Ry. Co. v. Arthur* (Tex. Civ. App.) 213.

§ 474. A witness, who had known plaintiff for several years, though not a physician or expert, could testify that he did not seem healthy after he was injured.—*Missouri, K. & T. Ry. Co. of Texas v. Farris* (Tex. Civ. App.) 497.

§ 501. A witness in a will contest on the ground of undue influence, *held* not competent to give his opinion as to whether testatrix was mentally able of resisting a command of her daughter, made the principal beneficiary.—*Smith v. Boswell* (Ark.) 264.

§ 501. Plaintiff's testimony as to market value of his burned grass *held* admissible.—*Texas Cent. R. Co. v. Qualls* (Tex. Civ. App.) 140.

#### (B) Subjects of Expert Testimony.

§ 525. An expert may show that a disc plow, which was in a building at the time of its destruction by fire, was of no value after the fire.—*Ft. Worth & D. C. Ry. Co. v. Arthur* (Tex. Civ. App.) 213.

§ 528. The testimony of a physician as to the results produced by a personal injury *held* competent.—*City of Georgetown v. Groff* (Ky.) 888.

§ 529. In an action against a railroad for damages to plaintiff's land, through overflow from the construction of defendant's road, certain expert testimony *held* admissible.—*Gurley v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 502.

#### (C) Competency of Experts.

§ 537. A witness, not a medical graduate, *held* qualified to testify as to the condition of plaintiff's legs after they were injured.—*Missouri, K. & T. Ry. Co. of Texas v. Farris* (Tex. Civ. App.) 497.

#### (D) Examination of Experts.

§ 550. An expert *held* entitled to give his opinion as to the value of the material in a building based on a detailed statement of the dimensions of the building, and the character and kind of the lumber contained therein.—*Ft. Worth & D. C. Ry. Co. v. Arthur* (Tex. Civ. App.) 213.

### XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

In criminal prosecutions, see Criminal Law, § 539.

### XIV. WEIGHT AND SUFFICIENCY.

Credibility, impeachment, contradiction, and corroboration of witnesses, see Witnesses, §§ 321-405.

Effect of tax deeds as evidence, see Taxation, § 789.

For death of guest at lodging house, see Innkeepers, § 10.

In criminal prosecutions, see Criminal Law, §§ 549, 560.

Instructions as to weight and sufficiency, see Trial, § 237.

Questions for jury, see Trial, §§ 136-143.

Review as dependent on motion for new trial in lower court, see Appeal and Error, § 294.

Review as dependent on presentation of question in lower court, see Appeal and Error, § 213.

Scope and extent of review, see Appeal and Error, §§ 993-1011.

#### As to particular facts or issues.

See Alteration of Instruments, § 29; Boundaries, § 37; Dedication, § 44; Deeds, §§ 207, 211; Partnership, § 55.

Adultery as ground for divorce, see Divorce, § 129.

Agency, see Principal and Agent, § 23.

Assumption of risk by servant injured, see Master and Servant, § 280.

Authority of corporate agent, see Corporations, § 432.

Breach of warranty, see Exchange of Property, § 13.

Contributory negligence of servant injured, see Master and Servant, § 281.

Creation, existence, and validity of trust, see Trusts, §§ 44, 89.

Damages, see Damages, § 189.

Execution, existence, and genuineness of will, see Wills, § 302.

Execution of deed, see Deeds, § 207.

Fraudulent conveyance, see Fraudulent Conveyances, § 299.

Fraud in procuring settlement, see Compromise and Settlement, § 23.

Fraud or undue influence in procuring execution of will, see Wills, § 166.

Good faith of purchaser of land, see Vendor and Purchaser, § 244.

Incompetency of fellow servant, see Master and Servant, § 279.

Insanity of insured, see Insurance, § 665.

Insolvency of maker of note, see Bills and Notes, § 516.

Negligence of fellow servant, see Master and Servant, § 279.

Negligence of master causing injury to servants, see Master and Servant, § 278.

Payment, see Payment, § 75.

Payment of bill or note, see Bills and Notes, § 527.

Proximate cause of death of guest at lodging house, see Innkeepers, § 10.

Title of mortgagor, see Mortgages, § 463.

Title to property sold at tax sale, see Taxation, § 789.

Validity of deed, see Deeds, § 211.

#### In particular civil actions or proceedings.

See Forcible Entry and Detainer, § 29; Trespass to Try Title, § 41.

For breach of contract by servant, see Master and Servant, § 65.

For breach of warranty of goods sold, see Sales, § 441.

For compensation of broker, see Brokers, § 86.

For delay in transmission and delivery of message, see Telegraphs and Telephones, § 66.

For divorce, see Divorce, § 129.

For injunction, see Injunction, § 128.  
 For injuries from defects or obstructions in streets, see Municipal Corporations, § 819.  
 For injuries from fires caused by operation of railroad, see Railroads, § 482.  
 For injuries from negligence, see Negligence, § 134.  
 For injuries to animals on or near railroad tracks, see Railroads, § 443.  
 For injuries to passenger ejected from train, see Carriers, § 381.  
 For injuries to passengers, see Carriers, § 318.  
 For injuries to persons on or near railroad tracks, see Railroads, § 398.  
 For injuries to servants, see Master and Servant, §§ 276-281.  
 For malicious prosecution, see Malicious Prosecution, § 64.  
 For price of goods sold, see Sales, § 359.  
 For separate maintenance, see Husband and Wife, § 297.  
 For wrongful discharge of servant, see Master and Servant, § 40.  
 On bills or notes, see Bills and Notes, §§ 516-527.  
 On insurance policies, see Insurance, § 665.  
 Probate proceedings and actions relating to wills or probate, see Wills, § 302.  
 Relative weight of positive and negative testimony as question for jury, see Trial, § 139.  
 To avoid compromise, see Compromise and Settlement, § 23.  
 To cancel written instrument, see Cancellation of Instruments, § 47.  
 To establish boundaries, see Boundaries, § 37.  
 To foreclose mortgage, see Mortgages, § 463.  
 To recover earnest money from broker, see Brokers, § 106.  
 To recover property exchanged, see Exchange of Property, § 13.  
 To reform written instrument, see Reformation of Instruments, § 45.  
 To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 296.

§ 586. Certain testimony *held* positive, and for the jury to weigh in comparison with contradictory testimony.—Mudd v. Missouri, K. & T. Ry. Co. (Mo. App.) 59.

§ 594. The falsity of testimony may be determined by all the facts and circumstances proved, though it is not directly contradictory.—Paragould & M. R. Co. v. Smith (Ark.) 776.

## EXAMINATION.

Of expert witnesses, see Evidence, § 550.  
 Of nonexpert witnesses giving opinions, see Evidence, § 501.  
 Of witnesses, see Depositions, § 64; Witnesses, §§ 240-277.

## EXCEPTIONS.

In statutes, allegations in indictment or information, see Indictment and Information, § 111.

*In contracts and conveyances.*

Risks and causes of loss excepted in insurance policy, see Insurance, § 446.

*In judicial proceedings.*

Bill of exceptions in general, see Exceptions, Bill of.  
 Necessity and sufficiency for purpose of review in civil cases, see Appeal and Error, § 250.  
 Necessity and sufficiency for purpose of review in criminal cases, see Criminal Law, § 1056.  
 To evidence, see Trial, § 105.  
 To instructions, see Trial, §§ 290, 284.  
 To pleadings, review of decisions, see Appeal and Error, § 1040.

## EXCEPTIONS, BILL OF.

In criminal cases, see Criminal Law, §§ 1090-1124.  
 Necessity for purpose of review, see Appeal and Error, §§ 547-553.  
 Necessity that making and filing appear of record on appeal, see Appeal and Error, § 511.  
 Part of record for purpose of review, see Appeal and Error, § 537.  
 Presumptions as to making and contents, see Appeal and Error, § 938.  
 Taking exceptions at trial, see Trial, §§ 105, 280, 284.

## I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 27. Recitals of fact in a bill of exceptions to admission of evidence as grounds of objection to evidence *held* required to be verified by other parts of the bill.—Chicago, R. I. & G. Ry. Co. v. Thompson (Tex. Civ. App.) 144.

## II. SETTLEMENT, SIGNING, AND FILING.

As part of record for purpose of review, see Appeal and Error, § 537.  
 Bill of exceptions as part of record on appeal as dependent on timely filing, see Appeal and Error, § 537.  
 In criminal cases, see Criminal Law, § 1092.  
 § 43. A bill of exceptions not filed within the time allowed cannot be considered.—United States Fidelity & Guaranty Co. v. Herzog (Ky.) 279.

## EXCESSIVE DAMAGES.

See Damages, §§ 130, 132.  
 For wrongful death, see Death, § 99.

## EXCHANGE OF PROPERTY.

Parol or extrinsic evidence to contradict or vary written contract, see Evidence, § 400.  
 § 13. In an action to recover mules traded by plaintiff for a horse represented by defendant to be sound, evidence *held* to show that the horse was unsound, and that plaintiff had no knowledge thereof.—Talbot v. Krahwinkle (Ky.) 323.  
 § 13. Where plaintiff traded his mules for a horse falsely represented by defendant to be sound, plaintiff could either sue for a breach of warranty or for the return of the mules.—Talbot v. Krahwinkle (Ky.) 323.

## EXCISE.

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

## EXCLAMATIONS.

As part of *res gestæ*, see Evidence, § 127.

## EXECUTION.

See Attachment; Garnishment.  
 Exemptions, see Exemptions; Homestead.  
 Right of officer in possession of property under execution to attack conveyance as in fraud of execution creditor, see Fraudulent Conveyances, § 222.

## V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 172. In a suit by a married woman to restrain the sale of property on execution against her husband, the burden is on plaintiff to show that the property belongs to her as alleged.—Broussard v. Lawson (Tex. Civ. App.) 712.

§ 172. An injunction sued out by a wife to prevent the sale of property on an execution against her husband may be perpetuated on a showing that she owns the property.—*Broussard v. Lawson* (Tex. Civ. App.) 712.

## VII. SALE.

Of property of insane person, see *Insane Persons*, § 101.

### (D) Conveyance to Purchaser.

§ 306. Failure of a purchaser of land under an execution to obtain a deed from the sheriff and a writ of possession may be waived by those against whom the execution ran.—*Miller v. Goodin* (Ky.) 818.

## X. SUPPLEMENTARY PROCEEDINGS.

§ 371. In view of Civ. Code Prac. § 70, an action may be brought under section 439, upon return of execution unsatisfied, in the county in which the judgment was rendered, and a debtor of the judgment debtor made a party thereto, though he resides in another county.—*Parks v. O. K. Jellico Coal Co.* (Ky.) 868.

## EXECUTORS AND ADMINISTRATORS.

See *Descent and Distribution*; *Wills*.  
Administration of community property, see *Husband and Wife*, § 276.  
Courts of probate, see *Courts*, § 202.  
Testamentary trustees, see *Trusts*.  
Testimony as to transactions with persons subsequently deceased, see *Witnesses*, §§ 144-160.

### I. ADMINISTRATION IN GENERAL.

Evidence of death, see *Death*, § 2.

§ 7. An independent executrix, making an advancement in part payment of a claim, held entitled to a credit therefor.—*Mattingly v. Kelly* (Tex. Civ. App.) 483.

### II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 17. Under the facts and Ky. St. §§ 3896, 3897 (Russell's St., §§ 3919, 3920), a son of decedent held entitled to appointment as administrator.—*Watkins v. Watkins' Adm'r* (Ky.) 801.

§ 20. Affidavits in opposition to the appointment of one applying for appointment as administrator held insufficient.—*Watkins v. Watkins' Adm'r* (Ky.) 801.

### III. ASSETS, APPRAISAL, AND INVENTORY.

Mandamus to compel making of inventory, see *Mandamus*, §§ 23, 60.

§ 55. An executor or administrator, keeping money and treating it as funds of the estate, is estopped to deny the capacity in which they are held, where no other person has a better claim thereto, but as against one whom deceased defrauded, the proceeds of the property fraudulently obtained cannot be held for distribution among general creditors.—*Fidelity & Deposit Co. of Maryland v. Wiseman* (Tex.) 621.

### IV. COLLECTION AND MANAGEMENT OF ESTATE.

#### (A) In General.

Liabilities of heirs and distributees, see *Descent and Distribution*, § 125.

§ 105. Executor held properly credited with amount of deposit lost through bank failure.—*Dockins v. Vass* (Ky.) 290.

§ 117. Executor held not chargeable with waste for cutting timber on decedent's estate.—*Dockins v. Vass* (Ky.) 290.

§ 124. Under the express provisions of Sayles' Ann. Civ. St. 1897, art. 1990, a less number than all of the executors who have qualified cannot by deed convey title to testator's land.—*Dean v. Furrh* (Tex. Civ. App.) 481.

#### (B) Real Property and Interests Therein.

§ 130. Under Rev. St. 1899, § 130 (Ann. St. 1906, p. 379), an administrator, on the court directing him to take possession of the real estate and rent the same, is in full charge of the real estate, with the right to sue therefor.—*Meeks v. Clear Jack Mining Co.* (Mo. App.) 1084.

§ 131. Executor held not liable for renting land for less than might have been procured.—*Dockins v. Vass* (Ky.) 290.

§ 135. A deed by an administratrix of land sold by decedent under an invalid contract held invalid.—*Brooks v. Payne* (Tex. Civ. App.) 463.

§ 137. Where 18 years after letters of administration are granted, but before final settlement, the administratrix sells a land certificate belonging to the estate, her rights and duties as to the sale are governed by the law in force at the time of sale.—*McLain v. Pate* (Tex. Civ. App.) 718.

§ 138. Under a will the executors held authorized to sell without giving bonds and being directed by the probate court to sell.—*Dean v. Furrh* (Tex. Civ. App.) 481.

§ 148. Where a sale of a land certificate by an administratrix is collaterally attacked, it devolves on the attacking parties to show the absence of some essential element, or the existence of some fact that would destroy the validity of the transaction.—*McLain v. Pate* (Tex. Civ. App.) 718.

#### (C) Personal Property.

§ 153. In an action by an administrator for conversion, evidence held to support a judgment for defendant.—*Painter v. Painter* (Mo. App.) 561.

§ 158. Under Paschal's Dig. arts. 5612, 5613, 5629-5631, 5633, 5698, 5771, the transfer of a land certificate by an administratrix held valid without an order of court.—*McLain v. Pate* (Tex. Civ. App.) 718.

## VI. ALLOWANCE AND PAYMENT OF CLAIMS.

#### (A) Liabilities of Estate.

§ 219. An executor's claim for nursing and caring for testator and his wife held properly allowed.—*Dockins v. Vass* (Ky.) 290.

§ 221. In a proceeding for the allowance of a claim against the estate of a decedent for services rendered, held, under the evidence, that the amount allowed the claimant was not excessive.—*Lancaster's Ex'r v. O'Brien* (Ky.) 864.

#### (B) Presentation and Allowance.

§ 227. Under Ky. St. § 3870 (Russell's St. § 3901), relating to proof of claims against estates of decedents, a claim for services performed held sufficiently supported by affidavits.—*Lancaster's Ex'r v. O'Brien* (Ky.) 864.

## VII. DISTRIBUTION OF ESTATE.

Partition of property of estate, see *Partition*.

## VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.

#### (A) When Authorized.

§ 329. Under Rev. St. 1899, § 130 (Ann. St. 1906, p. 379), the probate court may order the

administrator of a decedent owning a mine to lease the same in order to pay debts.—*Meeks v. Clear Jack Mining Co.* (Mo. App.) 1084.

#### (B) Application and Order.

§ 356. A judgment, directing the sale of land of a decedent, *held* not void because the petition for the sale did not describe the land.—*Ison v. Halcomb* (Ky.) 813.

§ 356. A judgment ordering the sale of decedent's land *held* not void as against an infant.—*Ison v. Halcomb* (Ky.) 813.

#### (C) Sale.

§ 376. Evidence in trespass to try title *held* insufficient to establish an estoppel on the part of plaintiffs.—*Brooks v. Payne* (Tex. Civ. App.) 463.

§ 380. Evidence in trespass to try title to land entered under a headright certificate conveyed by an administratrix, *held* insufficient to make it necessary for plaintiffs to restore to defendants the consideration paid for the land.—*Brooks v. Payne* (Tex. Civ. App.) 463.

### X. ACTIONS.

Continuance or revival of action by or against decedents, see Abatement and Revival, §§ 73, 77.

Right to sue for causing death of decedent, see Death, § 81.

Survival of actions by or against decedents, see Abatement and Revival, § 58.

### XI. ACCOUNTING AND SETTLEMENT.

#### (A) Duty to Account.

Mandamus to compel making of settlements, see Mandamus, § 60.

Mandamus to compel settlement of accounts, see Mandamus, § 23.

#### (B) Proceedings for Accounting.

§ 470. Under Rev. St. 1895, art. 1882, the administration of an estate is not closed until the discharge of the administrator.—*McLain v. Pate* (Tex. Civ. App.) 718.

#### (E) Stating, Settling, Opening, and Review.

§ 516. Where exceptions to the settlement of an executor or administrator are dismissed by the county court without a hearing, an action may be instituted in equity in the circuit court to surcharge the settlement and force an accounting.—*Caplinger v. Pritchard* (Ky.) 352.

### EXECUTORY CONTRACTS.

In general, see Contracts.

### EXEMPLARY DAMAGES.

See Damages, § 215.

### EXEMPTIONS.

See Homestead.

From liability for loss of or injury to goods, see Carriers, § 156.

From liability for negligence or default in transmission or delivery of messages, see Telegraphs and Telephones, § 54.

From taxation, see Taxation, §§ 217, 245.

### I. NATURE AND EXTENT.

#### (C) Property and Rights Exempt.

§ 40. Under the statute exempting wearing apparel, a diamond ring worn on the finger is exempt from execution.—*First Nat. Bank v. Robinson* (Tex. Civ. App.) 177.

§ 50. Rev. St. 1899, § 7908 (Ann. St. 1906, p. 3761), exempting the funds from beneficiary certificates from debts of the beneficiary, does not prevent a certificate payable to "legal representatives" of the insured from becoming a part of his estate, or require that the words be interpreted as "legal heirs" in order to enforce the exemption.—*Walker v. Peters* (Mo. App.) 35.

§ 61. Under a constitutional provision exempting property to the value of \$500, a debtor may select as his share in a judgment owned by a firm of which he is a member.—*Farmers' Union Gin & Milling Co. v. Seitz* (Ark.) 780.

### EX PARTE PROCEEDINGS.

Habeas corpus, see Habeas Corpus.

### EXPENSES.

Right of pledgee to incur for protection of collateral, see Pledges, § 27.

### EXPERT TESTIMONY.

See Evidence, §§ 525-529, 537, 550.

### EXPRESS TRUSTS.

See Trusts, §§ 44-61.

### EXPROPRIATION.

See Eminent Domain.

### EXTENSION.

Of lease, see Landlord and Tenant, § 86.

Of time for payment of bill or note, see Bills and Notes, § 137.

Of time for presentation, allowance, and filing of bills of exceptions, see Criminal Law, § 1092.

### EXTORTION.

See False Personation; Threats.

### EXTRINSIC EVIDENCE.

In general, see Evidence, §§ 400-460.

### EYEWITNESSES.

Necessity of calling in prosecution for homicide, see Homicide, § 266.

### FACT.

Evidence of matters of fact or conclusions, see Evidence, § 471.

Findings of fact, see Trial, §§ 351, 365, 390.

Judicial notice of facts, see Evidence, §§ 12-43.

Matter of fact distinguished from matters of opinion, see Fraud, § 11.

Presumption as to continuance of fact, see Evidence, § 67.

Questions of law and fact, province of court and jury, see Criminal Law, §§ 741, 742; Trial, §§ 136-143.

### FACTORIZING PROCESS.

See Garnishment.

### FACTORS.

See Brokers.

### FALSE IMPRISONMENT.

See Malicious Prosecution.

Liability of city for acts of officers in enforcing illegal ordinance, see Municipal Corporations, § 747.

Right to make, and mode of making, arrest in general, see Arrest, § 62.

## FALSE PERSONATION.

§ 4. An indictment under Ky. St. c. 32, subd. 2, § 1212 (Russell's St. § 3479), for collecting money as a tax under a pretense of acting as a deputy sheriff, *held* bad for not alleging that accused was not a deputy sheriff when he collected the money.—Commonwealth v. Wolfford (Ky.) 288.

## FALSE PRETENSES.

Forgery, see Forgery.

Personation of another, see False Personation.

§ 32. An indictment for false pretenses *held* insufficient for failure to negative the matter as to which the alleged false pretense was made.—Commonwealth v. Nunnally (Ky.) 813.

## FALSE REPRESENTATIONS.

See False Personation; False Pretenses; Fraud. Affecting validity of sale, see Sales, §§ 38, 41.

## FALSIFYING.

Instruments, in general, see Forgery.

## FAMILY.

See Husband and Wife; Parent and Child.

Homestead, see Homestead.

Meaning of term as used in insurance certificates, see Insurance, § 785.

## FARES.

For carriage of passengers, see Carriers, §§ 253, 356, 358.

## FARM CROSSINGS.

See Railroads, § 413.

## FATHER.

See Parent and Child.

## FAULT.

See Negligence.

## FEES.

*Of particular classes of officers or other persons.*

See District and Prosecuting Attorneys, § 5; Witnesses, § 29.

Attorneys, see Attorney and Client, § 150.

Tax collectors, see Taxation, § 549.

## FEE SIMPLE.

Construction of wills, see Wills, § 600.

## FELLOW SERVANTS.

See Master and Servant, §§ 177-201, 216, 279, 287.

## FEME COVERT.

See Husband and Wife.

## FENCES.

Animals running at large, see Animals, § 57.

§ 28. Evidence *held* insufficient to sustain a conviction of unlawfully breaking down a fence belonging to complainant.—Farmer v. State (Tex. Cr. App.) 925.

§ 28. A criminal prosecution cannot be sustained for the destruction of prosecutor's fence,

protecting land on which prosecutor was a trespasser.—Farmer v. State (Tex. Cr. App.) 925.

## FIDEI COMMISSUM.

See Trusts.

## FIDUCIARY RELATIONS.

See Brokers; Guardian and Ward; Partnership; Principal and Agent; Trusts.

Between corporations and their officers or agents, see Corporations, § 310.

## FIERI FACIAS.

See Execution.

## FILING.

Record on appeal or writ of error, see Appeal and Error, § 619.

## FINAL ACCOUNTS.

Of executors and administrators, see Executors and Administrators, § 470.

## FINAL JUDGMENT.

Decisions reviewable, see Appeal and Error, § 79.

## FINDINGS.

By court in general, see Trial, § 390.

By jury in general, see Trial, §§ 351, 365.

Conformity of judgment to findings, see Judgment, § 256.

Review in appellate court, see Appeal and Error, §§ 931, 1009-1011; Criminal Law, §§ 1159, 1160.

## FIREARMS.

See Weapons.

## FIRE ESCAPES.

On lodging houses, see Innkeepers, § 10.

## FIRE INSURANCE.

See Insurance.

## FIRES.

Civil liability for injuries from fires caused by operation of railroad, see Railroads, §§ 454-484.

Criminal responsibility for burning or setting fire to buildings or other structures and their contents, see Arson.

Injuries to persons in lodging houses, see Innkeepers, § 10.

Interest as element of damages for destruction of property by fire, see Damages, § 69.

Liability of trespasser, see Trespass, § 14.

Measure of damages for destruction of property by fire, see Damages, § 112.

Measure of damages for injuries by trespassers, see Trespass, § 50.

## FISCAL MANAGEMENT.

Of counties, see Counties, § 192.

Of municipal corporations, see Municipal Corporations, §§ 867, 966.

Of school districts, see Schools and School Districts, §§ 97-107.

## FLIGHT.

Of accused as evidence of guilt, see Criminal Law, § 351.

Of accused as evidence of guilt, explanation by accused, see Criminal Law, § 361.

**FLOWAGE.**

See Waters and Water Courses, §§ 176-179.

**FOOTSTEPS.**

Ascertainment of boundaries by reference to footsteps of surveyor, see Boundaries, §§ 3, 8.

**FORCE.**

Element of rape, see Rape, § 6.

**FORCIBLE DEFILEMENT.**

See Rape.

**FORCIBLE ENTRY AND DETAINER.**

Trespass, see Trespass.

**I. CIVIL LIABILITY.**

§ 4. Under a statute (Kirby's Dig. § 3829) relating to forcible entry and detainer, *held*, that the acts of defendant amounted to forcible entry and detainer.—Grammer v. Blansett (Ark.) 1037.

§ 20. In an action of unlawful detainer, *held*, that the court has no authority to order the land rented pending the suit without a bond to defendants.—Ex parte Gilbert (Ark.) 762.

§ 29. In an action for forcible entry and detainer, evidence *held* to sustain a verdict for plaintiff.—Grammer v. Blansett (Ark.) 1037.

**FORECLOSURE.**

Of mortgage, see Chattel Mortgages, §§ 249-288; Mortgages, §§ 341, 463.

Of vendors' liens, see Vendor and Purchaser, § 295.

**FOREIGN ATTACHMENT.**

See Garnishment.

**FOREIGN CORPORATIONS.**

See Corporations, § 672.

**FOREIGN JUDGMENTS.**

See Judgment, §§ 829, 935, 942.

**FORFEITURES.**

For breach of condition in deed, see Deeds, § 108.

Of deposits for payment of price of land, see Vendor and Purchaser, § 334.

Of insurance, estoppel or waiver affecting right, see Insurance, §§ 372-392.

Of mining lease, see Mines and Minerals, § 66.

**FORGERY.**

§ 16. In a prosecution for passing a forged instrument, the proof must show that defendant knew at the time he passed the instrument that it was forged.—Feeney v. State (Tex. Cr. App.) 944.

§ 29. Explanatory averments to explain the instrument set forth in an indictment for forgery are proper.—Chappel v. State (Tex. Cr. App.) 657, 658.

§ 29. An indictment for uttering a forged instrument *held* sufficient.—Chappel v. State (Tex. Cr. App.) 657, 658.

§ 34. In a prosecution for passing a forged instrument, where the instrument introduced in evidence was different from that described in the indictment, there was a fatal variance be-

tween the indictment and proof.—Feeney v. State (Tex. Cr. App.) 944.

§ 48. In a prosecution for passing a forged instrument, an instruction *held* faulty in failing to require that the defendant must have known that the instrument was forged at the time he passed it.—Feeney v. State (Tex. Cr. App.) 944.

§ 48. In a prosecution for passing a forged instrument, where the count in the indictment upon which the conviction was predicated alleged that the party whose act the instrument on its face purported to be was a fictitious person, the jury should have been instructed on this averment.—Feeney v. State (Tex. Cr. App.) 944.

§ 48. In a prosecution for passing a forged instrument, the court should instruct that, in order for defendant to be convicted, he must have done so with intent to defraud.—Feeney v. State (Tex. Cr. App.) 944.

§ 48. An instruction in a prosecution for forgery, defining "property," *held* proper.—Williams v. State (Tex. Cr. App.) 954.

**FORMER ADJUDICATION.**

Operation and effect in general, see Judgment, §§ 603, 617, 707-732.

**FORMER JEOPARDY.**

Bar to prosecution, see Criminal Law, §§ 170, 186.

**FORMS OF ACTION.**

See Action, § 24; Ejectment; Forcible Entry and Detainer, §§ 4-29; Replevin; Trespass, § 50; Trespass to Try Title; Trover and Conversion.

**FORNICATION.**

See Adultery; Incest; Seduction.

**FRATERNAL ASSOCIATIONS.**

See Insurance, §§ 782-815.

Liability to liquor tax, see Intoxicating Liquors, § 60.

Sale of liquors by agent, see Intoxicating Liquors, § 169.

**FRAUD.**

Assignability of cause of action, see Assignments, § 24.

Constructive trust arising from fraud, see Trusts, § 95.

Conveyances and transactions fraudulent as to creditors or subsequent purchasers, see Fraudulent Conveyances.

Offenses involving fraud, see False Personation; False Pretenses; Forgery.

Right of assignee of contract of sale to recover for fraud on assignor, see Assignments, § 80.

*By particular classes of persons, or persons in particular relations.*

Sellers of goods, see Sales, §§ 38, 41.

Shipper, see Carriers, § 110.

*In particular classes of conveyances, contracts, transactions, or proceedings.*

See Wills, §§ 155-166.

Contracts for transportation of goods, see Carriers, § 110.

Sales, see Sales, §§ 38, 41.

**I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.**

§ 11. A representation *held* not one on which an action for fraud could be based.—Merchants' Nat. Bank v. Brisch (Mo. App.) 76.

**II. ACTIONS.****(A) Rights of Action and Defenses.**

§ 34. It is not a condition precedent to a suit for damages for fraudulent representations as to the value of a horse traded to plaintiff that plaintiff should tender the horse to defendant; the action not being one for rescission of the contract.—*Covington v. Sloan* (Tex. Civ. App.) 690.

**(B) Parties and Pleading.**

§ 49. A pleading charging fraud *held* not sustained by the proof.—*Mullinax v. Lowry* (Mo. App.) 572.

**(E) Trial, Judgment, and Review.**

Instructions ignoring evidence, see Trial, § 253.

**III. CRIMINAL RESPONSIBILITY.**

See False Personation; False Pretenses; Forgery.

**FRAUDS, STATUTE OF.****III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCARriage OF ANOTHER.**

§ 26. The promise of the owner of a building to pay for materials furnished solely on his credit if the contractor did not *held* an original undertaking not within the statute of frauds.—*Leifer Mfg. Co. v. Gross* (Ark.) 1039.

**V. AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR.**

§ 44. A contract *held* within Statute of Frauds, § 6 (Ky. St. § 470 [Russell's St. § 1775]), prohibiting actions upon a contract for the sale of real estate or any lease thereof for more than a year unless the contract or some memorandum thereof is in writing.—*McDaniel v. Hutcherson* (Ky.) 384.

§ 50. A contract *held* not within Statute of Frauds, § 7 (Ky. St. § 470 [Russell's St. § 1775]), prohibiting any action upon an agreement which is not to be performed in a year unless some memorandum thereof is in writing.—*McDaniel v. Hutcherson* (Ky.) 384.

**VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.**

§ 69. An oral exchange of lands *held* within the statute of frauds.—*Gordon v. Simmons* (Ky.) 306.

§ 70. An oral agreement fixing boundary between adjoining lands, *held* not within the statute of frauds.—*Gordon v. Simmons* (Ky.) 306.

**IX. OPERATION AND EFFECT OF STATUTE.**

§ 125. Damages stated which plaintiff could recover for breach of an oral contract, unenforceable under the statute of frauds, by which defendant agreed to furnish plaintiff a home during his life and give him his home place at defendant's death.—*McDaniel v. Hutcherson* (Ky.) 384.

§ 131. A parol agreement is not admissible to vary the terms of a previously executed contract for the sale of land which must be in writing.—*Ives v. Crawford County Farmers' Bank* (Mo. App.) 23.

§ 131. A parol agreement *held* to modify a prior written contract for the sale of land, and hence is inadmissible as varying a contract which the law requires to be in writing.—*Ives v. Crawford County Farmers' Bank* (Mo. App.) 23.

**FRAUDULENT CONVEYANCES.****I. TRANSFERS AND TRANSACTIONS INVALID.****(B) Nature and Form of Transfer.**

§ 24. Under Ky. St. § 1907 (Russell's St. § 2100), a conveyance or transfer by a debtor, without valid consideration, is void as to existing creditors, where the transfer is to a third person, and the consideration is paid by the debtor.—*Childers v. Bales* (Ky.) 295.

**(E) Consideration.**

§ 74. Under Ky. St. § 1907 (Russell's St. § 2100), *held*, that every voluntary conveyance is constructively fraudulent as to existing debts, whether fixed or contingent, or incurred as principal, surety, indorser, or guarantor.—*Atkins v. Globe Bank & Trust Co.* (Ky.) 879.

§ 74. Under Ky. St. § 1907 (Russell's St. § 2100), *held*, that no person can give away property liable for his debts to the prejudice of existing creditors, even though he may own and retain largely more than he gives.—*Atkins v. Globe Bank & Trust Co.* (Ky.) 879.

§ 74. The very best evidence that a voluntary conveyance is constructively fraudulent as to antecedent debts is that it becomes necessary to subject the property conveyed to pay grantor's debts.—*Atkins v. Globe Bank & Trust Co.* (Ky.) 879.

**(F) Confidential Relations of Parties.**

§ 104. An agreement between husband and wife to the effect that the wife shall have as her separate property cattle and their increase can be given no greater effect than to vest in the wife a separate right to all the cattle given her prior to the husband's failure to be possessed of sufficient property subject to execution to pay existing debts.—*Cone v. Belcher* (Tex. Civ. App.) 149.

**(H) Preferences to Creditors.**

§ 118. Transfer by a debtor to his wife of property in satisfaction of an indebtedness to her *held* not fraudulent.—*Broussard v. Lawson* (Tex. Civ. App.) 712.

**(I) Retention of Possession or Apparent Title by Grantor.**

§ 146. Under Rev. St. 1895, art. 2967, the transfer of property by a husband to his wife *held* not shown to be fraudulent by the fact that the husband continues in possession of the property.—*Broussard v. Lawson* (Tex. Civ. App.) 712.

**II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.****(A) Original Parties.**

§ 172. A deed cannot be impeached by the grantor or his administrator as in fraud of creditors.—*Phillips v. Henry* (Tex. Civ. App.) 184.

**III. REMEDIES OF CREDITORS AND PURCHASERS.****(A) Persons Entitled to Assert Invalidity.**

§ 222. A constable as defendant in replevin, who seeks to justify his possession under an execution against a third person, cannot attack as fraudulent as to the execution creditor, a sale by such third person to plaintiff, unless he shows a valid execution issued on a valid judgment.—*Moriund v. Johnson* (Mo. App.) 80.

**(B) Remedies on Ground of Nullity of Transfer.**

Restraining execution, see Execution, § 172.

**(D) Jurisdiction, Limitations, and Laches.**

Necessity of pleading limitations, see Limitation of Actions, § 180.

**(G) Evidence.**

Sufficiency of evidence of consideration in suit to restrain execution, see Execution, § 172.

§ 271. In an action to set aside a conveyance as in fraud of creditors, the burden was upon plaintiff to show fraud.—Aultman & Taylor Machinery Co. v. Walker (Ky.) 329.

§ 276. To set aside a conveyance made to a third person for a consideration paid by the debtor, the suing creditor need not show that the money paid was not exempt; that being a matter of defense.—Childers v. Bales (Ky.) 295.

§ 287. On the issue whether a gift by the husband to the wife was fraudulent as against creditors, judgments against the husband are admissible, notwithstanding irregularities therein, to show that the husband was a debtor at the time of the making of the gift.—Cone v. Belcher (Tex. Civ. App.) 149.

§ 299. Testimony given five to six years after property was conveyed to another in consideration of money paid by a debtor, in an action by creditors to set the conveyance aside, held not to show that the money paid for the conveyance was exempt.—Childers v. Bales (Ky.) 295.

**(I) Trial.**

§ 308. Whether a gift by the husband to his wife was void as against creditors under the statute held for the jury.—Cone v. Belcher (Tex. Civ. App.) 149.

**FREIGHT.**

Carriage of goods, see Carriers, §§ 39-185.

Carriage of live stock, see Carriers, §§ 217-230.

**FREIGHT TRAINS.**

Care required of carrier of passengers, see Carriers, § 280.

Liability for injuries to passengers carried on freight trains, see Carriers, § 280.

**FRIGHT.**

Frightening animals near railroad tracks, see Railroads, § 407.

**FUNDS.**

Public funds, see Counties, § 192; Municipal Corporations, §§ 867, 966.

**GAMBLING.**

See Gaming.

**GAMING.****I. GAMBLING CONTRACTS AND TRANSACTIONS.****(A) Nature and Validity.**

§ 17. A contract to pay a certain sum held not rendered void by the further agreement to make payments from profits of a bucket shop till such sum is paid.—Williams Commission Co.'s Assignee v. W. A. Shirley & Bro. (Ky.) 327.

§ 17. Ky. St. § 1955 (Russell's St. § 1807), held to make void only contracts for payment of gaming debts, and not one for payment of money put up as security for any loss at gaming. Sections 1956, 1959.—Williams Commission Co.'s Assignee v. W. A. Shirley & Bro. (Ky.) 327.

**III. CRIMINAL RESPONSIBILITY.****(A) Offenses.**

§ 71. One cannot be convicted of playing or betting on a game of cards upon evidence showing that he, as banker, exhibited a monte bank at which the other players bet.—Vinson v. State (Tex. Cr. App.) 652.

§ 72. One may be prosecuted for betting on a game of cards played in a private residence.—Vinson v. State (Tex. Cr. App.) 652.

**(B) Prosecution and Punishment.**

Admissibility of declarations, see Criminal Law, § 417.

Following language of statute, see Indictment and Information, § 110.

§ 94. Where the information alleged that accused bet money at a game of cards, it was necessary to prove that he bet money in order to avoid a variance.—Melton v. State (Tex. Cr. App.) 910.

§ 94. In a prosecution for gambling, where defendant was charged with unlawfully playing at a game of cards, and the uncontradicted evidence showed that, if gambling at all, he was betting at a game of "monte," his conviction was unauthorized.—Arredondo v. State (Tex. Cr. App.) 930.

§ 97. In a prosecution for gaming, the answer to a question as to the market value of the poker chips used in the game held not admissible.—Melton v. State (Tex. Cr. App.) 910.

**GARNISHMENT.**

See Attachment.

In justice's court, see Justices of the Peace, § 104.

**IV. WRIT OR SUMMONS AND NOTICE, SERVICE, AND RETURN.**

§ 96. The return in garnishment proceedings is conclusive as to the truth of recitals therein; the remedy for a false return being a suit on the officer's bond.—Mound City Engraving Co. v. Mobile & O. R. Co. (Mo. App.) 27.

§ 97. Defects appearing on the face of the return in garnishment must be raised by motion to quash, and not by answer or plea in abatement.—Mound City Engraving Co. v. Mobile & O. R. Co. (Mo. App.) 27.

§ 104. The garnishee, by answering to the merits after his motion to quash a return for defects on its face was overruled, lost the benefit of his motion, though he excepted to the ruling and alleged the same defects in his answer by way of plea in abatement.—Mound City Engraving Co. v. Mobile & O. R. Co. (Mo. App.) 27.

**IX. OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT.**

§ 230. Where a garnishee pays the debt to the debtor after service of the writ, in violation of Sayles' Ann. Civ. St. 1897, art. 225, he cannot recover the money from the debtor.—Baughn v. J. B. McKee Co. (Tex. Civ. App.) 732.

§ 230. A garnishee having paid the debt before service held not entitled to recover the same from the debtor because the garnishee appeared and answered, admitting the indebtedness.—Baughn v. J. B. McKee Co. (Tex. Civ. App.) 732.

**XI. WRONGFUL GARNISHMENT.**

§ 248. In an action for wrongful garnishment, a certain contention held without merit as a defense.—Battle & McKinney v. White (Tex. Civ. App.) 216.

**GENEALOGY.**

Determination of right of inheritance, see Descent and Distribution, § 47.

**GENERAL APPEARANCE.**

See Appearance, § 8.

**GIFTS.**

Between husband and wife, see Husband and Wife, §§ 40½, 40%.

**I. INTER VIVOS.**

Advancements, see Descent and Distribution, § 109.

§ 4. Elements of a valid gift inter vivos, stated.—Foxworthy v. Adams (Ky.) 381.

§ 32. A gift of one's check held incomplete until the check has been paid or accepted by the bank.—Foxworthy v. Adams (Ky.) 381.

§ 34. A gift of the donor's check subject to a written memorandum stipulating that the check shall not be payable until after the donor's death held not a valid gift inter vivos.—Foxworthy v. Adams (Ky.) 381.

§ 34. Gift to take effect after donor's death held invalid as gift inter vivos.—Foxworthy v. Adams (Ky.) 381.

**GOOD FAITH.**

Of attorney in dealing with client, see Attorney and Client, § 123.

Of party asking equitable relief, see Specific Performance, § 101.

Of purchaser of land, see Vendor and Purchaser, §§ 224-244.

Of purchaser of property subject to tax, see Taxation, § 511.

Of purchaser of public lands, see Public Lands, § 178.

**GOODS.**

See Property.

Confusion, see Confusion of Goods.

Mortgage, see Chattel Mortgages.

Sale, see Sales.

**GOOD WILL.**

Restraining breach of contract, see Injunction, § 59.

§ 5. A contract for the sale by a retail lumber dealer of his stock of lumber and good will, held to show a consideration for his agreement not to engage in such business.—Wills v. Forster (Mo. App.) 1090.

**GRAIN.**

Elevators, see Warehousemen.

**GRAND JURY.**

See Indictment and Information.

Admissibility of admissions by accused, see Criminal Law, § 406.

**GRANTS.**

See Deeds.

Application of statute of frauds to grant of existing estates or interests in real property, see Frauds, Statute of, §§ 69, 70.

Constitutional grant of powers in general, see Constitutional Law, § 26.

Of minerals and mining rights, see Mines and Minerals, § 55.

Of public lands, see Public Lands.

**GROWING CROPS.**

Injuries to, measure of damages, see Damages, § 112.

**GUARANTY.**

See Indemnity; Principal and Surety.

Application of statute of frauds, see Frauds, Statute of, § 26.

**GUARDIAN AD LITEM.**

In action by or against infant, see Infants, §§ 82-110.

In action by or against insane person, see Insane Persons, § 94.

**GUARDIAN AND WARD.**

See Parent and Child.

Guardian ad litem, see Infants, §§ 82-110; Insane Persons, § 94.

Matters relating to infants and their property irrespective of guardianship, see Infants.

**III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.**

§ 33. In the absence of statutory restrictions, a guardian may compromise debts without first obtaining an order from the court so to do.—Nashville Lumber Co. v. Barefield (Ark.) 758.

§ 33. Where the compromise by the guardian of a claim of his ward was made without sufficient justification or fraudulently, or on a grossly inadequate consideration, the compromise could be impeached when urged as a defense.—Nashville Lumber Co. v. Barefield (Ark.) 758.

§ 33. Kirby's Dig. § 3823, and other statutes, held not to restrict the power of the guardian to compromise a claim of his ward without first obtaining an order from the court so to do.—Nashville Lumber Co. v. Barefield (Ark.) 758.

§ 43. In the absence of statutory restrictions, a guardian may sell the personality of his ward without first obtaining an order from the court so to do.—Nashville Lumber Co. v. Barefield (Ark.) 758.

**VI. ACCOUNTING AND SETTLEMENT.**

Liability of judge for failing to require settlement, see Judges, § 36.

**GUESTS.**

See Innkeepers.

**GUNS.**

See Weapons.

**HABEAS CORPUS.****I. NATURE AND GROUNDS OF REMEDY.**

§ 30. Habeas corpus held not to lie because of attachment in contempt issuing on affidavit of another person than provided by Rev. St. 1895, art. 3012.—Ex parte Morgan (Tex. Cr. App.) 99; Ex parte Lane (Tex. Cr. App.) 100; Ex parte Patterson (Tex. Cr. App.) 101.

**HABITUAL DRUNKARDS.**

Penalties for sale of liquors to drunkards after notice, see Intoxicating Liquors, § 179.

**HARMLESS ERROR.**

In civil actions, see Appeal and Error, §§ 1028-1073.

In criminal prosecutions, see Criminal Law, §§ 1165-1173; Homicide, §§ 338-340.

**HAZARD.**

See Gaming.

**HEALTH.**

Regulation of practice of medicine, see Physicians and Surgeons.

**II. REGULATIONS AND OFFENSES.**

Liability of railroad company for negligence of servants causing spread of contagious disease, see Negligence, § 1.

Regulation of practice of medicine, see Physicians and Surgeons.

**HEARING.**

In action for injunction, see Injunction, § 130.

On demurrer, see Pleading, § 218.

On demurrer to evidence, see Trial, § 156.

On motion or application for direction of verdict, see Trial, § 178.

On motion or application for new trial, see Criminal Law, § 959.

On motion or application to quash or set aside indictment or information, see Indictment and Information, § 140.

**HEARSAY EVIDENCE.**

See Criminal Law, §§ 419, 420; Evidence, §§ 314-322.

**HEIRS.**

See Descent and Distribution.

Construction of term in insurance certificate, see Insurance, § 785.

Rights as to community and separate property, see Husband and Wife, § 274.

Rights as to homestead, see Homestead, § 140.

**HIGHWAYS.**

Crossing by railroads, see Railroads, §§ 244, 327-350.

Dedication of land for highway, see Dedication.

Eminent domain, additional servitude in highway, see Eminent Domain, § 119.

Eminent domain, occupation or use of highway as ground for compensation to abutting owners, see Eminent Domain, § 100.

Rights in and use of highways by street railroads, see Street Railroads, § 24.

**I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.**

Dedication, see Dedication.

**IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.**

§ 122. Const. Amend. 5, providing that a county road tax may be levied if a majority of the voters shall vote for it at a general election, *held* mandatory, so that Laws 1909, p. 246, authorizing a special election in a county for such purpose, is invalid.—*Merwin v. Russell* (Ark.) 1021.

**V. REGULATION AND USE FOR TRAVEL.**

(B) Use of Highway and Law of the Road.

Animals running at large, see Animals, § 57.

Collisions of street cars with animals or vehicles, see Street Railroads, § 90.

Statutory and municipal regulations relating to movement of trains across highways, see Railroads, § 244.

(C) Injuries from Defects or Obstructions.

Accidents at railroad crossings, see Railroads, §§ 327-350.

In streets, see Municipal Corporations, §§ 750-822.

**HINDERING.**

Creditors, by fraudulent transfers in general, see Fraudulent Conveyances.

**HIRING.**

Of premises, see Landlord and Tenant.

**HOMESTEAD.**

Dower or rights of widow in real property of deceased husband, see Dower.

Exemption of personal property, see Exemptions.

**I. NATURE, ACQUISITION, AND EXTENT.**

(E) Liabilities Enforceable Against Homestead.

Abandonment of contract as affecting right to mechanic's lien, see Mechanics' Liens, § 93.

Right of assignee of contract to mechanic's lien, see Mechanics' Liens, § 204.

§ 97. Under the statute giving a lien on a homestead for improvements, both the contract and the employment of the work and material on the homestead in compliance therewith are made essential to the lien.—*Murphy v. Williams* (Tex.) 900.

§ 105. A penalty cannot, under the Constitution, be imposed on a homestead in addition to "taxes due thereon."—*Toepperwein v. City of San Antonio* (Tex. Civ. App.) 699.

**III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.**

§ 140. The payment by the surviving husband of water rents on the homestead, in the possession of tenants paying him rent, is for his personal benefit, and the community estate is not chargeable therefor.—*Mattingly v. Kelly* (Tex. Civ. App.) 483.

§ 140. Where the surviving husband collected rents from real estate after the same ceased to be his homestead, the only child of the marriage was entitled to a half thereof.—*Mattingly v. Kelly* (Tex. Civ. App.) 483.

§ 140. The amount paid by the surviving husband for permanent street improvements in front of the homestead, after the death of the wife, *held* properly deducted from proceeds of a sale of the premises in determining the amount the only child of the surviving husband and deceased wife is entitled to.—*Mattingly v. Kelly* (Tex. Civ. App.) 483.

§ 140. A surviving husband, using the rents from the homestead in paying a community debt and taxes, *held* entitled to reimbursement therefor out of the community estate.—*Mattingly v. Kelly* (Tex. Civ. App.) 483.

**IV. ABANDONMENT, WAIVER, OR FORFEITURE.**

§ 159. A married woman entitled to a homestead *held* not deprived thereof by the death of her husband, but entitled thereto for her own use so long as she continues to occupy it as a homestead.—*American Nat. Bank v. Mathews* (Ky.) 811.

§ 161. Removal from a homestead with no intention of returning is an abandonment.—*American Nat. Bank v. Mathews* (Ky.) 811.

§ 162. Where the removal is only temporary, the homestead right is not lost.—*American Nat. Bank v. Mathews* (Ky.) 811.

§ 163. Evidence *held* not to show an abandonment of a homestead.—American Nat. Bank v. Mathews (Ky.) 811.

§ 181½. Whether acts of one owning a homestead amount to an abandonment thereof *held* a question of fact, depending on the intention as well as the acts.—American Nat. Bank v. Mathews (Ky.) 811.

## HOMICIDE.

Civil liability for causing death, see Death, §§ 31-104.

Continuance, see Criminal Law, § 597.

## II. MURDER.

§ 11. An instruction defining malice aforethought *held* proper.—Burns v. Commonwealth (Ky.) 409.

§ 13. "Implied malice" defined.—Burns v. Commonwealth (Ky.) 409.

## V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 114. Defendant could not justify the killing where he and deceased engaged in a fight with an agreement that it should be with their fists, and, when entering it, intended to use a deadly weapon, and, pursuant to such intention, did use it.—Bordeaux v. State (Tex. Cr. App.) 640.

## VI. INDICTMENT AND INFORMATION.

Election between counts, see Indictment and Information, § 132.

§ 133. An indictment for murder in the first degree *held* sufficient under Kirby's Dig. § 2234.—Hunter v. State (Ark.) 1028.

§ 142. Under facts, *held*, there was no variance between indictment and evidence as to name of person alleged to have been murdered.—Betts v. State (Tex. Cr. App.) 424.

## VII. EVIDENCE.

### (A) Presumptions and Burden of Proof.

§ 144. The state in a homicide case need not prove motive.—Hogue v. State (Ark.) 783.

### (B) Admissibility in General.

Evidence admissible by reason of admission of similar evidence by accused, see Criminal Law, § 396.

Res gestae, see Criminal Law, § 366.

§ 156. Where there was a plea of accidental homicide and an issue as to whether the shooting was intentional, any circumstance or declaration showing accused's state of mind was admissible.—Singleton v. State (Tex. Cr. App.) 92.

§ 158. Certain testimony as to statements by accused before the killing *held* admissible to show malignity.—Singleton v. State (Tex. Cr. App.) 92.

§ 159. Evidence of previous systematic cruel treatment *held* admissible on a prosecution for murder of defendant's child.—Betts v. State (Tex. Cr. App.) 424.

§ 166. In a prosecution for homicide where defendant's wife testified that she told her husband the night before the homicide that decedent had insulted her, testimony of defendant's son that his mother never told him not to associate with decedent or made any objections to his association with him *held* admissible.—Barbee v. State (Tex. Cr. App.) 961.

§ 166. In a prosecution for homicide, where there was evidence that defendant was told by his wife the night before the homicide that decedent had insulted her, testimony of a witness that he was with defendant on the morn-

ing of the homicide, and that defendant seemed to be angry at decedent because of trouble between one of his boys and decedent, was admissible.—Barbee v. State (Tex. Cr. App.) 961.

§ 168. In a prosecution for homicide, where there was evidence that defendant was told by his wife the night before the homicide that decedent had insulted her, *held* proper to admit evidence that decedent came to defendant's house after the claimed insult, and that there was no difference in the relationship between him and the wife.—Barbee v. State (Tex. Cr. App.) 961.

§ 169. In a prosecution for homicide, evidence as to a question by accused shortly before the killing, and the reply thereto, *held* admissible.—Pace v. State (Tex. Cr. App.) 949.

§ 169. In a prosecution for homicide where there was no dispute but that the defendant brought his own pistol with him from home, it was not error to allow a witness to state that the defendant exhibited it to him shortly before the homicide.—Barbee v. State (Tex. Cr. App.) 961.

§ 191. On a trial for assault with intent to kill, evidence *held* admissible to show prosecutor's feeling toward accused.—Potter v. Commonwealth (Ky.) 317.

§ 193. In a prosecution for homicide by shooting, testimony of a witness that after decedent fell he saw him making a motion with his hand as if putting a knife in his pocket was inadmissible.—Barbee v. State (Tex. Cr. App.) 961.

### (C) Dying Declarations.

§ 203. Facts *held* to constitute a sufficient predicate for the admission of deceased's statement as a dying declaration.—Douglas v. State (Tex. Cr. App.) 933.

### (E) Weight and Sufficiency.

§ 231. Malice may be proved by inferring it from facts and circumstances attending the killing.—Burns v. Commonwealth (Ky.) 409.

§ 234. Certain proof *held* to establish a circumstance, which, if unexplained by accused, tended to establish his guilt of murder.—Hogue v. State (Ark.) 783.

§ 250. Evidence *held* sufficient to support a conviction.—Middleton v. Commonwealth (Ky.) 355; Singleton v. State (Tex. Cr. App.) 92.

§ 253. Evidence *held* to support a conviction of murder in the first degree.—Hogue v. State (Ark.) 783.

§ 254. In a prosecution for homicide, evidence *held* to sustain a verdict of murder in the second degree.—Barbee v. State (Tex. Cr. App.) 961.

§ 257. Evidence *held* to sustain a conviction for assault with intent to murder.—Williams v. State (Tex. Cr. App.) 916.

## VIII. TRIAL.

### (A) Conduct in General.

§ 266. The state is not required to call all eyewitnesses of the homicide.—Davis v. State (Tex. Cr. App.) 104.

### (C) Instructions.

Contradictory instructions, see Criminal Law, § 810.

Error in instruction cured by giving other instructions, see Criminal Law, § 823.

Inconsistent or contradictory instructions, see Criminal Law, § 810.

Testimony of accomplices, see Criminal Law, § 780.

Undue prominence to particular facts, see Criminal Law, § 811.

§ 286. The court having submitted, as a predicate for a conviction on a prosecution for murder, a whipping with a belt strap, not a deadly weapon, *held*, Pen. Code, art. 717, as to considering, on the question of intent, the instrument with which a homicide is committed, should have been given.—*Betts v. State* (Tex. Cr. App.) 424.

§ 286. In a prosecution for homicide, the court *held* to have properly instructed that the instrument or means by which the homicide was committed should be considered in adjudging the intent of the party offending.—*Munos v. State* (Tex. Cr. App.) 941.

§ 291. Evidence *held* not to warrant submission to the jury of defendant's whipping of his child as a predicate for his conviction on prosecution for murder.—*Betts v. State* (Tex. Cr. App.) 424.

§ 291. In view of evidence, *held*, an instruction to acquit if death was caused by a blow on the head, and it was inflicted by other means than at the hands of defendant, should have been given.—*Betts v. State* (Tex. Cr. App.) 424.

§ 300. An instruction that under certain state of facts there could not be an acquittal on self-defense *held* proper.—*Gordon v. Commonwealth* (Ky.) 806.

§ 300. Defendant *held* not entitled to complain of instruction that if deceased "in good faith" abandoned the conflict, and defendant then being in no danger, as he knew, shot deceased, he could not justify on the ground of self-defense.—*Bordeaux v. State* (Tex. Cr. App.) 640.

§ 300. Under White's Ann. Pen. Code, art. 713, relating to threats as a defense for homicide, a charge in a prosecution for assault with intent to murder relating to threats *held* erroneous.—*Graves v. State* (Tex. Cr. App.) 676.

§ 300. In a prosecution for assault with intent to murder, an instruction relating to threats *held* erroneous, as confused and too burdensome on the defense.—*Graves v. State* (Tex. Cr. App.) 676.

§ 300. In a prosecution for homicide, an instruction on the law of self-defense *held* not erroneous, as indicating that the court thought that defendant had used more force than was necessary.—*Munos v. State* (Tex. Cr. App.) 941.

§ 300. In a prosecution for homicide, *held* proper to charge that, if decedent attacked defendant, so that defendant had reason to believe he was in danger of death or serious bodily injury, the killing was justifiable.—*Munos v. State* (Tex. Cr. App.) 941.

§ 301. A charge confining defendant's right to kill in his own defense *held* proper.—*Burns v. Commonwealth* (Ky.) 409.

§ 307. An instruction *held* erroneous as not requiring the homicide to have been unlawful, or with malice, and ignoring the questions of self-defense and of manslaughter.—*Smith v. State* (Tex. Cr. App.) 679.

§ 308. Evidence *held* to warrant an instruction as to murder.—*Burns v. Commonwealth* (Ky.) 409.

§ 309. In a prosecution for homicide, instructions *held* error as blending two causes for reducing the offense to manslaughter.—*Barbee v. State* (Tex. Cr. App.) 961.

## IX. NEW TRIAL.

Newly discovered evidence, ground for new trial, see Criminal Law, § 945.

## X. APPEAL AND ERROR.

§ 338. In view of verdict, *held* testimony could not have been understood so as to be

prejudicial.—*Gordon v. Commonwealth* (Ky.) 806.

§ 338. In a prosecution for assault with intent to murder, *held* not prejudicial error to allow physicians who dressed the wounds of the person assaulted to give their opinions as to the course the bullet took.—*Graves v. State* (Tex. Cr. App.) 676.

§ 338. Evidence in a prosecution for homicide as to the commission of other crimes *held* prejudicial error.—*Pace v. State* (Tex. Cr. App.) 949.

§ 339. Exclusion of details of troubles between deceased and defendant long before the killing to show ill will *held* harmless.—*Bordeaux v. State* (Tex. Cr. App.) 640.

§ 340. In a trial for homicide, an unnecessary instruction *held* not prejudicial.—*Middleton v. Commonwealth* (Ky.) 355.

§ 340. On a trial for murder, the error in an instruction on self-defense *held* not prejudicial.—*Frazier v. Commonwealth* (Ky.) 797.

§ 340. In a prosecution for homicide, an erroneous instruction on the issue of manslaughter *held* harmless, where defendant was convicted of manslaughter and given the lowest penalty.—*Munos v. State* (Tex. Cr. App.) 941.

§ 340. In a prosecution for homicide, where defendant was found guilty of murder in the second degree, he cannot complain of error in the court's charge on manslaughter upon sudden impulse, on the ground that the evidence did not suggest manslaughter upon sudden impulse.—*Barbee v. State* (Tex. Cr. App.) 961.

## HORSES.

Injuries to horses on railroad tracks, see Railroads, §§ 407-446.

## HOSTILE POSSESSION.

Of occupant of real estate holding adversely, see Adverse Possession, §§ 68-85.

## HOSTILE WITNESS.

Leading questions, see Witnesses, § 244.

## HOTELS.

See Innkeepers.

Power of city to require fire escapes on lodging houses, see Municipal Corporations, § 603.

## HOUSEBREAKING.

See Burglary.

## HUMANITARIAN DOCTRINE.

Injury avoidable notwithstanding contributory negligence, see Negligence, § 83; Street Railroads, § 103.

## HUSBAND AND WIFE.

See Divorce; Dower.

Competency as witnesses for or against each other, see Witnesses, § 53.

Consent of husband as defense to prosecution for detention of wife, see Abduction, § 2.

Coverture as affecting limitation of actions, see Limitation of Actions, § 73.

Right of survivor to exemptions, see Homestead, § 140.

## III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 104.

§ 41. Notwithstanding the statutory power of the husband and wife to contract with each other, husband and wife *held* not authorized to contract with each other for the payment by the husband to the wife for her services in nursing him.—*Foxworthy v. Adams* (Ky.) 381.

§ 40½. A gift of a note by the payee to his wife *held* not a valid gift inter vivos.—*Foxworthy v. Adams* (Ky.) 381.

§ 40¾. A wife may give her husband money or contribute it to the improvement of their home, and he cannot be forced to return it.—*Davis v. Davis* (Ark.) 525.

## V. WIFE'S SEPARATE ESTATE.

Transactions in fraud of creditors, see *Fraudulent Conveyances*, § 104.

### (A) What Constitutes.

§ 115. All personal property belonging to a woman at the time of her marriage belongs to her as her separate estate, unless reduced to the husband's possession by the wife's express, written assent, under the express provisions of Rev. St. 1899, § 4340 (Ann. St. 1906, p. 2382).—*McKee v. Downing* (Mo.) 7.

§ 125. Where the right of the wife, married prior to the Married Woman's Act (Rev. St. 1899, § 4340 [Ann. St. 1906, p. 2382]), was a common-law estate, the husband was entitled to the rents and profits thereof.—*State ex rel. Armour Packing Co. v. Dickmann* (Mo. App.) 29.

### (B) Rights and Liabilities of Husband.

§ 135. Act of a husband in using his wife's individual personal property to buy land without her written assent, and taking title in his own name, *held* a fraud.—*McKee v. Downing* (Mo.) 7.

§ 138. In an action for use and occupation against an occupant holding under a lease authorized by the owner's husband, it will not be presumed that the husband asserted an adverse title to the wife, or that he had authority to make the lease.—*State ex rel. Armour Packing Co. v. Dickmann* (Mo. App.) 29.

### (C) Liabilities and Charges.

§ 149. A home standing in the name of the wife, purchased partly with the husband's exempt property and partly with the wife's money, *held* not subject to the husband's creditors.—*Thompson & Co. v. Taylor* (Ky.) 357.

### (D) Conveyances and Contracts to Convey.

§ 179. A deed of trust, executed by a wife and her husband, for her benefit, when Ky. St. § 4827, was in force, *held* to give her title for her sole use, with power to make a will, and, on the trustee making a reconveyance, she acquired the fee.—*Kearns' Guardian v. Anderson* (Ky.) 271.

## VI. ACTIONS.

Vacation of judgment against infant married woman, see *Infants*, § 110.

## VII. COMMUNITY PROPERTY.

Accrual of cause of action to recover share of property sold by survivor, see *Limitation of Actions*, § 49.

Adverse possession by cotenant of community property, see *Tenancy in Common*, § 15.

Conveyance by surviving husband as color of title, see *Adverse Possession*, § 71.

Transactions in fraud of creditors, see *Fraudulent Conveyances*, § 104.

§ 258. If a wife inherited a lot from her father and her husband erected improvements thereon, the improvements would be community

property, so that the husband would have an interest in the property.—*Brady v. Maddox* (Tex. Civ. App.) 739.

§ 270. The husband alone can sue for community property.—*Cone v. Belcher* (Tex. Civ. App.) 149.

§ 273. Where the president of an insurance company obtained stock by fraud, and his wife, as survivor of the community estate, before discovery of the fraud, received new shares and sold them for cash, *held* that the purchaser took a good title, and only the amount received by her remained subject to make good what the company lost in the transaction.—*Fidelity & Deposit Co. of Maryland v. Wiseman* (Tex.) 621.

§ 273. The descent of the interest of a child in his mother's estate under the law in force in 1835, determined.—*Hardy Oil Co. v. Burnham* (Tex. Civ. App.) 221.

§ 273. The power of a wife to act as survivor of the community in transferring community property independent of the probate court ceases when she qualifies as administratrix of the estate of her deceased husband.—*Broocks v. Payne* (Tex. Civ. App.) 463.

§ 273. A wife as survivor of the community has no power to transfer community property by deed for the purpose of carrying out an unenforceable contract between her deceased husband and another.—*Broocks v. Payne* (Tex. Civ. App.) 463.

§ 274. Where the survivor holds the community estate, and does not act in repudiation of the interests of the heirs of the deceased spouse, the holding is as a tenant in common.—*Wingo v. Rudder* (Tex.) 899.

§ 276. A conveyance by a widow who was also administratrix of a league and labor land certificate *held* sufficient to convey her community interest therein.—*McLain v. Pate* (Tex. Civ. App.) 718.

## VIII. SEPARATION AND SEPARATE MAINTENANCE.

Alimony in actions for divorce, see *Divorce*, § 218.

§ 278. Waiver of a wife of ground for divorce, with alimony, and her consent to return to her husband, *held* sufficient consideration for a contract with him for her separate maintenance, if she were again compelled to leave him.—*Hite v. Hite* (Ky.) 815.

§ 278. Evidence *held* not to show that a husband was deceived in the execution of a contract with his wife for her separate maintenance.—*Hite v. Hite* (Ky.) 815.

§ 283. A separate maintenance may be awarded a wife where she was justified in leaving her husband's home because of his conduct.—*Winburn v. Winburn* (Ky.) 364.

§ 283. Conduct of husband *held* to entitle a wife to separate maintenance.—*Hite v. Hite* (Ky.) 815.

§ 297. Evidence *held* to sustain a finding that plaintiff was entitled to a separate maintenance by defendant, her husband.—*Winburn v. Winburn* (Ky.) 364.

## HYPOTHECATION.

See *Chattel Mortgages*; *Pledges*.

## IDENTIFICATION.

Of subject-matter of written instrument, parol or extrinsic evidence, see *Evidence*, § 460.

**IDENTITY.**

Of causes of action or defenses as affecting operation of former judgment as bar, see Judgment, §§ 603, 617.  
 Of issues or subject-matter of action as affecting conclusiveness of judgment, see Judgment, §§ 720, 732.  
 Of persons as affecting conclusiveness of former judgment, see Judgment, §§ 707, 708.

**IDIOTS.**

See Insane Persons.

**IDLE PERSONS.**

See Vagrancy.

**IGNORANCE.**

Of cause of action as affecting limitation, see Limitation of Actions, § 95.

**IMBECILES.**

In general, see Insane Persons.

**IMMOVABLES.**

In general, see Property.  
 Conveyances, see Deeds.  
 Mortgages, see Mortgages.  
 Sales, see Vendor and Purchaser.

**IMMUNITY.**

See Exemptions.  
 From liability for negligence or default in transmission or delivery of messages, see Telegraphs and Telephones, § 54.  
 From taxation, see Taxation, §§ 217, 245.

**IMPEACHMENT.**

Of award of arbitrators, see Arbitration and Award, § 78.  
 Of certificate of acknowledgment, see Acknowledgment, § 62.  
 Of record, see Criminal Law, § 1112.  
 Of verdict by affidavits and testimony of jurors on motion for new trial, see Criminal Law, § 957.  
 Of witness, see Witnesses, §§ 321-405.  
 Of witness, newly discovered impeaching evidence as ground for new trial, see Criminal Law, § 942.

**IMPLIED AUTHORITY.**

Of agent, see Principal and Agent, §§ 99, 101.

**IMPLIED CONTRACTS.**

See Contracts, § 27; Use and Occupation; Work and Labor.  
 Limitation of actions for breach, see Limitation of Actions, § 49.  
 Tenancy, see Landlord and Tenant, § 10.

**IMPLIED MALICE.**

Element of homicide, see Homicide, § 13.

**IMPLIED REPEAL.**

Of statute, see Statutes, §§ 158-167.

**IMPLIED TRUSTS.**

See Trusts, §§ 89, 95.

**IMPORTS.**

Duties, see Customs Duties.

**IMPRISONMENT.**

Arrest in criminal cases, see Arrest, § 62.  
 Punishment for crime, see Criminal Law, § 1223.  
 Release on habeas corpus, see Habeas Corpus.

**IMPROVEMENTS.**

Liens, see Mechanics' Liens.  
 Public improvements, see Drains; Highways; Municipal Corporations, §§ 280-449.  
 Rights as between vendor and purchaser, see Vendor and Purchaser, § 201.

§ 4. Under Kirby's Dig. § 2754, children not making improvements on their father's land under color of title held not entitled to compensation therefor.—Davis v. Davis (Ark.) 525.

**INCAPACITY.**

In general, see Infants; Insane Persons.  
 To make will, see Wills, § 52.

**INCENDIARISM.**

See Arson.

**INCEST.**

Accomplices, see Criminal Law, § 507.  
 Election between counts, see Indictment and Information, § 132.  
 Instruction as to testimony of accomplices, see Criminal Law, § 780.

§ 5. The crime of incest may be committed between a father and an illegitimate child.—Wadkins v. State (Tex. Cr. App.) 959.

§ 13. In a prosecution for incest with accused's illegitimate child, certain evidence held admissible to show accused's relationship to the child.—Wadkins v. State (Tex. Cr. App.) 959.

**INCLOSURE.**

In general, see Fences.  
 Element of adverse possession, see Adverse Possession, § 19.

**INCOME.**

Rights and liabilities of life tenants as to income of property, see Life Estates, § 15.

**INCOMPETENCY.**

See Insane Persons.

**INCONSISTENCY.**

In defenses alleged, see Pleading, § 93.  
 In description of boundaries, see Boundaries, § 3.  
 In instructions to jury, see Criminal Law, § 810; Trial, § 243.  
 Statements by witnesses inconsistent with testimony as ground for impeachment, see Witnesses, §§ 379-388.

**INCONVENIENCE.**

Element of damages for personal injuries, see Damages, § 32.

**INCORPORATION.**

In general, see Corporations, §§ 14, 18.

**INCUMBRANCES.**

See Mechanics' Liens; Mortgages.  
 On property of intestate, see Descent and Distribution, § 125.  
 On property of married woman's separate estate, see Husband and Wife, § 149.

**INDEBTEDNESS.**

Charge on married woman's separate property, see Husband and Wife, § 149.  
 Of counties, see Counties, § 192.  
 Of intestate, liability of heirs and distributees, see Descent and Distribution, § 125.  
 Of municipal corporations, see Municipal Corporations, § 867.  
 Of railroad companies, see Railroads, § 161.  
 Of school districts, see Schools and School Districts, §§ 97-107.

**INDEMNITY.**

See Principal and Surety.

§ 13. There can be no indemnity as between joint tort-feasors unless the one seeking indemnity did not join in the commission of the unlawful act, and has been made to suffer therefor in damages.—*City of Georgetown v. Groff* (Ky.) 888.

§ 13. Until a judgment against a city for injuries to a traveler on a defective street has been paid by it, it may not proceed against a third person actually liable for the defect for indemnity.—*City of Georgetown v. Groff* (Ky.) 888.

**INDEPENDENT CONTRACTORS.**

Liability for acts and omissions, see Master and Servant, § 318.

**INDEPENDENT EXECUTORS.**

See Executors and Administrators, § 7.

**INDICTMENT AND INFORMATION.**

Preliminary complaint, see Criminal Law, § 211.  
 Review of questions as dependent on presentation of objections in lower court, see Criminal Law, § 1032.

*For particular offenses.*

See Burglary, § 24; False Personation, §§ 4, 32; Forgery, §§ 29, 34; Gaming, § 94; Homicide, §§ 133, 142; Larceny, § 40; Libel and Slander, § 152; Rape, § 35; Robbery, §§ 17, 20.

Practicing medicine without license, see Physicians and Surgeons, § 6.

Violations of liquor laws, see Intoxicating Liquors, § 200.

Violation of stock laws, see Animals, § 57.

**II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.**

Substitution of indictment as affecting limitations, see Criminal Law, § 159.

§ 11. An indorsement on indictment *held* not to show return of it into court by the grand jury.—*Shinn v. State* (Ark.) 263.

§ 11. Return of indictment into court by grand jury *held* essential to jurisdiction.—*Shinn v. State* (Ark.) 263.

**IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.**

§ 47. In an information, it is insufficient for the prosecuting attorney to state that he is informed of the commission of an offense, but he must state that the offense has been committed.—*State v. McCoy* (Mo. App.) 78.

§ 47. Where a prosecuting attorney bases an information upon the affidavit of a private person, he must so state in the information, and file the affidavit with the information.—*State v. McCoy* (Mo. App.) 78.

§ 50. Under Code Cr. Proc. 1895, art. 458, an information for aggravated assault need not in terms aver that the acts complained of were contrary to the form of the statute.—*Burk v. State* (Tex. Cr. App.) 658.

§ 52. Under Ann. St. 1906, § 2477, requiring an information to be signed and verified by the prosecuting attorney or by the oath of a competent witness in the case, or supported by an affidavit of the witness, filed with the information, an information followed by an affidavit, stating that the prosecuting attorney makes oath that the facts stated are true according to his best knowledge, etc., but signed by the prosecuting witness, was insufficient.—*State v. McCoy* (Mo. App.) 78.

**V. REQUISITES AND SUFFICIENCY OF ACCUSATION.**

§ 110. An indictment charging the commission of an offense that is created by statute is generally good if it follows the language of the statute.—*State v. Ramsauer* (Mo. App.) 67.

§ 110. An exception to the rule that an indictment is good if it follows the language of the statute, stated.—*State v. Ramsauer* (Mo. App.) 67.

§ 110. An indictment for gaming *held* to follow the language of the statute, Rev. St. 1899, § 2196 (Ann. St. 1906, p. 1405), and sufficient as to the place of offense.—*State v. Ramsauer* (Mo. App.) 67.

§ 111. In a prosecution for violation of Acts 30th Leg. 1907, pp. 224-228, c. 123, forbidding the practice of medicine without registering and filing for record the certificate required, the complaint and information need not negative the exceptions in the act, where they are not contained in the enacting clause, which defines the offense.—*Newman v. State* (Tex. Cr. App.) 956.

§ 122. An information for aggravated assault, which charged that defendant "did strike," is not fatally variant from the affidavit, which charged, "did then and there strike."—*Stuart v. State* (Tex. Cr. App.) 656.

§ 122. Where the complaint charges an assault with "a knife and with a chair," and the information charges that the assault was made with "fists and a chair," the variance is fatal.—*Smith v. State* (Tex. Cr. App.) 665.

§ 122. A complaint charging the unlawful riding on a train of the "G., H. & S. A. Ry. Co." *held* not to support an information charging that the train was on the track of the Galveston, Harrisburg & San Antonio Railway Company.—*Cardenas v. State* (Tex. Cr. App.) 953.

**VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.**

Verdict on indictment containing several counts, see Criminal Law, § 878.

§ 132. Where the jury's consideration was limited to one count, *held*, there was no merit in a contention that an election between counts should have been required.—*Betts v. State* (Tex. Cr. App.) 424.

§ 132. Counts for rape and incest based on the same transaction could be joined in the indictment.—*Wadkins v. State* (Tex. Cr. App.) 959.

**VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.**

§ 133. Matter offered in defense *held* such that it could only be considered on a plea in abatement.—*State v. Poundstone* (Mo. App.) 79.

§ 140. Allegations in a motion to quash an indictment which sets up facts dehors the record do not prove themselves, and the pleader should offer proof of them, otherwise they will not be noticed.—*State v. Ramsauer* (Mo. App.) 67.

### VIII. AMENDMENT.

§ 161. An information *held* properly amended to show the true date of filing.—*Burk v. State* (Tex. Cr. App.) 658.

### IX. ISSUES, PROOF, AND VARIANCE.

*In prosecutions for particular offenses.*

See Forgery, § 34; Homicide, § 142; Larceny, § 40; Libel and Slander, § 152; Rape, § 35.

### XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AID BY VERDICT.

§ 203. Where, in a prosecution for aggravated assault, the verdict is general, and the affidavit and information contained two counts, that one count in the information is at variance with the affidavit will not be noticed, where the other count is good.—*Stuart v. State* (Tex. Cr. App.) 656.

### INDORSEMENT.

Of bill of exchange or promissory note, see Bills and Notes, § 254.

Of envelopes inclosing depositions, see Depositions, § 78.

Of indictment, see Indictment and Information, § 11.

### INDUCEMENT.

In contracts, see Contracts, §§ 58, 88.

### INFANTS.

See Guardian and Ward; Parent and Child. Care required of master as to infant servant, see Master and Servant, § 153.

Dangerous machinery as attractions to children, see Negligence, § 23.

### III. PROPERTY AND CONVEYANCES.

Homestead rights, see Homestead, § 140.

Presumption of acceptance of deed, see Deeds, § 194.

§ 31. Where an infant purchased property under fraudulent representations that he was of age and failed to pay for it, the seller was entitled to recover the property as against attaching creditors of the infant.—*Wray v. Hale* (Mo. App.) 38.

### VII. ACTIONS.

§ 82. Under Kirby's Dig. § 6021, the next friend of a minor plaintiff *held* under the control of the court, and subject to removal in its discretion.—*Nashville Lumber Co. v. Barefield* (Ark.) 758.

§ 102. A contention that a case was prematurely submitted as to an infant defendant *held* untenable in view of the answer filed for him and of the answer of his guardian ad litem.—*Childers v. Bales* (Ky.) 295.

§ 110. A married woman, who has filed a bad answer asserting a homestead right for her husband in a foreclosure suit in which her infancy is also pleaded, cannot open the judgment under Civ. Code Prac. §§ 391, 518, by tendering at the next term a good answer.—*Eversole v. First Nat. Bank of Hazard* (Ky.) 360.

### INFERIOR COURTS.

See Courts, §§ 169, 172.

### INFLUENCE.

Constructive trust in respect to property acquired by undue influence, see Trusts, § 95. Undue influence affecting validity of will, see Wills, §§ 155-166.

### INFORMATION.

Criminal accusation, see Indictment and Information.

### INFORMATION AND BELIEF.

Complaint on information and belief, see Criminal Law, § 211.

Verification of information on information and belief, see Indictment and Information, § 52.

### INHERITANCE.

See Descent and Distribution.

### INJUNCTION.

*Relief against particular acts or proceedings.*

Enforcement of judgment, see Judgment, §§ 407-463.

Enforcement of taxes, see Schools and School Districts, § 107; Taxation, § 608.

Execution, see Execution, § 172.

Judicial proceedings, concurrent and conflicting jurisdiction of state courts, see Courts, § 480.

### II. SUBJECTS OF PROTECTION AND RELIEF.

(B) Property, Conveyances, and Incumbrances.

§ 46. Plaintiff *held* not entitled to enjoin his children from entering on and occupying his property.—*Davis v. Davis* (Ark.) 525.

(C) Contracts.

§ 59. Whether a contracting party is limited to an action at law on a breach, or whether he is entitled to injunctive relief, depends on the intention of the parties, deducible from the contract.—*Wills v. Forester* (Mo. App.) 1090.

§ 59. A contract by a retail lumber dealer for the sale of a stock of lumber and good will, *held* not to give him an option to pay the liquidated damages for the privilege of re-entering the business, but the buyer is entitled to injunctive relief.—*Wills v. Forester* (Mo. App.) 1090.

§ 59. A party *held* entitled to restrain the adverse party from violating his contract, whether the sum to be paid by him for a breach is regarded as liquidated damages or not.—*Wills v. Forester* (Mo. App.) 1090.

§ 61. Where a party agrees for a consideration not to engage in a given business for a certain time in a given territory, a violation entitles the party injured to injunctive relief.—*Wills v. Forester* (Mo. App.) 1090.

§ 61. A buyer of a lumber business and good will *held* entitled to an injunction restraining the seller from violating his agreement not to re-enter the business.—*Wills v. Forester* (Mo. App.) 1090.

(D) Corporate Franchises, Management, and Dealings.

§ 70. Equity *held* to have jurisdiction of the suit of a corporation at the instance of its de facto officers to enjoin others claiming to hold the offices, where their acts interfere with the management of the corporation business.—*De Zavala v. Daughters of the Republic of Texas* (Tex. Civ. App.) 100.

**III. ACTIONS FOR INJUNCTIONS.**

Counterclaim, see Set-Off and Counterclaim, § 31.

§ 128. In injunction proceedings to restrain defendant from engaging in the photograph business, evidence *held* to support a jury finding in favor of plaintiff.—Parrish v. Adwell (Tex. Civ. App.) 441.

§ 130. In proceedings to restrain defendant from re-engaging in the photograph business, whether defendant made a statement to plaintiff's partner *held* for the jury.—Parrish v. Adwell (Tex. Civ. App.) 441.

**VII. VIOLATION AND PUNISHMENT.**

Release on habeas corpus, see Habeas Corpus, § 30.

**VIII. LIABILITIES ON BONDS OR UNDERTAKINGS.**

Effect of supersedeas, see Appeal and Error, § 490.

§ 241. In a suit to enjoin the sale of property under an execution, *held*, that the court properly allowed defendant to dismiss a cross-bill as to plaintiff, and prosecute his action against the sureties on the injunction bond.—Broussard v. Lawson (Tex. Civ. App.) 712.

§ 241. Where a married woman sues to enjoin the sale of property on execution against her husband, it is not error to refuse to make her husband a party defendant to a cross-bill against her.—Broussard v. Lawson (Tex. Civ. App.) 712.

§ 241. In an action to restrain the sale of property on an execution in which defendant files a cross-bill against plaintiff and the sureties on her injunction bond, and plaintiff subsequently dies insolvent, it is unnecessary to bring her representatives into the action as parties.—Broussard v. Lawson (Tex. Civ. App.) 712.

**INJURIES.**

In general, see Damages; Negligence.

**INNKEEPERS.**

Power of city to require fire escapes on lodging houses, see Municipal Corporations, § 603.

§ 10. In an action against a lodging house keeper for death alleged to have been caused by defendant's failure to provide adequate fire escapes, evidence *held* to show that decedent was familiar with the condition of the building as to fire escapes when he was injured.—Radley v. Knepfly (Tex. Civ. App.) 447.

§ 10. One, having the time and opportunity to learn of the condition of a lodging house as to fire escapes, by voluntarily remaining in the building assumed the danger of any failure to provide adequate escapes.—Radley v. Knepfly (Tex. Civ. App.) 447.

§ 10. In an action against a lodging house keeper for death claimed to have been caused by failure to provide adequate fire escapes, evidence *held* to show such failure was not the proximate cause of decedent's injuries.—Radley v. Knepfly (Tex. Civ. App.) 447.

**INNOCENT PURCHASERS.**

Of property subject to tax, see Taxation, § 511.  
Of public lands, see Public Lands, § 178.

**INNUENDO.**

Averment in indictment for libel and slander, see Libel and Slander, § 152.

**IN PAIS.**

Estoppel, see Estoppel, §§ 78-98.

**INSANE PERSONS.**

Mental capacity affecting responsibility for crime, see Criminal Law, § 48.

**IX. ACTIONS.**

Vacation of judgment, see Judgment, § 338.

§ 94. Where, after default, a motion was made to set it aside on the ground of defendant's insanity, and a trial was thereafter had defended by a guardian ad litem, the judgment *held* not void. Const. art. 7, § 34; Kirby's Dig. §§ 6026-6029.—Peters v. Townsend (Ark.) 255.

§ 101. A sale under execution of property of an insane judgment debtor *held* valid.—Kirby's Dig. § 4035.—Peters v. Townsend (Ark.) 255.

**INSOLVENCY.**

See Bankruptcy.

Best and secondary evidence of insolvency, see Evidence, § 158.

Of corporations in general, see Corporations, § 550.

Of insurance companies, see Insurance, § 70.

Of maker as excusing suit on note at request of indorser, see Bills and Notes, § 254.

**III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF INSOLVENT'S ESTATE.**

(C) Preferences and Transfers by Insolvent, and Attachments and Other Liens.

Preference affecting validity of conveyance as to creditors, see Fraudulent Conveyances, § 118.

**INSPECTION.**

By jury, see Trial, § 28.

Of tools, machinery, appliances, and places for work for protection of servant, see Master and Servant, § 124.

**INSTRUCTIONS.**

By court to jury, see Criminal Law, §§ 761-764, 770-823, 825, 829; Trial, §§ 191-206.  
By master to servant, see Master and Servant, §§ 153, 158.

**INSTRUMENTS.**

Acknowledgment of, see Acknowledgment.

Alteration, see Alteration of Instruments.

As hearsay evidence, see Evidence, § 318.

Best and secondary evidence, see Criminal Law, §§ 398-404; Evidence, §§ 158-175.

Cancellation, see Cancellation of Instruments.

Competency of written instruments as admissions in general, see Evidence, § 215.

Documentary evidence, see Criminal Law, § 438; Evidence, §§ 342-372.

Estoppel by deeds and other instruments, see Estoppel, §§ 28-45.

Forgery, see Forgery.

Parol or other extrinsic evidence, see Evidence, §§ 400-460.

Recording, see Records.

Reformation, see Reformation of Instruments.

*Particular classes of written instruments.*

See Bills and Notes; Chattel Mortgages; Compromise and Settlement; Indictment and Information; Insurance; Mortgages; Release; Stipulations; Wills.

Award of arbitrators, see Arbitration and Award, §§ 78, 82.

Bills of sale, see Sales, § 146.  
 Checks, see Banks and Banking, § 138.  
 Contracts in general, construction and operation, see Contracts, §§ 176-231.  
 Deeds, see Deeds.

## INSULTING LANGUAGE.

See Disorderly Conduct.

## INSURANCE.

Exemption of life insurance, see Exemptions, § 50.

### II. INSURANCE COMPANIES.

#### (B) Mutual Companies.

§ 70. A receiver of a mutual fire insurance company *held* not entitled to maintain an action on a bond given by the company pursuant to Acts 1905, p. 492, § 4, and Kirby's Dig. § 950.—*Forte v. Chamberlain* (Ark.) 234.

### V. THE CONTRACT IN GENERAL.

#### (A) Nature, Requisites, and Validity.

§ 136. A condition in a receipt for the first premium paid for life insurance that no obligation was incurred by the company unless insured was in sound health when the policy was delivered *held* binding.—*Commonwealth Life Ins. Co. v. Davis* (Ky.) 345.

#### (B) Construction and Operation.

Usurious loans, see Usury, § 18.

### VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

§ 248. Act of an insurance company in receiving a premium on the policy which had been repudiated *held* not to render it liable thereon.—*Citizens' Life Ins. Co. v. Riley* (Ky.) 402.

### IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

#### (C) Matters Relating to Person Insured.

§ 290. Under Rev. St. 1899, § 7890 (Ann. St. 1906, p. 3746), the provision of a policy that proof of actual age of insured may be required, and the amount payable shall be the insurance which the premiums paid would have purchased at the true age, is void.—*Burns v. Metropolitan Life Ins. Co.* (Mo. App.) 539.

### XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 372. A provision in a life policy and in a premium note, that the policy should lapse by failure of insured to pay the note, being wholly for the insurer's benefit, is one which it may waive, and such waiver may be express or by such conduct as evinces the purpose not to enforce it.—*New York Life Ins. Co. v. Evans* (Ky.) 376.

§ 378. Where the company's agent issued a fire policy with the understanding that insured did not own the building in which the property was, the company cannot claim that insured made any misrepresentation or warranty as to its ownership by accepting the policy which stipulated that she was sole owner of the building.—*Hilburn v. Phoenix Ins. Co.* (Mo. App.) 63.

§ 388. Under Rev. St. 1899, § 7976 (Ann. St. 1906, p. 3792), insurer *held* to waive the forfeiture provision of the iron-safe clause.—*Culver v. Williamsburg City Fire Ins. Co.* (Mo. App.) 540.

§ 392. Acceptance by an insurer of a premium note *held* a waiver of the policy provision for a cash payment for the time the note is to run.—*New York Life Ins. Co. v. Evans* (Ky.) 376.

§ 392. If an insurer, after a policy has lapsed, retains the unpaid premium note merely as evidence that it has been canceled and acts consistently with its claim of forfeiture, it does not waive the forfeiture; but, if it retains the note as evidence of indebtedness to it, or asserts it as a debt against insured, the forfeiture is deemed to have been waived.—*New York Life Ins. Co. v. Evans* (Ky.) 376.

### XII. RISKS AND CAUSES OF LOSS.

#### (D) Life Insurance.

§ 446. An insurer *held* liable for the amount of the policy, where insured at the time he killed himself was so insane that he did not know that he was taking his life.—*Inter-Southern Life Ins. Co. v. Boyd* (Ky.) 333.

### XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

#### (B) Insurance of Property and Titles.

§ 500. In view of Rev. St. 1899, § 7969 (Ann. St. 1906, p. 3789) the value of personality insured cannot be questioned in a subsequent proceeding where its value is fixed by the policy.—*Hilburn v. Phoenix Ins. Co.* (Mo. App.) 63.

### XIV. NOTICE AND PROOF OF LOSS.

§ 559. An insurance company waived proof of loss as required by the policy by denying liability thereon and refusing to pay.—*Hilburn v. Phoenix Ins. Co.* (Mo. App.) 63.

### XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

Parol evidence to explain receipt, see Evidence, § 450.

Payment by draft, see Payment, §§ 17, 53.

### XVIII. ACTIONS ON POLICIES.

Questions for jury as to release of claim, see Release, § 58.

Receipt as presumptive evidence of payment, see Payment, § 65.

§ 623. Where an insurer with prompt notice of loss denies all liability, he cannot complain that insured did not observe the provision requiring him to wait 60 days after proof of loss before suing.—*Phoenix Ins. Co. of Hartford v. Flowers* (Ky.) 403.

§ 629. An insurance company is ordinarily presumed to know its own agent, and, if it should be surprised in an action on a fire policy by proof relative thereto, a continuance may be had, so that it was not error to refuse to require plaintiff to state in his petition the name of the agent with whom he contracted.—*Phoenix Ins. Co. of Hartford v. Flowers* (Ky.) 403.

§ 634. Allegations of the petition in an action on a fire policy *held* not self-serving for the purpose of prejudicing defendant, but proper to show compliance with the conditions of the policy.—*Hilburn v. Phoenix Ins. Co.* (Mo. App.) 63.

§ 645. Failure to make proof of loss according to the terms of a fire policy *held* not available under a mere general denial; the petition alleging compliance with the requirement.—*Hilburn v. Phoenix Ins. Co.* (Mo. App.) 63.

§ 646. In an action on an insurance policy not issued by defendant, where plaintiffs claimed that defendant became liable thereon by a consolidation with the company issuing it, which

defendant denied, the burden was on plaintiffs to prove defendant bound on the policy.—*Capital Fire Ins. Co. v. J. H. Davis & Son* (Ark.) 620.

§ 650. Ky. St. § 679 (Russell's St. § 4400), providing that the application for insurance, rules of the company, etc., be made a part of the policy, does not apply in an action for insurance where the policy was never issued.—*Commonwealth Life Ins. Co. v. Davis* (Ky.) 345.

§ 662. Where, in an action on a fire policy, there was no proof of a custom by the company's adjuster to notify insured before examining the property after the fire, and the policy did not require such notice, it was error to admit evidence that the adjuster did not notify plaintiff's attorney before investigating the loss.—*Hartford Fire Ins. Co. v. Becton* (Tex. Civ. App.) 474.

§ 665. In an action on an insurance policy, not issued by defendant, evidence held insufficient to show that defendant was bound by the policy, either by consolidation or other contract with the company issuing it.—*Capital Fire Ins. Co. v. J. H. Davis & Son* (Ark.) 520.

§ 665. Evidence held to show that insured in a life policy committed suicide when so insane that he did not know that he was taking his life, authorizing a recovery.—*Inter-Southern Life Ins. Co. v. Boyd* (Ky.) 333.

§ 665. In an action on an indemnity policy, evidence held to show that insured was intentionally killed by another while fighting, precluding a recovery for any sum greater than the minimum liability.—*Continental Casualty Co. v. Fleming* (Ky.) 331.

§ 665. Evidence held to show that an insurance company had not elected to treat a life policy as lapsed for failure to pay a premium note when due, but was holding it in abeyance, deferring final action until it had exhausted the chance of having insured continue it, when the note was paid.—*New York Life Ins. Co. v. Evans* (Ky.) 376.

§ 665. In an action on a fire policy, evidence held not to show that insured kept gasoline within the building containing the insured property, in violation of a warranty against doing so.—*Hilburn v. Phoenix Ins. Co.* (Mo. App.) 63.

§ 666. Where plaintiff in an action against an insurance company did not recover the full amount demanded, it was error to add a penalty and attorney's fees to the judgment.—*Industrial Mut. Indemnity Co. v. Armstrong* (Ark.) 236.

§ 668. In an action to recover the balance due on a life insurance policy, evidence held not to conclusively show that the insured in his application misstated his age.—*Metropolitan Life Ins. Co. v. Lennox* (Tex.) 623.

§ 668. In an action to recover the balance due on a life insurance policy, evidence held insufficient to raise a question for the jury as to whether defendant waived a condition of its policy, limiting its liability if the age of insured was misstated.—*Metropolitan Life Ins. Co. v. Lennox* (Tex.) 623.

§ 668. In an action to recover the balance due on a life insurance policy, evidence held sufficient to take the question of defendant's liability for the balance due under the terms of the policy to the jury.—*Metropolitan Life Ins. Co. v. Lennox* (Tex.) 623.

§ 668. In an action on a life policy, the question whether a certain premium had been paid held under the evidence one for the jury.—*Fidelity Mut. Life Ins. Co. v. Click* (Ark.) 764.

§ 669. In an action on a valued fire policy, it was not necessary to state the value of the

insured goods in the instructions, where there was no evidence that it had depreciated since the policy was issued.—*Hilburn v. Phoenix Ins. Co.* (Mo. App.) 63.

## XX. MUTUAL BENEFIT INSURANCE.

### (B) Beneficiaries and Benefits.

§ 782. Under Rev. St. 1890, § 1417 (Ann. St. 1906, p. 1116), where the beneficiary of a benefit certificate contracts to pay the assessments and dues, the member is not thereby deprived of the right to change the beneficiary or revoke the certificate.—*Londry v. Sovereign Camp Woodmen of the World* (Mo. App.) 530.

§ 783. Insured in a benefit certificate may change his beneficiary at will, if he does so according to the rules of the association.—*Londry v. Sovereign Camp Woodmen of the World* (Mo. App.) 530.

§ 784. The adoption of a particular method of changing the benefit certificate is the exclusion of all other methods.—*Londry v. Sovereign Camp Woodmen of the World* (Mo. App.) 530.

§ 784. After death of a member, a benefit association could not waive as to his certificate a law of the association providing the method of changing the beneficiary.—*Londry v. Sovereign Camp Woodmen of the World* (Mo. App.) 530.

§ 785. The words "legal representatives" in beneficiary certificates held to be given their usual meaning, making the fund payable to the insured's executor, and not to his legal heirs.—*Walker v. Peters* (Mo. App.) 35.

§ 785. Relation of brother and sisters alone held not to make the sisters the family of insured, within the meaning of certificates or articles of incorporation of a beneficial association.—*Walker v. Peters* (Mo. App.) 35.

§ 785. The various provisions of a beneficial certificate and the articles of incorporation held to show that the word "heirs" was used in its proper sense and a distinction clearly drawn between "heirs" and "legal representatives."—*Walker v. Peters* (Mo. App.) 35.

### (F) Actions for Benefits.

Assumption of facts in instructions in action on benefit certificate, see Trial, § 191.

Presumption of death from absence, see Death, § 2.

§ 815. Where the action on a benefit certificate is based on the presumption of insured's death from his absence for more than seven years, the petition should allege that death occurred before date of the lapse of the policy.—*Bradley v. Modern Woodmen of America* (Mo. App.) 69.

## INTENT.

Carrying weapons, see Weapons, § 7.

Construction of wills, see Wills, §§ 439, 440.

Element of homicide, see Homicide, §§ 156-159, 286.

## INTEREST.

See Usury.

Disqualification of jurors, see Jury, § 87.

Element of damages in general, see Damages, § 69.

On funds garnisheed, see Justices of the Peace, § 87.

## INTERLOCUTORY DECISIONS.

Review, see Appeal and Error, §§ 874, 876.

## INTERMEDDLING.

In suits between others, see Champerty and Maintenance.

**INTERMEDIATE COURTS.**

Review of decisions, see Appeal and Error, § 1091.

**INTERMIXTURE.**

Of goods, see Confusion of Goods.

**INTERPLEADER.**

Claims, by third persons to property levied upon, see Attachment, §§ 287-306.

**INTERPRETATION.**

Of contracts, instruments, or judicial acts and proceedings.

See Statutes, § 228; Wills, §§ 439-707.

Assignments, see Assignments, §§ 73, 80.

Bills and notes, see Bills and Notes, § 122.

Constitutional provisions, see Constitutional Law, §§ 15-46.

Contracts in general, see Contracts, §§ 176-231.

Contracts of sale, see Sales, §§ 68-87, 468; Vendor and Purchaser, §§ 58-80.

Deeds, see Boundaries, §§ 3, 8; Deeds, §§ 124, 168.

Instructions, see Criminal Law, §§ 822, 823; Trial, §§ 286-296.

Judgment on trial of issues, see Judgment, § 525.

Leases, see Mines and Minerals, §§ 62-71.

Parol or extrinsic evidence to aid interpretation of written instruments, see Evidence, §§ 448-460.

Suretyship agreement, see Principal and Surety, § 86.

Testamentary trusts, see Wills, § 682.

Verdict or findings, see Trial, § 365.

**INTERROGATORIES.**

To jury, see Trial, §§ 351, 365.

**INTERSTATE COMMERCE.**

Power to regulate, see Commerce.

**INTERVENTION.**

In attachment proceedings by claimant of property, see Attachment, §§ 287-306.

**INTER VIVOS.**

Gifts, see Gifts, §§ 4-34.

**INTESTACY.**

See Descent and Distribution.

**INTIMIDATION.**

See Threats.

**INTOXICATING LIQUORS.****IV. LICENSES AND TAXES.**

§ 50. A bona fide subordinate lodge of a fraternal benevolent and social order held not engaged in handling liquor within the revenue act of 1907 (Acts 1907, c. 541).—*Moriarty v. State* (Tenn.) 1016.

§ 74. Mandamus will not lie to compel the issuance of a license to sell liquor under the law of 1907 (Acts 1907, c. 138), after that law has been repealed by Acts 1909, c. 17.—*Lytleton v. Downer* (Tex. Civ. App.) 994.

**VI. OFFENSES.**

§ 146. A club organized to evade under the forms of law the prohibitory statutes held guilty

of selling liquor in violation of law.—*Moriarty v. State* (Tenn.) 1016.

§ 169. A servant of a subordinate lodge of a fraternal benevolent and social order engaged in furnishing liquor to the members of the lodge held not engaged in selling or aiding in the sale of liquor in violation of Acts 1899, c. 161.—*Moriarty v. State* (Tenn.) 1016.

**VII. ACTIONS FOR PENALTIES.**

§ 178. Rev. St. 1899, § 3017 (Ann. St. 1906, p. 1728), imposing a penalty for selling liquors to a drunkard after notice from his wife not to do so, should be liberally construed.—*Jackson County v. Schmid* (Mo. App.) 1074.

§ 179. An oral notice to an agent of a dram-shop keeper held to be a notice to the latter within Rev. St. 1899, § 3017 (Ann. St. 1906, p. 1728), so as to warrant a recovery of damages for selling to a drunkard.—*Jackson County v. Schmid* (Mo. App.) 1074.

§ 179. A notice, given under Rev. St. 1899, § 3017 (Ann. St. 1906, p. 1728), imposing a penalty for selling liquors to a drunkard after notice from his wife not to do so, held sufficient, though the reason for giving it was not stated.—*Jackson County v. Schmid* (Mo. App.) 1074.

§ 179. The term "habitual drunkard" in Rev. St. 1899, § 3017 (Ann. St. 1906, p. 1728), imposing a penalty for selling to such persons, defined.—*Jackson County v. Schmid* (Mo. App.) 1074.

**VIII. CRIMINAL PROSECUTIONS.**

Best and secondary evidence, see Criminal Law, § 402.

Evidence of other offenses, see Criminal Law, § 372.

Objections to evidence, see Criminal Law, § 695.

§ 200. An information charging a physician with unlawfully issuing a prescription for intoxicating liquors, in violation of Rev. St. 1899, § 3050 (Ann. St. 1906, p. 1750), held fatally bad.—*State v. Hume* (Mo. App.) 1099, 1100; *Same v. Steel* (Mo. App.) 1100; *Same v. Conway*, Id.

§ 233. Certain evidence of prior possession of liquor by defendant held inadmissible.—*Goss v. State* (Tex. Cr. App.) 107.

§ 236. Evidence held to sustain a conviction for selling liquors in violation of the local option law.—*State v. Draughn* (Mo. App.) 20.

§ 236. Evidence held to show a sale of liquor in violation of the local option law.—*Davis v. State* (Tex. Cr. App.) 635.

§ 236. Evidence held insufficient to sustain a conviction for violating the local option law.—*McLendon v. State* (Tex. Cr. App.) 637.

§ 239. In a prosecution for violating the local option law, an instruction authorizing conviction if the jury found that defendant "directly or indirectly" sold liquor without telling the jury what was meant by these words was erroneous.—*State v. Bowerman* (Mo. App.) 41.

§ 239. Under certain facts in a prosecution for violating the local option law, the court should have charged that defendant was guilty of no offense.—*Dean v. State* (Tex. Cr. App.) 924.

**INTOXICATION.**

Contributory negligence of passenger ejected from train, see Carriers, § 370.

Negligence in ejecting intoxicated passenger, see Carriers, § 366.

**INTRUDERS.**

On land, see Forcible Entry and Detainer; Trespass.

**INVITED ERROR.**

See Appeal and Error, § 882.

**ISSUE.**

Effect of birth on provisions of will, see Descent and Distribution, § 47.

**ISSUES.**

Applicability of instructions to issues, see Criminal Law, § 814; Trial, § 251.

Identity of issues as affecting conclusiveness of judgment, see Judgment, §§ 720, 732.

In civil actions, see Pleading, § 380.

Instructions ignoring, see Trial, § 253.

Judgment on trial of issues, see Judgment, §§ 199-256.

Presented for review on appeal, see Appeal and Error, §§ 172-179.

**JEOPARDY.**

Former jeopardy as bar to prosecution, see Criminal Law, §§ 170, 186.

**JOINDER.**

Of causes of action, see Action, § 45.

Of counts in indictment or information, see Indictment and Information, § 132.

**JOINT ADVENTURES.**

See Partnership.

Conspirators, see Conspiracy.

**JOINT EXECUTORS AND ADMINISTRATORS.**

See Executors and Administrators, § 124.

**JOINT LIABILITIES.**

Indemnity among persons jointly liable, see Indemnity, § 13.

**JOINT OWNERS.**

Community property, see Husband and Wife, §§ 258-276.

**JOINT TENANCY.**

See Tenancy in Common.

Partition of joint property, see Partition.

**JOINT TORT-FEASORS.**

Liabilities for injuries to passengers, see Carriers, § 306.

Right of indemnity, see Indemnity, § 13.

**JUDGES.**

See Courts; Justices of the Peace.

Examination of witnesses, see Witnesses, § 246.

Mandamus to judge, see Mandamus, §§ 48, 60.

Remarks and conduct on trial, see Criminal Law, § 656; Trial, § 29.

**III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.**

Authority in supplementary proceedings, see Execution, § 371.

§ 36. In an action by surviving wards against the probate judge for neglect of duty imposed by

Ky. St. §§ 1065, 1068 (Russell's St. §§ 4161, 4164), the court properly deducted from the judge's liability the share of the fund alleged to have been lost to which the surviving heirs were not entitled.—*Cornelison v. Million* (Ky.) 366.

§ 36. A judicial officer is not civilly liable for his judicial acts, whether negligently, willfully, or maliciously committed.—*Kruegel v. Cobb* (Tex. Civ. App.) 723.

**IV. DISQUALIFICATION TO ACT.**

§ 47. An attorney, who had advised accused to plead guilty upon a prior indictment for the same offense, held disqualified to sit as special judge in his trial under a second indictment.—*Durham v. State* (Tex. Cr. App.) 932.

**JUDGMENT.**

Decisions of courts in general, see Courts, § 91.

Description in petition for writ of error, see Appeal and Error, § 361.

On pleadings, see Pleading, §§ 345-369.

Practice in justices' courts, see Justices of the Peace, §§ 122, 128.

Stipulations as to judgment, matters concluded, see Stipulations, § 18.

*In actions by or against particular classes of persons.*

See Clerks of Courts, § 75; Infants, § 110.

*In particular civil actions or proceedings.*

For divorce, see Divorce, § 168.

*Review.*

See Appeal and Error; Criminal Law, §§ 1024-1180.

Finality for purpose of review, see Appeal and Error, § 79.

Judgment on appeal or writ of error, see Appeal and Error, §§ 1152-1207; Criminal Law, §§ 1182-1189.

**I. NATURE AND ESSENTIALS IN GENERAL.**

§ 18. Where the petition stated a cause of action and the reply denied every affirmative averment of the answer, the pleadings authorized a judgment for plaintiff.—*Talbott v. Krahwinkle* (Ky.) 323.

**IV. BY DEFAULT.**

In justices' courts, see Justices of the Peace, § 122.

Mitigation of damages for wrongful acts resulting in default judgment, see Damages, § 37.

**VI. ON TRIAL OF ISSUES.**

(A) *Rendition, Form, and Requisites in General.*

Presumptions on appeal or writ of error, see Appeal and Error, § 934.

Review of objections, see Appeal and Error, § 1073.

§ 199. Where the verdict for plaintiff substantially conformed to the Code and the instructions, the court could not for any defect therein sustain the defendant's motion for judgment, notwithstanding the verdict.—*Talbott v. Krahwinkle* (Ky.) 323.

§ 199. In an action by a servant for wrongful discharge, a motion for judgment notwithstanding verdict held properly denied.—*Kentucky Shoe Mfg. Co. v. Carraway* (Ky.) 852.

§ 203. In an action in which a count for goods sold was joined with one on a note given for the goods, a judgment for defendant on the notes at plaintiff's request, before verdict was rendered for plaintiff on the common count, held

res judicata in a subsequent action between the parties on defendant's nonliability on the notes.—McCormick Harvesting Mach. Co. v. Blair (Mo. App.) 49.

§ 210. Where the court agreed to hold a submitted case under advisement until the decision in another case, it was not compelled to wait until notified of the latter decision by formal mandate before rendering judgment.—McCormick v. Stephens (Mo. App.) 1076; Same v. Allendorph (Mo. App.) 1077.

§ 213. Where the court took a cause under advisement, plaintiff *held* not entitled to notice of a decision withheld until the decision of another case.—McCormick v. Stephens (Mo. App.) 1076; Same v. Allendorph (Mo. App.) 1077.

#### (B) Parties.

§ 235. Where two or more sue jointly for conversion, that the evidence shows title to be solely in one of the plaintiffs does not preclude judgment in favor of that one.—Walker v. Lewis (Mo. App.) 567.

#### (C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 252. Under Civ. Code Prac. § 90, in an action by a county to surcharge a sheriff's tax settlements, the charging of defendant with taxes collected from taxpayers not on the assessment books, though liable to taxation, *held* proper.—Alexander v. Owen County (Ky.) 386.

§ 253. A judgment assessing a greater value than that claimed in the petition is erroneous.—Payne v. King (Mo. App.) 1066.

§ 256. In an action for injuries to an employe, an affirmative finding on one issue as to negligence *held* to support a judgment for plaintiff.—Galveston, H. & S. A. Ry. Co. v. Callahan (Tex. Civ. App.) 129.

### VII. ENTRY, RECORD, AND DOCKETING.

Approval of partition sale, see Partition, § 106.

### VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

Amendment of judgment as to lien on railroad property, see Railroads, § 161.

Modification in appellate court, see Appeal and Error, § 1152.

Petition for new trial, see New Trial, § 106.

§ 294. The remedy to vacate or modify a judgment for fraud is by proceeding at law under Kirby's Dig. §§ 3224, 4431, in the court in which it was rendered.—Dale v. W. H. Bland & Co. (Ark.) 1026.

§ 299. At common law, a judgment could not be amended after the term at which it was rendered.—St. Louis & N. A. R. Co. v. Bratton (Ark.) 752.

§ 299. Power of court to amend a judgment after expiration of the term stated.—St. Louis & N. A. R. Co. v. Bratton (Ark.) 752.

§ 305. The court properly allowed the clerk to amend the judgment at the same term of court, so as to conform to the verdict for plaintiff.—Talbot v. Krahwinkle (Ky.) 323.

§ 314. Where the custodian of a fund was sued for its possession, and it asked to have all the claimants for the fund interpleaded in the action which the court granted by a decree, discharging it from all liability, and ordering that it be allowed costs and reasonable counsel fees to be determined later, the trial court had power, at a subsequent term after the affirmance of the decree of interpleader, to allow expenses and attorney's fees.—Little v. St. Louis Union Trust Co. (Mo. App.) 600.

### IX. OPENING OR VACATING.

Judgment against infant, see Infants, § 110.

§ 336. The remedy to vacate or modify a judgment for fraud is by proceeding at law under Kirby's Dig. §§ 3224, 4431, in the court in which it was rendered.—Dale v. W. H. Bland & Co. (Ark.) 1026.

§ 338. Erroneous proceedings in an action against an insane person *held* not grounds for setting aside the judgment under Kirby's Dig. § 4431.—Peters v. Townsend (Ark.) 255.

§ 377. On foreclosure, if no answer is filed, or if a bad answer is filed, the judgment will bar a subsequent proceeding even in the same suit to assert a homestead.—Eversole v. First Nat. Bank of Hazard (Ky.) 360.

### X. EQUITABLE RELIEF.

#### (A) Nature of Remedy and Grounds.

§ 407. A complaint to enjoin the collection of a judgment is demurrable, unless it shows that plaintiff has no adequate remedy at law.—Dale v. W. H. Bland & Co. (Ark.) 1026.

#### (B) Jurisdiction and Proceedings.

§ 461. Showing necessary to set aside a default judgment stated.—Hess v. Fox (Mo. App.) 83.

§ 463. In an action to set aside a default judgment, the chancellor should not try the case on its merits.—Hess v. Fox (Mo. App.) 83.

### XI. COLLATERAL ATTACK.

On probate of will, see Wills, § 421.

#### (B) Grounds.

§ 497. A recital in the judgment of service on a defendant involves absolute verity in a collateral proceeding.—Douglas v. State (Tex. Cr. App.) 933.

### XII. CONSTRUCTION AND OPERATION IN GENERAL.

§ 525. The surety on bond of plaintiff in replevin *held* not bound by recital in the nunc pro tunc judgment against plaintiff and the sureties, that he was plaintiff's attorney.—Huttig-McDermid Pearl Button Co. v. Springfield Shirt Co. (Mo. App.) 1094.

### XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

#### (B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 603. Where payments are to be made periodically, successive actions can be maintained for the installments as they mature.—Thetford v. General Accident Assur. Corp., Limited (Mo. App.) 39.

§ 617. In an action against two sureties on a note in which one surety against whom judgment went, after satisfying it, filed a cross-petition for contribution, judgment overruling the demurrer of cross-defendant to the original petition on certain grounds *held* to preclude him from setting up those grounds as a defense in the suit for contribution.—Fritts v. Kirchdorfer (Ky.) 882.

### XIV. CONCLUSIVENESS OF ADJUDICATION.

Award of arbitrators, see Arbitration and Award, § 82.

Former decision in same case as law of the case, see Appeal and Error, § 1097.

#### (B) Persons Concluded.

§ 707. A judgment in a suit to quiet title as against unknown heirs binds only the parties

named in the suit.—*Ives v. Crawford County Farmers' Bank* (Mo. App.) 23.

§ 708. Where the land was originally located by office work without actual survey, a judgment in another action finding corners of adjacent land by which the land in suit could be identified is admissible in evidence though defendant was not a party thereto.—*Finberg v. Gilbert* (Tex. Civ. App.) 979.

(C) **Matters Concluded.**

§ 720. Where, in a prior action between parties to a suit in which an accounting was had, the court rendered judgment fixing their rights in respect to all transactions between them, which judgment was affirmed on appeal, this judgment was conclusive against any claim one might bring against the other in a subsequent suit based on transactions involved in the first suit.—*Fant v. D. Sullivan & Co.* (Tex. Civ. App.) 691.

§ 732. A judgment *held* not *res judicata* as to a certain matter.—*Thompson v. McPherson* (Ky.) 272.

**XV. LIEN.**

Amendment of judgment against railroad as to lien, see *Railroads*, § 161.

**XVII. FOREIGN JUDGMENTS.**

§ 829. A decision of the United States Supreme Court *held* to necessarily decide that the statute under which a cause was removed to a federal circuit court was valid so that its invalidity could not be raised on remand to the state court for retrial.—*McCabe's Adm'r v. Maysville & B. S. R. Co.* (Ky.) 892.

§ 829. Under the circumstances *held* that the unconstitutionality of a statute under which a case was removed to a federal circuit court could not be first raised in the state court on remand for retrial, after the federal Supreme Court had held that the federal circuit court obtained jurisdiction by removal of the cause.—*McCabe's Adm'r v. Maysville & B. S. R. Co.* (Ky.) 892.

**XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.**

Pending appeal or other proceeding for review, see *Appeal and Error*, §§ 485, 490.

**XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.**

§ 891. Where plaintiff recovered judgment against two joint tort-feasors, and collected his judgment against one of them, his cause of action was satisfied.—*Thomas' Adm'r v. Maysville St. Ry. & Transfer Co.* (Ky.) 398.

**XXI. ACTIONS ON JUDGMENTS.**

(A) **Domestic Judgments.**

Variance between pleading and judgment attached, see *Pleading*, § 312.

§ 903. Where a judgment of foreclosure of a tax lien against a lot was rendered against a husband and wife, and she died without a sale, *held* that all questions as to the effect of a sale were removed by a proceeding against a subsequent purchaser who assumed payment, establishing the lien and a clear right to issue process, and that its inclusion in a suit to enforce a lien for all unpaid taxes was not for an idle and vexatious purpose.—*Toepperwein v. City of San Antonio* (Tex. Civ. App.) 699.

(B) **Foreign Judgments.**

§ 935. In view of Rev. St. 1893, art. 1256, a suit may be brought on a foreign judgment against one of two persons against whom the judgment was rendered.—*Varn v. Arnold Hat Co.* (Tex. Civ. App.) 693.

§ 942. An allegation *held* sufficient to show the jurisdiction of a court, in the absence of a plea or evidence attacking it.—*Varn v. Arnold Hat Co.* (Tex. Civ. App.) 693.

**JUDICIAL DISCRETION.**

Amendment of pleadings, see *Pleading*, § 236. Continuance, see *Criminal Law*, § 586.

Limiting number of witnesses, see *Criminal Law*, § 676.

Review of discretion in civil actions, see *Appeal and Error*, §§ 959-984.

Review of discretion in criminal prosecutions, see *Criminal Law*, §§ 1153, 1156.

Separation and exclusion of witnesses, see *Trial*, § 41.

**JUDICIAL NOTICE.**

In civil actions, see *Evidence*, §§ 12-43.

In criminal prosecutions, see *Criminal Law*, § 304.

**JUDICIAL OFFICERS.**

See *Judges*; *Justices of the Peace*.

**JUDICIAL PROCESS.**

In general, see *Process*.

**JUDICIAL SALES.**

Exemption of personal property, see *Exemptions*.

Exemption of real property, see *Homestead*. Of property in possession of receiver, see *Receivers*, § 143.

Of property of decedent, see *Executors and Administrators*, §§ 320-380.

Of seminary property, see *Colleges and Universities*, § 6.

On execution, see *Execution*, § 306.

On partition, see *Partition*, §§ 106, 109.

Tax sales, see *Taxation*, §§ 634, 641.

**JURISDICTION.**

Amount or value in controversy, see *Appeal and Error*, § 45; *Courts*, § 121.

Appellate jurisdiction, see *Appeal and Error*, § 20; *Courts*, §§ 231, 247.

Of courts in general, see *Courts*.

Of lower court requisite to jurisdiction of Appellate Court, see *Appeal and Error*, § 20.

Of supplementary proceedings, see *Execution*, § 371.

Presumptions as to jurisdiction on appeal or writ of error, see *Appeal and Error*, § 911.

Probate courts, see *Courts*, § 202.

Review of questions of jurisdiction, see *Appeal and Error*, § 185.

**JURY.**

Affidavits, statements, and testimony of jurors on motion for new trial, see *Criminal Law*, § 957.

Custody, conduct and deliberations, see *Criminal Law*, §§ 854, 857; *Trial*, §§ 309, 311.

Instructions, see *Criminal Law*, §§ 761-764, 770-823, 825, 829; *Trial*, §§ 191-296.

Questions for jury in civil actions, see *Trial*, §§ 136-178.

Questions for jury in criminal prosecutions, see *Criminal Law*, §§ 741-764.

Taking case or question from jury at trial, see Criminal Law, §§ 741, 742; Trial, §§ 136-178. Verdict in civil actions, see Trial, §§ 351, 365. Verdict in criminal prosecutions, see Criminal Law, § 878. View and inspection by jury, see Trial, § 28.

## II. RIGHT TO TRIAL BY JURY.

§ 25. Under Sayles' Ann. Civ. St. 1897, art. 3189, the denial of an application for a jury trial *held* proper.—City Loan & Trust Co. v. Sterner (Tex. Civ. App.) 207.

## III. QUALIFICATIONS OF JURORS AND EXEMPTIONS.

Disqualification of or misconduct affecting as ground for new trial, see New Trial, § 54.

## IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

§ 66. Where there was no willful violation of the statute requiring the jury commission to draw a jury panel, there was no error in forcing one to be tried before a jury summoned by the sheriff.—McKnight v. State (Tex. Cr. App.) 423.

§ 70. The action of the court in appointing jury commissioners to draw a jury for the trial of a criminal prosecution at the term of court then in session *held* not error, under Code Cr. Proc. 1895, art. 695, and Rev. St. 1895, art. 3150, relating to the summoning and impaneling of juries.—Schuh v. State (Tex. Cr. App.) 908.

§ 72. Where regular juries were drawn as provided by the wheel jury law for alternate weeks, and a felony case, not being reached on a week on which a jury had been ordered, was reset for the next week, there being no regular jury, the court could order the sheriff to procure talesmen to serve as jurors during that week.—Martin v. State (Tex. Cr. App.) 681.

## V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

Incompetency of or misconduct affecting as ground for new trial, see New Trial, § 54.

§ 87. Though a juror asserts that his direct interest in the result of the trial will not influence his judgment, the law presumes him to be under a disqualifying bias, and public policy forbids him to sit notwithstanding his avowal.—Gershner v. Scott-Mayer Commission Co. (Ark.) 772.

## JUSTICES OF THE PEACE.

### IV. PROCEDURE IN CIVIL CASES.

§§ 73, 74. Where the venue of a cause pending before a justice of the peace was changed, and the cause sent to another justice, service of notice of the trial day of the cause on defendant's attorney was not sufficient.—Hess v. Fox (Mo. App.) 83.

§ 86. An interplea in attachment before a justice of the peace *held* sufficient.—Wray v. Hale (Mo. App.) 38.

§ 87. Under Rev. St. 1895, art. 225, defendant *held* not limited to a recovery of interest upon an amount which would have satisfied plaintiff's claim and costs of suit.—Battle & McKinney v. White (Tex. Civ. App.) 216.

§ 104. Though plaintiff in replevin in a justice's court must state that the property was not taken on execution, etc., the burden of proving defendant's answer, alleging that he claims the right of possession under execution, is on defendant.—Moriund v. Johnson (Mo. App.) 80.

§ 122. Judgment of a justice of the peace *held* not void.—Hess v. Fox (Mo. App.) 83.

§ 128. Facts *held* to authorize refusal to set aside a default judgment of a justice of the peace.—Hess v. Fox (Mo. App.) 83.

## JUSTIFIABLE HOMICIDE.

See Homicide, §§ 114, 300, 301.

## KIDNAPPING.

See Abduction.

## KNOWLEDGE.

Affecting competency of expert witness, see Evidence, § 537.

Ignorance of cause of action as affecting limitation, see Limitation of Actions, § 95.

Of agent imputed to principal, see Principal and Agent, § 177.

Of defect or danger as affecting assumption of risk by servant, see Master and Servant, § 217.

Of defect or danger as affecting contributory negligence of servant, see Master and Servant, § 234.

Opinion evidence founded on special knowledge as to subject-matter, see Evidence, § 474.

*Affecting or element of particular acts or transactions.*

By former owner, as to possession alleged to be adverse, see Adverse Possession, § 31.

Insurance or application therefor, see Insurance, § 378.

Purchase of land, see Vendor and Purchaser, §§ 229-233.

## LABOR.

See Master and Servant; Work and Labor.

Liens on real property for work and materials, see Mechanics' Liens.

## LACHES.

*Affecting particular rights, remedies, or proceedings.*

See Quieting Title, § 29; Trespass to Try Title, § 25.

In equity, see Equity, § 73.

To confirm or try tax title, see Taxation, § 805.

## LANDLORD AND TENANT.

See Use and Occupation.

Duty of lessee of railroad as to passengers, see Carriers, § 306.

Lease of mines and mineral lands, see Mines and Minerals, §§ 58-71.

## I. CREATION AND EXISTENCE OF THE RELATION.

§ 1. Before the relation of landlord and tenant can arise, there must be both privity of estate and contract.—Love v. Cahn (Ark.) 259.

§ 1. The relation of landlord and tenant must be created through contract express or implied.—State ex rel. Armour Packing Co. v. Dickmann (Mo. App.) 29.

§ 10. A decree confirming a mortgage foreclosure sale *held* not to create the relation of landlord and tenant between the mortgagor and the purchaser.—Love v. Cahn (Ark.) 259.

## II. LEASES AND AGREEMENTS IN GENERAL.

Lease of mines and mineral lands, see Mines and Minerals, §§ 58-71.

**IV. TERMS FOR YEARS.****(B) Assignment, Subletting, and Mortgage.**

§ 75. A leasehold cannot be sold without the consent of the landlord, and it has no market value.—*Steger v. Barrett* (Tex. Civ. App.) 174.

**(C) Extensions, Renewals, and Options to Purchase or Sell.**

§ 86. Notice of renewal by the lessee *held* a condition precedent to the right to renew.—*Bluthenthal v. Atkinson* (Ark.) 510.

§ 86. A lessor *held* not estopped, under the evidence, to claim a forfeiture of the lessee's right to a renewal by his failure to give the required notice.—*Bluthenthal v. Atkinson* (Ark.) 510.

§ 86. Failure of the lessor, after expiration of the time for notice of renewal, to mention the failure to receive such notice *held* not a waiver of such notice.—*Bluthenthal v. Atkinson* (Ark.) 510.

**VII. PREMISES AND ENJOYMENT AND USE THEREOF.****(B) Possession, Enjoyment, and Use.**

§ 129. In an action for damages for failure to allow plaintiff to take possession of premises rented from defendants, an instruction as to damages for mental and physical suffering and inconvenience *held* error.—*Scanlan & Bartell v. Davis* (Tex. Civ. App.) 126.

**VIII. RENT AND ADVANCES.****(A) Rights and Liabilities.**

Right of husband to rents on wife's separate estate, see *Husband and Wife*, § 125.  
Rights as between vendor and purchaser, see *Vendor and Purchaser*, § 196.

**IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.**

Equitable defenses, see *Action*, § 24.

**LANDS.**

See *Property*.

Conveyances, see *Deeds*; *Vendor and Purchaser*.  
Mortgage, see *Mortgages*.  
Public lands, see *Public Lands*.

**LANGUAGE.**

Of statute, following statutory language in indictment or information, see *Indictment and Information*, § 110.

**LARCENY.**

See *False Pretenses*; *Robbery*.

Liability of carrier by larceny of agent, see *Carriers*, § 108.

**I. OFFENSES AND RESPONSIBILITY THEREFOR.**

§ 26. In a trial for theft, accused *held* entitled to prove that property did not belong to the prosecuting witness and was not in his possession at the time of the alleged taking.—*Wilson v. State* (Tex. Cr. App.) 943.

**II. PROSECUTION AND PUNISHMENT.****(A) Indictment and Information.**

§ 40. An indictment for larceny, alleging ownership in three persons, a copartnership, *held* not sustained by proof of ownership by two of such persons.—*Hardeman v. State* (Tex. Cr. App.) 632.

§ 40. In a prosecution for theft, where the property taken was described in an indictment as current money of the United States of America, it was necessary to prove that it was such.—*Rogers v. State* (Tex. Cr. App.) 921.

§ 40. Where the indictment alleged the larceny of a \$5 gold piece of United States money, the state must not only prove that a \$5 gold piece was stolen, but that it was United States money.—*Marey v. State* (Tex. Cr. App.) 927.

**(B) Evidence.**

Acts and declarations of conspirators, see *Criminal Law*, §§ 424, 427.

Demonstrative evidence, see *Criminal Law*, § 404.

Explanation of flight of accused, see *Criminal Law*, § 361.

§ 45. On a trial for larceny, evidence that portions of the property were found in the possession of accused and a third person *held* admissible as a circumstance to identify the goods.—*Wiley v. State* (Ark.) 249.

§ 55. Evidence *held* to support a conviction of hog theft.—*Fields v. State* (Tex. Cr. App.) 652.

§ 60. On a trial of larceny of merchandise, evidence *held* to justify a finding that the merchandise found in the possession of accused and a third person jointly indicted with him was the property of prosecutor.—*Wiley v. State* (Ark.) 249.

§ 63. In a prosecution for theft of a bay horse, which accused was shown to have exchanged for a sorrel, evidence *held* to show that accused was in exclusive possession of the bay when he swapped it for the sorrel.—*Johnson v. State* (Tex. Cr. App.) 664.

§ 64. The unexplained possession of property recently stolen is presumptive evidence of guilt.—*Wiley v. State* (Ark.) 249.

§ 64. The question as to whether or not the possession of stolen property is recent *held* not to depend wholly on the lapse of time.—*Wiley v. State* (Ark.) 249.

§ 64. Possession by accused of the stolen property *held* not too remote, but sufficient to raise a presumption of his guilt.—*Wiley v. State* (Ark.) 249.

**(C) Trial and Review.**

Application of instructions to case, see *Criminal Law*, § 814.

Instructions as to principals and accessories, see *Criminal Law*, § 792.

Instructions giving undue prominence to particular matters, see *Criminal Law*, § 811.

Instructions on weight and sufficiency of evidence, see *Criminal Law*, §§ 763, 764.

Requests for instructions, see *Criminal Law*, § 820.

§ 78. On a trial for larceny, an instruction *held* sufficient on the issue of mistake of fact.—*Fields v. State* (Tex. Cr. App.) 652.

**(D) Sentence and Punishment.**

§ 88. Acts 25th Leg. 1897, p. 83, c. 67, amending Pen. Code 1895, art. 881, prescribing the punishment for theft of a horse, etc., *held* not to abrogate the punishment prescribed by Pen. Code 1895, art. 877, enacted March 8, 1887 (Laws 1887, p. 14, c. 21), for theft by a bailee.—*Brown v. State* (Tex. Cr. App.) 101.

**LAST CLEAR CHANCE.**

Injury avoidable notwithstanding contributory negligence, see *Negligence*, § 83; *Street Railroads*, § 103.

**LATENT AMBIGUITY.**

Parol evidence to explain, see Evidence, § 452.

**LAW.**

Conclusions of law, see Trial, § 390.

Instructions as to matters of law, see Criminal Law, § 790.

Questions of law or fact, province of court and jury, see Criminal Law, §§ 741, 742; Trial, §§ 136-143.

Statutory law, see Statutes.

**LAW OF THE CASE.**

Former decision on appeal, see Appeal and Error, § 1097.

**LAWYERS.**

See Attorney and Client.

**LEADING QUESTIONS.**

On examination of witnesses, see Witnesses, §§ 240, 244.

**LEASE.**

See Landlord and Tenant.

Of mines and mineral lands, see Mines and Minerals, §§ 58-71.

**LEAVE OF COURT.**

To amend pleading, see Pleading, §§ 236, 237.

**LEGACIES.**

See Wills.

**LEGAL NOTICE.**

See Process.

**LEGAL REPRESENTATIVES.**

Construction of words in insurance certificates, see Insurance, § 785.

**LEGISLATION.**

In general, see Statutes.

**LETTERS.**

Presumptions as to mailing and delivery, see Evidence, § 71.

**LEVY.**

Of assessment or tax, see Counties, § 192; Municipal Corporations, § 449; Schools and School Districts, § 103.

**LEX LOCI.**

As to relation of carrier and passenger, see Carriers, § 234.

Conflicting jurisdiction of courts, see Courts, §§ 472-485.

Contracts for transmission and delivery of telegrams, see Telegraphs and Telephones, § 27.

Liability for negligence or default in transmission or delivery of telegrams, see Telegraphs and Telephones, § 27.

**LIBEL AND SLANDER.****IV. ACTIONS.**

Power of court to try issue of truth of charges against defendant after dismissal of action, see Action, § 6.

**VI. CRIMINAL RESPONSIBILITY.****(B) Prosecution and Punishment.**

§ 152. An indictment for slander *held* not to state an offense under Pen. Code 1895, art. 750.—*Woods v. State* (Tex. Cr. App.) 918.

§ 152. The state, on a trial of an indictment for slander, in violation of Pen. Code 1895, art. 750, *held* confined to the specific allegations in the indictment.—*Woods v. State* (Tex. Cr. App.) 918.

§ 152. An indictment for libel *held* to sufficiently charge complainant with a penal offense, under Pen. Code, arts. 721, 727.—*Gonzales v. State* (Tex. Cr. App.) 937.

**LICENSES.****I. FOR OCCUPATIONS AND PRIVILEGES.**

Mandamus to compel grant of, or other official action in reference to, licenses, see Mandamus, § 87.

*For particular occupations or privileges.*

See Physicians and Surgeons, § 5.

Sale of intoxicating liquors, see Intoxicating Liquors, §§ 50, 74.

Teachers, see Schools and School Districts, §§ 130, 131.

§ 7. The rule that the amount of a license fee imposed as a tax is ordinarily a question for the taxing power is subject to the limitation that the tax must not amount to a prohibition of any lawful business.—*City of Louisville v. Pooley* (Ky.) 315.

§ 7. The occupation of lending money on salaries or chattels being a legitimate one, an ordinance imposing a license fee amounting to 80 per cent. of the average net earnings of companies engaged in such business is unreasonable and prohibitive.—*City of Louisville v. Pooley* (Ky.) 315.

§ 7. Under Const. §§ 171, 181, Ky. St. § 2980, a license tax imposed on merchandising *held* not unconstitutional.—*City of Louisville v. Sagalowski* (Ky.) 339.

§ 7. A license tax *held* not so high as to be prohibitive.—*City of Louisville v. Sagalowski* (Ky.) 339.

**II. IN RESPECT OF REAL PROPERTY.**

Injuries to licensees on or about railroads, see Railroads, §§ 274-282.

**LIENS.**

Enforcement against exempt property, see Homestead, § 97.

*Particular classes of liens.*

See Chattel Mortgages, § 150; Mechanics' Liens; Pledges.

Of vendor for price of land, see Vendor and Purchaser, §§ 261-296.

On railroad property, see Railroads, § 161.

Tax liens, see Taxation, § 511.

**LIFE ESTATES.**

See Dower.

§ 15. The enhancement in the value of corporate stock while in the hands of the life tenant, with gift over, belongs to the remaindermen.—*Bains v. Globe Bank & Trust Co.* (Ky.) 343.

**LIFE INSURANCE.**

See Exemptions, § 50; Insurance.

**LIGHTS.**

Duty of street railroad as to equipment of cars, see Street Railroads, § 81.

**LIMITATION.**

Constitutional limitation of powers in general, see Constitutional Law, § 26.  
 Estates on limitation, see Estates, § 1.

**LIMITATION OF ACTIONS.**

See Adverse Possession.

Contract limiting time to sue on insurance policies, see Insurance, § 623.

Laches, see Equity, § 73.

Review as dependent on presentation of grounds of review in record, see Appeal and Error, § 673.

*Particular actions or proceedings.*

See Quieting Title, § 29; Trespass to Try Title, § 25.

Appeal or other proceedings for review, see Appeal and Error, § 345.

Criminal prosecutions, see Criminal Law, § 159.  
 To confirm or try tax title, see Taxation, § 805.

**II. COMPUTATION OF PERIOD OF LIMITATION.****(A) Accrual of Right of Action or Defense.**

§ 43. The statute of limitations does not begin to run until the right to sue has accrued.—*Pitman v. Ball* (Mo. App.) 1082.

§ 47. Till the final determination of a suit in favor of the owner of a paramount title against a covenantee and his warrantors, the covenantee has no cause of action on his warranty.—*Sievert v. Underwood* (Tex. Cr. App.) 721.

§ 49. Where the surviving husband sold the community property and appropriated the entire proceeds to his own use, the right of action by the heirs of the deceased wife for their share in the property at once accrued, and the statute of limitation began to run.—*Wingo v. Kudder* (Tex.) 899.

§ 55. Plaintiff *held* barred by limitations from suing for damages resulting from the inundation of his land by the permanent raising of a dam.—*Abilene Light & Water Co. v. Clack* (Tex. Civ. App.) 201.

§ 55. That on the permanent raising of a dam defendant paid plaintiff a certain sum per year as damages did not stop the running of limitations for flooding plaintiff's land; there being no evidence that plaintiff's cause of action was merged in the payment of damages.—*Abilene Light & Water Co. v. Clack* (Tex. Civ. App.) 201.

§ 58. An action against a stockholder for unpaid stock subscription by a judgment creditor of the corporation *held* not barred by limitations.—*Pitman v. Ball* (Mo. App.) 1082.

**(C) Personal Disabilities and Privileges.**

§ 73. Rev. St. 1899, § 4281 (Ann. St. 1906, p. 2355), relating to limitation of civil actions, construed in view of sections 4271 and 4279.—*McKee v. Downing* (Mo.) 7.

§ 73. An action brought by heirs to recover land alleged to have been purchased by decedent's husband with decedent's money and held by him in trust for her *held* not barred by limitation under Rev. St. 1899, §§ 4265, 4267 (Ann. St. 1906, pp. 2338, 2342).—*McKee v. Downing* (Mo.) 7.

§ 73. Right of heirs of a deceased married woman to recover land alleged to be held by

her husband as her trustee *held* to be barred, if at all, only by Rev. St. 1899, §§ 4265, 4267 (Ann. St. 1906, pp. 2338, 2342).—*McKee v. Downing* (Mo.) 7.

**(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.**

§ 95. Ordinarily neglect or laches of public officials is not chargeable to the public, so as to bar a suit by lapse of time, where no intervening right of a third person is to be affected.—*Alexander v. Owen County* (Ky.) 386.

§ 96. The statute of limitation began to run against the right of a county to surcharge a sheriff's tax collection settlement when a mistake therein was discoverable by the exercise of reasonable diligence.—*Alexander v. Owen County* (Ky.) 386.

**(H) Commencement of Action or Other Proceeding.**

§ 130. Kirby's Dig. § 5083, *held* to apply only to those causes of action which under the general statute of limitation would be barred before the running of one year from the time of the taking by plaintiff of a nonsuit.—*Love v. Cahn* (Ark.) 259.

**III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.**

§ 157. Where one indebted to another on account for money borrowed and for board payments thereon, accompanied by the statement that the payments should go for the board, the payments did not acknowledge the indebtedness for money borrowed and did not stop the running of limitations thereon.—*Brown's Adm'r v. Osborne* (Ky.) 405.

§ 159. The mere putting a credit on an open account or a note, unless there is evidence that the amount represented by the credit was paid by the debtor, is not sufficient to stop the running of limitations.—*Brown's Adm'r v. Osborne* (Ky.) 405.

§ 163. Where a payment is made by the debtor on an open account or a note before the same is barred by limitations, there is a sufficient acknowledgment of the debt to stop the running of the statute.—*Brown's Adm'r v. Osborne* (Ky.) 405.

§ 163. Where a debtor at the time of the making of a payment on account has before him the account, or knows what it is made up of, and the amount of it, the payment is an acknowledgment of the account and stops the running of limitations.—*Brown's Adm'r v. Osborne* (Ky.) 405.

§ 163. Payments by one indebted for board *held* to stop the running of limitations and to create a new period for limitations.—*Brown's Adm'r v. Osborne* (Ky.) 405.

**V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.**

§ 180. A statute of limitations must be pleaded, and cannot be raised by demurrer.—*Childers v. Bales* (Ky.) 295.

§ 180. A defendant, setting up the statute by way of demurrer, must show that, on the face of his adversary's pleadings, the action is barred.—*Sievert v. Underwood* (Tex. Civ. App.) 721.

§ 180. A petition for breach of warranty of title *held* not to show that the action was barred.—*Sievert v. Underwood* (Tex. Civ. App.) 721.

§ 193. An allegation in an answer that the action was barred by limitation because not brought within one year after the death of plaintiff's decedent does not prove itself, and is not sufficient to show, that the suit was not brought within that time.—*McKee v. Downing* (Mo.) 7.

§ 196. An acknowledgment of an indebtedness on account made at the time of payments thereon, and as a part of the same transaction, is competent to show for what purpose the payments are made.—*Brown's Adm'r v. Osborne* (Ky.) 405.

## LIMITATION OF LIABILITY.

Of carrier in respect to goods, see Carriers, § 156.  
Of insurer by provisions of policy, see Insurance, § 500.  
Of master for injuries to servant, see Master and Servant, § 100.  
Of telegraph or telephone company for negligence or default in transmission or delivery of message, see Telegraphs and Telephones, § 54.

## LIQUIDATED DAMAGES.

See Damages, §§ 74-81.

## LIQUIDATION.

In general, see Bankruptcy.  
Of corporations in general, see Corporations, § 550.

## LIQUOR SELLING.

See Intoxicating Liquors.

## LIVE STOCK.

See Animals.  
Carriage of, see Carriers, §§ 217-230.  
Fence laws in general, see Fences.  
Injuries to, by operation of railroad, see Railroads, §§ 407-446.

## LOANS.

Usurious loans, see Usury.  
Validity of ordinances imposing license fee on persons making salary or chattel loans, see Licenses, § 7.

## LOCAL ASSESSMENTS.

See Municipal Corporations, § 449.

## LOCATION.

Of lines of land conveyed, see Boundaries, § 8.

## LODGING HOUSES.

See Innkeepers.  
Power of city to require fire escapes, see Municipal Corporations, § 603.

## LOGS AND LOGGING.

Sale of timber by tenant in dower, see Dower, § 114.  
Sale of timber on public lands, see Public Lands, § 173.  
Venue of action against tram road appertinent to sawmill, see Railroads, § 22.

§ 35. Right of the vendor of standing timber retaining possession and title thereof to bring trover for its conversion upon the bankruptcy of the purchaser stated.—*Swann-Day Lumber Co. v. Hall* (Ky.) 826.

## LOSS.

Causes of loss within insurance policy, see Insurance, §§ 446.  
Of goods by carrier, see Carriers, §§ 108-135.

## LOST INSTRUMENTS.

Supplying or restoring records lost or destroyed, see Records, § 17.

## LOTTERIES.

Matters relating to wages and gambling in general, see Gaming.

## LUMBER.

See Logs and Logging.

## LUNATICS.

See Insane Persons.

## MACHINERY.

Dangerous machinery, liability of master for injuries to servant, see Master and Servant, §§ 101-124, 208-211, 233-236.

## MAGISTRATES.

See Justices of the Peace.

## MAIL.

Presumptions as to mailing and delivery of mail matter, see Evidence, § 71.

## MAINTENANCE.

See Champerty and Maintenance.  
Separate maintenance of wife, see Husband and Wife, §§ 283, 297.

## MALICE.

See Malicious Prosecution, § 33.  
Element of homicide, see Homicide, §§ 11, 13, 156-159.

## MALICIOUS PROSECUTION.

Wrongful garnishment, without malice, see Garnishment, § 248.

### II. WANT OF PROBABLE CAUSE.

§ 20. Defendant in an action for malicious prosecution may show as a defense that he had reasonable grounds to believe that plaintiff was guilty of the offense charged.—*Stephens v. Gravit* (Ky.) 414.

§ 22. That defendant acted upon the advice of a magistrate is no defense.—*Stephens v. Gravit* (Ky.) 414.

§ 24. That plaintiff in an action for malicious prosecution may recover he must show that the criminal case was instituted against him without probable cause, and also that he was acquitted.—*Stephens v. Gravit* (Ky.) 414.

### III. MALICE.

§ 33. That plaintiff in an action for malicious prosecution may recover, he must show that the criminal case was instituted against him maliciously, and also that he was acquitted.—*Stephens v. Gravit* (Ky.) 414.

### V. ACTIONS.

§ 56. It cannot be presumed that a magistrate was a practicing lawyer, so as to constitute a defense to an action for malicious prosecution.—*Stephens v. Gravit* (Ky.) 414.

§ 64. In an action for malicious prosecution for arresting plaintiff and another for horse stealing, evidence held to warrant a finding that the arrest of such other was malicious, and

without probable cause.—*Stephens v. Gravit* (Ky.) 414.

§ 69. A verdict for \$300 in an action for malicious prosecution by having plaintiff arrested for stealing a horse was not excessive.—*Stephens v. Gravit* (Ky.) 414.

## MALPRACTICE.

Liability of employer furnishing physician for injuries to servant, see *Master and Servant*, § 92.

## MANDAMUS.

To compel issuance of liquor license, see *Intoxicating Liquors*, § 74.

## I. NATURE AND GROUNDS IN GENERAL.

§ 14. Mandamus will not issue commanding an inferior court or ministerial body to act until it is first established by evidence that the court or body has been legally requested to act, and that it has illegally declined to do so.—*State ex rel. Abbott v. Adcock* (Mo.) 1100.

§ 23. Under Ky. St. §§ 3855, 3857, 3858 (*Russell's St. §§ 3885, 3887, 3888*), and Civ. Code Prac. § 477, *held*, that the commonwealth can maintain mandamus to compel a county judge to require an executor to file an inventory and make a settlement of his accounts and return it to the county court, though the sole object is to secure evidence for the enforcement of inheritance taxes.—*Commonwealth v. Peter* (Ky.) 896.

## II. SUBJECTS AND PURPOSES OF RELIEF.

### (A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

§ 48. The remedy for the failure of the trial judge to file his conclusions of fact and law as required by Laws 1907, p. 446, c. 7, *held* not by mandamus, but by a reversal of the judgment for new trial.—*Wandry v. Williams* (Tex.) 85.

§ 60. Under Ky. St. §§ 3855, 3857, 3858 (*Russell's St. §§ 3885, 3887, 3888*), and Civ. Code Prac. § 477, *held*, that mandamus will lie to compel a county judge to require an executor to file an inventory and make a settlement of his accounts and return it to the county court.—*Commonwealth v. Peter* (Ky.) 896.

### (B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 87. An applicant for a license to practice medicine *held* entitled by mandamus to compel the state board of health, empowered by Laws 1907, p. 359, § 1, to examine applicants, to act.—*State ex rel. Abbott v. Adcock* (Mo.) 1100.

## MANDATE.

See *Mandamus*.

To lower court on decision on appeal or other proceeding for review, see *Appeal and Error*, § 1207.

## MANUFACTURES.

Charter of manufacturing company, see *Corporations*, § 18.

Right to incorporate for manufacturing purposes, see *Corporations*, § 14.

## MAPS.

Dedication of property to public use, see *Dedication*, § 19.

## MARITAL RIGHTS.

See *Husband and Wife*.

## MARKETABLE TITLE.

See *Vendor and Purchaser*, § 130.

## MARKETS.

Liability of municipal property to taxation, see *Taxation*, § 217.

## MARKET VALUE.

Of property, opinion evidence, see *Evidence*, § 525.

Of property, relevancy of evidence, see *Evidence*, § 113.

## MARRIAGE.

See *Divorce*; *Husband and Wife*.

As revocation of will, see *Wills*, § 191.

## MARRIED WOMEN.

See *Husband and Wife*.

## MARSHALING ASSETS AND SECURITIES.

Of firms and partners, see *Partnership*, § 181.

## MASSAGE.

Practicing medicine, see *Physicians and Surgeons*, § 6.

## MASTER AND SERVANT.

Criminal responsibility of servant for illegal sale of intoxicating liquors, see *Intoxicating Liquors*, § 169.

Declarations by employé as evidence against employer, see *Evidence*, § 241.

Implied liabilities for services rendered not in performance of duties of employment, see *Work and Labor*.

## I. THE RELATION.

### (A) Creation and Existence.

Employment of agents, see *Principal and Agent*, § 23.

### (B) Statutory Regulation.

Concurrent regulations by state and United States, see *Commerce* §§ 8, 58.

Powers of Congress as to employes of railroads engaged in interstate commerce, see *Commerce*, § 8.

### (C) Termination and Discharge.

Alder of pleading by verdict, see *Pleading*, § 433.

§ 36. One discharged from his employment *held* required to prove that he performed his part of the agreement in order to recover thereon.—*Matson v. Stewart* (Tex. Civ. App.) 736.

§ 40. In an action by a servant for wrongful discharge, evidence *held* to show that he was employed for a year at \$15 a week, and, though competent, was discharged before expiration of the term.—*Kentucky Shoe Mfg. Co. v. Carraway* (Ky.) 852.

## II. SERVICES AND COMPENSATION.

### (A) Performance of Services.

§ 65. In an action by a brewing company against a former employé for damages resulting from defendant's alleged carelessness in making beer, certain evidence *held* admissible under a traverse of the complaint.—*West Louisville Brewing Co. v. Schaefer* (Ky.) 395.

§ 65. Evidence, in an action against an employé for breach of the contract of employment,

held to sustain a finding that under the contract defendant's authority as head brewer was limited to certain employes and did not extend to all departments of plaintiff's brewery.—*West Louisville Brewing Co. v. Schaefer* (Ky.) 395.

**(B) Wages and Other Remuneration.**

§ 73. One discharged from employment under which he was to receive property may recover the specific property.—*Matson v. Stewart* (Tex. Civ. App.) 736.

**III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.**

Statutory actions for death, see Death, §§ 31-104.

**(A) Nature and Extent in General.**

§ 92. Liability of employer for malpractice by a physician in treating an injured employe determined with reference to the evidence as to the employment of the physician.—*Texas & Pacific Coal Co. v. McWain* (Tex. Civ. App.) 202.

§ 92. Where a mining company undertakes to furnish medical treatment for its employes, it is liable for the negligence of the physician employed by it in discharge of such undertaking, though it makes no deduction therefrom from the wages of the employes.—*Texas & Pacific Coal Co. v. McWain* (Tex. Civ. App.) 202.

§ 96. A master is liable for his negligence resulting in injury to a servant, though the negligence of a third person concurs in producing the injury.—*Buchanan & Gilder v. Murayda* (Tex. Civ. App.) 973.

§ 96. A master held not liable for injury to a servant resulting from the master's negligence and the negligence of a servant of an independent contractor.—*Buchanan & Gilder v. Murayda* (Tex. Civ. App.) 973.

§ 97. A master held not liable to his servant for an injury resulting from causes which could not be reasonably expected, unaccompanied by ordinary care on the master's part.—*Buchanan & Gilder v. Murayda* (Tex. Civ. App.) 973.

§ 100. An agreement by a parent to hold the employer of a minor child harmless for injuries negligently inflicted held contrary to public policy and void.—*Pacific Express Co. v. Watson* (Tex. Civ. App.) 127.

**(B) Tools, Machinery, Appliances, and Places for Work.**

§§ 101, 102. It is the duty of a master to furnish the servant with a reasonably safe place, material, and appliances in and with which to perform his labor, and he is liable for ordinary negligence in failing to perform this duty.—*Chesapeake & O. Ry. Co. v. Marcum* (Ky.) 293.

§§ 101, 102. While the master is bound to furnish a reasonably safe place for a servant to work, he is not required to make it absolutely safe, nor to insure the servant against the ordinary risks incident to the employment.—*Nicholas v. E. H. Abadie Co.* (Ky.) 325.

§§ 101, 102. The duty of a master to furnish the servant with reasonably same appliances requires the master to exercise ordinary care to keep such appliances in a reasonably safe condition.—*Harris v. Kansas City Southern Ry. Co.* (Mo. App.) 576.

§§ 101, 102. Rule stated as to the duty of a master in respect to furnishing safe, simple appliances for commonplace work.—*Harris v. Kansas City Southern Ry. Co.* (Mo. App.) 576.

§§ 101, 102. The question of a master's negligence in furnishing unsafe appliances for work must be determined with reference to the dangers to be reasonably apprehended.—*Harris v. Kansas City Southern Ry. Co.* (Mo. App.) 576.

§§ 101, 102. The duty of a master to furnish a reasonably safe place in which to work is discharged where he exercises ordinary care in furnishing the servant a place as reasonably safe as the character of the work permits.—*Bennett v. Crystal Carbonate Lime Co.* (Mo. App.) 608.

§§ 101, 102. It is a master's duty to provide his employes a reasonably safe place to work.—*Ferris Press Brick Co. v. Thompson* (Tex. Civ. App.) 490.

§§ 101, 102. A master must exercise ordinary care to provide his servant a safe place for work.—*Buchanan & Gilder v. Murayda* (Tex. Civ. App.) 973.

§ 103. The duty of the master to furnish the servant with a reasonably safe place, material, and appliances in and with which to work cannot be delegated.—*Chesapeake & O. Ry. Co. v. Marcum* (Ky.) 293.

§ 103. The duty of a master to exercise ordinary care to furnish his servant a reasonably safe place to work held nondelegable.—*Buchanan & Gilder v. Murayda* (Tex. Civ. App.) 973.

§ 107. Where the place in which a servant works is reasonably safe, and it is the particular work done that renders it temporarily unsafe, the rule requiring a reasonably safe place does not obtain.—*Bennett v. Crystal Carbonate Lime Co.* (Mo. App.) 608.

§ 107. Where the place in which a servant works is reasonably safe, and the master negligently orders a servant's act which renders it unsafe, prima facie liability held to arise because of the negligent order.—*Bennett v. Crystal Carbonate Lime Co.* (Mo. App.) 608.

§ 118. A post supporting the roof over an entry to a room in a coal mine through which cars are moved should not be set so near the track as to endanger men handling the cars, using ordinary care.—*Main Jellico Mountain Coal Co. v. Parker* (Ky.) 871.

§ 124. Facts held to show a master liable for injuries from the explosion of a radiator.—*Monarch Tobacco Works v. Northern* (Ky.) 350.

§ 124. Where brick burners had been in the habit of using a shed along the side of a kiln to retire from the gases and heat, the duty of inspection to see that the shed was in a safe condition was upon the employer.—*Ferris Press Brick Co. v. Thompson* (Tex. Civ. App.) 490.

§ 124. Statement of master's duty to brakemen to inspect brakebeams of cars.—*St. Louis Southwestern Ry. Co. of Texas v. Keith* (Tex. Civ. App.) 695.

**(C) Methods of Work, Rules, and Orders.**

§ 137. Trainmen may presume that flagmen and other employes on or near the track will keep out of danger, and the railroad is not liable for an injury to them unless the trainmen have good reason to believe that the employes will not keep out of danger, and then fail to use proper means at their command.—*Wilkerson v. St. Louis & S. F. R. Co.* (Mo. App.) 543.

§ 137. Unless the evidence, in an action for the death of a flagman struck by a train because of the failure of the engineer to stop the train after the discovery of decedent's peril, showed that the engineer saw decedent, or by the exercise of ordinary care could have seen him, in time to have avoided the accident, there could be no recovery.—*Wilkerson v. St. Louis & S. F. R. Co.* (Mo. App.) 543.

**(D) Warning and Instructing Servant.**

§ 153. A master need not warn an inexperienced servant of possible dangers in the performance of his duties where experience and instruction are not necessary to enable him to do

his work with safety.—*St. Louis, I. M. & S. Ry. Co. v. Wells (Ark.)* 524.

§ 158. Where a lubricator feed glass on locomotive boiler was not inherently dangerous, so that a warning to a fireman that it might possibly break would not have obviated the danger of its breaking, failure to warn him that the glass might sometimes break could not contribute to his injury by its breaking.—*St. Louis, I. M. & S. Ry. Co. v. Wells (Ark.)* 524.

(E) Fellow Servants.

§ 177. A master held responsible for injuries resulting from gross negligence of foreman.—*Chesapeake & O. Ry. Co. v. Marcum (Ky.)* 293.

§ 180. Under Act March 8, 1907 (Laws 1907, p. 162), making the master liable for injuries to servants due to the negligence of fellow servants, where a switchman was injured while riding on the tender to a switch engine, any negligence of those operating the engine was negligence for which the master was liable.—*St. Louis, I. M. & S. Ry. Co. v. Davis (Ark.)* 754.

§ 180. Under Act March 8, 1907 (Laws 1907, p. 162), making the master liable for injuries to servants due to the negligence of fellow servants, where a switchman was injured by the engine on which he was riding taking an open switch, any negligence of another switchman in leaving the switch open was negligence for which the master was liable.—*St. Louis, I. M. & S. Ry. Co. v. Davis (Ark.)* 754.

§ 185. A train having stopped on a switchman's signal for the purpose of uncoupling cars, it was negligence for the engineer to start without a signal to that effect.—*Houston & T. C. R. Co. v. Mayfield (Tex. Civ. App.)* 141.

§ 193. A servant of a contractor erecting a building and a servant of an independent contractor are not fellow servants.—*Buchanan & Gilder v. Murayda (Tex. Civ. App.)* 973.

§ 201. A master held to fail to use ordinary care to furnish a servant a reasonably safe place to work rendering him liable for injuries sustained by the servant.—*Buchanan & Gilder v. Murayda (Tex. Civ. App.)* 973.

(F) Risks Assumed by Servant.

§ 203. The servant assumes only such risks as are ordinarily incident to the employment, and regarded as reasonably within the contemplation of the parties at the time of entering into the contract of hire.—*Harris v. Kansas City Southern Ry. Co. (Mo. App.)* 576.

§ 203. Generally a servant does not assume the risks arising from the master's negligence, however obvious.—*Bennett v. Crystal Carbonate Lime Co. (Mo. App.)* 608.

§ 208. In a servant's action for injury, through the slipping of a defective clawbar, with which he was drawing a spike from a railroad tie, plaintiff held to have assumed the risk.—*Harris v. Kansas City Southern Ry. Co. (Mo. App.)* 576.

§ 210. Facts held to show that a switchman injured by a collision did not assume the risk.—*International & G. N. R. Co. v. Owens (Tex. Civ. App.)* 210.

§ 211. If a master deputed to a servant the duty to make secure a rope supporting a cage which fell in a mine and injured him and he neglected to do so, he assumed the risk and the master is not liable.—*Southern Anthracite Coal Co. v. Bowen (Ark.)* 1048.

§ 216. Under Act March 8, 1907 (Acts 1907, p. 162) § 1, abolishing the fellow servant rule as to railroads, held that the servant of a railway company does not assume the risk of injury from negligence of a fellow servant.—*St. Louis Southwestern Ry. Co. v. Burd (Ark.)* 239.

§ 216. Under the common law, a master was not responsible for injuries to a servant caused by the negligence of a fellow servant; this being considered one of the risks assumed by the servant.—*St. Louis Southwestern Ry. Co. v. Burd (Ark.)* 239.

§ 217. A locomotive fireman held to have assumed risk of injury from the breaking of a lubricator feed glass.—*St. Louis, I. M. & S. Ry. Co. v. Wells (Ark.)* 524.

§ 217. If the servant is skilled in the work required, and equally or better qualified than the master to know the danger and the danger is so obvious that he must have known it, but nevertheless undertakes it, he cannot complain if injured.—*Nicholas v. E. H. Abadie Co. (Ky.)* 325.

§ 217. A servant, though knowing of defects in appliances, may recover for injuries resulting therefrom, where he did not know of the danger in their use.—*Muse v. Abeel (Tex. Civ. App.)* 430.

§ 217. A servant does not assume the risk of his master's negligence, unless he knows or is charged with knowledge thereof, and of the danger arising therefrom.—*Buchanan & Gilder v. Murayda (Tex. Civ. App.)* 973.

§ 217. A servant held not to assume the risk of danger resulting from the master putting him to work in a dangerous place.—*Buchanan & Gilder v. Murayda (Tex. Civ. App.)* 973.

§ 222. A servant performing an act pursuant to the express direction of the master held not to assume the risk as a matter of law.—*Bennett v. Crystal Carbonate Lime Co. (Mo. App.)* 608.

(G) Contributory Negligence of Servant.

§ 229. In an action for injuries to a railroad car carpenter, an instruction defining contributory negligence held proper.—*St. Louis Southwestern Ry. Co. v. Burd (Ark.)* 239.

§ 231. Employés may rely on the judgment of their foreman as to danger of injury in work he orders them to do, unless so manifestly dangerous that a person of ordinary prudence would not undertake it.—*Pittsburg, C. & St. L. Ry. Co. v. Schaub (Ky.)* 885.

§ 233. Facts held to show that a switchman suing for injuries in a collision was not negligent.—*International & G. N. R. Co. v. Owens (Tex. Civ. App.)* 210.

§ 234. Where an employé in charge of a hand car fails to see an open switch in time to avert derailment, when he could have seen the same by the exercise of ordinary care, he is guilty of contributory negligence.—*St. Louis Southwestern Ry. Co. of Texas v. Anderson (Tex. Civ. App.)* 1002.

§ 235. A railroad rule requiring protection flags to be set out when car repairers were working on cars, held applicable to car inspectors as well as car carpenters.—*Russell's Adm'r v. Louisville & N. R. Co. (Ky.)* 841.

§ 235. Brick burners who used a shed along the side of a kiln to retire upon from the gases and heat owed no duty of inspection to see that the shed was safe.—*Ferris Press Brick Co. v. Thompson (Tex. Civ. App.)* 499.

§ 236. A railroad engineer held negligent in going under his engine to make repairs while another train was attached thereto, so as to prevent him from recovering for injuries caused by the other train pulling ahead and moving his engine.—*Louisville & N. R. Co. v. Lumpkin (Ky.)* 318.

§ 236. Employés held entitled to presume their foreman had taken, or would take, sufficient precautions for their safety in a place where they were set to work.—*Pittsburg, C. & St. L. Ry. Co. v. Schaub (Ky.)* 885.

§ 240. A switchman, injured by a backing switch engine taking an open switch and colliding with cars on a side track, *held* guilty of contributory negligence as a matter of law.—*St. Louis, I. M. & S. Ry. Co. v. Davis* (Ark.) 754.

§ 241. Where cars were moved both by going in front and behind, and ordinarily there was no reason to anticipate danger from going in front to hold the car back, it was not the duty of a miner injured in going in front to have gone behind and used a sprag.—*Main Jellico Mountain Coal Co. v. Parker* (Ky.) 871.

#### (H) Actions.

Amendment of pleading, see Pleading, § 245.  
Application of personal knowledge of jurors, see Trial, § 311.

Conformity of judgment to verdict, see Judgment, § 258.

Consolidation, see Action, § 57.

Construction and effect of charge as a whole, see Trial, § 295.

Error in instructions cured by giving other instruction, see Trial, § 296.

Opinion evidence, see Evidence, § 472.

Venue of action against railroad company, see Railroads, § 22.

§ 258. Facts alleged in a complaint by an employé for injury *held* to warrant an instruction as to negligence of a defendant as to a safe place to work.—*Pittsburg, C. & St. L. Ry. Co. v. Schaub* (Ky.) 885.

§ 264. A petition by a miner for injuries and the evidence *held* not variant.—*Main Jellico Mountain Coal Co. v. Parker* (Ky.) 871.

§ 264. Statement of what was the substance of the issue, which alone had to be proved, under a petition for negligent injury to a servant.—*Galveston, H. & S. A. Ry. Co. v. Grant* (Tex. Civ. App.) 145.

§ 264. Pleading and proofs, in an action by an employé for malpractice by physician employed by defendant, considered, and *held*, that there was no variance.—*Texas & Pacific Coal Co. v. McWain* (Tex. Civ. App.) 202.

§ 265. The doctrine of *res ipsa loquitur* *held* not to apply in an action for injuries.—*Reliance Textile & Dye Works Co. v. Williams* (Ky.) 850.

§ 265. Where circumstances of injury to a miner show his place of work was not reasonably safe by reason of a post too near the track on which he assisted to move a car, or the car wobbled from being old and worn, so that it would not pass it, plaintiff was not required to show the particular defect which caused the injury.—*Main Jellico Mountain Coal Co. v. Parker* (Ky.) 871.

§ 265. In an action for the death of a flagman struck by a train, plaintiff *held* not entitled to rely on the mere proof of surrounding facts.—*Wilkerson v. St. Louis & S. F. R. Co.* (Mo. App.) 543.

§ 268. In an action for personal injuries to an employé while at work on a building, the application for a building permit and the permit *held* admissible in evidence.—*Kirn v. E. E. Souther Iron Co.* (Mo. App.) 45.

§ 276. In an action for death of a switchman by the overriding of one car by another, caused by dissimilarity in size, and a defective coupler, evidence *held* sufficient to show that the negligence of defendant was the proximate cause of the injury.—*Kansas City Southern Ry. Co. v. Frost* (Ark.) 748.

§ 276. In an action for death of a railroad switchman, evidence *held* insufficient to show the manner or cause of death.—*Cincinnati, N. O. & T. P. Ry. Co. v. Zachary's Adm'r* (Ky.) 363.

§ 276. In an action for injury to a servant, evidence *held* sufficient to sustain verdict for

the plaintiff.—*Kirn v. E. E. Souther Iron Co.* (Mo. App.) 45.

§ 276. Evidence *held* to justify a finding that the injury to a servant was caused by the negligent failure of the master to properly secure a ladder.—*Buchanan & Gilder v. Murayda* (Tex. Civ. App.) 973.

§ 278. In an action for death of a switchman by the overriding of one car by another, caused by dissimilarity in size, and a defective coupler, evidence *held* sufficient to show that defendant was negligent.—*Kansas City Southern Ry. Co. v. Frost* (Ark.) 748.

§ 278. In an action by a coal miner for an injury, evidence *held* sufficient to sustain a verdict for plaintiff based on negligence either in not furnishing him a safe place to work or a reasonably safe car to work with.—*Main Jellico Mountain Coal Co. v. Parker* (Ky.) 871.

§ 278. In an action for the death of a flagman struck by a train, the conclusion that the engineer saw him, or could have seen him, in time to have avoided the accident *held* not justified.—*Wilkerson v. St. Louis & S. F. R. Co.* (Mo. App.) 543.

§ 278. In an action for death of a brick burner from the falling of a portion of a shed upon which he had stepped to avoid the heat, fumes, and gases arising from the kiln, evidence *held* sufficient to justify a finding that a proper inspection of the shed would have disclosed the defect.—*Ferris Press Brick Co. v. Thompson* (Tex. Civ. App.) 499.

§ 278. Evidence *held* to warrant findings of a brake beam on a car, causing injury to a brakeman, having been defective, as a reasonable inspection would have shown.—*St. Louis Southwestern Ry. Co. of Texas v. Keith* (Tex. Civ. App.) 695.

§ 279. In an action for injuries to a railroad car carpenter from the act of a fellow servant in allowing a brake plate to fall upon him, evidence *held* sufficient to sustain a finding that the fellow servant was negligent.—*St. Louis Southwestern Ry. Co. v. Burd* (Ark.) 239.

§ 279. In an action against a master for the injury of a servant, evidence *held* to show that the foreman in charge when the servant was injured had become reckless from the effects of whisky.—*Chesapeake & O. Ry. Co. v. Marcum* (Ky.) 293.

§ 279. The liability of a railroad under Rev. St. 1899, § 2864, as amended by Laws 1905, p. 136, § 1 (Ann. St. 1906, p. 1637), *held* founded on the negligence of a servant in operating a train.—*Wilkerson v. St. Louis & S. F. R. Co.* (Mo. App.) 543.

§ 279. Evidence *held* not to show negligence of a locomotive engineer and fireman in an action by a brakeman for injuries.—*San Antonio & A. P. Ry. Co. v. Middlebrooks* (Tex. Civ. App.) 169.

§ 280. Evidence *held* to show that an employé injured in a coal mine did not assume the risk.—*Southern Anthracite Coal Co. v. Bowen* (Ark.) 1048.

§ 280. In an action for death of a brick burner from the falling of a portion of a shed upon which he had stepped to avoid the heat, fumes, and gases arising from the kiln upon which he had been working, evidence *held* not to show that the defect in the shed was obvious, or that deceased had notice thereof.—*Ferris Press Brick Co. v. Thompson* (Tex. Civ. App.) 499.

§ 281. In an action for injuries to a railroad car carpenter from the act of a fellow servant in allowing a brake plate to fall upon him, evidence *held* sufficient to sustain a finding that he was not negligent.—*St. Louis Southwestern Ry. Co. v. Burd* (Ark.) 239.

§ 281. Evidence *held* to show that an employé injured in a coal mine was not guilty of contributory negligence.—*Southern Anthracite Coal Co. v. Bowen* (Ark.) 1048.

§ 281. In an action for death of a switchman by the overriding of one car by another, caused by dissimilarity in size, and a defective coupler, evidence *held* to show that plaintiff was not negligent.—*Kansas City Southern Ry. Co. v. Frost* (Ark.) 748.

§ 281. In an action against a railroad company for injuries to an employé, evidence *held* to conclusively establish contributory negligence.—*St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Tex. Civ. App.) 1002.

§ 284. In an action for injuries to an employé while engaged in the construction of a building, evidence *held* sufficient to take the case to the jury.—*Kirn v. El. E. Souther Iron Co.* (Mo. App.) 45.

§ 284. Evidence, in an action by an employé for malpractice by a physician called to treat his injuries received in his employment, *held* not to entitle defendant to a directed verdict on the ground that it failed to show that defendant contracted for plaintiff's medical treatment.—*Texas & Pacific Coal Co. v. McWain* (Tex. Civ. App.) 202.

§ 284. In an action for death of a brick burner from the falling of a portion of a shed upon which he had stepped to avoid the heat, fumes, and gases arising from the kiln upon which he had been working, evidence *held* sufficient to take the case to the jury.—*Ferris Press Brick Co. v. Thompson* (Tex. Civ. App.) 490.

§ 285. In an action for injuries to a servant owing to an explosion of a radiator, the question as to the cause of the explosion *held* one for the jury.—*Monarch Tobacco Works v. Northern* (Ky.) 350.

§ 285. In a suit for injury to a switchman in uncoupling cars, *held* that whether the failure of his fellow servants to see his stop signal was the proximate cause of the injury was for the jury.—*Houston & T. C. R. Co. v. Mayfield* (Tex. Civ. App.) 141.

§ 285. In an action for injuries to a switchman, evidence *held* sufficient to take the question to the jury whether defendant's negligence was the proximate cause of the injury.—*International & G. N. R. Co. v. Owens* (Tex. Civ. App.) 210.

§ 286. In a suit for injuries to employés in a coal mine, evidence *held* to present a question for the jury as to negligence.—*Southern Anthracite Coal Co. v. Bowen* (Ark.) 1048.

§ 286. In an action by an experienced servant for injuries from the falling in of the walls of a manhole while he was engaged in the work of propping or bracing the walls, evidence *held* to require that the question of plaintiff's negligence be submitted to the jury.—*Nicholas v. E. H. Abadie Co.* (Ky.) 325.

§ 286. In an action for injuries by a premature explosion, whether defendant was negligent in not warning plaintiff of the danger *held* for the jury.—*Nortonville Coal Co. v. Whited* (Ky.) 897.

§ 286. The situation of employés *held* not so manifestly dangerous that it could be said as a matter of law that some precautions should not have been taken for their safety.—*Pittsburg, C. & St. L. Ry. Co. v. Schaub* (Ky.) 885.

§ 286. In an action for injuries to a servant, whether a defective condition of a clawbar and the likelihood of its use, as it was used by plaintiff, were such as to bring the injury within the range of reasonable probabilities an ordinarily prudent employer should have anticipated

*held* for the jury.—*Harris v. Kansas City Southern Ry. Co.* (Mo. App.) 576.

§ 286. The question of the negligence of a master resulting in injury to a servant in a stone quarry *held* for the jury.—*Bennett v. Crystal Carbonate Lime Co.* (Mo. App.) 608.

§ 287. In an action against a railroad company for injuries to an employé who was acting under the direction of a foreman, the evidence *held* to make the question of the gross negligence of the foreman one for the jury.—*Chesapeake & O. Ry. Co. v. Marcum* (Ky.) 293.

§ 287. In a suit for injury to a switchman in uncoupling cars, *held* that whether it was negligence for his fellow servants to fail to see his stop signal was for the jury.—*Houston & T. C. R. Co. v. Mayfield* (Tex. Civ. App.) 141.

§ 288. In a suit for injuries to employés in a coal mine, evidence *held* to present a question for the jury as to assumption of risk.—*Southern Anthracite Coal Co. v. Bowen* (Ark.) 1048.

§ 288. The question of the assumption of risk of a servant in a stone quarry *held* for the jury.—*Bennett v. Crystal Carbonate Lime Co.* (Mo. App.) 608.

§ 288. Whether a servant injured by a defective appliance operated by him knew of the danger because of the defect *held* for the jury.—*Muse v. Abeel* (Tex. Civ. App.) 430.

§ 289. In a suit for injuries to employés in a coal mine, evidence *held* to present a question for the jury as to contributory negligence.—*Southern Anthracite Coal Co. v. Bowen* (Ark.) 1048.

§ 289. In an action by a servant for personal injuries, the question of contributory negligence *held* for the jury.—*Nicholas v. E. H. Abadie Co.* (Ky.) 325.

§ 289. The situation of employés *held* not so manifestly dangerous that it could be said as a matter of law that a person of ordinary prudence would not have undertaken the work.—*Pittsburg, C. & St. L. Ry. Co. v. Schaub* (Ky.) 885.

§ 289. The question of the contributory negligence of a servant injured in a stone quarry *held* for the jury.—*Bennett v. Crystal Carbonate Lime Co.* (Mo. App.) 608.

§ 289. A servant doing an act under the express direction of the master's foreman may not be declared negligent as a matter of law, unless the dangers incident to the act are so threatening as to portray obvious peril.—*Bennett v. Crystal Carbonate Lime Co.* (Mo. App.) 608.

§ 289. In an action by a railroad brakeman for personal injuries, whether he was negligent, *held* for the jury.—*San Antonio & A. P. Ry. Co. v. Middlebrooks* (Tex. Civ. App.) 169.

§ 289. In an action for death of a brick burner, evidence *held* insufficient to raise the issue whether defendant had provided a safe way for brick burners to go from the shed of one kiln to that of another, and that deceased, instead of adopting the safe way, took a dangerous way.—*Ferris Press Brick Co. v. Thompson* (Tex. Civ. App.) 490.

§ 291. In an action for injuries to a railroad car carpenter, the court properly instructed that, as plaintiff alleged he was injured by the negligence of a fellow workman in permitting a brake plate to fall upon him, in order to recover, he must prove by preponderance of the evidence that his injury was caused by the negligence of the fellow workman in the manner alleged.—*St. Louis Southwestern Ry. Co. v. Burd* (Ark.) 239.

§ 291. In consolidated cases of injuries to two employés due to the fall of a cage in a coal mine, an instruction as to a safe place to work

*held* prejudicially erroneous to defendant in one case because ignoring evidence, but not misleading in the other.—Southern Anthracite Coal Co. v. Bowen (Ark.) 1048.

§ 291. In an action for injuries to a servant, an instruction *held* erroneous because of the absence of evidence on which to predicate it.—Bennett v. Crystal Carbonate Lime Co. (Mo. App.) 608.

§ 291. In an action for injuries to an employe of a railroad company, an instruction which did not submit to the jury all the grounds of negligence *held* not to be erroneous.—Galveston, H. & S. A. Ry. Co. v. Callahan (Tex. Civ. App.) 129.

§ 291. An instruction, in an action by the employe against his master for malpractice of a contract physician, *held* properly refused as in effect denying recovery irrespective of the evidence.—Texas & Pacific Coal Co. v. McWain (Tex. Civ. App.) 202.

§ 293. An instruction in a suit for injuries to two employes *held* to be confusing, misleading, and prejudicial to defendant in ignoring a defense as to one of them supported by evidence.—Southern Anthracite Coal Co. v. Bowen (Ark.) 1048.

§ 293. An instruction as to the master's duty as to a safe place to work, *held* to conflict with other instructions.—Southern Anthracite Coal Co. v. Bowen (Ark.) 1048.

§ 293. In a suit for injury to a miner, *held*, that there was no practical objection to instructions under the evidence.—Main Jellico Mountain Coal Co. v. Parker (Ky.) 871.

§ 293. Facts alleged in a complaint by an employe for injury, *held* to warrant an instruction as to a safe place to work.—Pittsburg, O., C. & St. L. Ry. Co. v. Schaub (Ky.) 885.

§ 295. In a suit for injury to a miner, an instruction *held* to present the law as to assumption of risk in continuing at work with a defective appliance or in an unsafe place.—Main Jellico Mountain Coal Co. v. Parker (Ky.) 871.

§ 296. In an action for injuries to a railroad car carpenter alleged to have been injured by the negligence of a fellow servant, an instruction relating to contributory negligence *held* proper.—St. Louis Southwestern Ry., Co. v. Burd (Ark.) 239.

§ 296. In an action for injuries to a railroad car carpenter, alleged to have been caused by the negligence of a fellow servant assisting him in repairing a car, *held* that an instruction directing a verdict for defendant if the evidence showed that plaintiff was not exercising ordinary care in the performance of his work was proper.—St. Louis Southwestern Ry. Co. v. Burd (Ark.) 239.

§ 296. In a suit for injury to an employe, *held* that defendants were not substantially prejudiced by the form of an instruction on contributory negligence.—Pittsburg, C., C. & St. L. Ry. Co. v. Schaub (Ky.) 885.

§ 296. In an action by a servant for personal injuries, an instruction on contributory negligence *held* erroneous.—Bennett v. Crystal Carbonate Lime Co. (Mo. App.) 608.

§ 296. In an action for injury to a switchman in uncoupling cars, *held* that defendant was not injured by failure to give a requested charge.—Houston & T. C. R. Co. v. Mayfield (Tex. Civ. App.) 141.

§ 296. In an action for personal injuries to a railroad employe, an instruction that, in the event of defendant's negligence in leaving a switch set to a side track, plaintiff was not bound to use ordinary care to discover the condition of the switch *held* error.—St. Louis South-

western Ry. Co. of Texas v. Anderson (Tex. Civ. App.) 1002.

§ 296. Instructions, in an action by a servant to recover for personal injuries, *held* conflicting.—St. Louis Southwestern Ry. Co. of Texas v. Anderson (Tex. Civ. App.) 1002.

#### IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

Liability of municipal corporations for torts of officers and employes, see Municipal Corporations, § 747.

Liability of railroad company for negligence of servants causing spread of contagious disease, see Negligence, § 1.

##### (A) Acts or Omissions of Servant.

§ 302. A master is not liable for acts of his servant which are unauthorized and not within the real or apparent scope of the employment.—Lessoft v. Gordon (Tex. Civ. App.) 182.

##### (B) Work of Independent Contractor.

§ 318. One *held* not an independent contractor, but the servant of another.—Steger v. Barrett (Tex. Civ. App.) 174.

#### MATERIALITY.

Of alteration of written instrument, see Alteration of Instruments, §§ 2-7.

Of evidence, see Criminal Law, § 384; Evidence, § 147.

Of newly discovered evidence as affecting right to new trial, see Criminal Law, § 940.

#### MATERIALS.

Liens on real property for materials furnished, see Mechanics' Liens.

#### MEASURE OF DAMAGES.

See Damages, §§ 95-122.

#### MECHANICS' LIENS.

##### II. RIGHT TO LIEN.

##### (D) Persons Entitled in General.

§ 93. Where a building contractor was not entitled to a mechanic's lien for work on a homestead, because of his abandonment thereof before substantial performance, his assignee of the owner's notes for the price was also without right to a lien.—Murphy v. Williams (Tex.) 900.

##### (E) Subcontractors, and Contractors' Workmen and Materialmen.

§ 99. Statement by the owner that he would pay all bills, and requesting a materialman to continue delivering material will not support a claim for a lien for materials furnished the contractor before such statement was made.—Elliot v. Waites & Wilkie (Tex. Civ. App.) 992.

§ 107. Under Ky. St. § 2463 (Russell's St. § 2383), persons who performed labor in the erection of a house under a contract with the subcontractor, and with the knowledge and consent of the owner, *held* entitled to a lien on the premises.—Whitt v. Maddix (Ky.) 270.

#### III. PROCEEDINGS TO PERFECT.

§ 118. Before a subcontractor can entitle himself for a lien for materials furnished under Kirby's Dig. § 4976, he must give the prescribed notice, in the time and manner specified.—Leifer Mfg. Co. v. Gross (Ark.) 1039.

§ 118. Plaintiff *held* to have furnished materials for a building under contract with the owner, and not as a subcontractor, as defined

by Kirby's Dig. § 4993, and was therefore entitled to a mechanic's lien, without giving the notice prescribed by section 4976.—Leifer Mfg. Co. v. Gross (Ark.) 1039.

#### V. ASSIGNMENT OF LIEN OR CLAIM.

§ 204. The right of an assignee of notes given for the purchase price of improvements to be constructed on a homestead, to a mechanic's lien thereon, is limited to the right of the contractor.—Murphy v. Williams (Tex.) 900.

#### VII. ENFORCEMENT.

Exclusive or concurrent jurisdiction, see Courts, § 472.

Sale of seminary property, see Colleges and Universities, § 6.

#### MEDICAL EXPERTS.

Testimony, see Evidence, §§ 528, 537, 550.

#### MEDICAL JURISPRUDENCE.

See Physicians and Surgeons.

#### MEDIUM OF PAYMENT.

In general, see Payment, §§ 16, 17.

#### MEMBERS.

Of firms, see Partnership.

Of school boards, see Schools and School Districts, §§ 48, 53.

#### MEMORANDA.

Use to refresh memory of witnesses, see Witnesses, § 255.

#### MENTAL CAPACITY.

See Insane Persons.

Affecting responsibility for crime, see Criminal Law, § 48.

To make will, see Wills, § 52.

#### MERGER.

Of cause of action in judgment, see Judgment, §§ 603, 617.

#### MESSAGES.

Transmission and delivery of telegraph or telephone messages, see Telegraphs and Telephones, §§ 27-74.

#### METES AND BOUNDS.

See Boundaries.

#### MINES AND MINERALS.

##### II. TITLE, CONVEYANCES, AND CONTRACTS.

###### (A) Rights and Remedies of Owners.

Ore as property subject to replevin, see Replevin, § 4.

Remedies of owner of ore mingled with that of another, see Confusion of Goods, § 12.

###### (B) Conveyances in General.

Bona fide purchasers, see Vendor and Purchaser, §§ 239, 244.

§ 54. Where a deed of land does not limit the estate conveyed, it embraces the minerals thereunder, as well as the surface.—Richards v. Potter (Ky.) 850.

§ 55. A covenant to convey the mineral in a part of certain lands of a party, together with

all necessary mining rights, included a conveyance of such easements in the balance of the land as were necessary to accomplish the mining and removal of the material.—Neal v. Finley (Ky.) 348.

§ 55. Where a party covenanted to convey the mineral together with the necessary mining rights in certain land which was a parcel wholly within a larger boundary of his land, a right of way over the land not conveyed as of necessity was included in the covenant.—Neal v. Finley (Ky.) 348.

###### (C) Leases, Licenses, and Contracts.

Authority of administrator to lease mine, see Executors and Administrators, § 329.

Relevancy of evidence of value of mining lease, see Evidence, § 113.

§ 58. A lease may confer on the lessee the right to remove a portion of the leased premises or of sand or gravel found on the surface thereof, as well as to remove stone, coal, zinc, or lead, found either on the surface or beneath it.—Meeks v. Clear Jack Mining Co. (Mo. App.) 1084.

§ 62. A lease for mining purposes held to give the lessee the right to the possession of the ore in the ground, and after it has been cleaned.—Meeks v. Clear Jack Mining Co. (Mo. App.) 1084.

§ 63. A mining lease held to constitute defendant a tenant for years.—Mullins v. Dees (Ky.) 828.

§ 66. A lessee under a mining lease held to have committed waste for which the lessor was entitled to cancel the lease, under Ky. St. § 2328 (Russell's St. § 201).—Mullins v. Dees (Ky.) 828.

§ 71. Under the rules posted by a lessee in a mining lease, as provided by Rev. St. 1899, § 8766 (Ann. St. 1906, p. 4068), persons mining under him held licenses only, without any interest in the ore, or any right to a possession of the land.—Meeks v. Clear Jack Mining Co. (Mo. App.) 1084.

#### III. OPERATION OF MINES, QUARRIES, AND WELLS.

##### (B) Mining Partnerships and Companies.

Certificate of incorporation of mining company, see Corporations, § 18.

Right to incorporate for mining purposes, see Corporations, § 14.

##### (C) Rights and Liabilities Incident to Working.

Contributory negligence of employé injured, see Master and Servant, § 241.

Liability of master for injuries to servant from defective or dangerous condition of mines, quarries, and excavations, see Master and Servant, § 118.

§ 122. The right to take ore from underneath the surface of a railroad right of way must yield, if the surface will be impaired.—St. Louis & S. F. R. Co. v. Yankee (Mo. App.) 18.

#### MINORS.

See Infants.

#### MISCONDUCT.

Of counsel at trial, see Criminal Law, §§ 719-730.

Of trial judge, see Criminal Law, § 656.

#### MISDELIVERY.

Of goods by carrier, see Carriers, § 94.

Of telegraph message, see Telegraphs and Telephones, §§ 27-74.

**MISJOINDER.**

Of causes of action, see Action, § 45.

**MISREPRESENTATION.**

See False Pretenses; Fraud.

Affecting validity of contract of sale, see Sales, §§ 38, 41.

Of value of goods as affecting liability of carrier for loss, see Carriers, § 110.

**MISTAKE.**

*In conveyances, contracts, or other transactions.*  
See Compromise and Settlement, § 19; Release, § 16; Sales, § 36.

**Remedies.**

Ground for equitable defense in action at law, see Action, § 24.

Opening or setting aside compromise, see Compromise and Settlement, § 19.

**MITIGATION.**

Of damages, see Damages, § 59.

**MIXTURE.**

Of goods, see Confusion of Goods.

**MODIFICATION.**

Of contract, see Contracts, § 237.

Of judgment, see Judgment, §§ 294-314.

Of judgment or order of lower court in appellate court, see Appeal and Error, § 1152.

**MONEY.**

Deposits, see Banks and Banking, § 138.

Duty of carrier to transport, see Carriers, § 39.

Liability of carrier for loss, see Carriers, § 110.

Obtaining money under false pretenses, see False Pretenses.

**MONEY LENT.**

Bill or note given for loan of money, see Bills and Notes.

Usurious loans, see Usury.

**MONEY PAID.**

Recovery of price paid for land, see Vendor and Purchaser, § 334.

**MONEY RECEIVED.**

Recovery of price paid for land, see Vendor and Purchaser, § 334.

**MORTGAGES.**

Of personal property in general, see Chattel Mortgages.

**I. REQUISITES AND VALIDITY.**

(A) *Nature and Essentials of Conveyances as Security.*

§ 11. Gen. St. 1888, c. 63, art. 1, § 6, authorizes a mortgage or any interest in land, so that one could mortgage land which he had purchased and owned, though he had no deed therefor.—Perkins v. J. M. Robinson, Norton & Co. (Ky.) 310.

**IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.**

§ 341. A deed of trust construed and held to authorize a sale on foreclosure by the sheriff in office at the time of foreclosure.—Feller v. Lee (Mo.) 1129.

**X. FORECLOSURE BY ACTION.**

(F) *Pleading and Evidence.*

§ 463. In an action to foreclose a mortgage, evidence held to show that the mortgagor owned the mortgaged property.—Perkins v. J. M. Robinson, Morton & Co. (Ky.) 310.

(I) *Judgment or Decree and Execution.*

Creation of relation of landlord and tenant by foreclosure decree, see Landlord and Tenant, § 10.

Equitable relief, see Judgment, § 377.

Vacating judgment against minor, see Infants, § 110.

**XI. REDEMPTION.**

§ 594. Right of redemption on defective foreclosure of a deed of trust rests in the grantor and cannot be exercised by a stranger to his title.—Feller v. Lee (Mo.) 1129.

**MOTHER.**

See Parent and Child.

**MOTIONS.**

Relating to pleadings, see Pleading, § 426.

*For particular purposes or relief.*

Change of venue, see Venue, § 58.

Continuance, see Continuance, § 46; Criminal Law, §§ 603, 608.

Direction of verdict, see Trial, §§ 168, 178.

Dismissal of appeal or writ of error, see Criminal Law, § 1131.

Garnishment proceedings, see Garnishment, § 97.

New trial, see Criminal Law, §§ 956-959; New Trial, §§ 150, 166.

Publication of process, see Process, § 96.

Quashing or setting aside indictment or information, see Indictment and Information, § 140.

Relating to pleadings, see Pleading, §§ 345-369.

Striking out evidence, see Trial, § 96.

§ 13. Under Rev. St. 1899, § 640 (Ann. St. 1906, p. 660), a party failing to put a motion in writing, after the request of the court so to do, held not entitled to complain of its denial.—Meeks v. Clear Jack Mining Co. (Mo. App.) 1084.

**MOTIVE.**

Evidence of, in criminal prosecutions, see Homicide, § 166.

**MUNICIPAL CORPORATIONS.**

See Counties; Schools and School Districts, §§ 10-131.

Mandamus to municipalities and municipal officers, see Mandamus, § 87.

Street railroads, see Street Railroads.

Taxation of municipal property, see Taxation, § 217.

**IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.**

(B) *Ordinances and By-Laws in General.*

§ 112. Const. § 51, providing that no law enacted by the General Assembly shall relate to more than one subject, which shall be expressed in the title, held not to apply to municipal ordinances.—Kentucky Light & Power Co. v. James H. Williams & Co. (Ky.) 840.

§ 112. There is no provision in the charter of cities of the fifth class requiring ordinances to embrace but one subject to be expressed in the title.—Kentucky Light & Power Co. v. James H. Williams & Co. (Ky.) 840.

§ 112. An ordinance providing for submission to the voters of the question whether a city should issue bonds *held* to provide for the submission of but a single subject.—*Kentucky Light & Power Co. v. James H. Williams & Co. (Ky.)* 840.

§ 121. Whether an ordinance is void as being unreasonable is a question for the court under the evidence.—*Radley v. Knepfly (Tex. Civ. App.)* 447.

## V. OFFICERS, AGENTS, AND EMPLOYÉS.

Mandamus to municipal officers, see *Mandamus*, § 87.

Of school districts, see *Schools and School Districts*, §§ 48, 53.

### (A) Municipal Officers in General.

§ 145. Under Ky. St. §§ 3131, 3132, 3753 (*Russell's St. §§ 1240, 1241, 4855*), one elected treasurer of a city *held* entitled to the office as against his predecessor seeking to hold over under Const. § 160.—*Dorian v. City of Paducah (Ky.)* 360.

## IX. PUBLIC IMPROVEMENTS.

### (A) Power to Make Improvements or Grant Aid Therefor.

§ 280. Under Rev. St. 1899, §§ 5989, 5991 (*Ann. St. 1906, pp. 3024, 3026*), granting power to the city council to construct and repair sidewalks, *held* that a petition of citizens is required only where a sidewalk is to be constructed for the first time, and not where an old walk is to be replaced by a new one.—*Platte City v. Paxton (Mo. App.)* 531.

### (B) Preliminary Proceedings and Ordinances or Resolutions.

§ 301. Under Ky. St. § 3094 (*Russell's St. § 1205*), any street improvement, of whatever kind or nature that is desired, must be ordered and directed by the council before it may be legally done.—*Dodd v. Heeter & Sons (Ky.)* 860.

§ 302. Ky. St. § 3100 (*Russell's St. § 1211*), *held* only to require ordinances directing original construction of street improvements to be passed by the respective boards of the general council, with an interval of two weeks' time.—*Dodd v. Heeter & Sons (Ky.)* 860.

§ 314. Plans and specifications for the construction of a sidewalk need not be filed with the city clerk at the time the ordinance authorizing the improvement is passed.—*Platte City v. Paxton (Mo. App.)* 531.

§ 314. Reference in an ordinance authorizing a street improvement to plans and specifications on file as allowed by Rev. St. 1899, § 5989 (*Ann. St. 1906, p. 3024*), is only a statutory substitute for their incorporation within the ordinance; and, where this is done, no plans or specifications need be filed.—*Platte City v. Paxton (Mo. App.)* 531.

### (C) Contracts.

§ 335. Where a city ordinance was passed authorizing a street improvement, and plaintiff submitted a bid for the work, an acceptance thereof by resolution providing that the work be completed within 30 days *held* not to inject a new condition into the contract, so as to render the acceptance incomplete.—*Platte City v. Paxton (Mo. App.)* 531.

§ 338. An ordinance, authorizing a street improvement, together with a resolution accepting a signed bid for the work, *held* sufficient compliance with Rev. St. 1899, § 6759 (*Ann. St. 1906, p. 3327*), prescribing that contracts made by a city be in writing and subscribed by

the parties thereto.—*Platte City v. Paxton (Mo. App.)* 531.

§ 338. Where an ordinance was passed authorizing a street improvement, and a bid submitted for the work duly signed was accepted by resolution of the city council, properly passed and made of record, there was no necessity for a separate written contract.—*Platte City v. Paxton (Mo. App.)* 531.

§ 359. Where a party contracts to construct a sidewalk on the established grade, a substantial compliance with this specification is sufficient.—*Platte City v. Paxton (Mo. App.)* 531.

### (D) Damages.

Compensation or damages for property taken under power of eminent domain, see *Eminent Domain*.

§ 396. Benefits to a property owner's lots on the north side of an alley by the construction of a drain in the street *held* not proper to be considered in determining the damage to his lots on the south side of the alley thereby; those lots being used for a different purpose.—*Drake v. City of Bosworth (Mo. App.)* 570.

§ 404. It is the special province of the jury to determine the amount of damages in an action for damage to property by the construction of a drain in the street.—*Drake v. City of Bosworth (Mo. App.)* 570.

### (E) Assessments for Benefits, and Special Taxes.

§ 449. The provision in Ky. St. § 3096 (*Russell's St. § 1207*), that the cost of reconstructing sidewalks shall be assessed as in the construction of streets, *held* to mean that an ordinance shall be passed assessing the cost, just as an ordinance is required assessing the cost for other street improvements.—*Dodd v. Heeter & Sons (Ky.)* 860.

## X. POLICE POWER AND REGULATIONS.

Regulation of licenses and license taxes, see *Licenses*, § 7.

### (A) Delegation, Extent, and Exercise of Power.

Ordinances imposing license fees, see *Licenses*, § 7.

§ 603. Dallas City Charter, § 71, *held* not to authorize an ordinance (section 99) requiring all rooms above the second story of lodging houses to be provided with more than one way of escaping from fire, at opposite ends of the room, leading to fire escapes on the outside of the building.—*Radley v. Knepfly (Tex. Civ. App.)* 447.

§ 603. An ordinance, requiring the third story of a building to be constructed as stated, in order to provide escape from fires, *held* unreasonable and void.—*Radley v. Knepfly (Tex. Civ. App.)* 447.

§ 603. Under an ordinance requiring buildings of a certain kind to have one or more fire escapes, as directed by the building inspector, unless he deemed fire escapes unnecessary, the building need not be provided with more than one fire escape, where notice of such requirement is not given the owner by the inspector.—*Radley v. Knepfly (Tex. Civ. App.)* 447.

§ 623. In view of Rev. St. 1895, arts. 447, 462, *held* that the owner of a sick horse left in a livery stable, which was killed without his consent when it became a public nuisance, was not entitled to recover damages against the city and other parties concerned.—*Mezlar v. City of Miles (Tex. Civ. App.)* 972.

## **XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.**

Dedication of property to public or to municipality, see Dedication.

### **(A) Streets and Other Public Ways.**

Acceptance of dedication of street, see Dedication, § 35.

Additional servitude in street, see Eminent Domain, § 119.

County roads, see Highways.

Dedication of, see Dedication.

Injuries to persons on street by collision with street cars, see Street Railroads, §§ 81-103.

Jurisdiction of suit to restrain obstruction of street, see Courts, § 172.

Occupation or use of street as ground for compensation to abutting owners, under laws of eminent domain, see Eminent Domain, § 100.

Rights in and use of streets by street railroads, see Street Railroads, § 24.

Sale of street railway franchise, see Street Railroads, § 24.

Statutory, municipal, and official regulations as to movement of trains across highways, see Railroads, § 244.

### **(C) Public Buildings, Parks, and Other Public Places and Property.**

Liability to taxation, see Taxation, § 217.

## **XII. TORTS.**

### **(B) Acts or Omissions of Officers or Agents.**

§ 747. An incorporated town is not liable for the acts of its mayor and marshal in enforcing, without malice, an illegal ordinance by imprisoning one violating it.—*Franks v. Town of Holly Grove* (Ark.) 514.

### **(C) Defects or Obstructions in Streets and Other Public Ways.**

Implied indemnity and recovery of damages over against abutting owners, see Indemnity, § 13.

§ 759. A city accepting the dedication of a street by grading it and exercising jurisdiction over it must keep it in a reasonably safe condition for use by the traveling public.—*Scheffler v. City of Hardin* (Mo. App.) 569.

§ 799. A city held bound to use reasonable care to protect the traveling public from obstructions placed in the street while making improvements thereon.—*City of Georgetown v. Groff* (Ky.) 888.

§ 803. A traveler on a street at night must use ordinary care in driving thereon.—*City of Georgetown v. Groff* (Ky.) 888.

§ 803. A city is required to keep all of its walks in a reasonably safe condition, and a person using them need not exercise greater care while on a cross-walk than upon ordinary sidewalks.—*Cochran v. City of Springfield* (Mo. App.) 53.

§ 819. One suing a municipality for injuries on a defective street need only show in a general way that the street was within the limits of the municipality.—*Scheffler v. City of Hardin* (Mo. App.) 569.

§ 821. In an action against a city for personal injuries from falling over a wire stretched across the sidewalk, plaintiff held entitled to go to the jury.—*Asbill v. City of Joplin* (Mo. App.) 22.

§ 821. In an action against a city for personal injuries from falling over a wire stretched across the sidewalk, held, that the question as to lights and barriers was for the jury.—*Asbill v. City of Joplin* (Mo. App.) 22.

§ 821. In an action for injuries from defects in a city street, evidence held sufficient to take

the question of plaintiff's contributory negligence to the jury.—*Cochran v. City of Springfield* (Mo. App.) 53.

§ 821. Question whether one injured by a defect in a street was guilty of contributory negligence held one for the jury.—*Rose v. Kansas City* (Mo. App.) 1057.

§ 822. In an action for injuries from defects in a city street, an instruction, withdrawing from the jury evidence admitted without objection, relating to notice to the city of the defect, held properly refused.—*Cochran v. City of Springfield* (Mo. App.) 53.

§ 822. In an action against a city for injuries from a defect in a street, an instruction held not erroneous.—*Rose v. Kansas City* (Mo. App.) 1057.

## **XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.**

Of counties, see Counties, § 192.

### **(A) Power to Incur Indebtedness and Expenditures.**

§ 867. A two-thirds majority of those voting at an election is a sufficient compliance with Const. § 157, providing that no municipality shall become indebted, in any year, beyond the income for that year, without the assent of two-thirds of the voters thereof voting at an election for that purpose.—*Kentucky Light & Power Co. v. James H. Williams & Co.* (Ky.) 840.

### **(D) Taxes and Other Revenue, and Application Thereof.**

Of counties, see Counties, § 192.

§ 966. Under Const. art. 8, §§ 5, 8, and Rev. St. 1895, arts. 500, 5083, a city containing the principal office of a railroad company held not entitled to levy a municipal tax on the entire rolling stock of the company.—*City of Tyler v. Coker* (Tex. Civ. App.) 729.

## **MURDER.**

See Homicide.

## **MUTUAL BENEFIT INSURANCE.**

See Insurance, §§ 782-815.

## **MUTUAL INSURANCE COMPANIES.**

See Insurance, § 70.

## **MUTUALITY.**

Of obligation of contract, see Contracts, § 10.

## **MUTUAL PROMISES.**

Consideration for contracts, see Contracts, §§ 58, 88.

## **NAMES.**

Names idem sonans in prosecution for rape, see Rape, § 35.

## **NATIONAL BANKS.**

See Banks and Banking, § 270.

## **NAVIGABLE WATERS.**

Nonnavigable waters, see Waters and Water Courses.

## **NECESSITY.**

Ways of necessity, see Mines and Minerals, § 55.

**NEGATIVE COVENANTS.**

Restraining breach, see Injunction, §§ 59, 61.

**NEGATIVE EVIDENCE.**

Weight and conclusiveness, see Evidence, § 586.

**NEGLIGENCE.**

Causing death, see Death, §§ 31-104.

*By particular classes of persons.*

See Adjoining Landowners, § 7; Carriers, §§ 99, 104, 108-135, 156, 280-321, 350-381, 399, 400; Municipal Corporations, §§ 747-822; Railroads, §§ 274-282, 327-350, 360-398, 407-440, 454-484; Street Railroads, §§ 81-103; Warehousemen, § 24.

Children, see Parent and Child, § 13.

Employers, see Master and Servant, §§ 92-296.

Employees, liability for injuries to third persons, see Master and Servant, §§ 302, 318.

Fellow servants, see Master and Servant, §§ 177-201.

Mineowners, see Mines and Minerals, § 122.

Telegraph or telephone companies, see Telegraphs and Telephones, §§ 27-74.

*Condition or use of particular species of property, works, machinery, or other instrumentalities.*

See Mines and Minerals, § 122; Railroads, §§ 274-282, 327-350, 360-398, 407-440, 454-484; Street Railroads, §§ 81-103; Telegraphs and Telephones, §§ 27-74.

Buildings on adjoining lands, see Adjoining Landowners, § 7.

Carrier's premises, see Carriers, § 286.

Streets and highways, see Municipal Corporations, §§ 759-822.

Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101-124.

*Injuries to particular species of property.*

Animals in operation of railroads, see Railroads, §§ 407-446.

Goods shipped, see Carriers, §§ 108-135.

**I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.****(A) Personal Conduct in General.**

§ 1. The test of negligence defined.—Wilkerson v. St. Louis & S. F. R. Co. (Mo. App.) 543.

§ 1. A railroad company is liable for the spread of a contagious disease through the negligence of its servants acting within the scope of their authority, whereby another is injured as the proximate result of such negligence.—Mellody v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.) 702.

§ 1. In the absence of a duty violated, there can be no negligence.—Missouri, K. & T. Ry. Co. of Texas v. Byrd (Tex. Civ. App.) 738.

**(B) Dangerous Substances, Machinery, and Other Instrumentalities.**

Interest as element of damages for destruction of property by fire, see Damages, § 69.

Liability of trespasser, see Trespass, § 14.

Measure of damages for destruction of property by fire, see Damages, § 112.

Measure of damages for injuries by trespassers, see Trespass, § 50.

§ 23. A telephone company in possession of a vacant lot as a licensee, while constructing a telephone line across it, held to owe no duty to children trespassing thereon except not to injure them wantonly.—Hall v. Missouri & Kansas Telephone Co. (Mo. App.) 557.

**(C) Condition and Use of Land, Buildings, and Other Structures.**

Adjoining lands, see Adjoining Landowners, § 7.

Carrier's premises, see Carriers, § 286.

Master's liability for acts or omissions of independent contractor in general, see Master and Servant, § 318.

Mines, see Mines and Minerals, § 122.

Streets and highways, see Municipal Corporations, §§ 759-822.

Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101-124.

**II. PROXIMATE CAUSE OF INJURY.**

Injuries from fire on or near railroad right of way, see Railroads, §§ 464, 465.

Injuries to animals on or near railroad tracks, see Railroads, § 425.

**III. CONTRIBUTORY NEGLIGENCE.**

Of owner of shipment of live stock, see Carriers, § 217.

Of owners of animals injured by operation of railroad, see Railroads, § 421.

Of passengers, see Carriers, § 347.

Of person injured by defects or obstructions in street, see Municipal Corporations, § 803.

Of person injured by operation of railroad, see Railroads, §§ 278, 327, 331.

Of person injured in lodging house, see Innkeepers, § 10.

Of person injured on or near street railroad tracks, see Street Railroads, § 99.

Of servants, see Master and Servant, §§ 229-241, 281, 289, 296.

**(A) Persons Injured in General.**

Contributory negligence of owner as proximate cause of injury, to animal on railroad track, see Railroads, § 421.

§ 82. Where the negligence of a person injured so far contributes to the happening of the event that, if he had not been negligent, the other's negligence would have been harmless to him, he cannot recover.—Chesapeake & O. Ry. Co. v. Conley (Ky.) 861.

§ 83. Where a defendant or its servants before an accident discovered, or by the exercise of ordinary care might have discovered, plaintiff's perilous position, and then neglected to use the means at their command to prevent the injury when the use of such means would have prevented the accident, the defendant was liable.—Wilkerson v. St. Louis & S. F. R. Co. (Mo. App.) 543.

**(B) Children and Others Under Disability.**

Contributory negligence of intoxicated passenger ejected from train, see Carriers, § 370.

**IV. ACTIONS.**

Damages, inadequate and excessive, see Damages, §§ 130, 132.

Damages, measure, see Damages, §§ 95, 108, 112.

**(A) Right of Action, Parties, Preliminary Proceedings, and Pleadings.**

§ 111. Negligence may be alleged generally, and the facts constituting it need not be set out.—Pittsburg, C. & St. L. Ry. Co. v. Schaub (Ky.) 885.

§ 119. A petition alleging several acts of negligence does not require proof of all the acts.—Galveston, H. & S. A. Ry. Co. v. Callahan (Tex. Civ. App.) 129.

**(B) Evidence.**

Acts and statements accompanying or connected with transaction as constituting part of res gestæ, see Evidence, §§ 127, 128.

§ 121. Where the inference of negligence tended to establish an act of negligence not pleaded, as well as that specifically alleged, the doctrine of *res ipsa loquitur* was inapplicable.—*Gulf Pipe Line Co. v. Brymer* (Tex. Civ. App.) 1007.

§ 134. In an action against a railroad company for injuries sustained through its negligence in permitting a section house to become infected with smallpox, which was communicated to plaintiff, evidence *held* insufficient to show negligence.—*Mellody v. Missouri, K. & T. Ry. of Texas* (Tex. Civ. App.) 702.

#### (C) Trial, Judgment, and Review.

§ 136. Whether negligence or care exists in a given case is peculiarly and exclusively for the jury.—*Tuck v. Springfield Traction Co.* (Mo. App.) 1079.

§ 136. In an action against a railroad company for injuries sustained through its negligence in permitting a section house to become infected with smallpox, which was communicated to plaintiff, evidence *held* not to raise an issue of negligence.—*Mellody v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 702.

§ 136. Where there was no issue of fact, in a personal injury action, upon which liability of defendant could have been predicated, the trial court *held* to have properly directed a verdict for defendant.—*Mellody v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 702.

§ 139. In a suit for personal injury based on defendant's negligence, a charge coupling culpable acts of negligence with the conjunction "and" *held* more onerous on plaintiff than necessary.—*Houston & T. C. R. Co. v. Mayfield* (Tex. Civ. App.) 141.

§ 141. In an action for personal injuries, *held*, that it was not necessary that the instruction relating to contributory negligence be a separate instruction.—*Chesapeake & O. Ry. Co. v. Conley* (Ky.) 861.

§ 141. In an action for personal injuries, an instruction relating to contributory negligence *held* not erroneous.—*Chesapeake & O. Ry. Co. v. Conley* (Ky.) 861.

## NEGOTIABLE INSTRUMENTS.

See Bills and Notes.  
Forgery, see Forgery.

## NEGROES.

Ejection of white passengers from coach set apart for negroes, see Carriers, § 359.  
Separation of white and colored passengers, see Carriers, § 267.

## NEWLY DISCOVERED EVIDENCE.

Ground for new trial, see Criminal Law, §§ 938-945; New Trial, §§ 102, 150.

## NEWSPAPERS.

Publication of libelous articles, see Libel and Slander.  
Publication of process, see Process, § 96.

## NEW TRIAL.

In criminal prosecutions, see Criminal Law, §§ 938-969.  
Necessity of motion for purpose of review, see Appeal and Error, §§ 281-295.  
Opening or vacating judgment, see Judgment, §§ 336-377.  
Review of proceedings on motion involving disrevelation of court, see Appeal and Error, § 973.

## II. GROUNDS.

### (D) Disqualification or Misconduct of or Affecting Jury.

§ 54. When objection is made to a juror after verdict for the first time, the objecting party must show due diligence to discover the disqualification.—*Gershner v. Scott-Mayer Commission Co.* (Ark.) 772.

### (H) Newly Discovered Evidence.

§ 102. Motion for new trial on the ground of newly discovered evidence as to the title of the act (Laws N. M. 1880, c. 27), of which Comp. Laws N. M. 1897, § 98, was a part, *held* properly denied.—*Porter v. El Paso & S. W. Ry. Co.* (Tex. Civ. App.) 708.

## III. PROCEEDINGS TO PROCURE NEW TRIAL.

Effect of motion for new trial on time for taking appeal or other proceeding for review, see Appeal and Error, § 345.

§ 150. Absence of an affidavit of an absent witness on a motion for a new trial on the ground of newly discovered evidence *held* ground for denying the motion.—*Weinman v. Spencer* (Tex. Civ. App.) 208.

§ 166. Rev. St. 1895, art. 1375, authorizing a new trial within two years after judgment in certain cases, *held* inapplicable where defendant has been served or has appeared.—*Kruegel v. Cobb* (Tex. Civ. App.) 723.

§ 166. An application for a new trial after the term *held* in the nature of a suit in equity to vacate the judgment for fraud, accident, or mistake.—*Kruegel v. Cobb* (Tex. Civ. App.) 723.

§ 166. An application for a new trial after the term at which judgment was rendered because of alleged perjured testimony must show that the perjury was not discovered until after the term.—*Kruegel v. Cobb* (Tex. Civ. App.) 723.

§ 166. In a suit to set aside a judgment after the term for denial of a meritorious defense, the complaint must show that complainant did not know of the defense, and that his ignorance was not the result of negligence.—*Kruegel v. Cobb* (Tex. Civ. App.) 723.

§ 166. A petition for a new trial on equitable grounds after the term must show sufficient matter to have entitled the complainant to a new trial during the term and legal grounds for the delay.—*Kruegel v. Cobb* (Tex. Civ. App.) 723.

§ 166. A petition in the nature of a bill of review for a new trial of a suit of trespass to try title *held* demurrable for failure to allege an application for a new trial of the original suit within the term, or an excuse for failure to do so.—*Kruegel v. Cobb* (Tex. Civ. App.) 723.

§ 166. A petition in the nature of a bill of review to obtain a new trial of a suit in trespass to try title because the judgment was the result of perjury *held* insufficient.—*Kruegel v. Cobb* (Tex. Civ. App.) 723.

## NEXT FRIEND.

Of infant, see Infants, §§ 82-110.  
Of insane person, see Insane Persons, § 94.

## NEXT OF KIN.

See Descent and Distribution.

## NOMINAL DAMAGES.

See Damages, § 11.

**NON COMPOS MENTIS.**

See Insane Persons.

**NON OBSTANTE VEREDICTO.**

Judgment in general, see Judgment, § 199.

**NONRESIDENCE.**

Ground for requiring security for costs, see Costs, § 110.

Ground for service of process by publication, see Process, § 96.

**NOTES.**

Promissory notes, see Bills and Notes.

**NOTICE.**

See Process.

Judicial notice, see Evidence, §§ 12-43.

*As affecting particular classes of persons.*

See Principal and Agent, § 177.

Insurance companies, see Insurance, §§ 378, 559.

Mortgagees, see Chattel Mortgages, § 150.

Purchasers of land, see Vendor and Purchaser, §§ 229-233.

*As affecting particular rights, duties, and liabilities.*

Duty to construct fire escapes on buildings, see Municipal Corporations, § 603.

Liability for sale of liquor to drunkards, see Intoxicating Liquors, § 179.

Liability of carrier for loss of baggage, see Carriers, § 400.

Liability of insurer as affected by notice of facts warranting avoidance or forfeiture of policy, see Insurance, § 378.

Liability of insurer as affected by notice of loss, see Insurance, § 559.

Liability of principal as affected by notice to agent, see Principal and Agent, § 177.

Priorities of mortgages, see Chattel Mortgages, § 150.

Rights and liabilities of bona fide purchasers of real property, see Vendor and Purchaser, §§ 229-233.

Right to mechanic's lien, see Mechanics' Liens, § 118.

*Of particular facts, acts, or proceedings not judicial.*

Arrival of shipment, see Carriers, § 85.

Claim of mechanic's lien, see Mechanics' Liens, § 118.

Condition of grain in warehouse, see Warehousemen, § 8.

Defects in title of vendor of land, see Vendor and Purchaser, §§ 229-231.

Existence of mortgage, see Chattel Mortgages, § 150.

Intention to renew lease, see Landlord and Tenant, § 86.

Loss under insurance policy, see Insurance, § 559.

Possession adverse to owner, see Adverse Possession, § 31.

To construct fire escapes on buildings, see Municipal Corporations, § 603.

*Of particular judicial proceedings.*

Entry of judgment, see Judgment, § 213.

Trial in justice court after change of venue, see Justices of the Peace, §§ 73, 74.

**NOVATION.**

Modification of contracts in general, see Contracts, § 237.

**NUISANCE.**

Abatement by city, see Municipal Corporations, § 623.

**I. PRIVATE NUISANCES.**

(A) *Nature of Injury, and Liability Therefor.*

§ 7. If the operation of defendant's compress plant amounted to a nuisance to plaintiff, no amount of care by defendant in conducting the business would exempt it from liability for damages.—*Western Texas Compress Co. v. Williams* (Tex. Civ. App.) 493.

(D) *Actions for Damages.*

Application of general statute of limitations, see Limitation of Actions, § 55.

§ 43. That defendant erected its plant and operated it for some time without objection, would not be a defense to an action for damages caused by gases, odors, etc., and the overflow of oil from defendant's tanks, as plaintiff could not complain until he was injured by the nuisance.—*Western Texas Compress Co. v. Williams* (Tex. Civ. App.) 493.

§ 54. In an action for damages from maintaining a nuisance, where the court submitted the issue as to whether or not the operation of defendant's plant constituted a nuisance warranting a recovery by plaintiff, further instructions by the court held erroneous as unduly emphasizing plaintiff's contention.—*Hamm v. Briant* (Tex. Civ. App.) 112; *Same v. Gunn* (Tex. Civ. App.) 113.

§ 54. In an action for damages from maintaining a nuisance, a requested instruction held properly refused as an improper statement of law.—*Hamm v. Briant* (Tex. Civ. App.) 112; *Same v. Gunn* (Tex. Civ. App.) 113.

**II. PUBLIC NUISANCES.**

Offenses constituting nuisances, see Disorderly Conduct.

(B) *Rights and Remedies of Private Persons.*

§ 75. Acts 30th Leg. p. 248, c. 132, § 1 (Pen. Code, art. 362b), authorizing suit to enjoin a disorderly house being brought by one not personally injured held not repealed by Rev. St. 1895, art. 2389, § 3, as amended by Acts 31st Leg. p. 354, c. 34.—*Ex parte Morgan* (Tex. Cr. App.) 99; *Ex parte Lane* (Tex. Cr. App.) 100; *Ex parte Patterson* (Tex. Cr. App.) 101.

§ 75. Acts 30th Leg. p. 248, c. 132, § 1 (Pen. Code, art. 362b), authorizing suit to enjoin a disorderly house being brought by one not personally injured, held not invalid.—*Ex parte Morgan* (Tex. Cr. App.) 99; *Ex parte Lane* (Tex. Cr. App.) 100; *Ex parte Patterson* (Tex. Cr. App.) 101.

**NURSING.**

Contracts between husband and wife for nursing, see Husband and Wife, § 41.

**OBJECTIONS.**

*In judicial proceedings.*

Necessity and sufficiency for purpose of review in civil actions, see Appeal and Error, §§ 185-232.

Necessity and sufficiency for purpose of review in criminal prosecutions, see Criminal Law, §§ 1062-1063.

To evidence at trial, see Criminal Law, § 695; Trial, § 105.

To indictment or information, see Indictment and Information, §§ 133, 140, 203.

To instructions, see Trial, §§ 280, 284.

To jurors, see Jury, § 87.

To parties, see Parties, §§ 75, 96.

To pleadings, see Pleading, §§ 406-433.

To record on appeal or writ of error, see Appeal and Error, §§ 634-644.

**OBSCENITY.**

Use of indecent language as affecting individuals only, see Disorderly Conduct.

**OBSTRUCTIONS.**

Of streets, see Municipal Corporations, §§ 759-822.

**OCCUPATION.**

License tax on occupations in general, see Licenses, § 7.  
Of real property, see Use and Occupation.

**OFFENSES.**

See Criminal Law.

**OFFER.**

Bids for contracts with municipal corporation, see Municipal Corporations, § 335.

**OFFICERS.**

Liability of municipal corporation for torts of officers, see Municipal Corporations, § 747.  
Mandamus to public officers in general, see Mandamus, § 87.  
Official acts, constituting acceptance of dedication, see Dedication, § 35.  
Presumptions as to official proceedings and acts, see Evidence, § 83.  
Regulation and conduct of elections in general, see Elections.

*Particular classes of officers.*

See Clerks of Courts; District and Prosecuting Attorneys; Judges; Justices of the Peace; Receivers; Sheriffs and Constables.  
Attorneys, see Attorney and Client.  
Corporate officers in general, see Corporations, §§ 284, 310.  
Municipal officers, see Municipal Corporations, § 145.  
Of railroad companies, see Railroads, § 17.  
School officers, see Schools and School Districts, §§ 48, 53.  
Tax collectors, see Taxation, §§ 549-570.  
Trustees, see Trusts.  
Trustees in bankruptcy, see Bankruptcy, § 156.

**I. APPOINTMENT, QUALIFICATION, AND TENURE.**

Of municipal officers, see Municipal Corporations, § 145.  
Of receivers, see Receivers, § 38.  
Regulation and conduct of elections in general, see Elections.

*(C) Eligibility and Qualification.*

Of municipal officers, see Municipal Corporations, § 145.

*(F) Term of Office, Vacancies, and Holding Over.*

School officers, see Schools and School Districts, § 53.

**III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.**

Compensation of prosecuting attorneys, see District and Prosecuting Attorneys, § 5.  
Compensation of tax collectors, see Taxation, § 549.  
Of judges, see Judges, § 36.  
Of receivers, see Receivers, § 82.  
Of sheriffs or constables, see Sheriffs and Constables, § 139.

**IV. LIABILITIES ON OFFICIAL BONDS.**

Bonds of sheriffs and constables, see Sheriffs and Constables, § 170.  
Bonds of tax collectors, see Taxation, § 570.

**OFFSET.**

See Set-Off and Counterclaim.

**OPENING.**

Judgment, see Judgment, §§ 336-377.  
Judgment against infant, see Infants, § 110.  
Sale of property of decedent, see Executors and Administrators, § 380.

**OPINION EVIDENCE.**

See Criminal Law, § 448; Evidence, §§ 471-550.

**OPINIONS.**

Matters of opinion distinguished from matters of fact, see Fraud, § 11.

**OPTIONS.**

To renew lease, see Landlord and Tenant, § 86.

**ORAL AGREEMENTS.**

See Frauds, Statute of.

**ORDERS.**

See Bills and Notes.  
Forgery, see Forgery.  
Of municipal council, see Municipal Corporations, §§ 301, 302.  
Review of appealable orders, see Appeal and Error; Criminal Law, §§ 1024-1189.

**ORDINANCES.**

Municipal ordinances, see Municipal Corporations, §§ 112, 121, 301, 302, 449, 603, 623.

**ORES.**

See Mines and Minerals.

**ORGANIC LAW.**

See Constitutional Law.

**ORGANIZATION.**

Of corporations in general, see Corporations, §§ 14, 18.

**ORPHANS' COURTS.**

See Courts, § 202.

**OSTEOPATHY.**

See Physicians and Surgeons.

**OWNERSHIP.**

Of property as affecting performance of contract of sale, see Vendor and Purchaser, §§ 130, 137.  
Of property at time of decedent's death as determining what are assets of decedent's estate, see Executors and Administrators, § 55.  
Of property intermixed, see Confusion of Goods.

**PAIS.**

Estoppel in pais, see Estoppel, §§ 78-98.

**PANEL.**

Selection and drawing of jury panel, see Jury, § 68.  
 Special jury panel, see Jury, § 70.

**PARAPHERNAL PROPERTY.**

See Husband and Wife, §§ 258-276.

**PARENT AND CHILD.**

See Guardian and Ward; Infants.  
 Damages for loss of services, see Damages, § 37.  
 Illicit relations with child, see Incest.  
 Rights of surviving children as to homestead, see Homestead, § 140.

§ 13. A father is not liable for the torts of his child committed without his knowledge or consent and not in the course of his employment of the child.—*Lessoff v. Gordon* (Tex. Civ. App.) 182.

§ 13. A father's liability for the acts of his child done in the course of his employment of the child is governed by the rules applicable to the relation of master and servant.—*Lessoff v. Gordon* (Tex. Civ. App.) 182.

§ 13. The act of a minor in causing injuries to a third person *held* not within the scope of any employment, so as to render the father liable.—*Lessoff v. Gordon* (Tex. Civ. App.) 182.

**PARISHES.**

See Counties.

**PAROL AGREEMENTS.**

See Frauds, Statute of.

**PAROL DEDICATION.**

See Dedication, § 1.

**PAROL EVIDENCE.**

In civil actions, see Evidence, §§ 400-460.

**PARTIES.**

As witnesses, cross-examination of, see Witnesses, §§ 275, 277.  
 Death ground for abatement, see Abatement and Revival, §§ 58-77.  
 Rights and liabilities as to costs, see Costs.

*In actions by or against particular classes of persons.*

See Partnership, § 199.  
 Trustees, see Trusts, § 366.

*In particular actions or proceedings.*

On bonds or undertakings on appeal or writ of error, see Appeal and Error, § 1244.  
 On foreign judgment, see Judgment, § 935.  
 To establish and enforce trust, see Trusts, § 366.

*Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.*  
 Parties and other persons liable for costs, see Costs, § 93.

Parties to judgment on trial of issues, see Judgment, § 235.  
 Persons concluded by judgment in general, see Judgment, §§ 707, 708.

*Review as to parties, and parties to proceedings in appellate courts.*

Parties entitled to allege error, see Appeal and Error, § 882.  
 Parties to appeal or writ of error, see Appeal and Error, § 327.

Persons entitled to review, see Appeal and Error, § 150.

Review of questions as dependent on prejudicial nature of error, see Appeal and Error, § 1036.  
 Review of questions as dependent on presentation in lower court, see Appeal and Error, § 187.

*To conveyances, contracts, or other transactions.*  
 See Bills and Notes, § 122; Contracts, § 187.

**I. PLAINTIFFS.**

(A) *Persons Who may or must Sue.*

Assignee of claim as real party in interest, see Assignments, § 121.

**III. NEW PARTIES AND CHANGE OF PARTIES.**

Intervention in attachment proceedings by claimant of property, see Attachment, §§ 287-306.  
 On death of party, see Abatement and Revival, §§ 73, 77.

**V. DEFECTS, OBJECTIONS, AND AMENDMENT.**

Objections raised for first time on appeal, see Appeal and Error, § 187.

§ 75. A general demurrer to the complaint does not reach defect of proper parties.—*Love v. Cahn* (Ark.) 259.

§ 75. A defect of parties plaintiff cannot be raised by a motion for judgment on the pleadings, but, if the defect is apparent from the face of the petition, it must be raised by demurrer, and, if the petition is sufficient on its face, the objection must be taken by the answer.—*McKee v. Downing* (Mo.) 7.

§ 96. A defendant in replevin *held* to waive the error in overruling an objection to the amended petition changing the parties plaintiff.—*Meeks v. Clear Jack Mining Co.* (Mo. App.) 1084.

**PARTITION.**

Creation of co-tenancies, and rights and liabilities of co-tenants in general, see Tenancy in Common.

**II. ACTIONS FOR PARTITION.**

Presumption that judge shown to preside in partition proceedings presided throughout, see Evidence, § 67.

(A) *Right of Action and Defenses.*

§ 13. Parties *held* to have no joint interest in a building on a lot, so as to entitle either of them to have the property sold under Civ. Code Prac. § 490.—*Eather Temple of the Mysterious Ten v. Shelby Tabernacle* (Ky.) 304.

(B) *Proceedings and Relief.*

Acceptance of benefits as ground of estoppel to question sale, see Estoppel, § 92.

§ 106. A memorandum in a minute book in the office of the clerk of court indicating that a report of a partition sale was approved, but which has never been made into a record entry, is not a judgment of the court approving the sale.—*Hector v. Mann* (Mo.) 1109; *Same v. Warren* (Mo.) 1119.

§ 106. In a suit to recover land sold under a partition decree, a memorandum in a minute book in the office of the clerk of court indicating that a report of the partition sale was approved *held* not objectionable as evidence because it failed to describe the land in question, and because it showed the approval of sale was made prior to the sale.—*Hector v. Mann* (Mo.) 1109; *Same v. Warren* (Mo.) 1119.

§ 109. A purchaser at partition sale *held* not entitled to reject the title on the ground that there might be other persons entitled to share in the property who had not been made parties.—Krekel v. Guenzler's Adm'r (Ky.) 848.

## PARTITION FENCES.

See Fences.

## PARTNERSHIP.

Exemption of partnership property, see Exemptions, § 61.

### I. THE RELATION.

#### (B) As to Third Persons.

§ 37. The doctrine that, before one can exact payment from one holding himself out as a partner, he must show that he extended credit on the faith of his acts and conduct and exercised due diligence to ascertain the true facts, *held* inapplicable against one to whom a representation of partnership is directly made.—Gershner v. Scott-Mayer Commission Co. (Ark.) 772.

§ 38. When one puts out a report that he is a partner, he will be liable to all selling goods to the firm on the faith thereof.—Gershner v. Scott-Mayer Commission Co. (Ark.) 772.

#### (C) Evidence.

§ 49. In an action by a bank on notes executed by defendant's son in defendant's name, where the principal issue was whether defendant and his son were partners, certain testimony of the bank's president *held* incompetent to prove partnership.—Mathis v. Bank of Taylorsville (Ky.) 876.

§ 50. In an action for goods sold to a firm in reliance on defendant having held himself out as a partner, *held*, that there was no prejudicial error in refusing to strike out certain testimony of confessed members as to withdrawal of funds from a bank before a check given to plaintiff was paid.—Gershner v. Scott-Mayer Commission Co. (Ark.) 772.

§ 55. In an action on notes executed by defendant's son in defendant's name, evidence *held* to sustain the finding that the defendant and his son were partners in the venture in which the money for the payment of which the notes were given was expended.—Mathis v. Bank of Taylorsville (Ky.) 876.

## II. THE FIRM, ITS NAME, POWERS, AND PROPERTY.

§ 68. Certain land *held* partnership property.—Lewis v. Buford (Ark.) 244.

## IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

### (A) Representation of Firm by Partner.

§ 158. In proceedings to restrain defendant from re-engaging in the photograph business, defendant *held* bound by a statement made to plaintiff's partner, whether plaintiff was present or not.—Parrish v. Adwell (Tex. Civ. App.) 441.

### (C) Application of Assets to Liabilities.

§ 181. Under Kirby's Dig. § 3244, a judgment creditor of a partner could only subject to the payment of his claim the balance due such partner after payment of the amount due the other partner, resulting from having overdrawn the debtor partner's share of the partnership funds, after such amount had been ascertained and set apart.—Lewis v. Buford (Ark.) 244.

### (D) Actions by or Against Firms or Partners.

§ 190. Where a partner trades for a horse in his own name, but for the partnership, he can

sue for all the damages arising from the contract in his own name.—Covington v. Sloan (Tex. Civ. App.) 690.

§ 213. One *held* a proper party plaintiff in replevin.—Meeks v. Clear Jack Mining Co. (Mo. App.) 1084.

§ 218. In an action on notes executed by defendant's son in defendant's name, evidence *held* to make it a jury question whether defendant and his son were partners in the venture in which the money for which the notes were given was expended.—Mathis v. Bank of Taylorsville (Ky.) 876.

## VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

### (A) Causes of Dissolution.

§ 250. When one holds himself out as a partner, those who deal with the firm on the faith of such representation are entitled to act on the presumption that the relationship continues till notice of its discontinuance.—Gershner v. Scott-Mayer Commission Co. (Ark.) 772.

## PART OWNERS.

In general, see Tenancy in Common.

## PART PAYMENT.

Application, see Payment, §§ 36, 44.  
Within statute of limitations, see Limitation of Actions, §§ 157-163.

## PART PERFORMANCE.

Of contracts, rights and liabilities of parties, see Contracts, § 319.  
Recovery on quantum meruit for part performance of services where contract is rescinded or abandoned, see Work and Labor, § 14.

## PASSENGERS.

See Carriers, §§ 234-400.

## PASSWAYS.

See Easements.

## PASTURING.

As adverse possession, see Adverse Possession, § 22.

## PATENTS.

For public lands, see Public Lands, § 176.

## PAYMENT.

See Compromise and Settlement; Tender.

Liability of agent for wrongful payment, see Principal and Agent, § 157.

Part payment within statute of limitations, see Limitation of Actions, §§ 157-163.

Of particular classes of obligations or liabilities.

See Bills and Notes, § 527; Rewards, § 14.

Checks, see Banks and Banking, § 138.

Fare for transportation to avoid ejection, see Carriers, § 358.

## I. REQUISITES AND SUFFICIENCY.

§ 16. A note given for an indebtedness *held* not to wholly extinguish the indebtedness, in absence of express agreement to that effect.—McCormick Harvesting Mach. Co. v. Blair (Mo. App.) 49.

§ 17. Where property insured was destroyed by fire, the execution and delivery to the insured of drafts for the amount of the loss by the in-

surance company's adjuster was not payment, unless the insured agreed to receive them as such.—*American Ins. Co. v. McGehee Liquor Co. (Ark.)* 252.

§ 17. Where insured property was destroyed and the insurance company's adjuster gave the insured drafts on the company for the amount of the loss, which were not paid, the insured was entitled to recover thereon.—*American Ins. Co. v. McGehee Liquor Co. (Ark.)* 252.

## II. APPLICATION.

§ 36. Where there are two separate accounts between the parties, the application of a payment which could be applied to either account is determined by the intention of the parties.—*Paragould & M. R. Co. v. Smith (Ark.)* 776.

§ 44. Where one makes a payment on an account, a part of which is barred by limitations, and he gives no direction to what items on the account the payment shall be applied, the law authorizes the application of it to the payment of the oldest items on the account.—*Brown's Adm'r v. Osborne (Ky.)* 405.

## III. OPERATION AND EFFECT.

§ 53. Where insured property was destroyed and the insurance company's adjuster gave the insured drafts on the company for the amount of the loss, the insured cannot recover on the policy without producing and surrendering, or offering to surrender, the drafts for cancellation.—*American Ins. Co. v. McGehee Liquor Co. (Ark.)* 252.

## IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

Parol evidence to explain receipt, see Evidence, § 450.

§ 65. On an issue as to whether a premium had been paid in an action on a life policy, the introduction of a receipt for the premium raised a presumption of payment.—*Fidelity Mut. Life Ins. Co. v. Click (Ark.)* 764.

§ 67. The burden is upon one seeking to defeat a recovery on the original indebtedness to show that the parties expressly agreed that the indebtedness should be discharged by the giving of a note.—*McCormick Harvesting Mach. Co. v. Blair (Mo. App.)* 49.

§ 75. In an action for work done for defendant, in which he claimed that a payment made by another, for whom plaintiff had also worked, and who made special payments on defendant's account as well as his own, was made on defendant's account, evidence held to sustain a finding that the payment was made on the account of such other, and not of defendant.—*Paragould & M. R. Co. v. Smith (Ark.)* 776.

## V. RECOVERY OF PAYMENTS.

Payment by garnishee after garnishment, see Garnishment, § 230.

Payments for land sold, see Vendor and Purchaser, § 334.

## PEACE.

Breach of public peace, see Breach of the Peace.

## PECUNIARY LOSS.

Element of damages in general, see Damages, § 37.

## PENALTIES.

Distinction between liquidated damages and penalties, see Damages, §§ 74-81.

For nonpayment of insurance policy, see Insurance, § 666.

For violations of liquor laws, see Intoxicating Liquors, §§ 178, 179.

Recovery in action on bond of clerk of court, see Clerks of Courts, § 75.

## PEREMPTORY INSTRUCTIONS.

See Trial, §§ 168, 178.

## PERFORMANCE.

Time of performance of contracts as affecting application of statute of frauds, see Frauds, Statute of, §§ 44, 50.

*Of particular classes of duties or obligations.*

See Covenants, § 102.

Contract in general, see Contracts, §§ 312-323.

Contract for transportation of passengers, see Carriers, §§ 267-277.

Contract of sale, see Sales, §§ 146-177; Vendor and Purchaser, §§ 130, 137.

Contract with municipal corporation, see Municipal Corporations, § 359.

Judgment in civil actions, see Judgment, § 891.

Principal contract for improvements on land as affecting right of contractor to mechanic's lien, see Mechanics' Liens, § 93.

Services, see Master and Servant, § 65.

Services by broker, see Brokers, §§ 54-57.

## PERISHABLE PROPERTY.

Liability of carrier, see Carriers, § 117.

## PERPETUATION OF TESTIMONY.

See Depositions.

## PERPETUITIES.

§ 6. A general restraint on the power of alienation, when incorporated in a will otherwise conveying the fee-simple right to the property, is void.—*Diamond v. Rotan (Tex. Civ. App.)* 196.

## PERSONAL INJURIES.

Causing death, see Death, §§ 31-104.

*Particular causes or means of injury.*

See Assault and Battery.

Acts or omissions of carrier, see Carriers, §§ 280-321.

Acts or omissions of municipality in general, see Municipal Corporations, §§ 747-822.

Acts or omissions of municipal officers or agents, see Municipal Corporations, § 747.

Defects or obstructions in streets, see Municipal Corporations, §§ 759-822.

Negligence in general, see Negligence.

Operation of railroads, see Railroads, §§ 274-282, 327-350, 360-398.

Operation of street railroads, see Street Railroads, §§ 81-103.

*Particular classes of persons injured.*

Employees, see Master and Servant, §§ 92-296.

Passengers, see Carriers, §§ 280-321, 347.

Travelers on streets, see Municipal Corporations, §§ 759-822.

*Remedies.*

See Damages.

Evidence admissible as part of *res gestæ*, see Evidence, §§ 127, 128.

Opinion evidence as to cause and effect, see Evidence, § 528.

Release of claim for damages, see Release, § 16.

## PERSONAL PROPERTY.

See Property.

Assets of estate of decedent, see Executors and Administrators, §§ 153, 158.

Confusion, see Confusion of Goods.  
 Gift, see Gifts.  
 Mortgage, see Chattel Mortgages.  
 Offenses involving or affecting, see False Pretenses; Robbery; Threats.  
 Pledge, see Pledges.  
 Remedies involving or affecting, see Replevin.  
 Sales, see Sales.  
 Sales by executors or administrators, see Executors and Administrators, §§ 329-380.  
 Storage, see Warehousemen.  
 Taxation of, see Taxation.  
 Wrongful conversion, see Trover and Conversion.

## PERSONAL REPRESENTATIVES.

See Executors and Administrators.

## PERSONAL SERVICE.

See Process, § 61.

## PERSONATION.

See False Personation.

## PERSONS.

Offenses against the person, see Homicide; Incest; Rape; Robbery; Seduction, § 40.

## PETITION.

See Pleading.

For allowance of appeal or writ of error, see Appeal and Error, § 361.

For drain, see Drains, § 28.

For public improvements, see Municipal Corporations, § 280.

## PETIT JURY.

See Jury.

## PHOTOGRAPHS.

Competency as evidence, see Criminal Law, § 438.

## PHYSICAL CONDITION.

Expert testimony, see Evidence, § 537.

Opinion evidence in general, see Evidence, § 474.

## PHYSICAL SUFFERING.

Element of damages in general, see Damages, §§ 32-34.

## PHYSICIANS AND SURGEONS.

Expert testimony, see Evidence, §§ 528, 537, 550.

Indictment for practicing without authority following language of statute, see Indictment and Information, § 122.

Liability of employer for malpractice, see Master and Servant, § 92.

Mandamus to compel granting of license, see Mandamus, § 87.

Statements to physicians by person injured as part of res gestæ, see Evidence, § 128.

§ 5. Under Laws 1907, p. 359, § 1, one presenting himself before the State Board of Health for examination for license to practice medicine, *held* required to show that the medical college from which he graduated was reputable.—State ex rel. Abbott v. Adcock (Mo.) 1100.

§ 5. A rule of the State Board of Health, authorized by Laws 1907, p. 359, § 1, to examine applicants for license to practice medicine, *held* only to require all medical colleges to adopt such standards as will prove their reputableness, and

thereby remove that burden from each applicant for a license.—State ex rel. Abbott v. Adcock (Mo.) 1100.

§ 5. A rule of the State Board of Health, empowered by Laws 1907, p. 359, § 1, to examine applicants for license to practice medicine, *held* illegal, and not to prevent a graduate from a medical college to prove that it is reputable, but, until he furnishes such proof, the board need not examine him.—State ex rel. Abbott v. Adcock (Mo.) 1100.

§ 6. An indictment, in a prosecution for practicing medicine without filing the authority to practice, required by Acts 30th Leg. c. 123, §§ 4, 6, *held* insufficient for failure to allege that the authority was not filed in the office of the clerk of the district court of the county in which accused resides.—Lockhart v. State (Tex. Cr. App.) 923.

§ 6. A party *held* practicing medicine, within the meaning of Acts 30th Leg. 1907, pp. 224-228, c. 123, forbidding the practice of medicine without a license, and defining what constituted practicing medicine, although he prescribed and used no drugs.—Newman v. State (Tex. Cr. App.) 956.

## PICTURES.

Competency as evidence, see Criminal Law, § 438.

## PISTOLS.

See Weapons.

## PLACE.

For work, duties, and liabilities of master as to servants, see Master and Servant, §§ 101-124.  
 Of trial, see Venue.

## PLANS.

For public improvements, see Municipal Corporations, § 314.

## PLATS.

Dedication of property to public use, see Dedication, § 19.

## PLEA.

In civil actions, see Pleading, §§ 84-149.

Of privilege, see Venue, § 58.

## PLEADING.

Applicability of instructions to pleadings and issues, see Trial, § 251.

Conformity of judgment to pleadings, see Judgment, §§ 252, 253.

Indictment or criminal information or complaint, see Indictment and Information.

Plea of privilege, see Venue, § 58.

To sustain judgment, see Judgment, § 18.

*Allegations as to particular facts, acts, or transactions.*

Authority to bring action by private corporation, see Corporations, § 513.

Compliance with requirements of laws by foreign corporation, see Corporations, § 672.

Damages, see Damages, §§ 153-159.

Existence of partnership, see Partnership, § 213.

Fraud, see Fraud, § 49.

Insolvency of maker of note, see Bills and Notes, § 462.

Negligence of carrier, see Carriers, § 314.

Negligence of master causing injuries to servant, see Master and Servant, § 258.

Negligence of railroad company, see Railroads, § 282.

Performance of conditions of insurance policy, see Insurance, § 634.

Statute of limitations, see Limitation of Actions, §§ 180, 193.  
Time of death of insured, see Insurance, § 815.

*In actions by or against particular classes of persons.*

See Carriers, § 314; Corporations, §§ 513, 518, 672; Master and Servant, §§ 65, 258, 264; Partnership, § 213; Railroads, §§ 282, 439, 478.

Foreign corporations, see Corporations, § 672.  
Insurance companies, see Insurance, §§ 629-645, 815.

Telegraph or telephone companies, see Telegraphs and Telephones, § 65.

*In particular actions or proceedings.*

See Ejectment, §§ 69-82; Replevin, § 57; Trespass to Try Title, § 35.

For breach of contract in general, see Contracts, § 346.

For breach of contract by servant, see Master and Servant, § 65.

For breach of warranty of goods sold, see Sales, §§ 437, 441.

For fraud, see Fraud, § 49.

For injuries from fires caused by operation of railroads, see Railroads, § 478.

For injuries, from negligence, see Negligence, §§ 111, 119.

For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, § 65.

For injuries to animals on or near railroad tracks, see Railroads, § 439.

For injuries to licensees on railroad property, see Railroads, § 282.

For injuries to passengers, see Carriers, § 314.  
For injuries to servants, see Master and Servant, §§ 258, 264.

On bills or notes, see Bills and Notes, § 462.  
On insurance policies, see Insurance, §§ 629-645, 815.

Preliminary complaint in criminal prosecutions, see Criminal Law, § 211.

*Review of decisions and pleading in appellate courts.*

Review of decisions as dependent on prejudicial nature of error, see Appeal and Error, §§ 1039-1042.

Review of decisions as dependent on presentation of question in lower court, see Appeal and Error, § 195.

Review of decisions as dependent on presentation of question in record, see Appeal and Error, §§ 679, 681.

Review of decisions involving discretion of court, see Appeal and Error, § 959.

## II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

Conformity of judgment to prayer for relief, see Judgment, § 252.

Joinder of causes of action, see Action, § 45.

*In particular actions or proceedings.*

See Replevin, § 57.

For injuries from negligence in general, see Negligence, § 111.

For injuries to licensees on railroad property, see Railroads, § 282.

For injuries to passenger, see Carriers, § 314.  
For injuries to servants, see Master and Servant, § 258.

On bills or notes, see Bills and Notes, § 462.  
On insurance policy, see Insurance, §§ 629, 634, 815.

§ 72. Where the prayer for relief in a petition contains a statement of the fact on which it is intended to base a prayer for relief, it is entitled to be given the force and effect of an allegation.—*First Nat. Bank v. Robinson* (Tex. Civ. App.) 177.

## III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

In ejectment, see Ejectment, § 69.

Mode of making objection for defects in return in garnishment proceedings, see Garnishment, § 97.

Operation and effect as appearance, see Appearance, § 8.

(A) *Defenses in General.*

§ 84. Where each of several makers of a note delivered to the agent of the payee rely in defense on different statements made to them by the agent when the note was executed, separate answers should be filed by each maker.—*Jobes v. Wilson* (Mo. App.) 548.

§ 93. Defendant, in an action on a contract for the sale of jewelry, denied in his answer that he made the contract except as thereafter set out, and a subsequent paragraph fully stated the facts as to what contract was made. *Held*, that the answer was not defective, there being no inconsistency between the paragraphs.—*American Jobbing Ass'n v. Potter* (Ky.) 311.

(C) *Traverses or Denials and Admissions.*

§ 129. An answer, in an action against a railroad company for killing animals on its track, *held* to admit that the injury occurred at the place alleged in the complaint.—*St. Louis, I. M. & S. R. Co. v. Weatherly* (Ark.) 1031.

(E) *Set-Off, Counterclaim, and Cross-Complaint.*

§ 149. In an action on a note against two sureties in which one surety against whom judgment went filed a cross-petition against his co-surety for contribution, cross-defendant *held* not entitled to make answer to the cross-petition a cross-petition against another, in view of Civ. Code Prac. § 93, subsec. 3, and section 111.—*Fritts v. Kirchdorfer* (Ky.) 882.

## V. DEMURRER OR EXCEPTION.

Operation and effect as appearance, see Appearance, § 8.

Raising defense of statute of limitations, see Limitation of Actions, § 180.

Review of decisions, see Appeal and Error, § 1040.

§ 214. In determining the sufficiency of a pleading against a general demurrer, the allegations must be taken as true, and every reasonable intendment indulged in favor of its sufficiency.—*Magerstadt v. Martin* (Tex. Civ. App.) 459.

§ 218. A plea in the nature of a general demurrer is subject to the rule that, as against it, every reasonable intendment will be indulged in favor of the pleading demurred to.—*Sievert v. Underwood* (Tex. Civ. App.) 721.

§ 225. Where, under leave granted to amend, complainant filed two supplemental petitions which did not strengthen his case and to which demurrers were sustained, the court did not err in refusing to grant permission for further amendments.—*Kruegel v. Cobb* (Tex. Civ. App.) 723.

## VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

Amendment of indictment or information, see Indictment and Information, § 161.

Ground for continuance, see Continuance, § 30.  
Review of decisions, see Appeal and Error, §§ 195, 681, 959.

§ 236. Refusal to permit the filing of amended pleadings after trial and when judgment was about to be rendered on the verdict *held* not an abuse of discretion.—*Cornelison v. Million* (Ky.) 366.

§ 237. The allowance of an amendment to the petition to conform to the proof in an action against a railroad for fire set by engines *held* within the discretion of the trial judge.—*Illinois Cent. R. Co. v. Frost* (Ky.) 821.

§ 245. Under Civ. Code Prac. § 134, *held*, that the court did not abuse its discretion in an action for personal injuries in allowing a certain amendment to the complaint after issue joined.—*Chesapeake & O. Ry. Co. v. Conley* (Ky.) 861.

§ 250. The amendment of the statement of facts in an action for trespass on land, merely increasing the damages demanded, does not change the cause of action.—*Casey v. St. Louis & S. F. R. Co.* (Mo. App.) 562.

## VII. SIGNATURE AND VERIFICATION.

Verification of petition in attachment, see Attachment, § 306.

## VIII. PROPERT, OYER, AND EXHIBITS.

Raising question of defect of parties by motion for judgment on pleadings, see Parties, § 75.

§ 312. Where a copy of the original judgment sued on was attached as a part of the petition, there could be no variance between the allegations of the petition and the judgment itself.—*Varn v. Arnold Hat Co.* (Tex. Civ. App.) 693.

## XI. MOTIONS.

Review of decisions, see Appeal and Error, § 1042.

§ 345. Defendant is not entitled to judgment upon the mere filing of the petition unless the petition states such facts as clearly show that plaintiff is not entitled to judgment.—*McKee v. Downing* (Mo.) 7.

§ 362. In an action against a railroad for fire set by engines, the proper way to reach an allegation that sparks from an engine set fire to debris on the right of way is by motion to strike.—*Illinois Cent. R. Co. v. Frost* (Ky.) 821.

§ 369. A defendant *held* properly required to elect between an answer and amended answer, under Civ. Code Prac. § 113.—*J. S. Minor & Sons v. Paragon Plaster Co.* (Ky.) 268.

## XII. ISSUES, PROOF, AND VARIANCE.

Applicability of instructions to issues, see Trial, § 251.

Effect of stipulation, see Stipulations, § 18. In pleading damages in general, see Damages, §§ 157-159.

Issues on plea of privilege, see Venue, § 58.

### *In particular actions or proceedings.*

See Ejectment, §§ 81, 82; Trespass to Try Title, § 35.

For breach of contract in general, see Contracts, § 346.

For breach of contract by servant, see Master and Servant, § 65.

For breach of warranty of goods sold, see Sales, § 437.

For delay in delivery of messages, see Telegraphs and Telephones, § 65.

For delay in transmission and delivery of message, see Telegraphs and Telephones, § 65.

For fraud, see Fraud, § 49.

For injuries from negligence, see Negligence, § 119.

For injuries to licensee on railroad property, see Railroads, § 282.

For injuries to servants, see Master and Servant, § 264.

On insurance policy, see Insurance, § 645.

Replevin for property sold on condition, see Sales, § 480.

§ 380. The evidence in a case should be confined to the issue made by the pleadings.—*Mathis v. Bank of Taylorsville* (Ky.) 876.

## XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AIDER BY VERDICT OR JUDGMENT.

Defects in indictment and information, see Indictment and Information, § 203.

Review of decisions as dependent on presentation of question in lower court, see Appeal and Error, § 195.

§ 406. A petition in an action for injuries *held* sufficient after answer, though it might have been subject to a motion to make more specific.—*Tuck v. Springfield Traction Co.* (Mo. App.) 1079.

§ 411. Where a cross-defendant, on a cross-petition by his co-surety for contribution, consented that the answer and cross-petition against him be filed for record after his motion to strike the pleading was entered, he thereby waived any irregularity in proceeding by cross-petition for contribution.—*Fritts v. Kirchdorfer* (Ky.) 882.

§ 426. By answering the petition after its motion to strike out parts thereof had been overruled and going to trial, defendant waived an error in denying the motion to strike.—*Hilburn v. Phoenix Ins. Co.* (Mo. App.) 63.

§ 426. Where a defendant after his motion to require plaintiffs to elect had been overruled, answered over, and went to trial on the merits, his action amounted to an abandonment of the motion.—*Fryor v. Crum* (Mo. App.) 597.

§ 433. A defective allegation in a petition in an action for wrongful discharge *held* cured by proof and verdict.—*Kentucky Shoe Mfg. Co. v. Carraway* (Ky.) 852.

§ 433. A pleading will be good after verdict, if it contain allegations from which every necessary fact may be inferred.—*Kentucky Shoe Mfg. Co. v. Carraway* (Ky.) 852.

## PLEDGES.

See Chattel Mortgages.

Error in instructions cured by giving other instructions, see Trial, § 296.

§ 27. The pledgee of a note and mortgage *held* entitled to incur reasonable expenses for the protection and collection of the security.—*Ely-Walker Dry Goods Co. v. Colbert* (Tex. Civ. App.) 705.

§ 27. The attorney employed by the pledgee of a note to preserve and collect it is the attorney of the latter, and he may not make an unauthorized charge and hold the pledgor responsible therefor.—*Ely-Walker Dry Goods Co. v. Colbert* (Tex. Civ. App.) 705.

§ 27. A pledgee of a note and mortgage made by a third person *held* entitled under proper circumstances to incur expenses in preserving the collateral.—*Ely-Walker Dry Goods Co. v. Colbert* (Tex. Civ. App.) 705.

§ 33. The effect of an agreement by the pledgee of a note *held* for the jury.—*Ely-Walker Dry Goods Co. v. Colbert* (Tex. Civ. App.) 705.

§ 58. In an action on a note secured by pledge of an unmatured vendor's lien note, the court properly foreclosed the lien on the note pledged and ordered the same sold to satisfy the judgment on the note sued on, instead of foreclosing the vendor's lien.—*City Loan & Trust Co. v. Sterner* (Tex. Civ. App.) 207.

## POLICE POWER.

Of municipality, see Municipal Corporations, §§ 603, 623.

**POLICY.**

Of insurance, see Insurance.

**POLITICAL RIGHTS.**

Suffrage, see Elections.

**POPULATION.**

Judicial notice, see Evidence, § 12.

**POSSESSION.**

See Adverse Possession.

Of demised premises, see Landlord and Tenant, § 120.

Of mortgaged property, rights and liabilities of parties, see Chattel Mortgages, § 173.

Of personal property, remedies for recovery, see Replevin.

Of real property, remedies for recovery, see Ejectment; Forcible Entry and Detainer, §§ 4-29; Trespass to Try Title.

Retention by grantor, element of fraud as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 146.

Right of possession, element of right of action, see Replevin, § 8.

**POSSESSORY WARRANT.**

Actions for recovery of personalty founded on right of possession, see Replevin.

**POSTHUMOUS CHILDREN.**

See Descent and Distribution, § 47.

**POST OFFICE.**

Presumptions as to mailing and delivery of mail matter, see Evidence, § 71.

**I. POST-OFFICE DEPARTMENT, POST OFFICES, POSTMASTERS, AND OTHER OFFICERS.**

Indorsement of envelopes inclosing depositions, see Depositions, § 78.

**POSTPONEMENT.**

Continuance of civil actions, see Continuance.

Continuance of criminal prosecutions, see Criminal Law, §§ 586-608.

Of time of payment of check, see Bills and Notes, § 92.

**POWERS.**

Of attorney, see Principal and Agent.

Of executor or administrator as to property of decedent, see Executors and Administrators, § 158.

Of sale in mortgage, see Chattel Mortgages, §§ 258, 267; Mortgages, § 341.

**PRACTICE.**

*In particular civil actions or proceedings.*

See Attachment, §§ 287-306; Bankruptcy; Ejectment, §§ 69-82; Execution; Forcible Entry and Detainer, §§ 4-29; Garnishment, §§ 96-104; Injunction, §§ 128, 130; Partition, §§ 106, 109; Prohibition, § 28; Quieting Title, § 29; Replevin; Trespass, § 50; Trespass to Try Title, §§ 25-47; Trover and Conversion, § 29; Work and Labor, § 30.

Accounting by executor or administrator, see Executors and Administrators, § 470.

Against connecting carriers in respect to goods shipped, see Carriers, § 185.

Appointment of executor or administrator, see Executors and Administrators, § 20.

Appointment of receiver, see Receivers, § 38.

Assessment of damages, see Damages, §§ 215-217.

Between sureties, see Principal and Surety, § 200.

By or against assignee or assignors, see Assignments, §§ 121, 126.

By or against corporations in general, see Corporations, §§ 513, 518.

By or against firms or partners, see Partnership, §§ 199-213.

By or against foreign corporations, see Corporations, § 672.

By or against infants, see Infants, §§ 82-110.

By or against insane persons, see Insane Persons, §§ 94, 101.

By or against principals or agents, see Brokers, § 106; Principal and Agent, § 190.

By or against railroad companies in general, see Railroads, § 22.

By or against telegraph or telephone companies, see Telegraphs and Telephones, § 20.

For breach of contract, see Contracts, § 346.

For breach of contract by carrier for transportation of passenger, see Carriers, §§ 274½-277.

For breach of contract of sale, see Sales, §§ 383, 384, 415, 418; Vendor and Purchaser, § 330.

For causing death, see Death, § 104.

For change of venue, see Venue, §§ 45, 58.

For compensation of broker, see Brokers, §§ 84-88.

For conspiracy, see Conspiracy, § 20.

For continuance, see Continuance, § 46.

For delay in transportation or delivery of goods, see Carriers, § 104.

For delay in transportation or delivery of live stock, see Carriers, §§ 228, 230.

For divorce, see Divorce, §§ 115-168.

For ejection of passenger, see Carriers, § 381.

For equitable relief against judgment, see Judgment, §§ 461, 463.

For failure of carrier to deliver or for misdelivery of goods, see Carriers, § 94.

For fraud, see Fraud, §§ 34, 49.

For injuries at railroad crossings, see Railroads, §§ 347, 350.

For injuries by or to artificial ponds, reservoirs, channels, and dams, see Waters and Water Courses, § 179.

For injuries from defects or obstructions in streets, see Municipal Corporations, §§ 819-822.

For injuries from fires caused by operation of railroad, see Railroads, §§ 478-484.

For injuries from negligence in general, see Negligence, §§ 111-141.

For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 65-74.

For injuries from nuisances, see Nuisance, §§ 43, 54.

For injuries to animals on or near railroad tracks, see Railroads, §§ 439-446.

For injuries to licensees or trespassers on railroad property in general, see Railroads, § 282.

For injuries to passengers, see Carriers, §§ 314-321, 347.

For injuries to persons on or near railroad tracks, see Railroads, § 393.

For injuries to servants, see Master and Servant, §§ 258-296.

For judgment against real property for taxes, see Taxation, § 641.

For loss of or injury to goods, see Carriers, § 135.

For loss of or injury to live stock, see Carriers, §§ 228, 230.

For malicious prosecution, see Malicious Prosecution, §§ 56-69.

For new trial, see New Trial, §§ 150, 166.

For penalty for violation of liquor laws, see Intoxicating Liquors, §§ 178, 179.  
 For purchase money on sale of goods, see Sales, §§ 340, 350.  
 For separate maintenance, see Husband and Wife, § 297.  
 For wrongful discharge of servant, see Master and Servant, §§ 36, 40.  
 On bills or notes, see Bills and Notes, §§ 462-538.  
 On bonds of public officers, see Sheriffs and Constables, § 170; Taxation, § 570.  
 On bonds or undertakings on appeal or writ of error, see Appeal and Error, §§ 1234, 1244.  
 On judgment, see Judgment, §§ 903-942.  
 Probate proceedings and actions relating to wills or probate, see Wills, §§ 302-421.  
 Settlement, signing, and filing of bill of exceptions, see Exceptions, Bill of, § 43.  
 Supplementary proceedings, see Execution, § 371.  
 To cancel written instrument, see Cancellation of Instruments, §§ 45, 47.  
 To construe will, see Wills, § 707.  
 To determine validity of municipal ordinances, see Municipal Corporations, § 121.  
 To enforce forfeiture for breach of conditions in deed, see Deeds, § 168.  
 To enforce lien for price of land sold, see Vendor and Purchaser, § 295.  
 To enforce right of action pledged, see Pledges, § 58.  
 To enforce taxes, see Taxation, §§ 549-608, 634, 641.  
 To establish and determine claims to property attached, see Attachment, §§ 302, 306.  
 To establish and enforce trust, see Trusts, §§ 359, 366.  
 To establish and protect easement, see Easements, § 61.  
 To establish boundaries, see Boundaries, §§ 37-54.  
 To establish drains, see Drains, §§ 25-35.  
 To foreclose mortgage, see Chattel Mortgages, § 288; Mortgages, § 463.  
 To procure liquor license, see Intoxicating Liquors, § 74.  
 To recover possession of mortgaged property, see Chattel Mortgages, § 173.  
 To recover possession of pledged property, see Pledges, § 33.  
 To reform written instrument, see Reformation of Instruments, § 45.  
 To restrain enforcement of taxes, see Schools and School Districts, § 107.  
 To restrain execution, see Execution, § 172.  
 To sell property of decedent, see Executors and Administrators, § 356.  
 To set aside fraudulent conveyance, see Fraudulent Conveyances, §§ 222-308.  
 To supply or restore records lost or destroyed, see Records, § 17.

#### *Particular proceedings in actions.*

See Abatement and Revival; Appearance; Continuance; Costs; Damages, §§ 153-228; Depositions; Evidence; Execution; Judgment; Jury; Limitation of Actions; Motions; New Trial; Parties; Pleading; Process; Stipulations; Tender; Trial; Venue.  
 Appointment of guardian ad litem or next friend, see Insane Persons, § 94.  
 Consolidation of actions, see Action, § 57.  
 Demurrer to evidence, see Trial, § 156.  
 Directing verdict, see Trial, §§ 168, 178.  
 Examination of witnesses, see Witnesses, §§ 240-277.  
 Instructions to jury, see Trial, §§ 191-296.  
 Revival of action, see Abatement and Revival, §§ 73, 77.  
 Settlement, signing, and filing of bill of exceptions, see Exceptions, Bill of, § 43.  
 Transfer of causes from one state court to another, see Courts, § 485.  
 Verdict, see Trial, §§ 351, 365.

*Particular remedies in or incident to actions.*  
 See Attachment; Depositions; Garnishment; Injunction; Receivers.

#### *Procedure in criminal prosecutions.*

See Arrest, § 62; Criminal Law; Indictment and Information; Jury.  
 For causing death, see Death, §§ 95, 99.  
 Habeas corpus proceedings, see Habeas Corpus.

#### *Procedure in exercise of special or limited jurisdiction.*

Bankruptcy, see Bankruptcy.  
 Equity, see Equity.  
 Justices' courts in civil cases, see Justices of the Peace, §§ 73-128.  
 Probate and administration, see Courts, § 202; Executors and Administrators, §§ 20, 350, 470.  
*Procedure in or by particular courts or tribunals.*

See Courts.  
 Courts of appellate jurisdiction in particular states, see Courts, §§ 231, 247.  
 Probate courts, see Courts, § 202.

#### *Procedure on review.*

See Appeal and Error; Criminal Law, §§ 1024-1189; Exceptions, Bill of; New Trial.  
 Probate proceedings, see Wills, § 384.

### PRAYER.

For instructions, see Criminal Law, §§ 825, 829; Trial, §§ 255-261.  
 For relief, see Pleading, § 72.

### PREDICATE.

For impeachment of witnesses, see Witnesses, § 388.

### PRE-EXISTING LIABILITY.

As consideration for bill or note, see Bills and Notes, § 94.

### PREFERENCES.

Affecting validity of conveyance as to creditors, see Fraudulent Conveyances, § 118.

### PREJUDICE.

Appeal by counsel to prejudice of jury, see Criminal Law, § 723.  
 Ground for reversal in civil actions, see Appeal and Error, §§ 1028-1073.  
 Ground for reversal in criminal cases, see Criminal Law, §§ 1165-1173.  
 To adverse party, element of laches, see Equity, § 73.

### PRELIMINARY EVIDENCE.

Proof of execution, and authentication of documents offered in evidence, see Evidence, § 372.

### PREMEDITATION.

Element of murder, see Homicide, §§ 156-159, 286.

### PREROGATIVE WRITS.

See Habeas Corpus; Mandamus; Prohibition.  
 Original jurisdiction of appellate courts, see Courts, § 207.

### PRESCRIPTION.

See Limitation of Actions.  
 Acquisition of rights, see Adverse Possession, § 13.

## PRESENTATION.

Of claims against estate of decedent, see Executors and Administrators, § 227.

## PRESUMPTIONS.

In civil actions, see Evidence, §§ 54-83.

On appeal or writ of error in civil actions, see Appeal and Error, §§ 901-938, 1031, 1091.

On appeal or writ of error in criminal prosecutions, see Criminal Law, §§ 1141, 1144.

## PRETENSE.

See False Pretenses; Fraud.

## PREVENTIVE RELIEF.

See Injunction.

## PRICE.

Of goods sold, see Sales, §§ 340, 359.

## PRINCIPAL AND AGENT.

See Master and Servant.

Criminal responsibility of agent for illegal sale of intoxicating liquors, see Intoxicating Liquors, § 160.

Declarations by agent as evidence against principal, see Evidence, § 241.

Independent contractors, see Master and Servant, § 318.

Agency in particular relations, offices, or occupations.

See Attorney and Client; Brokers; Husband and Wife, § 138; Railroads, § 17.

Agency of partner for firm, see Partnership, § 158.

Corporate agents, see Corporations, §§ 284, 310, 399-433.

### I. THE RELATION.

Brokers, see Brokers, § 8.

#### (A) Creation and Existence.

§ 23. In an action against a livery stable keeper for conversion of property, loaned to assist in showing a horse defendant agreed to sell for plaintiff, evidence *held* to sustain a finding that the person who actually received the property from plaintiff was defendant's agent in so doing.—Walker v. Lewis (Mo. App.) 567.

§ 23. In a broker's action against several defendants for commissions for procuring the sale of realty, evidence *held* to sustain a finding that one defendant authorized negotiations for the sale by another defendant, and that the latter and his son were the agents of another defendant in the transaction.—Sills v. Burge (Mo. App.) 605.

## II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

Attorneys, see Attorney and Client, §§ 123, 150.  
Corporate officers and agents, see Corporations, § 310.

#### (A) Execution of Agency.

§ 73. An agent employing a clerk *held* liable for the acts of the clerk converting money collected for the principal.—Thompson & Co. v. Taylor (Ky.) 357.

#### (B) Compensation and Lien of Agent.

Brokers, see Brokers, §§ 54-67, 84-88.

## III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Brokers, see Brokers, § 108.

Liability of master for injuries to third persons by acts or omissions of servants or independent contractors, see Master and Servant, §§ 302, 318.

#### (A) Powers of Agent.

Authority of agent of corporations in general, see Corporations, §§ 399-433.

Authority of attorney, see Attorney and Client, § 101.

Declarations by agent as evidence against principal, see Evidence, § 241.

§ 99. If a principal permit the agent to exercise certain powers continually, it is reasonable to imply authority to exercise them, as principals usually protest against such conduct if opposed to their wish.—Tyler Estate v. Hoffman (Mo. App.) 535.

§ 101. Where a manager of a cold storage plant who was clothed with power to execute contracts contracted with defendant to store apples, he was a general agent of his principal, and could not deny defendants the privileges held out to them, by the manager, as an inducement to enter into the contract.—Montgomery & Co. v. Arkansas Cold Storage & Ice Co. (Ark.) 768.

§ 101. The acts of an agent in procuring carriage of freight of his principal *held* binding on the principal.—Chesapeake & O. Ry. Co. v. Hall (Ky.) 372.

#### (B) Undisclosed Agency.

Set-off against agent in action by undisclosed principal, see Set-Off and Counterclaim, § 46.

#### (C) Unauthorized and Wrongful Acts.

Liability of carrier for larceny by agent, see Carriers, § 108.

Liability of municipal corporation for torts of officers and agents, see Municipal Corporations, § 747.

§ 157. The liability of an agent holding money to be paid on the happening of a contingency for payment of the money before the contingency happened, stated.—Conness v. Baird (Tex. Civ. App.) 113.

#### (D) Ratification.

Of acts of corporate officers and agents, see Corporations, § 426.

Of agency of husband for wife, see Husband and Wife, § 138.

#### (E) Notice to Agent.

Notice to insurance agents, see Insurance, § 378.

§ 177. A principal is affected with knowledge of all material facts of which the agent receives notice in the course of his employment.—Jackson County v. Schmid (Mo. App.) 1074.

#### (F) Actions.

Set-off against agent in action by undisclosed principal, see Set-Off and Counterclaim, § 46.

§ 190. In an action by an undisclosed principal for the price of goods sold by his agent, where the purchaser sought to set off a claim against the agent, evidence *held* sufficient to show that the claim sought to be set off existed at the time when the sale was completed.—John Munroe & Co. v. Adamo (Ky.) 296.

## PRINCIPAL AND SURETY.

See Indemnity.

Sureties on bonds of sheriff or constable, see Sheriffs and Constables, § 170.

**Sureties on bonds in judicial proceedings.**

See Injunction, § 241; Replevin, § 126.

Appeal or other proceeding for review, see Appeal and Error, §§ 1234, 1244.

**II. NATURE AND EXTENT OF LIABILITY OF SURETY.**

§ 86. A surety on a note executed since the enactment of the negotiable instruments law is primarily liable thereon, and hence presentment, demand, protest for nonpayment, and notice thereof are not necessary as to him.—Fritts v. Kirchdorfer (Ky.) 882.

**III. DISCHARGE OF SURETY.**

§ 95. If the holder of a note did not know of misrepresentations by the maker to sureties thereon as to the purpose of executing it, and took it in good faith in payment of an antecedent debt, when the maker represented to the sureties that it was given for another purpose, the sureties would be bound.—Lovelace v. Lovelace (Ky.) 400.

**V. RIGHTS AND REMEDIES OF SURETY.****(C) As to Co-Surety.**

Cross-complaint against co-surety, see Pleading, § 149.

Matters precluded by former adjudication, see Judgment, § 617.

Questions considered on appeal from judgment for contribution, see Appeal and Error, § 875. Transfer of cause from equity to law docket, see Trial, § 11.

Waiver of objections to cross-complaint, see Pleading, § 411.

§ 200. In view of Civ. Code Prac. § 661, and of another statute, *held*, that a co-surety may sue for contribution in equity as well as at law.—Fritts v. Kirchdorfer (Ky.) 882.

**PRIOR ADJUDICATION.**

Operation and effect in general, see Judgment, §§ 603, 617, 707-732.

**PRIORITIES.**

Of mortgages, see Chattel Mortgages, § 150.

**PRISONS.**

Payment of reward for return of escaped convict, see Rewards, § 14.

**PRIVATE NUISANCE.**

See Nuisance, §§ 7-54.

**PRIVATE ROADS.**

Defects in private crossing as affecting liability for killing stock, see Railroads, § 413. Right of way, see Easements.

**PRIVILEGE.**

License tax on privileges, see Licenses, § 7.

**PRIVITY.**

Admissions by privies, see Evidence, § 230. With party to action, conclusiveness of adjudication, see Judgment, §§ 707, 708.

**PROBABLE CAUSE.**

For prosecution, see Malicious Prosecution, §§ 20-24.

**PROBATE.**

Of will, see Wills, §§ 302-421.

**PROBATE COURTS.**

See Courts, § 202.

**PROBATE JUDGES.**

See Judges, § 36.

**PROCEDURE.**

See cross-references under Practice.

**PROCESS.****Particular forms of writs or other process.**

See Execution; Garnishment; Habeas Corpus; Mandamus; Prohibition; Replevin.

**II. SERVICE.****(A) Personal Service in General.**

§ 61. The service of process in another state on defendants residing there, in compliance with Rev. St. 1899, § 582 (Ann. St. 1906, p. 608), *held* to confer no jurisdiction over them.—Bick v. Maupin (Mo. App.) 588.

**(C) Publication or Other Notice.**

§ 96. The publication of process against non-resident individual defendants is not invalid because the affidavit of nonresidence on which the order of publication is based does not also allege that the defendants cannot be served with the ordinary process of law.—Hector v. Mann (Mo.) 1109; Same v. Warren (Mo.) 1119.

**(E) Return and Proof of Service.**

Measure of damages in action on bond of sheriff for false return, see Sheriffs and Constables, § 170.

Presumption of damages from breach of duty to make return, see Damages, § 4.

**IV. ABUSE OF PROCESS.**

Malicious prosecution, see Malicious Prosecution.

Wrongful garnishment, see Garnishment, § 248.

**PROFANITY.**

Profane swearing as disorderly conduct, see Disorderly Conduct.

**PROHIBITION.**

Against proceedings in other courts, concurrent and conflicting jurisdiction of state courts, see Courts, § 480.

Of traffic in intoxicating liquors, see Intoxicating Liquors.

Prohibitory injunction, see Injunction.

**II. JURISDICTION, PROCEEDINGS, AND RELIEF.**

§ 28. In prohibition to prevent respondent from entertaining further proceedings in a suit on the ground of want of jurisdiction of the subject-matter, questions which go to the merits of the case cannot be considered.—State ex rel. Gavin v. Muench (Mo.) 1124.

**PROMISE.**

See Contracts.

To answer for debt, default, or miscarriage of another, see Frauds, Statute of, § 26.

**PROMISSORY NOTES.**

See Bills and Notes.

**PROOF.**

See Criminal Law, §§ 304-560; Depositions; Evidence; Witnesses.  
 Amendment to conform to proof, see Pleading, § 237.  
 Burden of proof in general, see Evidence, §§ 91, 96.  
 Of claims against decedent's estate, see Executors and Administrators, § 227.  
 Of loss under insurance policy, see Insurance, § 559.  
 Pleading and proof, see Pleading, § 380.  
 Reception of evidence at trial of civil actions in general, see Trial, §§ 41-105.  
 Reception of evidence at trial of criminal causes in general, see Criminal Law, §§ 665-676.

**PROPERTY.**

Assets of estate of decedent, see Executors and Administrators, § 55.  
 Constitutional guaranty of right of property, see Constitutional Law, § 98.  
 Estates, see Estates.  
 Evidence of value or market price, see Evidence, §§ 113, 142, 525.  
 Exemptions, see Exemptions, §§ 40-61.  
 Subject of descent or distribution, see Descent and Distribution, § 8.  
 Subject of sale under order of court, see Executors and Administrators, § 329.

*Of particular classes of persons.*

See Corporations, § 443; Partnership, §§ 68, 181.  
 Infants, see Guardian and Ward, §§ 33, 43; Infants, § 31.  
 Married women, see Husband and Wife, §§ 115-179.

*Particular estates or interests.*

See Dower.  
 Community and separate property, see Husband and Wife, §§ 258-276.  
 Married woman's separate property, see Husband and Wife, §§ 115-179.

*Particular species of property.*

See Animals; Good Will; Improvements; Mines and Minerals; Waters and Water Courses.  
 Logs and lumber, see Logs and Logging.

*Remedies involving or affecting property.*

See Attachment; Ejectment; Execution; Forcible Entry and Detainer, §§ 4-20; Fraudulent Conveyances; Garnishment; Injunction, § 46; Partition; Quietening Title; Replevin; Specific Performance; Trespass, § 50; Trespass to Try Title; Trover and Conversion, § 29.

Bankruptcy proceedings, see Bankruptcy.  
 Enforcement of mechanics' liens, see Mechanics' Liens.

Establishment of boundaries, see Boundaries, §§ 37-54.

Establishment of claim to attached property, see Attachment, §§ 302, 306.

Foreclosure of mortgages, see Chattel Mortgages, §§ 249-288; Mortgages, §§ 341, 463.

Forfeiture for breach of condition in deed, see Deeds, § 168.

Injuries to property, damages, see Damages, §§ 108, 112.

Restraining execution, see Execution, § 172.  
 Setting aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, §§ 222-308.

*Transfers and other matters affecting title.*

See Adverse Possession; Assignments; Chattel Mortgages; Deeds; Descent and Distribution; Gifts; Mortgages; Partition; Pledges.  
 Conveyances, contracts, and other transactions between husband and wife, see Husband and Wife, §§ 41-49½.

Conveyances of mines and mineral lands, see Mines and Minerals, §§ 54, 55.  
 Dedication to public use, see Dedication.  
 Intermixture, see Confusion of Goods.  
 Sale, see Sales; Vendor and Purchaser.  
 Sale of property of decedent, see Executors and Administrators, §§ 329-330.  
 Sale of property of ward, see Guardian and Ward, § 43.  
 Taking for public use, see Eminent Domain.

*Offenses against or involving property.*

See Arson; Burglary; Forgery; Larceny; Nuisance; Threats.  
 Obtaining property by false pretenses, see False Pretenses.  
 Robbery, see Robbery.

§ 4. A building is not necessarily part of the real estate.—Marshall v. Moore (Mo. App.) 585.

**PROPOSALS.**

Bids for contracts with municipal corporations, see Municipal Corporations, § 335.

**PROPOSITIONS.**

Accompanying assignment of errors, see Appeal and Error, § 742.

**PROSECUTING ATTORNEYS.**

See District and Prosecuting Attorneys.

**PROVINCE OF COURT AND JURY.**

See Criminal Law, §§ 741-764; Trial, §§ 136-178, 191, 194.

**PROVISIONAL REMEDIES.**

See Attachment; Garnishment; Injunction; Receivers.

**PROVISO.**

In statutes, see Statutes, § 228.

**PROXIMATE CAUSE.**

Of injury in general, see Negligence, § 82.  
 Of injury from fire on or near railroad right of way, see Railroads, §§ 464, 465.  
 Of injury to animals on or near railroad tracks, see Railroads, § 425.  
 Of injury to servant, see Master and Servant, § 96.

**PUBLICATION.**

Of notice as to condition of grain in warehouse, see Warehousemen, § 8.  
 Of process, see Process, § 96.

**PUBLIC CORPORATIONS.**

See Counties; Municipal Corporations.

**PUBLIC DEBT.**

See Counties, § 192; Municipal Corporations, §§ 867, 966; Schools and School Districts, §§ 97-107.

**PUBLIC DOMAIN.**

See Public Lands.

**PUBLIC FUNDS.**

See Counties, § 192; Municipal Corporations, §§ 867, 966.

**PUBLIC GRANTS.**

See Public Lands.

**PUBLIC HIGHWAYS.**

See Highways.

**PUBLIC HOUSES.**

See Innkeepers.

**PUBLIC IMPROVEMENTS.**

See Drains; Highways; Municipal Corporations, §§ 280-449.

**PUBLIC LANDS.****III. DISPOSAL OF LANDS OF THE STATES.**

Cancellation of patent in trespass to try title, see Trespass to Try Title, § 47.

Relief awarded in trespass to try title to lands purchased, see Trespass to Try Title, § 47.

Validity of laws relating to sale as interference with vested rights, see Constitutional Law, § 93.

§ 173. Where the purchaser of school land, after cancellation for abandonment, voluntarily made a second application and was awarded a second allotment, he acquiesced in the cancellation of his first purchase.—*Williams v. Robison* (Tex.) 85.

§ 173. Under the facts, one who made a bid for school lands *held* not entitled to an award.—*Hobbs v. Robison* (Tex.) 89.

§ 173. Under Act 1883 (Acts 18th Leg. c. 55) every new county, whether organized or unorganized at the date of the passage of Act 1881 (Acts 17th Leg. c. 61), *held* entitled to four leagues of land for school purposes.—*Holmes v. Robison* (Tex.) 629.

§ 173. A certificate of three years' occupancy of school lands is not conclusive as against a claimant whose rights accrued before the issuance of the certificate.—*Gilmore v. Lockwood* (Tex. Civ. App.) 111.

§ 173. Under Acts 1895, pp. 63, 64, 65, 68, c. 47, §§ 3, 8, 9, 16, a purchaser of timber buying the land pursuant to the act *held* not obliged to settle on the land in order to get title.—*Hooks v. Kirby* (Tex. Civ. App.) 156.

§ 173. Acts 1901, p. 296, c. 125, § 8, *held* to change the law as fixed by Acts 1895, p. 68, c. 47, § 16, that an owner of timber could purchase the land itself without settling on the land.—*Hooks v. Kirby* (Tex. Civ. App.) 156.

§ 173. Acts 1895, p. 68, c. 47, § 16, *held* not to limit an owner of timber to purchase only the land on which timber is left at the time of the purchase.—*Hooks v. Kirby* (Tex. Civ. App.) 156.

§ 174. Land certificates prior to their location are personal property which may be transferred as any other chattel.—*McLain v. Pate* (Tex. Civ. App.) 718.

§ 176. A patent to school land *held* not subject to attack by subsequent purchaser of school land.—*Millar v. Ward* (Tex. Civ. App.) 440.

§ 178. A patent for a survey of land will not be held void because of difficulty in determining its locality, or because it is not susceptible of being located in the usual way, where there exists any means of identifying the land sought to be included.—*Finberg v. Gilbert* (Tex. Civ. App.) 979.

§ 178. A vendee of a purchaser of land, erroneously classified as "grazing land" *held* not an innocent purchaser as against an owner of timber, who purchased the land under the provisions of Acts 1895, p. 68, c. 47, § 16.—*Hooks v. Kirby* (Tex. Civ. App.) 156.

§ 178. A contractor agreeing to convey school land, when an action involving the title thereto should have terminated favorably to the contracting party, *held* not invalid.—*Hudman v. Henderson* (Tex. Civ. App.) 186.

**PUBLIC LAWS.**

See Statutes.

**PUBLIC NUISANCE.**

See Nuisance, § 75.

**PUBLIC PROSECUTORS.**

See District and Prosecuting Attorneys.

**PUBLIC RECORDS.**

See Records.

**PUBLIC REVENUE.**

See Taxation.

**PUBLIC SCHOOLS.**

See Schools and School Districts, §§ 10-131.

**PUBLIC SERVICE CORPORATIONS.**

See Carriers; Corporations; Railroads; Street Railroads; Warehousemen.

Interstate commerce laws, see Commerce.

Telegraph and telephone companies, see Telegraphs and Telephones.

**PUBLIC USE.**

Dedication of property, see Dedication.

Taking property for public use in general, see Eminent Domain.

**PUBLIC WAYS.**

See Highways; Municipal Corporations, §§ 750-822.

**PUBLIC WORKS.**

See Drains; Highways; Municipal Corporations, §§ 280-449.

**PUNISHMENT.**

For crime in general, see Criminal Law, § 1223. For larceny, see Larceny, § 83.

**PUNITIVE DAMAGES.**

See Damages, § 215.

**PURCHASERS.**

See Sales; Vendor and Purchaser.

**QUALIFICATIONS.**

Of expert witnesses, see Evidence, § 537.

Of municipal officers, see Municipal Corporations, § 145.

Of witnesses in general, see Witnesses, §§ 40-160.

**QUALIFIED FEE.**

Construction of wills, see Wills, § 602.

**QUANTUM MERUIT.**

See Work and Labor.

**QUASHING.**

Garnishment proceedings, see Garnishment, § 97.

Indictment or information, see Indictment and Information, § 140.

## QUESTIONS OF LAW AND FACT.

In civil actions, see Trial, §§ 136-178, 191, 194.  
In criminal prosecutions, see Criminal Law, §§ 741-764.

## QUIA TIMET.

See Quieting Title.

## QUIETING TITLE.

Tax titles, see Taxation, § 805.

## II. PROCEEDINGS AND RELIEF.

Conclusiveness of judgment as to persons not parties, see Judgment, § 707.

§ 29. A suit to quiet title *held* barred by laches.—Blank v. Huddleston (Ark.) 786.

## QUITCLAIM.

Grantee in quitclaim deed as bona fide purchaser, see Vendor and Purchaser, § 224.

## QUO WARRANTO.

Original jurisdiction of Supreme Court, see Courts, § 207.

## RAILROADS.

See Street Railroads.

As employers, see Master and Servant.

Carriage of goods and passengers, see Carriers.  
Concurrent regulations by state and United States of hours of service of employé, see Commerce, §§ 8, 58.

Power of Congress to prescribe qualifications, duties and liabilities, of employes of railroads engaged in interstate commerce, see Commerce, § 8.

Relief department for employes, effect of receipt of benefits on liability of railroad for injury to employé, see Master and Servant, § 100.

Taxation, see Taxation, § 145.

## I. CONTROL AND REGULATION IN GENERAL.

Regulation of, as regulation of commerce, see Commerce, § 58.

## II. RAILROAD COMPANIES.

Evidence of authority of station agent, see Corporations, § 432.

Liability of railroad company for spread of contagious disease through negligence of servants, see Negligence, § 1.

§ 17. The rights of a person entering into a contract to perform services for a railroad company with its station agent do not depend upon the actual limitations placed on the agent's authority, but upon the apparent scope of his authority and the conduct of the company subsequent to his employment.—Cincinnati, N. O. & T. P. R. Co. v. Ashurst (Ky.) 303.

§ 22. Under Laws 1901, c. 27, an action for injuries to a brakeman on a sawmill railroad *held* triable in the county where plaintiff resided and the injury occurred, though the defendant receivers of the sawmill company and the company had their principal office in another county.—Receivers of Kirby Lumber Co. v. Lloyd (Tex.) 903.

## V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

Acquisition of rights under power of eminent domain, see Eminent Domain.

Condemnation of property for right of way, elements of compensation, see Eminent Domain, § 98.

Injuries to surface soil by mining, see Mines and Minerals, § 122.

## VIII. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES.

(A) Nature and Extent of Liabilities.

§ 161. Under Kirby's Dig. §§ 6661-6663 *held* that a lien against a railroad for injuries not incorporated in a judgment for the injury when rendered could not be incorporated by amendment after expiration of the term.—St. Louis & N. A. R. Co. v. Bratton (Ark.) 752.

## X. OPERATION.

Carriage of passengers, see Carriers, §§ 234-400.

Injuries to employes, see Master and Servant, §§ 92-296.

(B) Statutory, Municipal, and Official Regulations.

§ 244. An inspection car of a railroad *held* a locomotive engine within a city ordinance and Rev. St. 1899, § 1102 (Ann. St. 1906, p. 938).—Mudd v. Missouri, K. & T. Ry. Co. (Mo. App.) 59.

(C) Companies and Persons Liable for Injuries.

Care required of lessee as to passengers, see Carriers, § 306.

Injuries to passengers, see Carriers, § 306.

(D) Injuries to Licensees or Trespassers in General.

Assumptions as to facts in instructions, see Trial, § 191.

Ejection from passenger trains, see Carriers, §§ 356-381.

§ 274. A carrier *held*, as a matter of law not guilty of negligence in permitting a wheel to remain in a dangerous position on a depot platform.—Kasey's Adm'r v. Louisville, H. & St. L. Ry. Co. (Ky.) 380.

§ 274. The servants of a railway company *held* bound to exercise ordinary care to prevent injuring persons rightfully on a depot platform.—International & G. N. Ry. Co. v. Kent (Tex. Civ. App.) 179.

§ 275. A railroad crew must anticipate the presence of persons about a car on a private siding not ready to be moved, in charge of the shipper, and should not bump against it without notice.—Pittsburg, C., C. & St. L. Ry. Co. v. Schaub (Ky.) 885.

§ 275. A car wheel company maintaining a switch track connected with a railroad, placing a barrier on the track to separate the part on which repair work should be done from that on which switching cars should be done, need not provide a barrier sufficient to withstand an unusual and unnecessary impact of a car against the barrier.—Houston & T. C. R. Co. v. Hanks (Tex. Civ. App.) 136.

§ 278. In an action against a railroad company for personal injuries from stepping on a spike in a plank left exposed by defendant's servants in repairing a station platform, plaintiff *held* as a matter of law guilty of contributory negligence, barring a recovery.—Hanna v. St. Louis & S. F. R. R. Co. (Ark.) 514.

§ 278. The general rule that the question whether a person injured on a railroad platform

is blameless in his own conduct is for the jury *held* not to apply where the danger is known to the injured person, and he takes no precaution whatever for his own safety.—*Hanna v. St. Louis & S. F. R. R. Co.* (Ark.) 514.

§ 278. In an action for injuries to plaintiff on defendant's depot platform, evidence *held* not to show that he assumed the risk.—*International & G. N. Ry. Co. v. Kent* (Tex. Civ. App.) 179.

§ 279. The liability of a railroad for the act of its switching crew engaged in switching cars on the track of a manufacturer, causing injury to an employe of the manufacturer, *held* to depend on the negligence of the crew, and of the employe's guilt or innocence of contributory negligence.—*Houston & T. C. R. Co. v. Hanks* (Tex. Civ. App.) 136.

§ 281. Members of a switching crew engaged in switching cars on the track of a manufacturer *held* the servants of the railroad, making it liable for their negligence.—*Houston & T. C. R. Co. v. Hanks* (Tex. Civ. App.) 136.

§ 281. The act of a railroad section foreman in bringing his child afflicted with smallpox to a section house *held* not within the scope of his employment.—*Melody v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 702.

§ 282. In an action for injuries to plaintiff while working on a flat car, caused by a collision with loaded cars allowed to run down the track, *held*, under the pleading and evidence, that it was not error to fail to limit the jury in determining defendant's negligence to the consideration of the acts of the persons on the loaded cars alone.—*Chesapeake & O. Ry. Co. v. Conley* (Ky.) 861.

§ 282. Injuries to a workman on a flat car on defendant's side track *held* caused by a reckless disregard of life on the part of defendant's servants, justifying a recovery of exemplary damages.—*Chesapeake & O. Ry. Co. v. Conley* (Ky.) 861.

§ 282. In a suit for injury to a person at work under a box car on a siding when other cars are pushed thereon, *held* that he sufficiently stated his case for negligence against the railway company.—*Pittsburg, C., C. & St. L. Ry. Co. v. Schaub* (Ky.) 885.

§ 282. In an action for injuries to plaintiff on defendant's depot platform, evidence *held* to make the question of his contributory negligence one for the jury.—*International & G. N. Ry. Co. v. Kent* (Tex. Civ. App.) 179.

#### (F) Accidents at Crossings.

Admissibility of negative evidence, see Evidence, § 147.

§ 327. The law does not require one to stop, look, and listen before crossing a railroad track, but only to exercise ordinary care.—*Chesapeake & O. Ry. Co. v. Hawkins* (Ky.) 836.

§ 347. Evidence as to speed *held* admissible on the question of contributory negligence.—*Chesapeake & O. Ry. Co. v. Brashear's Adm'r* (Ky.) 277.

§ 350. The weight of testimony of witnesses, who were in a position to have heard the whistle on an approaching train, that it was not sounded, is for the jury.—*Chesapeake & O. Ry. Co. v. Brashear's Adm'r* (Ky.) 277.

§ 350. In an action for injuries at a railroad crossing, whether plaintiff exercised ordinary care *held* for the jury.—*Chesapeake & O. Ry. Co. v. Hawkins* (Ky.) 836.

§ 350. In an action for the death of a child while attempting to pass under a train, the question whether ordinary care required the conductor to look if persons were under the train before starting it *held* for the jury.—*Missouri, K. & T. Ry. Co. of Texas v. Kemendo*

(Tex. Civ. App.) 968.

#### (G) Injuries to Persons on or near Tracks.

Injuries to persons on or near street railroad tracks, see Street Railroads, §§ 81-103.

Positive and negative testimony, see Evidence, § 586.

§ 360. A railroad company is not liable for injuries resulting from plaintiff's team running away on taking fright at the ordinary noise by the sudden escape of steam from a locomotive.—*Ford v. Houston & T. C. R. Co.* (Tex. Civ. App.) 715.

§ 376. Trainmen *held* not negligent in operating the train after discovering decedent's peril on the track.—*Cobb's Adm'r v. Louisville & N. R. Co.* (Ky.) 831.

§ 377. Duty of trainmen, upon seeing one upon the track, stated.—*Cobb's Adm'r v. Louisville & N. R. Co.* (Ky.) 831.

§ 381. One who voluntarily undertakes to drive through railroad yards for his own convenience rather than to drive further around assumes the risk of his team becoming frightened at steam suddenly escaping from a locomotive.—*Ford v. Houston & T. C. R. Co.* (Tex. Civ. App.) 715.

§ 398. Evidence *held* to show that the noise from escaping steam which frightened plaintiff's team causing it to run away was the ordinary and usual noise made by steam escaping from the safety valve of a steam engine.—*Ford v. Houston & T. C. R. Co.* (Tex. Civ. App.) 715.

#### (H) Injuries to Animals on or near Tracks.

Admissions in answer, see Pleading, § 129.

§ 407. Trainmen not knowing of the presence of a horse near the track do not make the railroad liable for frightening the horse by noises unless they are unusual and unnecessary.—*Christie v. Louisville & N. R. Co.* (Ky.) 796.

§ 413. Under Sayles' Ann. Civ. St. 1897, art. 4427, *held* that, where a railway put in a crossing and gates not required under the statute, they were liable for injury to animals escaping onto the tracks through these gates.—*Chicago, R. I. & G. Ry. Co. v. Wilson* (Tex. Civ. App.) 132.

§ 415. A railroad *held* under no duty to keep a lookout for an animal unlawfully running at large.—*Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Tex. Civ. App.) 738.

§ 419. A railroad *held* under no duty to look out for a horse on the track until the horse is discovered in a place where it is reasonably to be expected that he will be injured.—*Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Tex. Civ. App.) 738.

§ 419. Employes of a railroad must exercise ordinary care to avoid injuring animals unlawfully running at large, if they know of their presence.—*Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Tex. Civ. App.) 993.

§ 421. Although a mare was a trespasser on a railroad track, if the negligence of the railroad company's employes was the proximate cause of her death, the company is liable.—*Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Tex. Civ. App.) 993.

§ 425. A finding that negligence in the operation of a train at an excessive speed was the proximate cause of the killing of an animal on the track cannot be sustained in the absence of proof of causal connection between the negligence found and the accident.—*Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Tex. Civ. App.) 738.

§ 439. The petition in an action for double damage for killing stock under Rev. St. 1890,

§ 1105 (Ann. St. 1906, p. 945), *held* sufficient as against a demurrer.—*Creason v. Missouri, K. & T. Ry. Co.* (Mo. App.) 572.

§ 441. One suing a railroad for frightening his horse by permitting the engine to emit steam has the burden of proving that the cylinder cocks were kept open longer than necessary.—*Christie v. Louisville & N. R. Co.* (Ky.) 796.

§ 441. Under Comp. Laws N. M. 1897, §§ 98, 241, 242, the owner of an animal killed on a railroad track cannot recover without proof of negligence, independent of sections 241, 242.—*Porter v. El Paso & S. W. Ry. Co.* (Tex. Civ. App.) 708.

§ 441. Where because an animal was unlawfully running at large the railroad owed no duty to look out for the animal, it could not be presumed from the fact that the track was straight where the animal was killed, and the view unobstructed, that the employees discovered the animal on the track.—*Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Tex. Civ. App.) 738.

§ 443. Evidence in an action against a railroad company for killing animals on its track *held* to warrant a finding that the injury occurred in the county alleged in the complaint.—*St. Louis, I. M. & S. R. Co. v. Weatherly* (Ark.) 1031.

§ 443. Evidence in an action against a railroad for frightening a horse *held* not to show negligence in the operation of the train.—*Christie v. Louisville & N. R. Co.* (Ky.) 796.

§ 443. In an action for the killing of a horse, unlawfully running at large, by a train running at an excessive speed, evidence *held* insufficient to show that the railroad employees discovered the horse to be where he might be expected to be injured by the train in the manner they operated it.—*Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Tex. Civ. App.) 738.

§ 443. In an action for the death of a mare struck by defendant's train, evidence *held* to sustain a finding that the negligence of defendant's employees running the train at a speed forbidden by an ordinance was the proximate cause of the injury.—*Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Tex. Civ. App.) 993.

§ 446. In an action against a railroad company for killing animals on its track, evidence *held* sufficient to carry the question of the company's negligence to the jury.—*St. Louis, I. M. & S. R. Co. v. Weatherly* (Ark.) 1031.

#### (I) Fires.

Amendment to conform to proofs, see Pleading, § 237.

Best and secondary evidence, see Evidence, § 174.

Hearsay evidence, see Evidence, § 318.

Measure of damages for injuries to grass, see Damages, § 112.

Opinion evidence, see Evidence, §§ 471, 501.

Responsiveness of answers to interrogatories as to origin of fire, see Depositions, § 64.

§ 454. Statement of duty of railroad as to spark arresters on locomotive.—*Texas Cent. R. Co. v. Qualls* (Tex. Civ. App.) 140.

§ 457. The servants of a railroad going to the rescue of property threatened by destruction by fire set by an engine *held* required to use ordinary care to see that the fire is put out before leaving.—*Ft. Worth & D. C. Ry. Co. v. Arthur* (Tex. Civ. App.) 213.

§ 464. The burden of proof in an action against a railroad for injuries by fire stated. Rev. St. 1899, § 1111 (Ann. St. 1906, p. 963).—*Waddell v. Chicago & A. Ry. Co.* (Mo. App.) 588.

§ 465. A fire set by an engine *held* the proximate cause of the destruction of a building.—

*Ft. Worth & D. C. Ry. Co. v. Arthur* (Tex. Civ. App.) 213.

§ 478. A petition in an action against a railroad for fire set by engines *held* to state a cause of action.—*Illinois Cent. R. Co. v. Frost* (Ky.) 821.

§ 481. Evidence *held* admissible in an action for fire set by a locomotive to rebut evidence that defendant's engines were properly equipped with spark arresters.—*Texas Cent. R. Co. v. Qualls* (Tex. Civ. App.) 140.

§ 482. Evidence *held* sufficient to authorize a finding that hot journal boxes on a freight car set fire to hay.—*Chicago, R. I. & P. Ry. Co. v. Dyal* (Ark.) 771.

§ 482. Evidence *held* to furnish the jury a basis on which to enable them to reach a fair valuation of a fence destroyed by fire.—*Illinois Cent. R. Co. v. Frost* (Ky.) 821.

§ 484. Evidence *held* to raise a question for the jury whether the fire which destroyed plaintiff's property was caused by sparks from defendant's locomotive.—*Vanderburgh v. St. Louis & S. F. R. Co.* (Mo. App.) 563.

§ 484. Whether a fire was set by one of defendant's locomotives *held* for the jury.—*Waddell v. Chicago & A. Ry. Co.* (Mo. App.) 588.

§ 484. Negligence of defendant in a certain respect *held* improperly submitted to the jury as a ground of recovery; it not having been pleaded or proved.—*Texas Cent. R. Co. v. Qualls* (Tex. Civ. App.) 140.

## RAPE.

Grounds for continuance, see Criminal Law, § 595.

## I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 6. Force *held* not essential to statutory rape under Ky. St. § 1155 (Russell's St. § 3773).—*Perkins v. Commonwealth* (Ky.) 794.

§ 13. Unlawful assault *held* not essential to statutory rape under Ky. St. § 1155 (Russell's St. § 3773).—*Perkins v. Commonwealth* (Ky.) 794.

## II. PROSECUTION AND PUNISHMENT.

### (A) Indictment and Information.

Election between counts, see Indictment and Information, § 132.

§ 35. A variance in the name of prosecutrix as recited in an indictment for rape and her real name as it appeared from her testimony *held* immaterial, the names being idem sonans.—*Howan v. State* (Tex. Cr. App.) 668.

### (B) Evidence.

Best and secondary evidence, see Criminal Law, § 308.

Opinion evidence, see Criminal Law, § 448.

§ 43. In a prosecution for rape evidence that the prosecutrix gave birth to the child some nine months after she testified that she had intercourse with defendant was competent.—*Druin v. Commonwealth* (Ky.) 866.

§ 44. In a prosecution for rape, evidence that accused gave prosecutrix some candies and a ring prior to the alleged intercourse, which was obtained with prosecutrix's consent, *held* admissible.—*Rowan v. State* (Tex. Cr. App.) 668.

§ 52. Evidence on statutory rape *held* to authorize a finding that prosecutrix was under 16 years old.—*Perkins v. Commonwealth* (Ky.) 794.

§ 52. Evidence *held* sufficient to warrant a conviction of statutory rape.—*Perkins v. Commonwealth* (Ky.) 794.

§ 54. In a prosecution for rape, evidence *held* to sustain a verdict of guilty.—*Druin v. Commonwealth* (Ky.) 856.

#### (C) Trial and Review.

Harmless error, see Criminal Law, § 1169.  
Separation and exclusion of witnesses, see Criminal Law, § 665.

§ 59. On proper evidence *held* on a prosecution under Ky. St. § 1155 (Russell's St. § 3773), for statutory rape, the question of attempt, punishable under section 1153, is properly submitted.—*Perkins v. Commonwealth* (Ky.) 794.

### RATE.

Transportation rates, see Carriers, § 253.

### RATIFICATION.

Of acts of others as ground of estoppel in pais, see Estoppel, § 02.  
Of acts of members of corporation, see Corporations, § 518.  
Of acts of officers and agents of corporations in general, see Corporations, § 426.

### REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer, §§ 4-29; Trespass to Try Title.

### REAL ESTATE AGENTS.

See Brokers.

### REAL PROPERTY.

See Property; Use and Occupation.  
Assets of estate of decedent, see Executors and Administrators, §§ 130-148.  
Conveyances, see Deeds; Vendor and Purchaser.  
Effect of statute of frauds on agreements relating to real property, see Frauds, Statute of, §§ 69, 70.  
Injuries, damages, see Damages, §§ 108, 112.  
Injuries in operation of mines, see Mines and Minerals, § 122.  
Liabilities of heirs for debts of intestate, see Descent and Distribution, § 125.  
Liens for improvements, see Mechanics' Liens.  
Mortgage, see Mortgages.  
Partnership real estate, see Partnership, § 68.  
Remedies involving or affecting, see Ejectment; Forcible Entry and Detainer, §§ 4-29; Trespass to Try Title.  
Restraining trespass or other injury, see Injunction, § 46.  
Sales by executors or administrators, see Executors and Administrators, §§ 329-390.  
Suspension of absolute power of alienation, see Perpetuities, § 6.  
Trespass to, see Trespass.

### REBUTTAL

Evidence admissible in rebuttal by reason of admission of similar evidence of adverse party, see Criminal Law, § 396.  
Of presumption of death from absence, see Death, § 2.

### RECEIPTS.

Parol evidence to explain, see Evidence, § 450.

### RECEIVERS.

Of corporations in general, see Corporations, § 550.  
Of insurance companies, see Insurance, § 70.

### I. NATURE AND GROUNDS OF RECEIVERSHIP.

#### (B) Grounds of Appointment of Receiver.

§ 12. Conditions precedent to appointment of receiver in an action for recovery of an interest in real estate stated. Rev. St. art. 1465.—*Hardy Oil Co. v. Burnham* (Tex. Civ. App.) 221.

### II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 38. In trespass to try title, wherein plaintiffs sought the appointment of a receiver, evidence *held* insufficient to show that plaintiffs would probably succeed upon a final trial.—*Hardy Oil Co. v. Burnham* (Tex. Civ. App.) 221.

### IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

#### (A) Administration in General.

§ 82. On appointment of a receiver in an action to recover an interest in land, *held* not necessary to authorize the receiver to take charge of a certain portion of the output of oil from the land.—*Hardy Oil Co. v. Burnham* (Tex. Civ. App.) 221.

#### (D) Sale and Conveyance or Redelivery of Property.

§ 143. Where defendant became the owner of a water company at a receiver's sale, and had no notice of the company's agreement with plaintiff to maintain a bridge, and did not agree to maintain it, it was not liable for plaintiff's expenses in repairing it.—*Abilene Light & Water Co. v. Clack* (Tex. Civ. App.) 201.

### RECEPTION.

Of evidence at trial, see Criminal Law, §§ 665-676; Homicide, § 286; Trial, §§ 41-105.

### RECIPROCITY.

Reciprocal trade agreements with foreign nations, see Customs Duties, § 11.

### RECOGNIZANCES.

Security for costs, see Costs, § 110.

### RECONVENTION.

See Set-Off and Counterclaim.

### RECORDS.

Secondary evidence of train records, see Evidence, § 174.

Train records as hearsay, see Evidence, § 318.  
Validity of deed not referring to record of conveyance to grantor's grantor, see Deeds, § 26.

*Of particular facts, acts, instruments, or proceedings not judicial.*

See Chattel Mortgages, § 150.

Dedication of property to public use, see Dedication, § 19.

#### *Of judicial proceedings.*

Abstracts or record on appeal, see Appeal and Error, §§ 580-592.

Approval of partition sale, see Partition, § 106.  
Transcript on appeal or writ of error, see Appeal and Error, §§ 511-699; Criminal Law, §§ 1090-1124.

*Records as notice, and as affecting priorities.*  
See Chattel Mortgages, § 150; Vendor and Purchaser, § 231.

§ 17. Loss of an execution under which land had been sold did not affect the purchaser's rights thereunder.—*Miller v. Goodin* (Ky.) 818.

## RECOUPMENT.

See Set-Off and Counterclaim.

## REDEMPTION.

From mortgage sale, see Chattel Mortgages, § 295; Mortgages, § 594.

## REFERENCE.

See Arbitration and Award.

## III. REPORT AND FINDINGS.

Presumptions on appeal or writ of error, see Appeal and Error, § 931.

## REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

## II. PROCEEDINGS AND RELIEF.

§ 45. The evidence necessary to correct a mistake in a deed, or to establish a right inconsistent with its provisions, must be clear and convincing.—*Mahoning Coal Co. v. Dowling* (Ky.) 370.

## REFRESHING MEMORY.

See Witnesses, § 255.

## REFRIGERATOR CARS.

Duties of carriers, see Carriers, § 117.

## REGISTERS OF DEEDS.

See Records.

## REGISTRATION.

See Records.

Of physicians and surgeons, see Physicians and Surgeons, § 5.

## REHEARING.

See New Trial.

On appeal or writ of error, see Appeal and Error, §§ 832, 835.

## REINSTATEMENT.

Of claim to public lands, see Public Lands, § 173.

## RELATIONSHIP.

Disqualification of witness by relationship, to party, see Witnesses, § 53.

Element of incest, see Incest, § 5.

## RELATORS.

In mandamus proceedings, see Mandamus, § 23.

## RELEASE.

See Compromise and Settlement; Payment.

Of particular classes of rights and liabilities.

Liability as surety, see Principal and Surety, § 95.

Liability of carrier in respect to goods, see Carriers, § 156.

Liability of master for future injuries to servant, see Master and Servant, § 100.

## I. REQUISITES AND VALIDITY.

Authority of attorney to execute, see Attorney and Client, § 101.

§ 16. A release of all claim for damages sustained by reason of personal injuries, held not avoided because the parties were mistaken as to the extent of the injuries.—*San Antonio & A. P. Ry. Co. v. Polka* (Tex. Civ. App.) 226.

## III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 58. In an action to recover the balance due on a life insurance policy, evidence held not to conclusively show a valuable consideration for a release of her claim executed by plaintiff.—*Metropolitan Life Ins. Co. v. Lennox* (Tex.) 623.

§ 58. In an action for a servant's death, in which defendant pleaded a release of all claim for damages executed by decedent, evidence held not to raise the issue of decedent's want of mental capacity to understand the nature and effect of his acts when he executed the release.—*San Antonio & A. P. Ry. Co. v. Polka* (Tex. Civ. App.) 226.

## RELEVANCY.

Of evidence, see Criminal Law, §§ 338-366; Evidence, §§ 100, 113.

## RELIEF ASSOCIATION OR DEPARTMENT.

For employes, effect on liability of employer for injuries to employe, see Master and Servant, § 100.

## REMAINDERS.

Duties and liabilities of life tenants as to remaindermen, see Life Estates.  
Merger in fee, see Estates, § 10.  
Vested or contingent construction of will, see Wills, § 634.

## REMAND.

Of cause by appellate court, see Appeal and Error, § 1207.

## REMEDIES.

See Action.

## REMEDY OVER.

Against person primarily liable in general, see Indemnity, § 13.

Contribution among sureties, see Principal and Surety, § 200.

## REMISSION.

Of debt, see Release.

## REMITTITUR.

Of cause by appellate court, see Appeal and Error, § 1207.

## RE MOTENESS.

Of limitations in deed, will, or declaration of trust, see Perpetuities.

## REMOVAL.

From homestead, see Homestead, §§ 161-163.

Of fences, see Fences, § 28.

Of passengers or intruders from passenger trains, see Carriers, §§ 356-381.

## REMOVAL OF CAUSES.

Change of venue or place of trial, see Venue, §§ 45, 58.  
Transfer of causes from one state court to another, see Courts, § 485.

## REMOVAL OF CLOUD.

See Quieting Title.

## RENDITION.

Of judgment, see Judgment, §§ 190-213, 235, 252-256.

## RENEWAL.

Of cause of action barred, or against which limitation has commenced to run, see Limitation of Actions, §§ 157-163.  
Of lease, see Landlord and Tenant, § 86.

## RENT.

Rights as between vendor and purchaser, see Vendor and Purchaser, § 196.  
Right of husband to rents on wife's separate estate, see Husband and Wife, § 125.

## REPAIRS.

See Improvements.

## REPEAL.

Of constitution, see Constitutional Law, § 1/2.  
Of statute, see Statutes, §§ 158-167.

## REPETITION.

Of instructions, see Trial, § 260.

## REPLEVIN.

Of mortgaged property, see Chattel Mortgages, § 173.

### I. RIGHT OF ACTION AND DEFENSES.

Presumptions on appeal, see Appeal and Error, § 909.

§ 4. An owner of land from which ore has wrongfully been taken by another, may replevy it.—Meeks v. Clear Jack Mining Co. (Mo. App.) 1084.

§ 8. Plaintiff must recover in replevin on the strength of his own title.—Holbrook v. Neely (Ark.) 1025.

§ 8. Plaintiff in replevin must show a general or special interest in and a right to immediate and exclusive possession of the property detained.—Moriund v. Johnson (Mo. App.) 80.

§ 8. Replevin can only be maintained by one having a general or special interest in the property replevied.—Meeks v. Clear Jack Mining Co. (Mo. App.) 1084.

§ 12. Defendant in replevin may show title or right of possession in a third person.—Moriund v. Johnson (Mo. App.) 80.

### III. PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY.

Presumptions as to approval of replevin bond, see Evidence, § 54.

§ 48. The denial of a motion to postpone the trial in replevin until the property had been redelivered to defendant *held* proper.—Meeks v. Clear Jack Mining Co. (Mo. App.) 1084.

## IV. PLEADING AND EVIDENCE.

Admissibility of evidence as to sale, see Sales, § 87.

In justice court, see Justices of the Peace, § 104.

§ 57. Where, in replevin, the affidavit stated the value of the property, and that it had not been seized under any process, execution, or attachment, the petition was sufficient, though it did not state such facts.—Marshall v. Moore (Mo. App.) 585.

## V. DAMAGES.

§ 82. In replevin for a steam shovel and for damages for its detention, verdict of \$1,650 *held* not excessive.—Cullin-McCurdy Const. Co. v. Vulcan Iron Works (Ark.) 1023.

§ 84. Measure of damages in replevin for the purpose of the alternative judgment stated.—Nashville Lumber Co. v. Barefield (Ark.) 758.

§ 84. A purchaser of standing timber from the dower land of a widow *held* liable in replevin for the value without deduction for money or labor expended.—Nashville Lumber Co. v. Barefield (Ark.) 758.

## VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

Amendment of judgment, see Judgment, § 305.

§ 88. In replevin for a mare, evidence *held* to make it a jury question whether plaintiff had title to the mare and a right to recover it, so that it was error to direct a verdict for him.—Holbrook v. Neely (Ark.) 1025.

§ 91. In replevin to recover a mule *held*, under the evidence, that it was not error to instruct that, if there was anything due on the purchase price of the mule, the verdict must be for plaintiff.—King v. Black (Ark.) 237.

## VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 126. Bond in replevin to authorize summary judgment against plaintiff and his sureties, under Rev. St. 1899, c. 56, § 4474 (Ann. St. 1906, p. 2453), *held* required to have been delivered to and approved by the sheriff according to section 4465.—Huttig-McDermid Pearl Button Co. v. Springfield Shirt Co. (Mo. App.) 1094.

## REPORTS.

Judicial notice of matters appearing in reports, see Evidence, § 43.

## REPRESENTATION.

Of client by attorney, see Attorney and Client, § 101.

Of corporation by officers and agents, see Corporations, §§ 399-435.

Of principal by agent, see Brokers, § 106.

## REPRESENTATIONS.

False representations, see False Pretenses; Fraud.

## REPRESENTATIVES.

Construction of words "legal representative," see Insurance, § 785.

Personal representatives, see Executors and Administrators.

## REPUDIATION.

Of act of officer or agent of corporation, see Corporations, § 426.

**REPUGNANCY.**

Implied repeal of statute by inconsistent or repugnant act, see Statutes, § 159.  
In description of boundaries, see Boundaries, § 3.  
In instructions to jury, see Criminal Law, § 810; Trial, § 243.

**REPUTATION.**

Of witness, see Witnesses, §§ 344-355.

**REQUESTS.**

For findings by jury, see Trial, § 351.  
For instructions, see Criminal Law, §§ 825, 829; Trial, §§ 255-261.  
For instructions, necessity for purposes of review, see Appeal and Error, § 216.

**RESALE.**

Of goods by seller, see Sales, § 339.

**RESCISSION.**

Cancellation of written instrument, see Cancellation of Instruments.  
Of contract of sale, see Vendor and Purchaser, §§ 82, 93.  
Of contract or conveyance of infant, see Infants, § 31.  
Of insurance policy, see Insurance, § 248.

**RESERVATIONS.**

Of minerals and mining rights, see Mines and Minerals, § 55.

**RES GESTÆ.**

In civil actions, see Evidence, §§ 127, 128.  
In criminal prosecutions, see Criminal Law, § 368.

**RESIDENCE.**

Affecting liability to give security for costs, see Costs, § 110.

**RES IPSA LOQUITUR.**

Negligence in general, see Negligence, § 121.  
Negligence of carrier, see Carriers, § 316.

**RES JUDICATA.**

See Judgment, §§ 603, 617, 707-732.  
Former decision as law of the case, see Appeal and Error, § 1097.

**RESPONDEAT SUPERIOR.**

See Master and Servant, §§ 302, 318; Principal and Agent, § 157.

**RESTORATION.**

Of consideration as condition precedent of action to set aside sale of property of decedent, see Executors and Administrators, § 380.  
Of lost records, see Records, § 17.

**RESTRAINT OF TRADE.**

Restraining breach of contracts in restraint of trade, see Injunction, § 61.

**RESTRICTIONS.**

On creation of perpetuities, see Perpetuities.

**RESTRICTIVE COVENANTS.**

Restraining breach, see Injunction, §§ 59, 61.

**RESULTING TRUSTS.**

See Trusts, § 89.

**RETENTION.**

Of possession or apparent title by grantor as element of fraud as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 146.

**RETURN.**

Of consideration as condition precedent of action to set aside sale of property of decedent, see Executors and Administrators, § 380.  
Of deposition, see Depositions, §§ 75, 78.  
Of record for purpose of review, see Criminal Law, § 1104.

**REVENUE.**

See Customs Duties; Taxation.

**REVERSAL.**

Of judgment or order in civil actions, see Appeal and Error, §§ 1169-1171.  
Of judgment or order in criminal prosecutions, see Criminal Law, §§ 1186, 1189.

**REVERSIONS.**

Merger in fee, see Estates, § 10.

**REVIEW.**

See Appeal and Error; Criminal Law, §§ 1024-1189; Habeas Corpus.  
Existence of remedy by petition for review as affecting right to writ of error, see Appeal and Error, § 10.  
Of judgment, in same court, see Judgment, §§ 294-314.  
Petition in nature of bill of review to obtain new trial, see New Trial, § 166.

**REVISION.**

Of statutes as constituting implied repeal, see Statutes, § 167.

**REVIVAL.**

Of action, see Abatement and Revival, §§ 73, 77.  
Of cause of action barred by statute of limitations, see Limitation of Actions, §§ 157-163.

**REVOCATION.**

See Cancellation of Instruments.  
Of will, see Wills, § 191.

**REWARDS.**

§ 8. Under Ky. St. § 1936 (Russell's St. § 3455), providing a reward for the capture and return of an escaped convict, a party was entitled to a reward although the convict, because of injuries, had abandoned the idea of escape, and asked him to return her to the prison.—Mudd v. Woodside (Ky.) 321.

§ 14. The warden of the penitentiary held not warranted by Ky. St. §§ 3798, 4688 (Russell's St. §§ 5219, 4978), in refusing to pay the reward prescribed by section 1936 (Russell's St. § 3455) for returning an escaped convict to the penitentiary.—Mudd v. Woodside (Ky.) 321.

**RIGHT OF WAY.**

See Easements.  
Way of necessity incident to conveyance of mining rights, see Mines and Minerals, § 55.

**RINGS.**

Exemption from execution, see Exemptions, § 40.

**RISKS.**

Assumed by passengers on freight trains, see Carriers, § 280.  
Assumed by servant, see Master and Servant, §§ 203-222, 280, 288, 295.  
Within insurance policy, see Insurance, § 446.

**ROADS.**

See Highways; Street Railroads.

**ROBBERY.**

Confessions, see Criminal Law, § 534.  
Error in instructions cured by giving other instructions, see Criminal Law, § 823.  
Ground for continuance, see Criminal Law, § 595.

§ 17. Under White's Ann. Pen. Code, art. 856, *held* unnecessary that an indictment for robbery allege in terms that the property was taken against the person's will.—*Chancey v. State* (Tex. Cr. App.) 426.

§ 20. Under an indictment charging robbery by violence by putting the prosecutor in fear of life and bodily injury, evidence that defendant used a pistol as a bludgeon does not constitute a variance.—*Wyatt v. State* (Tex. Cr. App.) 929.

§ 26. In a prosecution for robbery, evidence *held* to take the question of defendant's guilt to the jury.—*Hughes v. Commonwealth* (Ky.) 788.

**RULE IN SHELLEY'S CASE.**

See Wills, § 608.

**RULES.**

Of carrier of passengers, see Carriers, § 267.

**SALARY.**

Of prosecuting attorneys, see District and Prosecuting Attorneys, § 5.  
Of tax collectors, see Taxation, § 549.  
Validity of ordinance imposing license fee on persons making salary loans, see Licenses, § 7.

**SALES.**

See Exchange of Property, § 13.

Exercise of power of sale in mortgage, see Chattel Mortgages, §§ 258, 267; Mortgages, § 341.  
Of goods damaged in course of transportation credit of proceeds on liability for damages, see Carriers, § 135.

Parol or extrinsic evidence to contradict or vary contract of sale, see Evidence, § 400.

Retention of possession or apparent title by seller as element of fraud as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 146.

Right of assignee of contract of sale to recover for fraud on assignor, see Assignments, § 80.  
Validity as to creditors or subsequent purchasers, see Fraudulent Conveyances.

*Sales by or to particular classes of persons.*  
See Executors and Administrators, §§ 158, 329-380; Receivers, § 143.  
Mortgagees or trustees under power in mortgage, see Chattel Mortgages, §§ 258, 267.

*Sales of particular species of, or estates or interests in, property.*

See Good Will, § 5; Intoxicating Liquors; Mines and Minerals, §§ 54, 55; Public Lands, § 173.

Decedent's property, see Executors and Administrators, §§ 329-380.

Mortgaged property, see Chattel Mortgages, §§ 258, 267; Mortgages, § 341.

Real property in general, see Vendor and Purchaser.

Seminary property, see Colleges and Universities, § 6.

*Sales on judicial or other proceedings.*

See Execution, § 306.

By executors or administrators, see Executors and Administrators, §§ 329-380.

By receivers, see Receivers, § 143.

Foreclosure of mortgages, see Chattel Mortgages, §§ 258, 267.

On partition, see Partition, §§ 106, 109.

Tax sales, see Taxation, §§ 634, 641.

**I. REQUISITES AND VALIDITY OF CONTRACT.**

§§ 19, 20. A contract to sell a one-half interest in a horse *held* to be based on a valuable consideration.—*Strother v. Miller* (Ky.) 358.

§ 21. Consideration for notes *held* to have failed.—*Merchants' Nat. Bank v. Brisch* (Mo. App.) 76.

§ 36. In a suit against a buyer for the price, *held*, that defenses predicated on his failure to read the written contract, which he claimed did not express the real agreement, were properly rejected.—*Phelps v. Jones* (Mo. App.) 1067.

§ 38. Rule stated as to what a buyer must prove to be entitled to rescind for fraudulent representations.—*Phelps v. Jones* (Mo. App.) 1067.

§ 38. That a gas machine would produce refuse to be removed in some way was a material fact, misrepresentation as to which is a ground for rescission by a buyer.—*Phelps v. Jones* (Mo. App.) 1067.

§ 38. There may be fraud by a seller in suppressing material facts and circumstances, as well as in direct misrepresentation if the buyer is knowingly suffered to deal under a delusion.—*Phelps v. Jones* (Mo. App.) 1067.

§ 41. Circumstances stated when the rule of caveat emptor does not obtain.—*Phelps v. Jones* (Mo. App.) 1067.

**II. CONSTRUCTION OF CONTRACT.**

Parol or extrinsic evidence to contradict or vary written contract, see Evidence, § 400.

§ 68. A bank purchasing all the property of another bank on hand at a designated future date *held* entitled to certain interest on notes and bills discounted by the selling bank after the date of the contract.—*Livingston County Bank v. First State Bank* (Ky.) 829.

§ 71. If defendant only bought the lumber listed in a stock sheet, he could only be required to take the quantity of lumber of any particular dimension which was listed therein.—*Wm. Cameron & Co. v. Matthews* (Tex. Civ. App.) 192.

§ 81. A contract requiring plaintiff to fill defendant's orders for lumber "with as little delay as possible" meant in a reasonable time.—*Wm. Cameron & Co. v. Matthews* (Tex. Civ. App.) 192.

§ 82. Time was not of the essence of a contract to sell a one-half interest in a horse at a stated date, and, if the buyer within a reasonable time after the specified date offered the sum due, it would be a sufficient compliance as to time.—*Strother v. Miller* (Ky.) 358.

§ 87. In replevin for machinery sold under written orders of purchase, a catalogue describing the machinery was properly admitted in evidence as part of the sale contract.—*Robinson & Co. v. Ligon* (Mo. App.) 590.

### III. MODIFICATION OR RESCISSION OF CONTRACT.

#### (A) By Agreement of Parties.

§ 89. A contract for the sale of cattle *held* not discharged by a subsequent contract; there being no consideration to support the latter.—*Whitsett v. Carney* (Tex. Civ. App.) 443.

§ 90. A promise by defendant to make it right with plaintiff for hay which he had sold him, which proved to be of poor quality, *held* not a new agreement requiring plaintiff's action for breach of warranty of quality to have been based on it, and not on the original contract.—*Broderick v. Hartman* (Mo. App.) 1060.

### IV. PERFORMANCE OF CONTRACT.

#### (B) Bills of Sale.

§ 146. Bills of sale *held* ineffective to pass title on the grantor's death for want of delivery.—*Ashley v. Ashley* (Ark.) 778.

#### (C) Delivery and Acceptance of Goods.

§ 152. A buyer of flour for delivery in car load lots on his giving shipping directions, who breaches the contract by failing to give shipping directions, *held* not entitled to complain of the seller's failure to perform unless the latter first repudiated the contract.—*Majestic Milling Co. v. Copeland* (Ark.) 521.

§ 176. A buyer of goods for delivery in car load lots on his giving shipping directions from time to time waives any delay in delivery by consenting thereto.—*Majestic Milling Co. v. Copeland* (Ark.) 521.

§ 176. A buyer *held* not entitled to treat the contract as abandoned by the seller.—*Majestic Milling Co. v. Copeland* (Ark.) 521.

§ 177. Purchasers *held* to have a right to refuse to accept.—*Merchants' Nat. Bank v. Brisch* (Mo. App.) 76.

### V. OPERATION AND EFFECT.

#### (A) Transfer of Title as Between Parties.

§ 200. Where a buyer agreed to inspect and receive, at the market price at the time of delivery, all railroad cross-ties the seller would place upon the bank of a certain river, the property in the ties would not pass until the ties were inspected, received, and the market price agreed on.—*Indiana Tie Co. v. Phelps* (Ky.) 833.

§ 214. Title to tobacco sold *held* not to pass until certain acts, including delivery, had been performed by the seller.—*Quisenberry v. Rucker* (Ky.) 274.

#### (B) Rights and Liabilities of Seller as to Third Persons.

Right to recover property as against attaching creditors of infant, see *Infants*, § 31.

### VI. WARRANTIES.

§ 288. In replevin for machinery sold under written orders of purchase, an objection that defendant was concluded by the express warranty in the contract, and that he could not avail himself of the breach of it until he had complied with it on his part, *held* properly overruled.—*Robinson & Co. v. Ligon* (Mo. App.) 590.

### VII. REMEDIES OF SELLER.

#### (D) Resale.

§ 339. Where, on refusal of the purchaser to accept, the seller resold the machine, *held*, that

the purchaser would be liable for the balance of the price.—*Merchants' Nat. Bank v. Brisch* (Mo. App.) 76.

#### (E) Actions for Price or Value.

Alteration of note for price as affecting right of action for value, see *Alteration of Instruments*, § 23.

Election in pleading between defenses, see *Pleading*, § 369.

Joinder of causes of action, see *Action*, § 45.

Set-off against agent in action by undisclosed principal, see *Set-Off and Counterclaim*, § 46.

§ 340. The seller's remedy for a breach of contract to sell ties *held* an action for damages for breach of contract, and not for the market price of the ties.—*Indiana Tie Co. v. Phelps* (Ky.) 833.

§ 359. In an action for the price of brick sold contractors for the construction of a building, evidence *held* to show that, while there was some delay in the construction of the building, it was not due to any fault of plaintiff in delivering the brick, and that no complaint on account of delay was made until after the commencement of the action.—*J. S. Minor & Sons v. Paragon Plaster Co.* (Ky.) 268.

#### (F) Actions for Damages.

§ 383. In an action for damages for breach of a contract to purchase lumber, evidence *held* not to support a verdict for plaintiff in the amount rendered.—*Wm. Cameron & Co. v. Matthews* (Tex. Civ. App.) 192.

§ 384. Measure of damages in an action for breach of a contract for the sale of railroad cross-ties stated.—*Indiana Tie Co. v. Phelps* (Ky.) 833.

### VIII. REMEDIES OF BUYER.

#### (B) Recovery of Goods.

See *Exchange of Property*, § 13.

§ 399. A plaintiff *held* not entitled to a specific attachment, under Civ. Code Prac. § 249.—*Quisenberry v. Rucker* (Ky.) 274.

#### (C) Actions for Breach of Contract.

§ 415. Where defendant, in an action for the price of building materials, claimed that the materials furnished were defective, the burden was on him to prove the extent of his damages.—*Leifer Mfg. Co. v. Gross* (Ark.) 1039.

§ 418. Where building materials furnished are claimed to be defective, there may generally be a recovery of the difference between their value as furnished and the value of the materials contracted for.—*Leifer Mfg. Co. v. Gross* (Ark.) 1039.

#### (D) Actions and Counterclaims for Breach of Warranty.

See *Exchange of Property*, § 13.

§ 437. A buyer who, in an action for the balance of the price, pleads breach of warranty and damages therefor, may not recover the partial payment made on the delivery of the goods.—*Erie City Iron Works v. Noble* (Tex. Civ. App.) 172.

§ 441. Evidence *held* insufficient to show the extent of damages sustained by the owner of a building arising out of alleged defective materials furnished therefor by plaintiff.—*Leifer Mfg. Co. v. Gross* (Ark.) 1039.

### IX. CONDITIONAL SALES.

§ 454. A sale of cattle *held* an absolute sale.—*Whitsett v. Carney* (Tex. Civ. App.) 443.

§ 454. "Absolute" and "conditional" sales defined and distinguished.—*Whitsett v. Carney* (Tex. Civ. App.) 443.

§ 468. Absolute title to a shovel leased under a contract providing for its conveyance upon certain conditions at the expiration of the lease held not to pass to the lessee until the latter performed all the conditions.—Cullin-McCurdy Const. Co. v. Vulcan Iron Works (Ark.) 1023.

§ 473. Where a steam shovel was leased to another under contract to transfer it at the expiration of the lease if the lessee performed certain conditions, a subsequent purchaser for value without notice of the conditions attached to the sale acquired no greater rights than the conditional vendee had under his contract.—Cullin-McCurdy Const. Co. v. Vulcan Iron Works (Ark.) 1023.

§ 480. In replevin for a steam shovel leased by plaintiff to defendant's subcontractor for three months with a conditional agreement to convey, evidence that plaintiff's attorney agreed with defendant for the return of the shovel as soon as defendant completed the work it was doing held not admissible under the issues.—Cullin-McCurdy Const. Co. v. Vulcan Iron Works (Ark.) 1023.

## SALOONS.

See Intoxicating Liquors.

## SATISFACTION.

See Compromise and Settlement; Payment; Release; Tender.

Of judgment, see Judgment, § 891.

## SAWMILLS.

Venue of action against tram road as appurtenant to sawmill, see Railroads, § 22.

## SCHOOLS AND SCHOOL DISTRICTS.

See Colleges and Universities.

### II. PUBLIC SCHOOLS.

#### (A) Establishment, School Lands and Funds, and Regulation in General.

Disposal of school lands in general, see Public Lands, § 173.

Subject and title of statute, see Statutes, § 122.

§ 10. Laws 1909, p. 17, c. 12, held not invalid.—Charlton v. Cousins (Tex.) 422.

§ 10. Laws 1909, p. 17, c. 12, held not invalid on the ground that it allows national banks to become depositories, and that the assumption of such duties are beyond the powers of a national bank.—Charlton v. Cousins (Tex.) 422.

#### (B) Creation, Alteration, Existence, and Dissolution of Districts.

§ 41. Where one school district goes entirely out of existence by being annexed to or merged in another, if no arrangements are made respecting the property and liabilities of the district that ceases to exist, the subsisting district will be entitled to all the property, and answerable for all the liabilities.—Abler v. School Dist. of St. Joseph (Mo. App.) 564.

#### (C) Government, Officers, and District Meetings.

§ 48. A county superintendent of public instruction held authorized to employ counsel to assist the county attorney in prosecuting an action against a publishing company for breach of a bond given under Ky. St. 1903, §§ 4423, 4424, and pay a reasonable fee for his services if they were necessary.—Money v. Beard & Marshall (Ky.) 282.

§ 53. A superintendent of schools held to have authority to appoint, on June 29th, a school

trustee to fill a vacancy to occur on July 1st, in the same year, where his term extended beyond that date.—Terry v. Cornett (Ky.) 870.

#### (D) District Property, Contracts, and Liabilities.

Contracts for compensation of county attorney, see District and Prosecuting Attorneys, § 5.

#### (E) District Debt, Securities, and Taxation.

§ 97. Power of school district taxpayers to levy a tax for school purposes and the issue of bonds, under Acts 1909, putting into effect Const. art. 7, § 3 (Acts 1909, c. 12, § 154), stated.—Itasca Independent School Dist. v. McElroy (Tex. Civ. App.) 1011.

§ 97. In independent school districts elections to determine the questions of issuing bonds and special taxation should be ordered by the school trustees.—Itasca Independent School Dist. v. McElroy (Tex. Civ. App.) 1011.

§ 102. A transfer by a county court of the children and school tax of J. from one school district to another under Kirby's Dig. §§ 7639-7644, held not to effect a transfer of his property; this being done only by a different proceeding provided for by Kirby's Dig. §§ 7540-7544, so that the school tax on railroad property crossing the land of J. belonged to the district in which the land was located, so that an order of the county court transferring the tax to the other district was void.—School Dist. No. 4 v. School Dist. No. 84 (Ark.) 238.

§ 103. Power of trustees of an independent school district, under Acts 1909, c. 12, § 154, to fix the rate of taxation for maintenance of school and payment of principal and interest on bonds issued for school purposes, stated.—Itasca Independent School Dist. v. McElroy (Tex. Civ. App.) 1011.

§ 103. Under Acts 1909, c. 12, § 154, an election to authorize a tax for school purposes is not void because the order and notice of such election failed to state that the rate would be 50 cents on the \$100 property valuation, or less than that amount.—Itasca Independent School Dist. v. McElroy (Tex. Civ. App.) 1011.

§ 107. Equity has jurisdiction to restrain the illegal transfer and collection of school taxes made pursuant to a void order of the county court.—School Dist. No. 4 v. School Dist. No. 84 (Ark.) 238.

#### (G) Teachers.

§ 130. Where a teacher's certificate, dated September 6, 1904, recited that it was for the term of one year from this date unless revoked, a writing which followed the signature, "good till the next regular examination, March, 1905," held not to limit the duration of the certificate.—Abler v. School Dist. of St. Joseph (Mo. App.) 564.

§ 131. Where a school-teacher has a certificate as a licensed teacher, at the time of employment, it is not required that it extend to the end of the term of the employment; all that is required is that it be renewed at its expiration.—Abler v. School Dist. of St. Joseph (Mo. App.) 564.

§ 131. Where a school-teacher was competent, and had a certificate to that effect, and his contract was lawful, that his certificate did not state that it was either first or second class held not to affect its validity.—Abler v. School Dist. of St. Joseph (Mo. App.) 564.

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§ 40. In a prosecution for seduction, evidence of the prosecuting witness that the child resembled accused *held* admissible.—Adams v. State (Ark.) 766.

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§ 8. A party sued for goods sold by a nonresident having no property in the state and no agent upon whom service could be made may set up as an equitable set-off the breach of another contract with plaintiff for the purchase of other goods.—Ewing Merkel Electric Co. v. Lewisville Light & Water Co. (Ark.) 509.

**II. SUBJECT-MATTER.**

§ 31. In an action by a father to restrain his children from interfering with his possession of land, a claim of one of the defendants for compensation for services as a nurse could not be litigated therein.—Davis v. Davis (Ark.) 525.

§ 46. Purchaser of goods from agent of known principal *held* not entitled to set off against him a debt due from the agent.—John Munroe & Co. v. Adamo (Ky.) 296.

§ 46. In an action for the price of goods, *held*, under the facts, that the purchaser was entitled to set off a claim against the seller.—John Munroe & Co. v. Adamo (Ky.) 296.

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Right to attack conveyance as in fraud of creditors, see Fraudulent Conveyances, § 222.

§ 180. One claiming title to property attached as the property of a debtor *held* entitled to recover from the sheriff and the sureties on his

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§ 170. An action on the bond of a sheriff for a false return *held* to sound in tort, permitting a recovery of nominal damages only unless substantial injury resulted from the false return.—*State ex rel. Armour Packing Co. v. Dickmann* (Mo. App.) 29.

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§ 158. Repeals by implication *held* not favored.—*Davidson v. Schmidt* (Mo. App.) 552.

§ 159. The repugnancy essential to the repeal of an old statute by a new one determined.—*Texas & P. Ry. Co. v. Mosley* (Tex.) 90.

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plaintiff's lot, a stipulation made at trial *held*  
not to require a verdict for defendant.—Beavers  
v. Baker (Tex. Civ. App.) 450.

**STOCK.**

Live stock, see Animals.  
Live stock, carriage of, see Carriers, §§ 217—230.  
Live stock, fence laws in general, see Fences.  
Live stock, injuries to by operation of railroad,  
see Railroads, §§ 407—446.

**STORAGE.**

See Warehousemen.

**STREET RAILROADS.**

See Railroads.

Carriage of passengers, see Carriers, §§ 234,  
253, 267—277, 280—321, 347, 356—381.

**I. ESTABLISHMENT. CONSTRUC-  
TION, AND MAINTENANCE.**

§ 24. The granting by a city to a street rail-  
road company of the right to operate on a  
street not before used by it, *held* not the grant-  
ing of a new franchise so as to require its ad-  
vertisement and sale under Const. § 164.—  
Woodall v. South Covington & C. St. Ry. Co.  
(Ky.) 843.

§ 51. A consolidation agreement *held* to  
charge defendant with liability of the consoli-  
dated street car company to contribute to the  
cost of maintaining lights at a crossing over  
the tracks of a railroad company.—Beaumont  
Traction Co. v. Texarkana & Ft. S. Ry. Co.  
(Tex. Civ. App.) 987.

**II. REGULATION AND OPERATION.**

Injuries to passengers, see Carriers, §§ 280—321,  
347.  
Waiver of objections to pleading, see Pleading,  
§ 406.

§ 81. Duty to keep a light upon street cars at night stated.—*Clover v. Joplin & P. Ry. Co.* (Mo. App.) 43.

§ 90. Duty of motorman to avoid injuring persons and vehicles on the track stated.—*Clover v. Joplin & P. Ry. Co.* (Mo. App.) 43.

§ 99. A person injured by collision with a street car held guilty of contributory negligence.—*Louisville Ry. Co. v. Ray* (Ky.) 313.

§ 103. A person struck by a street car under certain circumstances held entitled to recover, regardless of her contributory negligence.—*Clover v. Joplin & P. Ry. Co.* (Mo. App.) 43.

## **STREETS.**

See Highways.

Crossing by railroads, accidents at crossings, see Railroads, §§ 327-350.

Crossing by railroads, statutory, municipal, and official regulations, see Railroads, § 244.

Dedication of, see Dedication.

Improvement of, see Municipal Corporations, §§ 280-449.

Injuries from defects or obstructions, see Municipal Corporations, §§ 759-822.

Injuries to persons on street by collision with street cars, see Street Railroads, §§ 81-103.

Occupation or use as ground for compensation under laws of eminent domain, see Eminent Domain, § 100.

Rights in and use of by street railroads, see Street Railroads, § 24.

## **STRIKING OUT.**

Evidence, see Trial, § 96.

Pleading or defense or part thereof, see Pleading, § 362.

## **SUBCONTRACTORS.**

Right to mechanic's lien, see Mechanics' Liens, §§ 99, 107.

## **SUBLETTING.**

See Landlord and Tenant, § 75.

## **SUBSTITUTES.**

For bill of exceptions, case or statement of facts, see Appeal and Error, § 553.

## **SUBSTITUTION.**

Construction of will, see Wills, § 555.

## **SUCCESSION.**

See Descent and Distribution.

## **SUFFRAGE.**

In general, see Elections.

## **SUICIDE.**

Of person insured, cause of death within policy, see Insurance, § 446.

## **SUIT.**

See Action; Equity.

## **SUMMARY PROCEEDINGS.**

For collection of taxes, see Taxation, § 573½.

## **SUMMONING.**

Jury, see Jury, § 72.

## **SUMMONS.**

See Process.

In garnishment proceedings, see Garnishment, §§ 96, 97.

## **SUPERINTENDENTS.**

Of schools, see Schools and School Districts, § 53.

## **SUPERSEDEAS.**

Assignment of claim under supersedeas bond, see Assignments, § 73.

On appeal or writ of error, see Appeal and Error, §§ 495, 490.

## **SUPERVISORY CONTROL.**

Writs of, see Mandamus.

## **SUPPLEMENTARY PROCEEDINGS.**

See Execution, § 371.

## **SUPPRESSION.**

Of depositions, see Depositions, § 83.

## **SUPREME COURTS.**

Of states, see Courts, §§ 207-247.

## **SURETYSHIP.**

See Principal and Surety.

## **SURGEONS.**

See Physicians and Surgeons.

## **SURPRISE.**

Ground for continuance, see Continuance, §§ 29, 30.

## **SURRENDER.**

Application of statute of frauds to surrender of existing estates or interests in real property, see Frauds, Statute of, §§ 69, 70.

Of mining lease, see Mines and Minerals, § 66.

## **SURROGATES' COURTS.**

See Courts, § 202.

## **SURVEYS.**

Official surveys to establish boundaries, see Boundaries, § 54.

## **SURVIVAL.**

Of cause of action, see Abatement and Revival, § 58.

## **SURVIVORSHIP.**

Right of surviving spouse, children or heirs as to homestead, see Homestead, § 140.

Rights and liabilities of survivor of community as to community property, see Husband and Wife, § 273.

## **SUSPENSION.**

Of absolute power of alienation, see Perpetuities, § 6.

Of running of statute of limitations, see Limitation of Actions, §§ 95, 96, 130.

## **SWAMP LANDS.**

Drainage by public authorities, see Drains.

**SWEARING.**

Criminal responsibility, see Disorderly Conduct.

**SWINDLING.**

See False Personation; False Pretenses.

**TALESMEN.**

See Jury, § 72.

**TARIFF.**

See Customs Duties.

**TAXATION.**

See Customs Duties.

Appellate jurisdiction of cases involving liability for taxes, see Courts, § 247.

*Local or special taxes.*

See Counties, § 192; Municipal Corporations, § 966; Schools and School Districts, §§ 102-107.

For construction and maintenance of highways, see Highways, § 122.

For municipal improvements, see Municipal Corporations, § 449.

*Occupation or privilege taxes.*

See Licenses, § 7.

Sale of intoxicating liquors, see Intoxicating Liquors, §§ 50, 74.

Teachers, see Schools and School Districts, §§ 130, 131.

**III. LIABILITY OF PERSONS AND PROPERTY.****(A) Private Persons and Property in General.**

§ 58. Laws 1907, c. 602, a general assessment law, repealing the former general law, Laws 1903, c. 258, and Laws 1907, c. 602, § 30, providing for the back-assessment of property, thereupon became the only provision for such assessment, and property cannot be back-assessed under the act of 1903.—Nashville Ry. & Light Co. v. Norvell (Tenn.) 613.

**(B) Corporations and Corporate Stock and Property.**

§ 113. Laws 1907, c. 602, *held* not to provide for the assessment or back-assessment of street railway property, assessable by the railroad assessors under Laws 1905, c. 513, § 1.—Nashville Ry. & Light Co. v. Norvell (Tenn.) 613.

§ 113. Laws 1905, c. 513, providing a new method of assessing the property of street railway companies, is wholly prospective in operation, and does not authorize a back-assessment for a period antecedent to its taking effect, though it provides that no assessment of property shall be made in any other manner than provided by the act.—Nashville Ry. & Light Co. v. Norvell (Tenn.) 613.

§ 145. Although a railroad company acquires only an easement over land, the fee remaining in the original owner, its property rights are separate and distinct, and are separately taxed.—School Dist. No. 4 v. School Dist. No. 84 (Ark.) 238.

**(D) Exemptions.**

§ 217. The market place and stalls thereon owned and maintained by a city *held* exempt from taxation under Const. § 170.—City of Paducah v. Commonwealth (Ky.) 286.

§ 245. A cemetery of a city *held* exempt from taxation under Const. § 170.—City of Paducah v. Commonwealth (Ky.) 286.

**V. LEVY AND ASSESSMENT.**

School taxes, see Schools and School Districts, § 103.

**VI. LIEN AND PRIORITY.**

§ 511. That the owner of a lot who bought it subject to taxes, was an innocent purchaser could not be set up as a defense against a suit to enforce the tax lien.—Toepperwein v. City of San Antonio (Tex. Civ. App.) 699.

**VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.****(A) Collectors and Proceedings for Collection in General.**

Conformity of judgment to pleading in action against sheriff, see Judgment, § 252.

False personation of officer collecting tax, see False Personation, § 4.

Mistake as affecting limitations against sheriff, see Limitation of Actions, § 96.

§ 549. Under Const. § 106, requiring the fees of county officers to be regulated by law, the fiscal court could not agree to a different rate of compensation to sheriffs for collection of county revenue than that fixed by statute.—Alexander v. Owen County (Ky.) 386.

§ 557. Under Ky. St. 1903, § 4143, an agreement by fiscal court that, if the sheriff would promptly pay off claims against the county as they were presented, using his own money when necessary, instead of interest, the county would not require him to account for the penalties on delinquent taxes which he might collect *held* illegal.—Alexander v. Owen County (Ky.) 386.

§ 557. A tax collection settlement made by the sheriff is a single transaction; but, when it is opened for fraud or mistake, it stands as if settlement had not been closed, and is open for the correction of all errors and frauds, though such latter errors or frauds might have been barred if standing alone.—Alexander v. Owen County (Ky.) 386.

§ 570. Under Ky. St. §§ 4067, 4241 (Russell's St. §§ 5959, 6170), a claim of a county for sums collected by the sheriff of taxpayers not on the assessment roll, but liable for taxes, *held* to be in the nature of an action for breach of the sheriff's bond.—Alexander v. Owen County (Ky.) 386.

**(B) Summary Remedies and Actions.**

§ 573½. The assumption of payment of a judgment for taxes against a lot *held* to give a city the right to sue the purchaser personally for the debt.—Toepperwein v. City of San Antonio (Tex. Civ. App.) 699.

§ 573½. A purchase of realty subject to taxes does not impose personal liability on the purchaser.—Toepperwein v. City of San Antonio (Tex. Civ. App.) 699.

**(C) Remedies for Wrongful Enforcement.**  
School taxes, see Schools and School Districts, § 107.

§ 608. Under Const. art. 16, § 13, and Kirby's Dig. § 3966, *held*, that a citizen and taxpayer may enjoin the collection of an illegal tax.—Merwin v. Fussell (Ark.) 1021.

**IX. SALE OF LAND FOR NONPAYMENT OF TAX.**

§ 634. A wife and her husband having parted with all their interest in a lot, it was not subject to be administered as a part of her estate, and a tax lien on it could not be enforced through such proceeding.—Toepperwein v. City of San Antonio (Tex. Civ. App.) 699.

§ 641. The lien on a lot securing subsequently accruing taxes, which a purchaser assumed, could not be enforced except by a suit against him.—*Toepperwein v. City of San Antonio* (Tex. Civ. App.) 699.

## **XI. TAX TITLES.**

### **(B) Tax Deeds.**

§ 764. A tax deed *held* void for uncertainty in the description.—*Penix v. Rice* (Ark.) 747.

§ 764. A description of land in a tax deed *held* not fatally defective for indefiniteness under Ky. St. § 4056 (Russell's St. § 5948), and Gen. St. 1883, c. 92, art. 8, § 17.—*Moseley v. Hamilton* (Ky.) 894.

§ 789. Under Ky. St. §§ 3760, 4030, 4162 (Russell's St. §§ 4862, 5922, 6022), holder of tax deed establishes a *prima facie* title on production of his tax deed, the recitals of which may be attacked only for fraud in the party benefited or mistake on the part of the officer.—*Moseley v. Hamilton* (Ky.) 894.

### **(C) Actions to Confirm or Try Title.**

§ 805. The two-year statute of limitations (Kirby's Dig. § 7114) does not begin to run where the tax deed is void on its face for failing to describe the land sold.—*Penix v. Rice* (Ark.) 747.

## **XII. FORFEITURES AND PENALTIES.**

Liability of homestead for penalty, see Homestead, § 105.

## **TEACHERS.**

See Schools and School Districts, §§ 130, 131.

## **TECHNICAL ERRORS.**

See Appeal and Error, § 1170.

## **TELEGRAPHS AND TELEPHONES.**

Concurrent regulations by state and United States of hours of service of employes, see Commerce, §§ 8, 53.

### **I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.**

Necessity of compensation for damages to abutting property from construction of lines in street, see Eminent Domain, § 69.

§ 20. A telephone company constructing a telephone line *held* not guilty of negligence in failing to warn a child trespassing on the premises.—*Hall v. Missouri & Kansas Telephone Co.* (Mo. App.) 557.

### **II. REGULATION AND OPERATION.**

Assumption by court as to facts in action for failure to promptly transmit and deliver message, see Trial, § 191.

Effect of custom to receive messages by telephone, see Customs and Usages, § 11.

Harmless error, see Appeal and Error, § 1066.

Hearsay evidence in action for delay in delivery of message, see Evidence, § 317.

§ 27. The validity of a stipulation, in a contract made in a sister state for the transmission of a message, *held* determined by the law of the forum as a stipulation affecting the remedy.—*Western Union Telegraph Co. v. Douglass* (Tex. Civ. App.) 488.

§ 35. A telegraph company, after accepting a message by telephone, cannot claim that the conditions in its printed forms are applicable, where it is accustomed to receive messages in that way.—*Gore v. Western Union Telegraph Co.* (Tex. Civ. App.) 977.

§ 35. Liability of company for failure to transmit message received by telephone stated.—*Gore v. Western Union Telegraph Co.* (Tex. Civ. App.) 977.

§ 37. Where a telegraph company delivered a message at the Oriental Hotel, instead of in care of the Oriental Oil Company, to which it was addressed, the company was negligent.—*Postal Telegraph Cable Co. of Texas v. Smith* (Tex. Civ. App.) 733.

§ 38. In an action against a telegraph company for delay in delivering a message, the refusal to give an instruction *held* not erroneous in view of the evidence.—*Western Union Telegraph Co. v. Douglass* (Tex. Civ. App.) 488.

§ 48. The agent of a telegraph company, who receives a message by telephone, is not thereby made the agent of the sender, though the company requires all messages to be given in writing, if the sender does not know of such requirement.—*Gore v. Western Union Telegraph Co.* (Tex. Civ. App.) 977.

§ 54. A stipulation, so far as it relieves a telegraph company from negligence in not delivering or transmitting an unrepeatable message, cannot be enforced; but for mere errors or mistakes in transmission such a stipulation is lawful and reasonable.—*Western Union Telegraph Co. v. Bennett* (Tex. Civ. App.) 151.

§ 54. Under Rev. St. 1895, art. 3379, a stipulation in the contract for the transmission of a message *held* void.—*Western Union Telegraph Co. v. Douglass* (Tex. Civ. App.) 488.

§ 65. In a suit for failure to promptly transmit and deliver a telegram, *held*, that defendant should be confined to the facts pleaded in a special plea as to how a mistake could have occurred.—*Western Union Telegraph Co. v. Bennett* (Tex. Civ. App.) 151.

§ 65. In an action against a telegraph company for delay in the delivery of a message, whereby a son was prevented from reaching the bedside of a dying mother and attending her funeral, certain evidence *held* admissible without any allegation in the petition.—*Western Union Telegraph Co. v. Douglass* (Tex. Civ. App.) 488.

§ 66. Evidence *held* to justify a verdict finding that a telegraph company was negligent in failing to deliver a telegram.—*Western Union Telegraph Co. v. Brasher* (Ky.) 788.

§ 66. A service message *held* inadmissible to show diligence in trying to find the addressee of a telegram.—*Western Union Telegraph Co. v. Brasher* (Ky.) 788.

§ 66. Evidence of efforts by a telephone company to find the addressee of a telegram *held* inadmissible to prove diligence of the telegraph company in trying to find him.—*Western Union Telegraph Co. v. Brasher* (Ky.) 788.

§ 66. In a suit for failure to promptly transmit and deliver a telegram, evidence *held* to show the addressee could have been found at his place of business if defendant's agent had exercised ordinary diligence.—*Western Union Telegraph Co. v. Bennett* (Tex. Civ. App.) 151.

§ 67. A telegraph company is liable for all damages that flow from its negligence of which it had notice, or which might have been reasonably anticipated at the time it received the message, in the event of a breach of its contract.—*Postal Telegraph Cable Co. of Texas v. Smith* (Tex. Civ. App.) 733.

§ 67. A death message *held* not notice to the telegraph company that the remains would be carried to a place other than that from which the message was sent.—*Postal Telegraph Cable Co. of Texas v. Smith* (Tex. Civ. App.) 733.

§ 71. For failure to promptly transmit and deliver a telegram resulting in the addressee not

being able to reach his mother in her last sickness before she became unconscious, an award of \$1,150 *held* not excessive.—*Western Union Telegraph Co. v. Bennett* (Tex. Civ. App.) 151.

§ 73. Whether a telegraph company's rule governing the handling of messages is reasonable is a question for the court.—*Western Union Telegraph Co. v. Brasher* (Ky.) 788.

§ 73. In an action against a telegraph company for delay in delivering a message, the issue of negligence *held* for the jury.—*Western Union Telegraph Co. v. Douglass* (Tex. Civ. App.) 488.

§ 74. In a suit for failure to promptly transmit and deliver a telegram, *held*, that the court did not err in refusing a special instruction limiting a recovery to certain damages.—*Western Union Telegraph Co. v. Bennett* (Tex. Civ. App.) 151.

§ 74. In a suit for failure to promptly transmit and deliver a telegram, *held*, that a special instruction as to the elements of damages was correctly refused.—*Western Union Telegraph Co. v. Bennett* (Tex. Civ. App.) 151.

§ 74. In a suit for failure to promptly transmit and deliver an unrepeatable message, a charge *held* to give defendant the benefit of all it was entitled to as to error in transmission.—*Western Union Telegraph Co. v. Bennett* (Tex. Civ. App.) 151.

## TEMPORARY ALIMONY.

See Divorce, § 218.

## TENANCY.

For life, see Life Estates.

For years, see Landlord and Tenant, §§ 75, 86.

## TENANCY IN COMMON.

Community property, see Husband and Wife, § 274.

Partition of property held in common, see Partition.

## II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF CO-TENANTS.

§ 15. The statute of limitations does not run in favor of a tenant in common holding the community property until some act is done repudiating the relation with the co-tenants.—*Wingo v. Rudder* (Tex.) 899.

§ 15. Facts *held* not to show that the heirs of a deceased wife were tenants in common with those claiming under an unauthorized conveyance of community property by the surviving husband.—*Hardy Oil Co. v. Burnham* (Tex. Civ. App.) 221.

§ 27. A sale of property left by a husband to his wife and children by the mother to one of the daughters *held* not to constitute conversion thereof as against the other legatees.—*Painter v. Painter* (Mo. App.) 561.

## TENDER.

Of fare to avoid ejection from train, see Carriers, § 358.

§ 15. Tender of payment by check is sufficient where the drawer has funds in the bank to meet the payment, unless refusal is upon the ground that the tender is not in lawful money.—*Neal v. Finley* (Ky.) 348.

## TERM.

Of lease, see Landlord and Tenant, §§ 75, 86.

## TERMINATION.

Of employment, see Master and Servant, §§ 36, 40.

Of trust, see Trusts, § 61.

## TESTAMENT.

See Wills.

## TESTAMENTARY CAPACITY.

See Wills, § 52.

## TESTAMENTARY POWERS.

Nature and extent of power to devise or bequeath, see Wills, § 1.

## TESTIMONY.

See Depositions; Evidence; Witnesses.

## THEFT.

See Burglary; Larceny; Robbery.

## THREATS.

As justification for carrying weapons, see Weapons, § 13.

Evidence of, in prosecutions for homicide, see Homicide, § 159.

§ 8. Where the information charged intimidation by threatening words and by the firing of guns, a charge as to the use of threatening words was objectionable.—*Oliver v. State* (Tex. Cr. App.) 637.

## TICKETS.

For carriage of passengers, see Carriers, § 253.

## TIMBER.

See Logs and Logging.

On public lands, see Public Lands, § 173.

Sale by tenant in dower, see Dower, § 114.

## TIME.

Agreements not to be performed within one year, see Frauds, Statute of, §§ 44, 50.

Computation of period of limitation, see Limitation of Actions, §§ 43-130.

Of accrual of right of action within statute of limitations, see Limitation of Actions, §§ 43-58.

Of death, presumptions, see Death, § 2.

For particular acts in or incidental to judicial proceedings.

Amendment of pleading, see Pleading, § 245.

Appeal or other proceeding for review, see Appeal and Error, § 345.

Certification of dissent to Supreme Court, see Courts, § 247.

Presentation, allowance, and filing of bill of exceptions, see Criminal Law, § 1092; Exceptions, Bill of, § 43.

Settlement of case or statement of facts for review, see Criminal Law, § 1099.

For particular acts not judicial.

Delivery of goods sold, see Sales, § 81.

Holding election, see Elections, § 38.

Payment for goods sold, see Sales, § 82.

Performance of contract of sale, see Vendor and Purchaser, § 75.

## TITLE.

See Property.

After-acquired title, estoppel to assert, see Estoppel, § 45.

Color of title, see Adverse Possession, §§ 68, 71, 100, 101.

Defects in principal's title as affecting broker's right to compensation, see Brokers, § 61.

Of bona fide purchasers of land, see Vendor and Purchaser, § 239.

Of purchaser at partition sale, see Partition, § 109.

Of trustee in bankruptcy to property of bankrupt, see Bankruptcy, § 156.

Of vendor, sufficiency to support contract of sale, see Vendor and Purchaser, §§ 130, 137.

Removal of cloud, see Quietening Title.

Retention of apparent title by grantor as element of fraud as to creditors or subsequent purchasers, see Fraudulent Conveyances, § 146.

Tax titles, see Taxation, §§ 764-805.

To property at time of decedent's death as determining what are assets of decedent's estate, see Executors and Administrators, § 55.

To property intermixed, see Confusion of Goods.

#### *Particular matters affecting title.*

See Adverse Possession; Dedication; Deeds; Descent and Distribution; Mortgages.

Estoppel to assert title, see Estoppel, § 45.

Sale of personal property in general, see Sales.

Sale of real property in general, see Vendor and Purchaser.

#### *Particular species of property or rights.*

See Bills and Notes, § 509.

Personal property in general, see Sales, §§ 200, 214.

Real property in general, bona fide purchasers, see Vendor and Purchaser, § 239.

#### *Title necessary to maintain particular actions.*

See Ejectment, §§ 9, 15; Replevin, § 8; Trespass to Try Title, § 10.

#### *Titles of particular acts or proceedings.*

See Statutes, § 122.

Municipal ordinances, or by-laws, see Municipal Corporations, § 112.

## TOOLS.

Liability of master for injuries to servant from defects in or failure to furnish tools, see Master and Servant, §§ 101-124, 208-211, 233-236.

## TORTS.

Indemnity among joint tort-feasors, see Indemnity, § 13.

#### *Liabilities of particular classes of persons.*

See Adjoining Landowners, § 7; Carriers, §§ 99, 104, 108-135, 156, 280-321, 356-381, 399, 400; Municipal Corporations, §§ 747-822; Railroads, §§ 274-282, 327-350, 360-398, 407-446, 454-484; Sheriffs and Constables, § 139; Street Railroads, §§ 81-103; Warehousemen, § 24.

Agents, see Principal and Agent, § 157.

Children, see Parent and Child, § 13.

Employers, for injuries to employes, see Master and Servant, §§ 92-296.

Employes, for injuries to third persons, see Master and Servant, §§ 302, 318.

Fellow servants, see Master and Servant, §§ 177-201.

Mineowners, see Mines and Minerals, § 122.

Telegraph or telephone companies, see Telegraphs and Telephones, §§ 27-74.

*Liabilities respecting particular species of property or instrumentalities.*

See Mines and Minerals, § 122; Railroads, §§ 274-282, 327-350, 360-398, 407-446, 454-484; Street Railroads, §§ 81-103; Telegraphs and Telephones, §§ 27-74.

Carrier's premises, see Carriers, § 286.

Injuries from defects or obstructions in streets, see Municipal Corporations, §§ 759-822.

Streets and highways, see Municipal Corporations, §§ 759-822.

Tools, machinery, appliances, and places for work, see Master and Servant, §§ 101-124.

#### *Particular torts.*

See Conspiracy, § 20; Forcible Entry and Detainer, §§ 4-29; Fraud; Libel and Slander; Malicious Prosecution; Nuisance; Trespass.

Causing death, see Death, §§ 31-104.

Delay in transportation or delivery of goods, see Carriers, §§ 99, 104.

Ejection of passenger or intruder from train, see Carriers, §§ 356-381.

Injuries by servants, see Master and Servant, §§ 302, 318.

Injuries from negligence, see Negligence.

Injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 27-74.

Injuries from operation of railroads, see Railroads, §§ 274-282, 327-350, 360-398, 407-446, 454-484.

Injuries from operation of street railroads, see Street Railroads, §§ 81-103.

Injuries to passengers, see Carriers, §§ 280-321.

Injuries to servants, see Master and Servant, §§ 92-296.

Loss of or injuries to goods stored, see Warehousemen, § 24.

Loss of or injury to goods by carrier, see Carriers, §§ 108-135, 156.

Loss of or injury to passenger's baggage, see Carriers, §§ 399, 400.

Wrongful conversion, see Trover and Conversion.

Wrongful garnishment, see Garnishment, § 248.

#### *Remedies for torts.*

See Damages; Trespass, § 50; Trover and Conversion, § 29.

Assignment of cause of action, see Assignments, § 24.

Collection of judgment from joint tort-feasor, see Judgment, § 891.

Limitation of actions, see Limitation of Actions, § 55.

## TOWNS.

See Counties; Municipal Corporations; Schools and School Districts, §§ 10-131.

Highways, see Highways.

## II. GOVERNMENT AND OFFICERS.

Constables, see Sheriffs and Constables.

Mandamus to town boards or officers, see Mandamus, § 87.

## IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

Taxes for highway purposes, see Highways, § 122.

## TRAIN RECORDS.

Best and secondary evidence, see Evidence, § 174.

Hearsay evidence, see Evidence, § 318.

## TRAINS.

See Carriers; Railroads.

## TRAMPS.

See Vagrancy.

## TRAM ROADS.

Venue of action against, see Railroads, § 22.

**TRANSCRIPTS.**

Of record for purpose of review, see Criminal Law, § 1104.

**TRANSFER OF CAUSES.**

Change of venue, see Venue, §§ 45, 58.  
From equity docket to law docket, and vice versa, see Trial, § 11.  
From one state court to another, see Courts, § 485.

**TRANSFERS.**

See Assignments; Deeds; Sales; Vendor and Purchaser.

By purchaser of property subject to vendor's lien, see Vendor and Purchaser, § 265.  
Of bills and notes, see Bills and Notes, § 254.  
Of good will, see Good Will, § 5.  
Of personal property as security, see Chattel Mortgages.  
Of real property as security, see Mortgages.  
Of title as between parties to sale, see Sales, §§ 200, 214.

**TRANSMISSION.**

Of record on appeal or other proceeding for review, see Appeal and Error, § 619.  
Of telegraph or telephone messages, see Telegraphs and Telephones, §§ 27-74.

**TRANSPORTATION.**

Of animals, see Carriers, §§ 217-230.  
Of baggage of passenger, see Carriers, §§ 399, 400.  
Of goods, see Carriers, §§ 39-185.  
Of passengers, see Carriers, §§ 234-400.

**TRAVELERS.**

On streets, injuries from defects or obstructions, see Municipal Corporations, §§ 759-822.

**TRAVERSE.**

In pleading in general, see Pleading, § 129.

**TREATIES.**

Relating to tariff, see Customs Duties, § 11.

**TREATMENT.**

Aggravation of damages by improper treatment, see Damages, § 34.

**TREES.**

See Logs and Logging.

**TRESPASS.**

Injuries to trespassers, see Railroads, §§ 274-282, 360-398.

Restraining trespass, see Injunction, § 46.  
To the person, see Assault and Battery.  
To try title, see Trespass to Try Title.

**I. ACTS CONSTITUTING TRESPASS AND LIABILITY THEREFOR.**

§ 10. A purchaser of standing timber from the dower land of a widow *held* a willful trespasser in cutting and removing it.—Nashville Lumber Co. v. Barefield (Ark.) 758.

§ 14. One trespassing on the land of another by stationing and operating thereon for his own benefit an engine is liable for the destruction of property by fire set by sparks emitted by the engine, irrespective of his negligence.—Steger v. Barrett (Tex. Civ. App.) 174.

**II. ACTIONS.****(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.**

Amendment of statement of facts as to relief, see Pleading, § 250.

**(D) Damages.**

§ 50. In an action for the destruction by fire of the property of a lessee, the court *held* to properly confine the jury in determining the damages to fair, actual value.—Steger v. Barrett (Tex. Civ. App.) 174.

**TRESPASS TO TRY TITLE.**

See Ejectment; Forcible Entry and Detainer.

**I. RIGHT OF ACTION AND DEFENSES.**

§ 10. Title acquired under a parol contract of sale *held* sufficient to support trespass to try title.—Lowry v. McDaniel (Tex. Civ. App.) 710.

**II. PROCEEDINGS.**

Petition for new trial, see New Trial, § 186.

§ 25. An action of trespass to try title *held* not barred by stale demand.—Hardy Oil Co. v. Burnham (Tex. Civ. App.) 221.

§ 25. Defense of stale demand *held* not available in trespass to try title based on equitable title.—Lowry v. McDaniel (Tex. Civ. App.) 710.

§ 35. In trespass to try title defendant's plea of not guilty *held* to require plaintiff to prove that he had title to the land he sought to recover.—Dean v. Furrh (Tex. Civ. App.) 431.

§ 38. In trespass to try title to half of the land entered under a headright certificate which was conveyed by the administratrix of the holder of the certificate under an invalid order of court, if defendants are entitled to recover the consideration paid for the land, the burden is on them to show the amount of such consideration.—Broocks v. Payne (Tex. Civ. App.) 463.

§ 38. Defendant's plea *held* not to relieve plaintiff from the necessity of showing the identity of the land sought to be recovered with that described in his patent.—Finberg v. Gilbert (Tex. Civ. App.) 979.

§ 41. Where, in trespass to try title, certain community property was involved, evidence *held* to show that the wife was the mother of four children.—Hardy Oil Co. v. Burnham (Tex. Civ. App.) 221.

§ 41. In trespass to try title evidence *held* insufficient to compel a finding by the trial court that a transfer of the land was made in accordance with a valid order of the probate court or under a valid deed.—Broocks v. Payne (Tex. Civ. App.) 463.

§ 41. Evidence in trespass to try title *held* not sufficient to require a finding by the trial court that the holder of a headright certificate ratified an invalid contract to enter the land and pay the expenses in consideration of the transfer of one-half the land, or accepted the benefit of the contract and verbally or by a deed which had been lost conveyed half of the land.—Broocks v. Payne (Tex. Civ. App.) 463.

§ 41. Where, in trespass to try title, complainant's claim rested on a constable's deed pursuant to a sale under execution on a judgment, production of the deed without the execution and judgment or excuse for complainant's inability to produce them *held* insufficient.—Kruegel v. Cobb (Tex. Civ. App.) 723.

§ 41. Where defendant in trespass to try title stands on plaintiff's allegation of title to make out a case, a prima facie case is sufficient to entitle plaintiff to a judgment.—Finberg v. Gilbert (Tex. Civ. App.) 979.

§ 47. In trespass to try title by an owner of timber purchasing land pursuant to Acts 1895, p. 68, c. 47, § 16, *held*, that a conflicting patent to the land purchased would not be canceled.—*Hooks v. Kirby* (Tex. Civ. App.) 156.

## TRIAL.

Of right of property levied on, see Attachment, §§ 287-306.

Surprise at trial as ground for continuance, see Continuance, §§ 29, 30.

Witnesses, see Witnesses.

### *Proceedings incident to trials.*

See Continuance; New Trial.

Assessment of damages, see Damages, §§ 215-217.

Competency of and challenge to jurors, see Jury, § 87.

Entry of judgment after trial of issues, see Judgment, §§ 199-256.

Examination of witnesses, see Witnesses, §§ 240-277.

Place of trial, see Venue.

Right to trial by jury, see Jury, § 25.

Summoning, attendance, discharge, and compensation of jury, see Jury, §§ 66-72.

### *Trial of actions by or against particular classes of persons.*

See Brokers, § 88; Carriers, §§ 230, 320, 321, 347; Master and Servant, §§ 294-296; Railroads, §§ 282, 350, 446, 484.

Insurance companies, see Insurance, §§ 668, 669.

Partners or partnerships, see Partnership, § 218.

Telegraph or telephone companies, see Telegraphs and Telephones, §§ 20, 73, 74.

### *Trial of particular civil actions or proceedings.*

See Replevin, §§ 88, 91; Work and Labor, § 30.

For causing death, see Death, § 104.

For compensation of broker, see Brokers, § 88.

For damages from nuisance, see Nuisance, § 54.

For delay in transportation or delivery of live stock, see Carriers, § 230.

For failure to furnish cars, see Carriers, § 45.

For injunction, see Injunction, § 130.

For injuries at railroad crossings, see Railroads, § 350.

For injuries from defects or obstructions in streets, see Municipal Corporations, §§ 821, 822.

For injuries from fires caused by operation of railroads, see Railroads, § 484.

For injuries from flowage, see Waters and Water Courses, § 179.

For injuries from negligence, see Negligence, §§ 136-141.

For injuries from negligence in construction of telephone lines, see Telegraphs and Telephones, § 20.

For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, §§ 73, 74.

For injuries from public improvements, see Municipal Corporations, § 404.

For injuries to animals on or near railroad tracks, see Railroads, § 446.

For injuries to licensees, see Railroads, § 282.

For injuries to passengers, see Carriers, §§ 320, 321, 347.

For loss of or injury to live stock in course of transportation, see Carriers, § 230.

On bills or notes, see Bills and Notes, §§ 537, 538.

To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 308.

Trial of right of property, see Justices of the Peace, § 86.

### *Trial of criminal prosecutions.*

See Arson, § 41; Assault and Battery, § 96; Burglary, § 46; Criminal Law, §§ 649-878; Disorderly Conduct, § 12; Forgery, § 48; Homicide, §§ 266-309; Larceny, § 78; Robbery, § 26; Threats, § 8.

Violations of liquor laws, see Intoxicating Liquors, § 239.

## I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

Consolidation of actions, see Action, § 57.

Review of proceedings involving discretion of lower court, see Appeal and Error, § 966.

## II. DOCKETS, LISTS, AND CALENDARS.

Transfer of causes from one state court to another, see Courts, § 485.

§ 11. In an action on a note against two sureties, in which one against whom judgment went, after satisfying it, filed an answer and cross-petition against his co-surety for contribution, *held* not error to overrule a motion made by the latter to transfer the case to the law docket, in view of Civ. Code Prac. § 10, requiring such motion to be made when defendant answers.—*Fritts v. Kirchdorfer* (Ky.) 882.

## III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

In criminal prosecutions, see Criminal Law, §§ 649, 656.

Postponement of trial to compel redelivery of property in replevin, see Replevin, § 48.

Review of proceedings as dependent on prejudicial nature of error, see Appeal and Error, § 1046.

§ 28. A view by the jury should not be directed unless the peculiar character of the case or the circumstances brought out in evidence make it manifest that without a view the jury cannot reach a proper conclusion.—*Illinois Cent. R. Co. v. Frost* (Ky.) 821.

§ 29. A casual remark by the trial judge during the introduction of testimony *held* immaterial.—*Tuck v. Springfield Traction Co.* (Mo. App.) 1079.

## IV. RECEPTION OF EVIDENCE.

Examination of witnesses, see Witnesses, §§ 240-277.

In criminal prosecutions, see Criminal Law, §§ 665-676.

Review of rulings as dependent on motion for new trial, see Appeal and Error, § 289.

### (A) Introduction, Offer, and Admission of Evidence in General.

§ 41. Under the statute providing for the exclusion of witnesses *held* that it was within the court's discretion to exclude them from the courtroom, and that there was no error in overruling a motion to exclude unless it appears prejudice resulted.—*Southern Anthracite Coal Co. v. Bowen* (Ark.) 1048.

### (C) Objections, Motions to Strike Out, and Exceptions.

In criminal prosecutions, see Criminal Law, § 695.

Necessity of motion for new trial for purpose of review, see Appeal and Error, § 289.

§ 96. A motion to strike the whole of an answer of a witness which was in part admissible *held* properly denied.—*Hilburn v. Phoenix Ins. Co.* (Mo. App.) 63.

§ 105. Statement as to time and mode for objection to evidence as not conforming to plaintiff's petition.—*Galveston, H. & S. A. Ry. Co. v. Grant* (Tex. Civ. App.) 145.

**V. ARGUMENTS AND CONDUCT OF COUNSEL.**

In criminal prosecutions, see Criminal Law, §§ 719-730.

Review of proceedings as dependent on prejudicial nature of error, see Appeal and Error, § 1060.

§ 128. Argument of an attorney *held* misconduct.—Tuck v. Springfield Traction Co. (Mo. App.) 1079.

§ 129. A party cannot complain of the remarks of the counsel of the adverse party elicited by the improper remarks of his own counsel.—Smith v. Boswell (Ark.) 264.

§ 133. Remarks in the opening statement of counsel for employes suing for injuries *held* not prejudicial in themselves so that their withdrawal with an instruction not to consider them removed any possible prejudice therefrom.—Southern Anthracite Coal Co. v. Bowen (Ark.) 1048.

§ 133. The error in the argument of counsel *held* removed by the court's statement to the jury.—Dow Wire & Iron Works v. Smith (Ky.) 819.

**VI. TAKING CASE OR QUESTION FROM JURY.**

In criminal prosecutions, see Criminal Law, §§ 741-764.

Presumptions on appeal or writ of error, see Appeal and Error, § 927.

Review of rulings as dependent on prejudicial nature of error, see Appeal and Error, § 1062.

Review of rulings as dependent on presentation of question in lower court, see Appeal and Error, § 213.

Review of rulings involving questions of fact, see Appeal and Error, § 997.

**(A) Questions of Law or of Fact in General.**

*As to particular facts, issues, or subjects.*

Assumption of risk by servant injured, see Master and Servant, § 288.

Construction of contract, see Contracts, § 176.

Contributory negligence of licensee on depot platform, see Railroads, § 282.

Contributory negligence of passenger, see Carriers, § 347.

Contributory negligence of servant injured, see Master and Servant, § 289.

Incompetency of fellow servant, see Master and Servant, § 287.

Negligence of master causing injury to servant, see Master and Servant, § 286.

Negligence of telephone company, see Telegraphs and Telephones, § 20.

Performance or breach of contract, see Contracts, § 323.

*In particular civil actions or proceedings.*

See Injunction, § 130; Replevin, § 88.

For compensation of broker, see Brokers, § 88.

For delay in transportation or delivery of live stock, see Carriers, § 230.

For injuries at railroad crossings, see Railroads, § 350.

For injuries from defects or obstructions in street, see Municipal Corporations, § 821.

For injuries from fires caused by operation of railroads, see Railroads, § 484.

For injuries from negligence, see Negligence, § 136.

For injuries from negligence or default in transmission or delivery of telegraph or telephone message, see Telegraphs and Telephones, § 73.

For injuries from negligent construction of telephone line, see Telegraphs and Telephones, § 20.

For injuries to animals on or near railroad tracks, see Railroads, § 446.

For injuries to passengers, see Carriers, §§ 320, 347.

For injuries to person on depot platform, see Railroads, § 282.

For injuries to servants, see Master and Servant, §§ 284-296.

For loss of or injury to live stock in course of transportation, see Carriers, § 230.

On bills or notes, see Bills and Notes, § 537.

On insurance policies, see Insurance, § 668.

To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, § 308.

§ 136. Where a case made by the evidence is one purely of fact, it is for the jury.—Taft v. Ward (Tex. Civ. App.) 437.

§ 139. Where the evidence introduced by defendant tended to establish every allegation of the defense and counterclaim, the issue of fact should have been submitted to the jury with appropriate instructions.—Montgomery & Co. v. Arkansas Cold Storage & Ice Co. (Ark.) 768.

§ 139. Whether certain positive testimony outweighed negative testimony *held* a question for the jury.—Chesapeake & O. Ry. Co. v. Hawkins (Ky.) 836.

§ 139. A peremptory instruction for defendant cannot be granted, unless there is total failure of proof to sustain plaintiff's case.—Chesapeake & O. Ry. Co. v. Conley (Ky.) 861.

§ 139. Where there is any evidence on an issue raised by the pleadings, the court must submit it to the jury.—Cone v. Belcher (Tex. Civ. App.) 149.

§ 139. To authorize the court to take a question from the jury, the evidence must be such that there is no room for ordinary minds to differ as to the conclusion to be drawn therefrom.—Muse v. Abeel (Tex. Civ. App.) 430.

§ 141. A party should not request the submission to the jury of an issue, where the undisputed evidence shows the facts as a matter of law.—Buchanan & Gilder v. Murayda (Tex. Civ. App.) 973.

§ 143. The jury are the sole judges of the weight and the credibility of the testimony.—Hilburn v. Phoenix Ins. Co. (Mo. App.) 63.

§ 143. A party introducing sufficient evidence to support a verdict in his favor is entitled to go to the jury, however strong the contradictory evidence may be.—Cone v. Belcher (Tex. Civ. App.) 149.

**(B) Demurrer to Evidence.**

Presumptions on appeal or writ of error, see Appeal and Error, § 927.

Review of rulings involving questions of fact, see Appeal and Error, § 997.

§ 156. Statement of when evidence is subject to demurrer.—Chenoweth v. Sutherland (Mo. App.) 1055.

**(C) Dismissal or Nonsuit.**

Presumptions on appeal or writ of error, see Appeal and Error, § 927.

Review of rulings involving questions of fact, see Appeal and Error, § 997.

**(D) Direction of Verdict.**

Presumptions on appeal or writ of error, see Appeal and Error, § 927.

Review of rulings involving questions of fact, see Appeal and Error, § 997.

§ 168. Where essential facts in the record are such that only one conclusion can be drawn from them, the court should direct a verdict.—St. Louis Southwestern Ry. Co. of Texas v. Anderson (Tex. Civ. App.) 1002.

§ 178. In determining the propriety of directing a verdict for defendant, the evidence must be

considered in its aspect most favorable to plaintiff, disregarding conflicts and contradictions.—*Cone v. Belcher* (Tex. Civ. App.) 149.

## VII. INSTRUCTIONS TO JURY.

In criminal prosecutions, see Criminal Law, §§ 770-823, 825, 829.

Presumptions on appeal or writ of error, see Appeal and Error, § 928.

Review as dependent on prejudicial nature of error, see Appeal and Error, §§ 1064-1068.

Review as dependent on presentation of question in lower court, see Appeal and Error, §§ 215, 216.

Review as dependent on presentation of question in record, see Appeal and Error, § 699.

Review as dependent on specification in assignment of errors, see Appeal and Error, § 730.

### *As to particular issues or subjects.*

See Adverse Possession, § 116.

Assumption of risk by servant injured, see Master and Servant, § 295.

Contributory negligence in general, see Negligence, § 141.

Contributory negligence of servant injured, see Master and Servant, § 296.

Damages, see Damages, §§ 215-217.

Damages for failure to deliver possession of demised premises, see Landlord and Tenant, § 129.

Death, see Death, § 104.

Negligence causing injuries to live stock in course of transportation, see Carriers, § 230.

Negligence of master causing injuries to servant, see Master and Servant, § 293.

### *In particular civil actions or proceedings.*

See Replevin, § 91.

Assessment of damages, see Damages, §§ 215-217.

For compensation of broker, see Brokers, § 88.

For delay in transportation or delivery of live stock, see Carriers, § 230.

For failure to deliver possession of demised premises, see Landlord and Tenant, § 129.

For failure to furnish cars, see Carriers, § 45.

For injuries from defects or obstructions in streets, see Municipal Corporations, § 822.

For injuries from flowage, see Waters and Water Courses, § 179.

For injuries from negligence, see Negligence, §§ 139, 141.

For injuries from negligence or default in transmission or delivery of telegraph or telephone messages, see Telegraphs and Telephones, § 74.

For injuries to passengers, see Carriers, § 321.

For injuries to servants, see Master and Servant, §§ 291-296.

For loss of or injury to live stock in course of transportation, see Carriers, § 230.

On bills or notes, see Bills and Notes, § 538.

On insurance policies, see Insurance, § 669.

### *(A) Province of Court and Jury in General.*

In criminal prosecutions, see Criminal Law, §§ 761-764.

§ 191. In an action for injuries to plaintiff while loading a flat car on defendant's side track, an instruction *held* not to have assumed a certain fact.—*Chesapeake & O. Ry. Co. v. Conley* (Ky.) 861.

§ 191. An instruction assuming the existence of death which is not shown *held* erroneous.—*Bradley v. Modern Woodmen of America* (Mo. App.) 69.

§ 191. In a suit for injury to a switchman in uncoupling cars, *held* that a charge did not assume that plaintiff was proceeding in a proper, careful, and correct manner.—*Houston & T. C. R. Co. v. Mayfield* (Tex. Civ. App.) 141.

§ 191. A charge, considered as a whole, *held* not to assume a fact.—*Galveston, H. & S. A. Ry. Co. v. Grant* (Tex. Civ. App.) 145.

§ 191. In a suit for failure to promptly transmit and deliver an unrepeat message, a charge *held* to assume there was a mistake in the address.—*Western Union Telegraph Co. v. Bennett* (Tex. Civ. App.) 151.

§ 191. A charge detailing facts which are not all uncontroverted is properly refused.—*Galveston, H. & S. A. Ry. Co. v. Word* (Tex. Civ. App.) 478.

§ 191. An instruction, which assumes, as uncontroverted, facts as to the existence of which the evidence is conflicting, is erroneous.—*Texas Traction Co. v. Hanson* (Tex. Civ. App.) 494.

§ 194. In an action for commissions for procuring the sale of land, *held* error, under the evidence, to instruct that there was no evidence that a certain person was used by defendants to deprive plaintiffs of their commissions.—*Sills v. Burge* (Mo. App.) 605.

§ 194. A charge, in an action for injuries to a passenger by the derailment of the train, *held* properly refused because on the weight of the evidence.—*Texas & P. Ry. Co. v. Mosley* (Tex. Civ. App.) 485.

### *(B) Necessity and Subject-Matter.*

§ 203. Where, in an action for injuries on a defective street, there was no controversy but that the street was a public street over which the city had assumed jurisdiction and control, it was not necessary to charge what was necessary to constitute a public street.—*Scheffler v. City of Hardin* (Mo. App.) 569.

§ 203. In connection with an instruction as to what the verdict should be if a deed was deposited with a certain intention, *held*, that one as to the verdict if it was deposited with the contrary intention was proper under the petition, even if the issue was not raised by an averment of the answer.—*Phillips v. Henry* (Tex. Civ. App.) 184.

§ 203. When the evidence affirmatively raises an issue which constitutes a defense, such defensive matter should be presented by the court to the jury, especially when requested by special charge.—*Parrish v. Adwell* (Tex. Civ. App.) 411.

§ 203. Where the testimony raises an issue, the court should give a special charge submitting it.—*Texas Traction Co. v. Hanson* (Tex. Civ. App.) 494.

§ 219. Failure to define ordinary care as used in instructions *held* not error.—*Western Union Telegraph Co. v. Brasher* (Ky.) 788.

### *(C) Form, Requisites, and Sufficiency.*

§ 228. A charge *held* not to have been rendered misleading by the use of the word "defendant" instead of "plaintiff," and the omission of the word "care"; the meaning being apparent.—*Galveston, H. & S. A. Ry. Co. v. Word* (Tex. Civ. App.) 478.

§ 237. A charge *held* erroneous as requiring facts to be proved beyond a reasonable doubt.—*Miller v. Hammock* (Ark.) 769.

§ 240. In an action for injuries to a passenger by the derailment of the train, a requested charge *held* properly refused because argumentative.—*Texas & P. Ry. Co. v. Mosley* (Tex. Civ. App.) 485.

§ 243. It is error to give contradictory and irreconcilable instructions.—*St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Tex. Civ. App.) 1002.

§ 244. An instruction as to the date on which a realty company was incorporated, *held* not objectionable as giving undue prominence to the date of the incorporation.—*Kirn v. E. E. Southern Iron Co.* (Mo. App.) 45.

**(D) Applicability to Pleadings and Evidence.**

Review as dependent on prejudicial nature of error, see Appeal and Error, § 1066.

§ 248. The practice of announcing correct general principles of law without applying them to particular phases of the evidence is not to be commended.—Southern Anthracite Coal Co. v. Bowen (Ark.) 1048.

§ 251. Instructions should relate only to issues made.—Mathis v. Bank of Taylorsville (Ky.) 878.

§ 252. An instruction, allowing the addressee of a telegram to recover for mental anguish caused by his failure to reach his mother before her death, *held* correct in view of the evidence.—Western Union Telegraph Co. v. Brasher (Ky.) 788.

§ 252. An instruction should not be given where there is no evidence upon the issue presented by it.—Central Kentucky Traction Co. v. Chapman (Ky.) 830.

§ 252. An instruction, submitting the falsity of certain representations, is error, where there is no evidence that they were false.—Jobes v. Wilson (Mo. App.) 548.

§ 252. In a broker's action for commissions for procuring the sale of property, an instruction *held* erroneous as injecting an issue not made by the evidence.—Sills v. Burge (Mo. App.) 605.

§ 252. In an action for flowage alleged to have been caused by the embankment of defendant's railroad, *held*, not error to refuse a charge that if the acts of plaintiffs caused the injury they could not recover, where there was no evidence of any such acts.—Missouri, K. & T. Ry. Co. of Texas v. Gilbert (Tex. Civ. App.) 434.

§ 252. In an action between adjoining lot owners to recover a part of plaintiff's lot, evidence *held* not to authorize a charge on a specified theory.—Beavers v. Baker (Tex. Civ. App.) 450.

§ 252. In an action for damages to plaintiff's land, through an overflow from the construction of defendant's road, an instruction *held* objectionable as not supported by the evidence.—Gurley v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.) 502.

§ 252. Evidence from which a fact is inferable *held* to authorize its submission.—St. Louis Southwestern Ry. Co. of Texas v. Keith (Tex. Civ. App.) 695.

§ 253. An instruction, submitting the falsity of certain representations, which ignores the question whether the representations were believed and relied on, is error.—Jobes v. Wilson (Mo. App.) 548.

§ 253. In an action for conversion of chattels, an instruction to find for plaintiff on finding certain matters *held* not erroneous for the omission of certain elements of the cause of action which were admitted by both parties.—Walker v. Lewis (Mo. App.) 567.

§ 253. In an action between adjoining lot owners to recover a strip claimed as a part of plaintiff's lot, a charge *held* properly refused as ignoring an issue.—Beavers v. Baker (Tex. Civ. App.) 450.

§ 253. A requested charge which ignored a contract between the parties and the effect the jury might give to it was properly refused.—Ely-Walker Dry Goods Co. v. Colbert (Tex. Civ. App.) 705.

§ 253. In an action for injuries by the escape of oil from a pipe line, defendant's application for a peremptory instruction *held* properly denied.—Gulf Pipe Line Co. v. Brymer (Tex. Civ. App.) 1007.

**(E) Requests or Prayers.**

In criminal prosecutions, see Criminal Law, §§ 825, 829.

Review as dependent on prejudicial nature of error, see Appeal and Error, § 1067.

Review of failure to give instructions as dependent on request in lower court, see Appeal and Error, § 216.

§ 255. Complaint cannot be made that the trial court failed to submit certain issues where no request to submit such issues was made.—Lattimore v. Tarrant County (Tex. Civ. App.) 205.

§ 256. In an action for personal injuries, *held* not error to fail to charge the converse of an instruction given, in the absence of request therefor.—Chesapeake & O. Ry. Co. v. Conley (Ky.) 861.

§ 256. A party desiring that a word used in an instruction be defined should request an instruction doing so.—Kirby v. Lower (Mo. App.) 34.

§ 256. In an action for conversion of chattels, it is not error to use the word "converted" in a charge stating the elements of the cause of action, without defining it; no request having been made to have it defined.—Walker v. Lewis (Mo. App.) 567.

§ 256. In an action for breach of contract of sale of lumber by failing to accept, an instruction referring to the conduct of the parties under the contract *held* sufficient, in the absence of a request for a more specific charge.—Wm. Cameron & Co. v. Matthews (Tex. Civ. App.) 192.

§ 256. In the absence of a request for a special instruction, defendant cannot complain of a correct instruction on the ground that it is not sufficiently favorable.—Texas & Pacific Coal Co. v. McWain (Tex. Civ. App.) 202.

§ 256. The trial court will not be put in error for not making a fuller presentation of the defense in its preliminary statement to the jury, where defendant did not request a fuller statement.—Western Texas Compress Co. v. Williams (Tex. Civ. App.) 493.

§ 260. A charge substantially embodied in one given is properly refused.—Elk Coal Co. v. Bingham (Ky.) 314; Talbott v. Krahwinkel (Ky.) 323; Western Union Telegraph Co. v. Brasher (Ky.) 788; Houston & T. C. R. Co. v. Hanks (Tex. Civ. App.) 136; Erie City Iron Works v. Noble (Tex. Civ. App.) 172; Galveston, H. & S. A. Ry. Co. v. Word (Tex. Civ. App.) 478; St. Louis Southwestern Ry. Co. of Texas v. Keith (Tex. Civ. App.) 695.

§ 260. Error cannot be predicated on the rejection of prayers for instructions in a case wherein the prayers granted covered such of the rejected prayers as were correct.—Southern Anthracite Coal Co. v. Bowen (Ark.) 1048.

§ 260. In a suit for injury to a switchman in uncoupling cars, *held* that a special charge as to contributory negligence was substantially covered by the charge given.—Houston & T. C. R. Co. v. Mayfield (Tex. Civ. App.) 141.

§ 260. In an action for flowage of plaintiffs' land during certain seasons of two different years, a requested charge *held* sufficiently covered by one given and properly refused.—Missouri, K. & T. Ry. Co. of Texas v. Gilbert (Tex. Civ. App.) 434.

§ 260. In proceedings to restrain defendant from re-engaging in the photograph business, the refusal to give a special charge requested by defendant *held* not error; the issue having been sufficiently presented by another charge given at defendant's request.—Parrish v. Adwell (Tex. Civ. App.) 441.

§ 280. A party cannot complain of the refusal of an instruction, where the instructions given were more favorable to him than the requested instruction.—*Buchanan & Gilder v. Murayda* (Tex. Civ. App.) 973.

§ 261. Where the court in its instructions ignored an issue, a requested charge on such issue, though erroneous, was sufficient to show that he was relying thereon.—*Brown v. Patterson* (Mo.) 1.

#### (F) Objections and Exceptions.

Necessity of objection or request for purpose of review, see Appeal and Error, §§ 215, 216.

§ 280. General objection to instruction held insufficient to raise objection to failure to define word.—*Kirby v. Lower* (Mo. App.) 34.

§ 284. Error in an instruction is waived by asking for a modification thereof, which does not cover the error.—*Southern Anthracite Coal Co. v. Bowen* (Ark.) 1048.

#### (G) Construction and Operation.

In criminal prosecutions, see Criminal Law, §§ 822, 823.

§ 286. The general charge that the jury should find a verdict upon "a preponderance of the evidence under the foregoing charge," followed by defendant's special charges, was not erroneous as requiring the jury to find a verdict under the general charge alone, and to ignore the special charges.—*Brady v. Maddox* (Tex. Civ. App.) 739.

§ 295. The rule requiring instructions to be taken together requires that they should not be so conflicting as to confuse or mislead the jury.—*Southern Anthracite Coal Co. v. Bowen* (Ark.) 1048.

§ 295. An instruction considered as a whole and in connection with others, held not erroneous as making the master an insurer of the servant's safety.—*Southern Anthracite Coal Co. v. Bowen* (Ark.) 1048.

§ 295. If separate instructions present every phase of the case, as a harmonious whole, failure of one to carry qualifications explained in others is not error.—*Southern Anthracite Coal Co. v. Bowen* (Ark.) 1048.

§ 295. Rule stated as to the construction of a charge as a whole in determining the correctness of particular instructions.—*Southern Anthracite Coal Co. v. Bowen* (Ark.) 1048.

§ 296. In an action for death of a switchman by defective cars, an instruction held not erroneous though too general when viewed in the light of the pleadings and evidence and other instructions.—*Kansas City Southern Ry. Co. v. Frost* (Ark.) 748.

§ 296. In consolidated cases of injuries to two employes held that instructions read with another instruction were not prejudicial to defendant, but that they did not cure error as to defendant in a certain other instruction.—*Southern Anthracite Coal Co. v. Bowen* (Ark.) 1048.

§ 296. Where an instruction given for plaintiff failed to mention one of defendant's defenses, but later upon defendant's request gave an instruction which clearly submitted the issue, there was no reversible error.—*Asbill v. City of Joplin* (Mo. App.) 22.

§ 296. In an action for carrying a passenger beyond his destination, an erroneous instruction relating to the duty of the carrier to deliver him at his destination held not cured by another instruction.—*Gulf, C. & S. F. Ry. Co. v. Ward* (Tex. Civ. App.) 130.

§ 296. A charge basing liability for negligence on specific acts held not subject to objection, because not referring to the essential

fact of plaintiff's negligence causing or contributing to his injury.—*Houston & T. C. R. Co. v. Mayfield* (Tex. Civ. App.) 141.

§ 296. Error of charge in not submitting an issue held cured by a special charge.—*Galveston, H. & S. A. Ry. Co. v. Grant* (Tex. Civ. App.) 145.

§ 296. The error in an instruction held not cured by another.—*Ely-Walker Dry Goods Co. v. Colbert* (Tex. Civ. App.) 705.

### VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

Disqualification or misconduct of or affecting jury, ground for new trial, see New Trial, § 54.

In criminal prosecutions, see Criminal Law, §§ 854, 857.

§ 309. A verdict in an action for personal injuries held not excessive.—*Dow Wire & Iron Works v. Smith* (Ky.) 819.

§ 311. The evidence in an action for injuries to a servant held to enable the jury to determine the issue of negligence.—*Dow Wire & Iron Works v. Smith* (Ky.) 819.

### IX. VERDICT.

Conformity of judgment to verdict and findings, see Judgment, § 256.

In criminal prosecutions, see Criminal Law, § 878.

Judgment notwithstanding verdict, see Judgment, § 199.

Review of objections to verdict or findings, see Appeal and Error, §§ 108, 731, 1070.

Review of sufficiency of evidence, see Appeal and Error, §§ 999-1006.

Setting aside verdict, see New Trial.

#### (B) Special Interrogatories and Findings.

Harmless error in submission of, or refusal to submit, special interrogatories, see Appeal and Error, § 1062.

§ 351. In the absence of any request, the court may, under the statute relating to special verdicts, make a finding of interest on the damages awarded by the jury, making separate and distinct findings on all items of damages.—*Steger v. Barrett* (Tex. Civ. App.) 174.

§ 365. Findings of the jury on special issues should be treated as in chancery practice, and the court may set aside any particular finding of damages as not being legally recoverable, and accept and base the judgment on the remaining findings.—*Steger v. Barrett* (Tex. Civ. App.) 174.

### X. TRIAL BY COURT.

Presumptions on appeal or writ of error, see Appeal and Error, § 931.

#### (B) Findings of Fact and Conclusions of Law.

Mandamus to compel filing of conclusions, see Mandamus, § 48.

Review of refusal to file conclusions of law and fact, see Appeal and Error, § 108.

§ 390. Under Laws 1907, p. 446, c. 7, a request for findings of fact and conclusions of law held sufficient.—*Wandry v. Williams* (Tex.) 85.

### XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

Error in instructions cured by verdict or judgment, see Appeal and Error § 1068.

Review in appellate court as dependent on prejudicial nature of error, see Appeal and Error, §§ 1028-1073.

Review in appellate court as dependent on presentation of questions in lower court, see Appeal and Error, §§ 172-295.

§ 412. Where improper evidence was admitted over objection, and on cross-examination the objecting party brings out the same evidence, he waived his objection.—*Cathey v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 217.

## TRIAL OF RIGHT OF PROPERTY.

See Attachment, §§ 287-306; Justices of the Peace, § 86.

## TRIBUNALS.

See Courts.

## TROVER AND CONVERSION.

See Larceny.

Conversion of timber, see Logs and Logging, § 35.

Liability of agent for conversion by subagent, see Principal and Agent, § 73.

## II. ACTIONS.

### (B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

§ 29. Where there are several joint owners of a chattel, they should join in an action for its conversion.—*Walker v. Lewis* (Mo. App.) 567.

### (E) Trial, Judgment, and Review.

Judgments for one or more coparties, see Judgment, § 235.

## TRUST DEEDS.

See Chattel Mortgages; Mortgages.

## TRUSTEE PROCESS.

See Garnishment.

## TRUSTEES.

See Trusts.

## TRUSTS.

Creation and construction of particular devises and bequests, see Wills, § 682.

Husband as trustee for wife, see Husband and Wife, § 135.

Particular fiduciary relations, see Brokers; Executors and Administrators; Guardian and Ward; Principal and Agent.

Trust deeds, see Chattel Mortgages; Mortgages.

## I. CREATION, EXISTENCE, AND VALIDITY.

Restrictions on creation of perpetuities, see Perpetuities.

### (A) Express Trusts.

§ 44. Evidence *held* to show that a deed of trust was obtained from grantor by fraud and undue influence.—*Gill's Trustee v. Gill* (Ky.) 875.

§ 50. Where a grantor executed a deed of trust to prevent a contest in proceedings to declare her incompetent, *held*, that she was a victim of compulsion or duress.—*Gill's Trustee v. Gill* (Ky.) 875.

§ 61. Court of equity *held* to have had jurisdiction to terminate a trust.—*Curtis v. Laughlin* (Mo. App.) 56.

### (B) Resulting Trusts.

§ 89. Evidence *held* not sufficient to establish a resulting trust in land alleged to have been purchased by a husband with his wife's separate property and without her express, written assent.—*McKee v. Downing* (Mo.) 7.

### (C) Constructive Trusts.

§ 95. The holder of property obtained by fraud is a constructive trustee of the person defrauded.—*Fidelity & Deposit Co. of Maryland v. Wiseman* (Tex.) 621.

## III. CONSTRUCTION AND OPERATION.

Construction of particular devises and bequests, see Wills, § 682.

## IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 187. Allowance of \$500 to executor and trustee for care given beneficiary *held* proper.—*Dockins v. Vass* (Ky.) 290.

## VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

### (C) Actions.

§ 359. Those who are the equitable beneficial owners of a fund which has been invested by another in land, who has taken the legal title to himself, may sue for the land itself or for the amount of money so converted, with interest thereon from the time of the conversion.—*McKee v. Downing* (Mo.) 7.

§ 386. In a suit by heirs to establish a resulting trust to land, *held*, that the administrator was not a necessary party.—*McKee v. Downing* (Mo.) 7.

## TUTORS.

See Guardian and Ward.

## ULTRA VIRES.

Effect of ultra vires acts and contracts of corporations in general, see Corporations, § 387.

## UNDERTAKINGS.

In proceedings for injunction, see Injunction, § 241.

In replevin, see Replevin, § 126.

Security for costs, see Costs, § 110.

## UNDERWRITERS.

See Insurance.

## UNDUE INFLUENCE.

Affecting validity of will, see Wills, §§ 155-166. Constructive trust in respect to property acquired by undue influence, see Trusts, § 95.

## UNILATERAL CONTRACTS.

See Contracts, § 10.

## UNITED STATES.

Customs duties, see Customs Duties.

Power to regulate commerce, see Commerce, § 8.

## UNIVERSITIES.

See Colleges and Universities.

## UNLAWFUL DETAINER.

See Forcible Entry and Detainer.

## USE AND OCCUPATION.

Element of adverse possession, see Adverse Possession, § 24.

§ 1. An action for use and occupation cannot be maintained unless the relation of landlord and tenant, express or implied, exists.—*State ex rel. Armour Packing Co. v. Dickmann* (Mo. App.) 29.

## USURY.

### I. USURIOUS CONTRACTS AND TRANSACTIONS.

#### (A) Nature and Validity.

§ 18. A provision of an agreement for a loan on a life policy held void as usurious.—*New York Life Ins. Co. v. Evans* (Ky.) 376.

## VACATION.

*Of particular acts, instruments, or proceedings.*  
Award of arbitrators, see Arbitration and Award, § 78.  
Judgment after trial of issues in general, see Judgment, §§ 330-377.  
Sale of property of decedent, see Executors and Administrators, § 380.  
Verdict, see New Trial.

## VAGRANCY.

§ 1. The term "larger portion of their time," as used in Gen. Laws 31st Leg. c. 59, § 1, par. "d," defining vagrancy, when construed with the balance of the provision, is not so vague as to render the law invalid.—*Ex parte Strittmatter* (Tex. Cr. App.) 906.

§ 1. In order to sustain a conviction for vagrancy under Gen. Laws 31st Leg. c. 59, § 1, par. "d," it must be shown that accused was able to work, and, being so, habitually loafed, loitered, and idled in a city, etc., for the greater part of his time, without any employment or visible means of support.—*Ex parte Strittmatter* (Tex. Cr. App.) 906.

§ 1. By Const. art. 3, § 46, the Legislature had ample power to pass Gen. Laws 31st Leg. c. 59, § 1, par. "d," defining vagrancy.—*Ex parte Strittmatter* (Tex. Cr. App.) 906.

§ 1. Gen. Laws 31st Leg. c. 59, § 1, par. "d," defining vagrants, held constitutional.—*Ex parte Strittmatter* (Tex. Cr. App.) 906.

§ 1. The common law on the subject of vagrancy has become largely superseded by the statutes adopted thereon in England and the United States.—*Ex parte Strittmatter* (Tex. Cr. App.) 906.

## VALUE.

Limits of jurisdiction, see Appeal and Error, § 45; Courts, §§ 121, 169, 172.  
Of property, evidence of price paid for property similarly situated, see Evidence, § 142.  
Of property insured, see Insurance, § 500.  
Of property, relevancy of evidence, see Evidence, § 113.  
Opinion evidence, see Evidence, §§ 474, 501, 525, 550.

## VALUED POLICIES.

See Insurance, § 500.

## VARIANCE.

Between indictment or information and preliminary complaint or warrant, see Indictment and Information, § 122.

Between judgment and process, pleadings, proofs, verdict, or findings, see Judgment, §§ 252-256.

## VENDOR AND PURCHASER.

Compensation of broker procuring conveyance, see Brokers, §§ 54-67.

Declarations by vendor as evidence against vendee and subsequent purchasers, see Evidence, § 230.

Dedication of other property to public use implied from sales, see Dedication, § 19.

Estoppel against grantees, see Estoppel, § 20.  
Estoppel of purchaser by acts of grantor, see Estoppel, § 98.

Parol or extrinsic evidence to contradict or vary contract of sale, see Evidence, § 400.

Specific performance of contract, see Specific Performance.

Validity of sales as to creditors or subsequent purchasers, see Fraudulent Conveyances.

#### *Sales by or to particular classes of persons.*

See Executors and Administrators, §§ 137-148, 329-380; Receivers, § 143.

Mortgagees or trustees under power in mortgage, see Mortgages, § 341.

*Sales of particular species of, or estates or interests in, property.*

See Mines and Minerals, §§ 54, 55; Public Lands, § 173.

Lands held adversely, see Champerty and Maintenance, § 7.

Mortgaged property, see Mortgages, § 341.

Personal property in general, see Sales.

Property of decedent, see Executors and Administrators, §§ 329-380.

Public lands, see Public Lands, §§ 173-178.

Seminary property, see Colleges and Universities, § 6.

#### *Sales on judicial or other proceedings.*

See Execution, § 306.

By executors or administrators, see Executors and Administrators, §§ 329-380.

By receivers, see Receivers, § 143.

On partition, see Partition, §§ 106, 109.

Tax sales, see Taxation, §§ 634, 641.

### I. REQUISITES AND VALIDITY OF CONTRACT.

Application of statute of frauds, see Frauds, Statute of, § 44.

### II. CONSTRUCTION AND OPERATION OF CONTRACT.

Parol or extrinsic evidence to contradict or vary written contract, see Evidence, § 400.

§ 58. Where defendant contracted with plaintiff to sell him his farm, agreeing to deliver the deed on the payment of the purchase price, the obligation was on plaintiff to pay or tender to defendant the purchase money on the date fixed by the contract, in order to put defendant in default.—*Norris v. Letchworth* (Mo. App.) 559.

§ 75. A contract for the sale of a house and lot assuming a debt construed as to the payment of interest on the assumed debt.—*Conness v. Baird* (Tex. Civ. App.) 113.

§ 80. Evidence held not to show that the purchaser of a lot assumed personally to pay taxes due thereon, but to show that he took it subject thereto.—*Toepperwein v. City of San Antonio* (Tex. Civ. App.) 699.

### III. MODIFICATION OR RESCISSION OF CONTRACT.

#### (A) By Agreement of Parties.

§ 82. A written contract for the sale of land cannot be modified by a subsequent parol agree-

ment for which there was no consideration.—*Norris v. Letchworth* (Mo. App.) 559.

(B) **Rescission by Vendor.**

§ 93. A deed of land and timber *held* not to authorize cancellation of the deed on failure of the vendee to pay the purchase money notes.—*Okolona Mercantile Co. v. Greeson* (Ark.) 257.

**IV. PERFORMANCE OF CONTRACT.**

(A) **Title and Estate of Vendor.**

§ 130. A purchaser has the right to demand a title which will enable him to hold the land in peace, and to be reasonably sure that no flaw will disturb its marketable value.—*Ives v. Crawford County Farmers' Bank* (Mo. App.) 23.

§ 137. Where the parties have agreed to rely on the judgment of an attorney selected to approve the vendor's title, they cannot, in the absence of fraud or collusion, afterwards ask to substitute the judgment of the court.—*Ives v. Crawford County Farmers' Bank* (Mo. App.) 23.

§ 137. Where a contract provides that the vendor's title shall be such as shall be approved by an attorney, his opinion, though wrong, is binding on the parties in the absence of fraud or collusion.—*Ives v. Crawford County Farmers' Bank* (Mo. App.) 23.

(D) **Payment of Purchase Money.**

Part payment as liquidated damages, see *Damages*, § 78.

**V. RIGHTS AND LIABILITIES OF PARTIES.**

(A) **As to Each Other.**

§ 196. In an action by a vendor to recover certain lands, *held*, that the vendee should pay rent from a certain date.—*Weil v. Martinez* (Tex. Civ. App.) 116.

§ 201. A vendee *held* entitled to compensation for improvements made on land on recovery by the vendor.—*Weil v. Martinez* (Tex. Civ. App.) 116.

(B) **As to Third Persons in General.**

§ 214. An assignee of a purchaser of land *held* entitled to the money paid by the assignor on the contract of sale.—*Ives v. Crawford County Farmers' Bank* (Mo. App.) 23.

(C) **Bona Fide Purchasers.**

Of property subject to tax, see *Taxation*, § 511.

§ 224. A conveyance *held* such that the grantee could not claim to be an innocent purchaser for value.—*Hudman v. Henderson* (Tex. Civ. App.) 186.

§ 229. One buying land *held* put on inquiry as to previous sale of part of it, by recital, known to him, in deed to another person.—*Lowry v. McDaniel* (Tex. Civ. App.) 710.

§ 230. The recitals in the act of sale by a remote grantor are binding on a subsequent grantee claiming through it.—*Davidson v. Ryle* (Tex.) 616.

§ 230. A declaration in an act of sale by a grantee *held* to authorize a finding that the real ownership remained in the original grantor until the sale.—*Davidson v. Ryle* (Tex.) 616.

§ 230. A warranty in a deed *held* not to excite suspicion in the mind of the purchaser, and not to justify a finding that he was not a bona fide purchaser without notice of a prior unregistered conveyance.—*Davidson v. Ryle* (Tex.) 616.

§ 230. Effect of statement in grant of a headright to the effect that the grantee was a married man, as to subsequent purchasers, stated.—

*Hardy Oil Co. v. Burnham* (Tex. Civ. App.) 221.

§ 230. Purchasers claiming under the grant of a headright reciting that the grantee was a married man *held* not entitled to rely on presumption that his predecessors in title had made such inquiry as to rebut presumptions of notice.—*Hardy Oil Co. v. Burnham* (Tex. Civ. App.) 221.

§ 231. Prior to the enactment of Ky. St. § 500 (Russell's St. § 2070), bonds for title to land and other contracts with reference to interests therein could not be recorded.—*Richards v. Potter* (Ky.) 850.

§ 233. To entitle a subsequent purchaser to have a prior unregistered conveyance postponed, it must appear that he was a bona fide purchaser without notice.—*Davidson v. Ryle* (Tex.) 616.

§ 235. To entitle a subsequent purchaser to have a prior unregistered conveyance postponed, it must appear that he paid the purchase price.—*Davidson v. Ryle* (Tex.) 616.

§ 235. The equity of a bona fide purchaser without notice of title in another by a prior conveyance will be protected only to the extent of his payment of the purchase price by cash, or negotiable promissory notes; the giving of nonnegotiable notes not being payment within the rule.—*Beavers v. Baker* (Tex. Civ. App.) 450.

§ 239. A purchaser of land, prior to the enactment of Ky. St. § 500 (Russell's St. § 2070), under a deed without reversions or exceptions, would take the coal and minerals thereunder in the absence of knowledge of an equitable claim of another holding a prior bond for title to such minerals.—*Richards v. Potter* (Ky.) 850.

§ 242. Ordinarily the burden is upon a subsequent grantee to show that he is a bona fide purchaser for value without notice of a prior grantee's title, in view of Rev. St. 1895, art. 4640.—*Beavers v. Baker* (Tex. Civ. App.) 450.

§ 242. In an action between adjoining lot owners to recover a strip claimed as a part of plaintiff's lot, *held*, that the burden was upon defendants to show fraud or mistake in the description in their deed, and that plaintiff had notice thereof on purchasing.—*Beavers v. Baker* (Tex. Civ. App.) 450.

§ 243. On the issue whether a subsequent purchaser was a bona fide purchaser without notice of a prior unregistered conveyance, evidence of what he did after the purchase was inadmissible.—*Davidson v. Ryle* (Tex.) 616.

§ 243. In an action between adjoining lot owners to recover a strip claimed as a part of plaintiff's lot, certain evidence *held* immaterial.—*Beavers v. Baker* (Tex. Civ. App.) 450.

§ 244. Evidence *held* not to show that a purchaser of land had notice of a prior sale by his grantor by an unrecordable contract of the coal and minerals under the land.—*Richards v. Potter* (Ky.) 850.

§ 244. The recital in a deed subsequent to an unregistered deed that the purchase money has been paid *held* not alone to prove payment.—*Davidson v. Ryle* (Tex.) 616.

§ 244. In determining whether a subsequent purchaser was a good-faith purchaser without notice of a prior unregistered conveyance the good or bad faith of the vendor may be considered.—*Davidson v. Ryle* (Tex.) 616.

§ 244. Evidence *held* to justify a finding that a grantor conveyed land in good faith, justifying a presumption that the grantee was a bona fide purchaser without notice of an unregistered conveyance.—*Davidson v. Ryle* (Tex.) 616.

§ 244. The character of the warranty in a deed may be considered on the question whether the grantee therein purchased in good faith without notice of a prior unregistered conveyance, but it is not conclusive.—*Davidson v. Ryle* (Tex.) 616.

§ 244. Evidence held to show that a subsequent purchaser without notice of a prior unregistered conveyance paid the price.—*Davidson v. Ryle* (Tex.) 616.

## VI. REMEDIES OF VENDOR.

### (A) Lien and Recovery of Land.

§ 261. The purchaser of notes reserving a vendor's lien, in due course of trade before maturity and for a valuable consideration, without notice of a parol dedication of a part of the land by the maker, will be protected as an innocent purchaser as against such dedication.—*Adoue & Lobit v. Town of La Porte* (Tex. Civ. App.) 134.

§ 265. The transfer to a transferee of mortgaged land of a secured note and trust deed held not to release a subsequent vendor's lien retained by the mortgagor upon selling to such transferee's grantor, such transferee taking with notice of the vendor's lien, so that the mortgagor was entitled to have the amount of such lien credited on the mortgage note.—*Magerstadt v. Martin* (Tex. Civ. App.) 459.

§ 295. The foreclosure of a vendor's lien held to extinguish the rights of a town under a prior parol dedication.—*Adoue & Lobit v. Town of La Porte* (Tex. Civ. App.) 134.

§ 296. Contract for the sale of land construed, and held, that under it the vendor was entitled to recover a portion of the land.—*Weil v. Martinez* (Tex. Civ. App.) 116.

§ 296. In an action by a vendor to recover lands, held proper not to, allow vendee to retain the lands and pay what might be due the vendor.—*Weil v. Martinez* (Tex. Civ. App.) 116.

### (C) Actions for Damages.

Liquidated damages or penalty, see Damages, § 78.

§ 330. The measure of damages for the breach by the vendee of the contract for the purchase of land is the difference between the contract price and the market value of the land on the day the sale was to have been completed.—*Norris v. Letchworth* (Mo. App.) 559.

## VII. REMEDIES OF PURCHASER.

### (A) Recovery of Purchase Money Paid.

§ 334. In the absence of any provision in the contract for a forfeiture or for liquidated damages, where a vendee failed to pay all of the purchase price for land, and the vendor refused to perform, he may recover the amount paid, less the damages, if any, suffered by the vendor from the breach of the contract.—*Norris v. Letchworth* (Mo. App.) 559.

## VENDOR'S LIEN.

See Vendor and Purchaser, §§ 261-296.

## VENUE.

Change of venue in justice court, see Justices of the Peace, §§ 73, 74.

Of action for injuries to passenger, see Carriers, § 274½.

## III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 45. Facts held insufficient to establish undue influence warranting change of venue.—*Mathis v. Bank of Taylorsville* (Ky.) 876.

§ 58. Defendant cannot, in a plea of privilege, seeking to change the venue, present an issue of fraudulent assignment of the claim in suit, without specially charging that the claim was fraudulently assigned for the purpose of conferring jurisdiction.—*Pearce v. Wallis, Landes & Co.* (Tex. Civ. App.) 496.

## VERDICT.

Aider by, see Pleading, § 433.

Conformity of judgment to verdict, see Judgment, § 256.

In civil actions in general, see Trial, §§ 351, 365.

In criminal prosecutions in general, see Criminal Law, § 878.

Judgment notwithstanding verdict, see Judgment, § 199.

Review in civil cases, see Appeal and Error, §§ 108, 999-1008, 1070.

Review in criminal cases, see Criminal Law, §§ 1159, 1160.

Setting aside, see New Trial.

## VERIFICATION.

Of claim against estate of decedent, see Executors and Administrators, § 227.

Of petition of claimant in attachment, see Attachment, § 306.

## VESTED REMAINDERS.

Construction of wills, see Wills, § 634.

## VESTED RIGHTS.

Protection, see Constitutional Law, § 93.

## VICIOUS ANIMALS.

Injuries to other animals, see Animals, §§ 79, 83.

## VIEW.

By jury, see Trial, § 28.

## VILLAGES.

See Municipal Corporations.

## VINDICTIVE DAMAGES.

See Damages, § 215.

## VOTERS.

See Elections.

## WAGERS.

See Gaming.

## WAGES.

Of employes in general, see Master and Servant, § 73.

## WAIVER.

See Estoppel.

Of objections to particular acts, instruments, or proceedings.

See Parties, § 96.

Bond for writ of error, see Appeal and Error, § 392.

Default or delay in delivering goods sold, see Sales, § 176.

Defects in garnishment return, see Garnishment, § 104.

Delay or default of plaintiff affecting right to specific performance, see Specific Performance, § 101.

Insurance policies, see Insurance, §§ 372-392.

Irregularities and errors at trial in general, see Trial, § 412.

Notice and proof of loss under insurance policy, see Insurance, § 559.  
 Petition for writ of error, see Appeal and Error, § 361.  
 Pleadings, see Pleading, §§ 406-433.  
 Record on appeal or writ of error, see Appeal and Error, § 644.

*Of rights or remedies.*

Appeal or other proceeding for review, see Appeal and Error, §§ 154, 395.  
 Breach of warranty in sale, see Sales, § 288.  
 Forfeiture of insurance policy, see Insurance, §§ 372-392.  
 Mode of changing beneficiary under insurance policy, see Insurance, § 784.  
 Notice of intention to renew lease, see Landlord and Tenant, § 86.  
 Objections to evidence, see Trial, § 105.  
 Requirement as to time to sue on insurance policy, see Insurance, § 623.  
 Requirement of notice and proof of loss under insurance policy, see Insurance, § 559.

## WARDS.

See Guardian and Ward.

## WAREHOUSEMEN.

§ 8. Right of warehousemen to refuse to receive infected grain, and to compel removal of grain becoming infected in their warehouse, stated.—Carley v. Offutt & Blackburn (Ky.) 280.

§ 8. Ky. St. § 4704 (Russell's St. § 2563), requiring notice in a daily newspaper upon a warehouseman's discovery that grain in his elevator is becoming out of condition, *held* to apply only to grain not stored in a separate bin.—Carley v. Offutt & Blackburn (Ky.) 280.

§ 10. A verbal agreement of a manager who executed a contract for the storage of apples *held* to have the effect of establishing a regulation governing the performance of the contract.—Montgomery & Co. v. Arkansas Cold Storage & Ice Co. (Ark.) 768.

§ 24. Ky. St. § 4794 (Russell's St. § 2563). *held* to contemplate a liability only for the warehouseman's neglect in dealing with grain deposited.—Carley v. Offutt & Blackburn (Ky.) 280.

§ 24. Warehousemen are not insurers, and are only bound to use ordinary care to protect property committed to them.—Carley v. Offutt & Blackburn (Ky.) 280.

§ 34. In an action to recover for storage charges, where plaintiff wrongfully refused to permit defendants to store 722 barrels of apples without further charge, defendants could counterclaim only for the price for storing 722 barrels of apples.—Montgomery & Co. v. Arkansas Cold Storage & Ice Co. (Ark.) 768.

## WARNING.

Precautions against injuries to servants, see Master and Servant, §§ 153, 158.

## WARRANT.

Arrest without warrant, see Arrest, § 62.

## WARRANTY.

Covenants of, performance or breach, see Covenants, § 102.  
 On sale of goods, see Sales, § 288.

## WASTE.

By tenant in dower, see Dower, § 114.  
 Liability of executor, see Executors and Administrators, § 117.

Waste by lessee of mine, see Mines and Minerals, § 66.

## WATERS AND WATER COURSES.

See Drains.

Compensation for alteration of flow or discharge of water, see Eminent Domain, § 98.

## VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

Application of instructions to case, see Trial, § 252.

Expert testimony, see Evidence, § 529.

Requests for instructions, see Trial, § 260.

§ 176. Where the obstruction causing the overflow of land is permanent in nature, the cause of action for damages accrues when the structure is completed, or when the injury to the property is first occasioned.—City of Richmond v. Gentry (Ky.) 337.

§ 176. Where the obstruction causing land to be overflowed is permanent in character, so that the damages are in gross, and there can be but one recovery, such damages are recoverable by the then owner of the land, and not by a successor in title.—City of Richmond v. Gentry (Ky.) 337.

§ 178. Permanent structure obstructing a water course, defined.—City of Richmond v. Gentry (Ky.) 337.

§ 178. Where the obstruction causing the overflow of land is of a permanent character, all damages to such land, past, present, and contingent, must be recovered in one action.—City of Richmond v. Gentry (Ky.) 337.

§ 178. Measure of damages from temporary structures causing overflow of land, determined.—City of Richmond v. Gentry (Ky.) 337.

§ 179. In an action for damage to plaintiff's land, through an overflow resulting from the construction of defendant's road, an instruction *held* misleading.—Gurley v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.) 502.

## WAYS.

Public ways, see Highways.

## WEAPONS.

Evidence of other offenses, see Criminal Law, § 369.

Possession or use by person killed or assaulted, admissibility of evidence, see Homicide, § 193.

§ 6. Where defendant went into a saloon, took a pistol from the saloon keeper, walked a distance of 80 or 90 feet to the back door of the saloon, and fired it off, and returned and handed it to the saloon keeper, he was guilty of carrying a pistol.—Schuh v. State (Tex. Cr. App.) 908.

§ 7. A person carrying a pistol home, who had stopped in a store on the way to make a purchase, *held* not guilty of unlawfully carrying a pistol.—Waterhouse v. State (Tex. Cr. App.) 633.

§ 7. It is lawful for a person to carry a pistol which will not shoot to a repairer to be fixed.—Britton v. State (Tex. Cr. App.) 684.

§ 13. In a prosecution for carrying concealed weapons, defended on the ground that accused had been threatened with great bodily harm, *held*, that merely to prove words amounting to a threat against him was not enough, but that he should show that the threat was made under circumstances justifying his carrying the weapon in good faith and on account thereof.—State v. Reed (Mo. App.) 55.

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1	107	684	178	104	225	364	104	305	438	104	1084	537	105	350	620
17	107	970	229	104	242	376	104	526	458	105	853	548	108	1068	639
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